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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
ARAVIND KUMAR; J., S.V.N. BHATTI; J.
October 09, 2023
CRIMINAL APPEAL NO. 3126 OF 2023 (@ Special Leave Petition (Crl.) No.12802 of 2022)
Rajesh Jain *versus* **Ajay Singh**

Negotiable Instruments Act, 1881 - Once the presumption under Section 139 was given effect to, the Courts ought to have proceeded on the premise that the cheque was, indeed, issued in discharge of a debt/liability. The entire focus would then necessarily have to shift on the case set up by the accused, since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the Court can straightaway proceed to convict him, subject to satisfaction of the other ingredients of Section 138. If the Court finds that the evidential burden placed on the accused has been discharged, the complainant would be expected to prove the said fact independently, without taking aid of the presumption. The Court would then take an overall view based on the evidence on record and decide accordingly. *(Para 55)*

Negotiable Instruments Act, 1881 - When the Courts have concluded that the signature in the cheque has been admitted and its execution has been proved, then the Courts should inquire into either of the two questions: 1. Has the accused led any defense evidence to prove and conclusively establish that there existed no debt/liability at the time of issuance of cheque? 2. In the absence of rebuttal evidence being led the inquiry would entail: Has the accused proved the nonexistence of debt/liability by a preponderance of probabilities by referring to the 'particular circumstances of the case? *(Para 56)*

Negotiable Instruments Act, 1881 - Once the accused adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption 'disappears' and does not haunt the accused any longer. The onus having now shifted to the complainant, he will be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove would result in dismissal of his complaint case. Thereafter, the presumption under Section 139 does not again come to the complainant's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. *(Para 45)*

Negotiable Instruments Act, 1881 - The fundamental error in the approach lies in the fact that the High Court has questioned the want of evidence on part of the complainant in order to support his allegation of having extended loan to the accused, when it ought to have instead concerned itself with the case set up by the accused and whether he had discharged his evidential burden by proving that there existed no debt/liability at the time of issuance of cheque. *(Para 62)*

Indian Evidence Act, 1872 - Burden of Proof - There are two senses in which the phrase 'burden of proof' is used in the Evidence Act. One is the burden of proof arising as a matter of pleading and the other is the one which deals with the question as to who has first to prove a particular fact. The former is called the 'legal

burden' and it never shifts, the latter is called the 'evidential burden' and it shifts from one side to the other. *(Para 29)*

Indian Evidence Act, 1872; Section 101 and 102 - 'legal burden' and 'evidential burden' - The legal burden is the burden of proof which remains constant throughout a trial. It is the burden of establishing the facts and contentions which will support a party's case. If, at the conclusion of the trial a party has failed to establish these to the appropriate standards, he would lose to stand. The incidence of the burden is usually clear from the pleadings and usually, it is incumbent on the plaintiff or complainant to prove what he pleaded or contends. On the other hand, the evidential burden may shift from one party to another as the trial progresses according to the balance of evidence given at any particular stage; the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be is adduced by either side. While the former, the legal burden arising on the pleadings is mentioned in Section 101 of the Evidence Act, the latter, the evidential burden, is referred to in Section 102 thereof. *(Para 30)*

Presumption - Presumptions of fact are inferences logically drawn from one fact as to the existence of other facts. Presumptions of fact are rebuttable by evidence to the contrary. Presumptions of law may be either irrebuttable (conclusive presumptions), so that no evidence to the contrary may be given or rebuttable. A rebuttable presumption of law is a legal rule to be applied by the Court in the absence of conflicting evidence. Among the class of rebuttable presumptions, a further distinction can be made between discretionary presumptions ('may presume') and compulsive or compulsory presumptions ('shall presume'). *(Para 32)*

Presumption - The Evidence Act provides for presumptions, which fit within one of three forms: 'may presume' (rebuttable presumptions of fact), 'shall presume' (rebuttable presumption of law) and conclusive presumptions (irrebuttable presumption of law). The distinction between 'may presume' and 'shall presume' clauses is that, as regards the former, the Court has an option to raise the presumption or not, but in the latter case, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved. *(Para 33)*

(Arising out of impugned final judgment and order dated 01-02-2022 in CRMA No. 148/2020 passed by the High Court of Punjab & Haryana at Chandigarh)

For Petitioner(s) Petitioner-in-person

For Respondent(s) Mr. Yudhvir Dalal, Adv. Mr. Surender Singh, Adv. Mr. Himanshu Singroha, Adv. Ms. Sunaina, Adv. Mr. Sunil Kumar Sethi, Adv. Mr. Kailas Bajirao Autade, AOR

J U D G M E N T

Aravind Kumar, J.

