

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

C.R.A. 246 of 2019

**Sri Subrata Mitra
Vs.
Smt. Alpana Das & Anr.**

For the Appellant : Mr. Sabir Ahmed
Mr. Tasmin Ahmed
Mr. Dhiman Banerjee
Mr. Quazi Ezaz Ahmed.

For the Respondent No.1 : Mr. Soumya Subhra Ray
Mr. Amarnath Agarwal

Heard on : 10.01.2025

Judgment on : 27.01.2025

Dr. Ajoy Kumar Mukherjee , J.:

1. The present appeal has been directed against the judgment and order dated January, 15th 2019 passed by Metropolitan Magistrate, 9th Court in Complaint Case no. 7232 of 2010. By the impugned judgment, learned Court below was pleased to dismiss the complaint and thereby acquitted the accused person under section 255 (1) of Cr.P.C. in a proceeding under section 138 of Negotiable Instrument Act, 1881(in short N.I. Act).

2. The complainant's case in brief is that the complainant/appellant herein is a government employee under the state of West Bengal and was posted at Malda District Hospital in the year 2007-2008. The accused person/opposite party no.1 herein was colleague of the petitioner herein at Malda District hospital, who asked for some financial help for her personal needs. Pursuant to such request, the appellant herein had extended financial help to the accused/opposite party to the tune of Rs. 5 lakhs and the opposite party no.1 accused assured to pay entire due amount by December, 2009. In discharge of her legally enforceable debt and liability, she issued the impugned cheque being no. 989003 dated 26.12.2009 for a sum of Rs. 5 lakhs drawn on Uco Bank. When the complainant presented the said cheque to his banker, it got dishonoured on 01.01.2010 on the ground of "insufficient fund". Thereafter appellant herein sent legal notice on 27th January, 2010. The said notice was received by the opposite party no.1/ accused on 02.02.2010 and even after receipt of such notice the opposite party no.1 did not take any step to pay the legally enforceable debt to the appellant which compelled the complainant to lodge the above mentioned complaint case no. 7232 of 2010. During trial the appellant was examined and cross examined and on the other hand the accused was also examined under section 313 of the Code of Criminal Procedure.

3. Though, the accused stated that he would produce witness in support of her defence during examination under section 313 Cr.P.C., but she did not examine any witness on her behalf. Learned Trial judge after considering the documentary as well as oral evidence was pleased to acquit the opposite party no. 1/accused by the impugned judgment dated

15.01.2019 from the charges under section 138 of the N.I. Act. mainly on the ground that complainant lacked capacity to give loan, which makes the debt not legally enforceable.

4. Being aggrieved by the said judgment of acquittal passed by the court below, Mr. Ahmed on behalf of the appellant submits that the complainant has categorically stated in his complaint as well as in affidavit that the respondent herein being the colleague borrowed Rs. 5 lakhs from the appellant and the accused/respondent herein acknowledged the same by issuing a single money receipt which has been marked as exhibit-2 in the present case. The complainant during cross examination has categorically stated that the signature appearing in the said money receipt is of the opposite party and the opposite party failed to rebut the same. The accused/respondent herein has failed to produce any document and or evidence to show that he is not indebted to the appellant to the tune of Rs. 5 lakhs.

5. Mr. Ahmed argued that unfortunately the trial court after discussing about the presumption arises under section 139 of the N.I. Act has wrongly proceeded to question evidence on source of funds for advancing locus to accused by the complainant, and pointed out want of examination of relevant witnesses and /or evidence. This approach runs contrary to the law laid down by the Apex Court. In this context he relied upon the judgment of ***Rohitbhai Jivan vs. State of Gujarat & another*** reported in **(2019) 18 SCC 106.**

6. Mr. Ahmed further argued that there appears to be no dispute that the accused signed the dishonored cheque and once execution of cheque is

admitted and the signature of the accused is proved on the cheque, it is a legal presumption under section 139 of the N.I. Act that the cheque was issued for discharging legally enforceable debt. In this context he also relied upon the judgment of the Supreme Court in ***K. Bhaskaran Vs. Shankaran Vidyan Balan*, (1999) 7 SCC 510.**

7. Mr. Ahmed further argued that the complainant through his advocate had sent legal notice to the accused person and the same was received by her but inspite of receipt of the same, the accused did not give any reply nor had taken any action. This purported inaction on the part of the accused shows her ill intention not to honour the cheque which was drawn by her in discharge of her legally enforceable debt. He further argued that the presumption that has arisen in this case under section 139 of the N.I. Act, has not been rebutted. He also argued that section 139 of N.I. Act is an example of reverse onus clause which usually imposes an evidentiary burden and not a persuasive burden. In other words principle of law would be to lead evidence of a character not to prove a fact affirmatively but to lead evidence to show non-existence of a liability. Further the law is well settled that when an accused has to rebut the presumption under section 139, the standard of proof of doing so is that of pre ponderous of probability. In this context he relied upon the judgments passed by the Apex Court in the case of ***K.N. bina Vs. Muniappan and another*** reported in **(2001) 8 SCC 458** and ***Bir singh Vs. Mukesh kumar*** reported in **(2019) 4 SCC 197.**

8. Mr. Ahmed further argued that the trial judge has failed to consider that the N.I. Act being a special statute has provided for reverse burden of

proof. The legal principle of presumption is always against the accused person and it is the duty of accused person to counter such presumption with cogent evidence, which in the present context the accused has miserably failed to overcome. As such the impugned order of acquittal is bad in law and is liable to be set aside.

9. Mr. Ray, learned Counsel appearing on behalf of the respondent no. 1 argued that it is his specific case that the impugned cheque and some other cheques were lost from his custody and for which she lodged diary at the local police station and also informed the bank. The complainant/appellant herein taking advantage of the signed blank cheque has converted it into a valuable instrument and has initiated the present proceeding with a manufactured story that the accused had taken a loan of Rs. 5 lakh from the complainant. Infact, the learned Trial court rightly observed that the complainant failed to disclose during evidence as to how many installments, the loan was accommodated nor it has been stated anywhere on which date the said loan was given by the complainant. He further contended that learned trial court specially observed that the cross examination of complainant/PW1 is full of self-contradiction, surmise and conjecture and the debt even if exists is not legally enforceable and recoverable debt because the complainant failed to show her capacity to accommodate such high amount of loan, in comparison with his income.

10. Mr. Roy further argued that inspite of getting opportunity the complainant failed to file pay slip or any other document to substantiate his monthly income. He also pointed out that complainant /PW1, in his cross examination on 31.08.2015 admitted that he cannot say his exact

amount of salary during the year 2007 and he also admitted that he has no other source of income except service. He further contended that in the cross examination PW1 could not say what amount was paid by him in cash and what amount was paid in cheque. Moreover he stated in his evidence that he issued a cheque in favour of Chiranjib Das, the son of the accused and, therefore, complainant does not know to whom he gave loan and what particular amount was given to whom. He further submits that in the evidence of complainant, there is contradiction as to whose presence, the loan was given, which raises a shadow of doubt upon the prosecution case.

11. Mr. Ray further argued that while granting such loan the complainant being government employee has violated the West Bengal Service Rules which prohibits a state government employee from giving loan to anyone. He also argued that the complainant in his evidence at one place stated that the loan was given by cash as well as by cheque but in another place he stated that the entire amount was given in cash. Accordingly the case of the complainant is full of doubts and is not sustainable in the eye of law. The judgment and order of acquittal passed by the court below is quite justified on the background of the facts and circumstances of the case and does not call for interference by this court.

12. I have considered submissions made by both the parties.

13. The trial court in its judgment was correct in observing that a cheque carries presumption of consideration in terms of section 118(a) and under section 139 of the Act and he also came to a finding that the money receipt marked exhibit 2 seems to be a genuine one and the payment of Rs. 5

lakhs as accommodation loan by the complainant to the accused is established through the said document and he further held that as it does not bear any particular date, it cannot be ascertained when it was executed but its genuineness is established. However, Learned Trial court in the concluding part came to a finding that complainant inspite of getting opportunity and scope to prove his income has abstained from doing so and therefore he concluded at the end that the otherwise believable case of the complainant fails, as the complainant failed to prove the existence of legally recoverable debt.

14. It is astonishing to note that even after drawing presumption under section 139 of N.I. Act against the accused, trial court proceeded to question about want of evidence on source of fund for advancing of the loan in question to the accused/opposite party by the complainant and observed:-

“that in order to succeed in the complaint case, the complainant had to first establish that he had capacity to give loan and particularly when the loan amount is very much high in comparison with his income and the complainant in spite of getting ample opportunity to bring document or oral evidence to substantiate his income has failed to do so and as such presumption must be taken against him that he lacked capacity to give loan and thereby makes the debt not legally enforceable.”