1. Leave Granted.

2. The respondent-accused was tried for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short 'NI Act'). The Trial Court acquitted[1] him. The High Court dismissed the appellant's-complainant's appeal and upheld the order of

[1] Judgment and Order dated 17.12.2019 in Crl. Complaint No. 221 of 2017

acquitta [2] . Challenging the concurrent findings passed by the Courts below, the complainant has preferred this appeal.

Case of the Complainant

3. Mr. Ajay Singh (respondent-accused), along with his wife, is said to have approached the appellant-complainant (Mr. Rajesh Jain) on 01.03.2014 with a request for lending him money. The meeting is said to have been facilitated by Ms. Gita Sunar the sister-in-law of Mr. Singh who had been working as an employee under Mr. Rajesh Jain for nearly 15 years then. Mr. Rajesh Jain, appellant appearing in-person contended that he had lent a sum of Rs. 6 lacs on that day and has lent further sums thereafter, in the genuine belief that Mr. Ajay Singh would honour his promise of timely repayment and return the sum borrowed with interest, as agreed.

4. The respondent-accused failed to repay as per the timeline agreed. The complainant's efforts to recover his money were met with avoidance tactics. The accused is said to have changed his cellular telephone number without notice to the complainant, with the intent of evading his payment obligations. It is only in the year 2017, that the complainant managed to trace the accused-at which point, the accused sought for forgiveness and promised to repay the amounts borrowed along with interest, within three months. The accused had informed the complainant that he would source the funds to clear his outstanding dues by selling two plots of land he owns in Nepal, by taking a personal loan and from the 7th Pay Commission arrears that he was to receive.

5. Yet again, the accused defaulted on his promise. He was not to be found in his residential address. Having successfully concealed himself for about 7 months, the complainant appears to have located him at a new residential address. On direct confrontation, the accused is said to have issued a post-dated cheque No.163044 (dated 19.10.2017) for a sum of Rs.6,95,204/- towards part repayment of outstanding dues. The accused assured the complainant that the balance dues would be repaid by issuing a second cheque in the month of December 2017.

6. On its presentation, the cheque was returned with the endorsement 'Funds Insufficient. The complainant issued a demand notice through his counsel on 26.10.2017 and called upon the accused to make repayment of the cheque amount (Rs. 6,95,204) and other expenses incurred within 15 days. Since the demand was not complied with, a complaint under Section 138 NI Act was instituted on 29.11.2017, before the Court of Judicial Magistrate First Class (JMFC), Jind.

Proceedings before the Trial Court

7. The Trial Court took cognizance of the offence, summoned the accused and issued notice of accusation. The accused pleaded not guilty and claimed to be tried.

8. In support of his case, the complainant had examined himself as CW-1. Mr. Gulab Singh, a bank official at SBI, Jind branch office was examined as CW-2 and Ms. Gita Sunar as CW3. The complainant had also produced the relevant documentary evidence[3]

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[2] Criminal Appeal No.148 of 2020 was dismissed by Hon'ble High Court of Gujarat by Judgment and Order dated 01.02.2021.

[3] Ex.CW1/A-Cheque No.163044 dt.19.10.2017
Ex.CW1/B-Cheque return Memo dt. 01.11.2017
Ex.CWA/C- Copy of Bank passbook of complainant
Ex.CW1/D-Legal Notice dt. 26.10.2017
Ex.CW1/E-Postal Receipt dt. 28.10.2017

including the cheque in question, cheque return memo, copy of the bank passbook, demand notice, postal register, statement of accounts of the complainant and cheque returned register.

9. In his statement under Section 313 of the Code of Criminal Procedure Code 1973, the accused admits of having borrowed money to the extent of Rs.20 lakhs from the complainant. He admits of having paid some interest amount and has pleaded that he could not pay the remaining amount since complainant had started demanding higher amount. He further admits of having received the legal notice but denies having issued any cheque.