15. It appears from the aforesaid observation that the approach of the trial court is as if the complainant is to prove a debt before civil court, wherein the plaintiff is required to prove his claim of advancing loan or his capacity to advance loan on the basis of evidence to be laid in support of his claim for the recovery of the amount due. This approach of the trial court clearly against the principle of presumption of law that arises under section 139 of the N.I. Act. This is because a dishonour of cheque carries

a statutory presumption of consideration under section 118(a) of the N.I. Act and the holder of cheque in due course is only required to prove that the cheque was issued by the accused and that when the same was presented it was not honoured. Accordingly in the context of statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or for other liability.

16. In Kumar Exports Vs. Sharma Carpets reported in **(2009) 2 SCC 513** the supreme Court held in para 20:-

“.....At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.”

17. In Kishan Rao Vs. Shankargouda reported in **(2018) 8 SCC 165** the apex court held in para 27 that section 139 of the Act is an example of reverse onus clause that has been included in furtherance of legislative objective of improving the credibility of Negotiable instrument. While section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheque, the rebuttable presumption under section 139 is a device to prevent undue delay in the course of litigation.

18. In the judgment of Bir Singh Vs. Mukesh Kumar reported in **(2019) 4 SCC 197** the court held that a meaningful reading of provision of

Negotiable Instrument Act including in particular, section 20, 87 and 139 makes it amply clear that a persons who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque has been issued for payment of a debt or in discharge of a liability and if the cheque is otherwise valid, the penal provision of section 138 would be attracted. Even a blank cheque leaf voluntarily signed and handed over by the accused which is towards some payment, would attract presumption under section 139 of the N.I. Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

19. In the present context so far as the question of existence of basic ingredients for drawing of presumption under section 118 and section 139 of the N.I. Act is concerned, it is apparent that the accused/respondent could not deny his signature on the cheque in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs. 5 lakhs. Complainant's further case is that the cheque was presented to his banker within the validity period but was returned unpaid due to insufficient fund. Thereafter demand notice was sent to accused who in spite of receipt the same failed to pay within the statutory period. Accordingly all the basic ingredients of section 138 as also of section 118 and section 139 are apparent on the face of the record. As I have stated above that the trial court has also taken note of these facts and drawn the requisite presumption. Therefore, the presumption would be that the cheque in question was drawn for consideration and the holder of the cheque received the same in discharge of an existing debt and the onus

shifted on the accused to establish a probable defence so as to rebut such a presumption. The Accused even did not put any suggestion to the complainant during his cross-examination that complainant did not have any financial capacity to advance the said loan amount.

20. It is to be mentioned that in the present case following facts remain unrebutted:

- (i)** The signature of the accused on the money receipt marked exhibit-2 amounting to Rs. 5 lakhs remains unchallenged and no evidence adduced on behalf of the accused to challenge the said document.
- (ii)** The accused had not denied by adducing cogent evidence that the cheque was not issued by her nor she could prove that the signature appearing in the cheque is not her signature.
- (iii)** The respondent/accused during cross examination of complainant had put a suggestion that the cheque book was lost or stolen from her desk at office, which is her only defence. However, the respondent had not lodged any FIR or diary in respect of loss of cheque even after the notice of dishonour of cheque. The mere putting a suggestion that the cheque was lost from her desk, is not sufficient to say that the accused has successfully rebutted the presumption.
- (iv)** The respondent did not adduce any evidence on her behalf to prove the allegation that the cheque was lost from her desk at office or that the cheque was not issued in discharge of any debt or liability.

- (v) There is nothing to show that complainant did not have sufficient means to advance the loan amount even no suggestion was put to the complainant/witness that he had no sufficient means at that time to advance loan of Rs. 5,00,000/-
- (vi) When the accused was examined under section 313 Cr.P.C. by putting question no.3 that complainant has alleged that she borrowed Rs. 5 lakhs from the complainant and towards repayment of said debt the impugned cheque was drawn by her, which was dishonoured on the ground of insufficient fund and inspite of receipt of demand notice she did not pay the cheque amount, the accused/respondent answered the question by saying "I am not guilty".

21. The accused has failed to lead any evidence to rebut the statutory presumption though under section 139 of N.I. Act, a presumption raised that the holder of a cheque received the cheque for the discharge in whole or in part of any debt or other liability. To rebut this presumption, evidence must have been adduced by the accused which on a preponderance of probability must then be proved. Infact in the present case the accused had occasion to prove the non-existence of consideration and debt or liability either by leading evidence or even from the case set out by the complainant, the averments in the complaint, the case set out in the statutory notice or from evidence adduced by the complainant during trial.

22. In the case in hand elucidating in the principle the complainant has able to prove by way of money receipt marked exhibit-2 that the accused had received interest free loan Rs. 5 lakhs and in lieu thereof, the

impugned cheque was issued by the accused in favour of the complainant in order to discharge his liability. On the cheques being presented for encashment the same was dishonoured on the ground of 'insufficient fund' in the account of the accused and the same was returned as unpaid. Thereafter legal notice was sent to the accused and even after receiving the said notice the accused neither responded to the notice nor made any payment within the statutory period and only thereafter the complaint was lodged. When the complainant by adducing evidence has proved all the relevant documents as stated above, in support of his complaint and the documents are marked as exhibit, the accused has only recorded her statement under section 313 of the Code merely by saying that she is not guilty and failed to record evidence to disprove or rebut the presumption in support of her defence available under section 139 of the N.I. Act.

23. In **Bir Singh Case (supra)** the Apex Court clearly held in para 20 that section 139 introduces an exception to the general rule as to the burden of prove and shifts this onus on the accused. In fact the presumption under section 139 of the N.I. Act is a presumption of law as distinguished from presumption of facts. Presumption are rule of evidence and do not conflict on the presumption of innocence which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumption of law and presumption of fact, unless the accused adduces evidence showing the reasonable possibility of non-existence of the presumed fact. Here in the present case the finding of the trial court is unlawful in view of the fact that after drawing presumption under section 139 of the N.I. Act, he shifted

onus upon the complainant though the onus shifted upon the accused and unless she discharges onus by bringing on record such facts and circumstances as to show preponderance of probabilities, tilting in her favour, any doubt on complainant's case would not have been raised by court merely for want of evidence, regarding source of fund for advancing loan to the accused/respondent. In such view of the matter the decision of trial court suffers from perversity and fundamental error of approach. Here the ultimate finding of the trial court is against the presumption under section 139 of the N.I. Act, which is in favour of the complainant. Once presumption is drawn, the trial court was absolutely unjustified in making observation to acquit the respondents/accused. He ought to have kept it in mind that mere denial during cross examination or mere creation of certain doubts showing some minor contradictory statements made by complainant during trial are not sufficient to rebut the presumption. Here the accused has miserably failed to bring on record relevant material to rebut presumption and to show that preponderance of probability is in favour of the defence.

24. The observation of the trial that there was no documentary evidence to show the source of funds with the respondents to advance the loan or that there were inconsistencies in the statement of the complainant as PW1, would have been relevant, if the matter was to be examined with reference to the onus on the complainant to prove his case "beyond reasonable doubts". These considerations and observation of the trial court do not stand in conformity with the presumption existing in favour of the complainant by virtue of section 118 and 139 of the N.I. Act. The trial court

virtually acquitted the accused on the mere ground, that the guilt of the accused is not proved “beyond reasonable doubt” and that the conduct of the complainant throughout the trial created doubt and suspicion and/or suffering from self-contradiction.

25. I am of the considered view that the trial court appears to have proceeded on a misplaced assumption that by mere denial during cross examination or mere creation of alleged doubt through minor contradictions in the statements of complainant made during cross examination, the appellant had successfully rebutted the presumption as envisaged by section 139 of the N.I. Act.

26. In such view of the matter the conclusion drawn by the trial court to acquit the accused is not only illegal but being perverse, is not sustainable in the eye of the law. Consequently the criminal appeal being CRA 246 of 2019 is allowed and the impugned judgment passed by the trial court dated 15th January, 2019 is hereby set aside.

27. The respondent/accused is hereby convicted under section 138 of N.I Act for dishonour of cheque. The respondent/convict is sentenced to pay fine of Rs. 10,00,000/- Ten Lakhs (i.e. twice of the cheque amount) within three months, in default the convict will appear before the trial court after expiry of three months to serve out sentence for a period of six months. If the fine amount is paid by the convict within the aforesaid period, the said amount shall be paid to the complainant towards compensation. If the convict neither paid the fine amount nor appeared before the Court below to serve out sentence as above within the period, the Trial Court will be at liberty to take appropriate steps against the

convict including issuance of warrant of arrest to secure her attendance to serve out sentence.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(DR. AJOY KUMAR MUKHERJEE, J.)