10. No defense evidence has been led on behalf of the accused.

11. On a consideration of evidence on record, the Trial Court returned a finding that the accused was not guilty.

12. The Trial Court found that (i) the complainant had discharged his initial onus of proving the essential facts underlying the offence under Section 138 of the NI Act; (ii) the signature on the cheque [Exh. CW1/A) was admitted by the accused and, hence, it rightly raised the statutory presumption under Section 139 NI Act. It, then, rightly noted that the onus of rebutting the presumption lay on the accused and said onus was to be discharged by raising a *'probable defence'* which would create a doubt as to the existence of a legally enforceable debt.

13. It then framed the point for determination as follows:

"The only question remaining for determination is whether a legally valid and enforceable debt existed qua the complainant and the cheque in question (Ex. CWI/A) was issued in discharge of said liability/debt?"

14. The Trial Court answered the issue in the negative. It held that the complainant had failed to prove his case beyond reasonable doubt. It has been observed that the defence led by the accused has created a doubt regarding the truthfulness of the complainant's case.

15. The conclusion of the Trial Court was based on the following grounds:

(i) That the legal notice [Ex. CW1/D] dated 26.10.2017 was not a valid legal notice since it was not signed by the complainant or his counsel.

(ii) In the complaint, legal notice as well as the affidavit evidence, the complainant has failed to mention the date, month and year on which he advanced various sums of money towards loan.

(iii) The evidence on records indicates that the complainant is in the business of money lending. Since he does not possess any valid license/registration[4] under the Punjab Registration of Money Lenders Act, 1938[5] (Money Lenders Act), he could not have filed a suit for recovery of money advanced as per Section 3 of the Money Lenders Act. The Bombay High Court has in the case of **Nanda** v. **Nandakishor**[6] interpreted the phrase 'in

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Ex.CW2/1-Statement of account of complainant Dr. Rajesh Jain w.e.f 01.10.2017 to 31.12.2017
Ex. CW2/2-Copy of Cheque Bonus Register

[4] Section 4(2) postulates no money-lender shall carry on the business of advancing loans unless he gets himself registered under sub-section (1)

[5] Adaptation of Law Order 1968 – See Page 75

[6] (2010) SCC OnLine Bombay 54

any suit' as found in Section 3, widely, to include even a complaint under Section 138 of the NI Act. Relying on the said decision, the Trial Court has concluded that the complaint has been filed in respect of an unenforceable claim.

(iv) The procedure set out in Section 138 has not been properly followed in that the legal notice has been issued prematurely, even before the complainant had received notice of the cheque return memo. The date reflected on the cheque return memo is 1.11.2017 and the date on which the legal notice was issued is 26.10.17. The legal notice could not have been issued until the cheque had been dishonoured.

(v) The version of the complainant is doubtful since the cheque was, admittedly, issued in part-payment of outstanding dues. Nowhere in the complaint or demand notice has the complainant disclosed the total amount loaned to the accused. The Court found it rather surprising that the complainant, an orthopaedic surgeon, would advance huge amounts of loan to the accused, a Class IV employee, without any formal agreement/acknowledgement of loan advanced.

16. The complainant was granted special leave to appeal under Section 378 (4) CrPC before the High Court of Punjab and Haryana.

Proceedings before the High Court

17. On reappreciating the evidence on record, the High Court has found no merit in the appeal and has upheld the order of acquittal passed by the Trial Court. The High Court has reasoned that accused had discharged his onus in rebutting the statutory presumption raised under Section 139 NI Act. The onus, then, once again had shifted to the complainant to prove that the cheque had been issued in respect of a legally enforceable debt and complainant had failed in discharging the onus to prove that cheque was issued in respect of a legally enforceable debt.

18. The underlying basis of the findings in the High Court judgment can be summarised thus:

18.1 The presumption under Section 139 was rebutted by putting questions to the appellant in his cross examination and explaining the incriminating circumstances found in the statement recorded under Section 313 of Cr.P.C.

18.2 The cross examination of the appellant reveals that he had given loan to accused commencing from 1st March, 2014 and on several dates thereafter. The cheque was handed over to the accused only on 19.10.2017, nearly three years thereafter. If the appellant had given loan on various dates, he must have maintained some documents to evidence such loans. He has remained silent as to the specific amounts loaned after 01.03.2014 and complainant ought to have tendered in evidence accounts, ledger, statement to prove the debt amount. The stand of the accused was that he did borrow money from the complainant but every month, the complainant would enhance the outstanding dues by Rs 1 lakh. Therefore, the stand of the respondent seems to be more probable than the case of the complainant.

18.3 There is a consistent allegation in the complaint, demand notice and the affidavit in evidence that the loan was given subject to payment of interest on the principal amount. The complainant ought to have mentioned the principal amount borrowed and the interest charged thereon in order to arrive at the cheque amount of Rs.6,95,204/-. Since the breakup of the principal amount and interest charged is conspicuously absent in all the

three documents, the complaint is bereft of material particulars and deserved to be dismissed at the very outset.

18.4 In so far as the Trial Court's finding that the complaint was not maintainable since the complainant was not registered under the Money Lenders Act, the High Court has observed that there was no necessity of evaluating such a finding since that question would only arise if the complainant had succeeded in proving that the cheque was issued in respect of a legally enforceable debt.

19. We have heard Mr. Rajesh Jain, appellant appearing in-person, and Mr. Yudhvir Dalal, learned Counsel for the respondent.

20. Mr. Rajesh Jain, appearing in-person has contended that there is a serious flaw in the approach of the Courts below while appreciating the evidence on record. According to him, the signature on the cheque not being under dispute, and the presumption under Section 139 having been drawn against the accused, there was nothing available on record to suggest that the accused had discharged his onus of rebutting the presumption. He drew our attention to the reasoning given in the orders of acquittal to contend that courts below had erroneously proceeded to appreciate the evidence as though the onus was on the complainant to prove that *'the cheque was issued in discharge of a debt'*. Once the presumption operates, the onus rests on the accused to prove the nonexistence of debt/liability and the courts could not have doubted the complainant's case from any point of view. He finally argued that the respondent cannot be said to have raised a *'probable defence'* since the case set up in defence was full of inconsistencies and bereft of any evidence. He, accordingly, prays that concurrent findings be set aside, and an order of conviction be passed against the accused.

21. Mr. Yudhvir Dalal, learned counsel has contended that this Court, while hearing an appeal by special leave, must be extremely slow to interfere against concurrent findings. Merely because another view can be taken on reappreciation of the evidence, is no ground to interfere; on the merits, he contends that the accused has discharged the burden fastened by raising a *'probable defence'*, which meets the standard of 'preponderance of probabilities. He has relied on a few judgments to contend that the presumption can be rebutted even without leading any rebuttal evidence. In this regard, he submits that it is always open to the accused to rely on the materials produced by the complainant for disproving the existence of a legally enforceable debt or liability. He submits that the complaint is lacking in material particulars-it fails to state the total sum loaned, the dates on which the loans were given, the basis on which the demand was made for a sum of Rs. 6,95,204/-. These facts coupled with other circumstances has justifiably created a doubt in the mind of the court as to the genuineness of the complainant's case and therefore, courts below were justified in disbelieving the complainant's version. On these grounds he prays for dismissal of the appeal.

22. We have taken note of the rival submissions canvassed and have perused the record.

Question for Consideration

23. Since the execution of the cheque is, admittedly, not under dispute, the limited question to be considered, is (i) whether the accused can be said to have discharged his 'evidential burden', for the courts below to have concluded that the presumption of law supplied by Section 139 had been rebutted?

23.1 If the answer to this question is found in the affirmative, the next question to be considered is (i) whether the complainant has, in the absence of the artificial force supplied by the presumption under Section 139, independently proved beyond reasonable doubt that the cheque was issued in discharge of a debt/liability? The necessity of dealing with point No. (ii) will only arise if the answer to point No. (i) in the affirmative. Hence, we shall take up point (i) for consideration.

Applicable Legal Principles

Scope of Article 136 vis a vis Concurrent Finding of Fact

24. At the threshold, we must note that the challenge in this appeal calls for an interference against concurrent findings by two Courts. The scope of an appeal by special leave under Article 136 of the Constitution of India against the concurrent findings is well settled. In ***Mst. Dalbir Kaur and Ors. vs. State of Punjab (1976) 4 SCC 158***, this Court, on a consideration of multiple authorities, has distilled the principles governing interference by this Court in a criminal appeal by special leave, as follows:

(1) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence.

(2) that the Court will not normally enter into a reappraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on.

(3) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court

(4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused.

(5) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence: It is very difficult to lay down a rule of universal application, but the principles mentioned above and those adumbrated in the authorities of this Court cited supra provide sufficient guidelines for this Court to decide criminal appeals by special leave. Thus, in a criminal appeal by special leave, this Court at the hearing examines the evidence and the judgment of the High Court with the limited purpose of determining whether or not the High Court has followed the principles enunciated above. Where the Court finds that the High Court has committed no violation of the various principles laid down by this Court and has made a correct approach and has not ignored or overlooked striking features in the evidence which demolish the prosecution case, the findings of fact arrived at by the High Court on an appreciation of the evidence in the circumstances of the case would not be disturbed.

Section 138 of the NI Act - Necessary Ingredients

25. Essentially, in all trials concerning dishonour of cheque, the courts are called upon to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act.

26. In ***Gimpex Private Limited*** *vs.* ***Manoj Goel***[7]*,* this Court has unpacked the ingredients forming the basis of the offence under Section 138 of the NI Act in the following structure:

(1) The drawing of a cheque by person on do account maintained by him with the banker for the payment of any amount of money to another from that account;

(i) The cheque being drawn for the discharge in whole or in part of any debt or other liability;

(iii) Presentation of the cheque to the bank arranged to be paid from that account,

(iv) The return of the cheque by the drawee bank as unpaid either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount

(v) A notice by the payee or the holder in due course making a demand for the payment of the amount to the drawer of the cheque within 30 days of the receipt of information from the bank in regard to the return of the cheque; and

(vi) The drawer of the cheque failing to make payment of the amount of money to the payee or the holder in due course within 15 days of the receipt of the notice.

27. In ***K. Bhaskaran v. Sankaran Vaidhyan Balan***[8] this Court had summarised the constituent elements of the offence in fairly similar terms by holding:

"14. The offence Under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (3) failure of the drawer to make payment within 15 days of the receipt of the notice."

28. The five (5) acts as set out in **K Bhaskaran's case** (supra) are, generally speaking, matters of record and would be available in the form of documentary evidence as early as, at the stage of filing the complaint and initiating prosecution. Apart from the above acts, it is also to be proved that cheque was issued in discharge of a debt or liability (Ingredient no. (ii) in **Gimpex's case**). The burden of proving this fact, like the other facts, would have ordinarily fallen upon the complainant. However, through the introduction of a presumptive device in Section 139 of the NI Act, the Parliament has sought to overcome the general norm as stated in Section 102 of the Evidence Act and has, thereby fixed the onus of proving the same on the accused. Section 139, in that sense, is an example of a reverse onus clause and requires the accused to prove the non-existence of the presumed fact, i.e., that cheque was not issued in discharge of a debt/liability.

Burden of Proof and Presumptions: Conceptual Underpinnings

29. There are two senses in which the phrase *'burden of proof'* is used in the Indian Evidence Act, 1872 (Evidence Act, hereinafter). One is the burden of proof arising as a matter of pleading and the other is the one which deals with the question as to who has first to prove a particular fact. The former is called the *'legal burden'* and it never shifts, the latter is called the *'evidential burden'* and it shifts from one side to the other. [See ***Kundanlal v. Custodian Evacuee Property (AIR 1961 SC 1316)***]

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[7] (2022) 11 SCC 705
[8] *(1999) 7 SCC 510*

30. The legal burden is the burden of proof which remains constant throughout a trial. It is the burden of establishing the facts and contentions which will support a party's case. If, at the conclusion of the trial a party has failed to establish these to the appropriate standards, he would lose to stand. The incidence of the burden is usually clear from the pleadings and usually, it is incumbent on the plaintiff or complainant to prove what he pleaded or contends. On the other hand, the evidential burden may shift from one party to another as the trial progresses according to the balance of evidence given at any particular stage; the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be is adduced by either side (See Halsbury's Laws of England, 4th Edition para 13). While the former, the legal burden arising on the pleadings is mentioned in Section 101 of the Evidence Act, the latter, the evidential burden, is referred to in Section 102 thereof. [***G.Vasu V. Syed Yaseen (AIR 1987 AP139) affirmed in Bharat Barrel Vs. Amin Chand [(1999) 3 SCC 35]]***

31. Presumption, on the other hand, literally means *"taking as true without examination or proof"*. In ***Kumar Exports v. Sharma Exports***[9]*,* this Court referred to presumption as *"devices by use of which courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence."*

32. Broadly speaking, presumptions are of two kinds, presumptions of fact and of law. Presumptions of fact are inferences logically drawn from one fact as to the existence of other facts. Presumptions of fact are rebuttable by evidence to the contrary. Presumptions of law may be either irrebuttable (conclusive presumptions), so that no evidence to the contrary may be given or rebuttable. A rebuttable presumption of law is a legal rule to be applied by the Court in the absence of conflicting evidence (Halsbury, 4th Edition paras 111, 112]. Among the class of rebuttable presumptions, a further distinction can be made between discretionary presumptions (*'may presume'*) and compulsive or compulsory presumptions (*'shall presume'*). [***G. Vasu V. Syed Yaseen*** *(Supra)*]

33. The Evidence Act provides for presumptions, which fit within one of three forms: *'may presume'* (rebuttable presumptions of fact), *'shall presume'* (rebuttable presumption of law) and conclusive presumptions (irrebuttable presumption of law). The distinction between *'may presume'* and *'shall presume'* clauses is that, as regards the former, the Court has an option to raise the presumption or not, but in the latter case, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved, [***G.Vasu V. Syed Yaseen (Supra)***]

Section 139 NI Act-Effect of Presumption and Shifting of Onus of Proof

34. The NI Act provides for two presumptions: Section 118 and Section 139. Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that 'unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability'. It will be seen that the *'presumed fact'* directly relates to one of the crucial ingredients necessary to sustain a conviction under Section 138.[10]

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[9] (2009) 2 SCC 513

[10] The rules discussed hereinbelow is common to both the presumptions under Section 139 and Section 118 and is hence, not repeated-Reference to one can be taken as reference to another

35. Section 139 of the NI Act, which takes the form of a *'shall presume'* clause is illustrative of a presumption of law. Because Section 139 requires that the Court *'shall presume'* the fact stated therein, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. But this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary as is clear from the use of the phrase *'unless the contrary is proved'*.

36. The Court will necessarily presume that the cheque had been issued towards discharge of a legally enforceable debt/liability in two circumstances. *Firstly*, when the drawer of the cheque admits issuance/execution of the cheque and *secondly*, in the event where the complainant proves that cheque was issued/executed in his favour by the drawer. The circumstances set out above form the fact(s) which bring about the activation of the presumptive clause. ***[Bharat Barrel Vs. Amin Chand] [(1999) 3 SCC 35]***.

37. Recently, this Court has gone to the extent of holding that presumption takes effect even in a situation where the accused contends that 'a blank cheque leaf was voluntarily signed and handed over by him to the complainant. [***Bir Singh v. Mukesh Kumar***[11]]. Therefore, mere admission of the drawer's signature, without admitting the execution of the entire contents in the cheque, is now sufficient to trigger the presumption.

38. As soon as the complainant discharges the burden to prove that the instrument, say a cheque, was issued by the accused for discharge of debt, the presumptive device under Section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.

39. **John Henry Wigmore[12] on Evidence** states as follows:

"The peculiar effect of the presumption of law is merely to invoke a rule of law compelling the Jury to reach the conclusion in the absence of evidence to the contrary from the opponent but if the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption 'disappears as a rule of law and the case is in the Jury's hands free from any rule."

40. The standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the prosecution is required to prove the guilt of an accused. The accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The accused must meet the standard of *'preponderance of probabilities'*, similar to a defendant in a civil proceeding. ***[Rangappa vs. Mohan (AIR 2010 SC 1898)]***

41. In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words *'until the contrary is proved'* occurring in Section 139 do not mean that accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability but the accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist.

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[11] (2019) 4 SCC 197

[12] Rules of Evidence- The Hidden Origin of Modern Law

***[Basalingappa Vs. Mudibasappa (AIR 2019 SC 1983) See also Kumar* Exports Vs. Sharma Carpets (2009) 2 SCC 513]**

42. In other words, the accused is left with two options. The first option-of proving that the debt/liability does not exist-is to lead defence evidence and conclusively establish with certainty that the cheque was not issued in discharge of a debt/liability. The second option is to prove the non-existence of debt/liability by a preponderance of probabilities by referring to the particular circumstances of the case. The preponderance of probability in favour of the accused's case may be even fifty one to forty nine and arising out of the entire circumstances of the case, which includes: the complainant's version in the original complaint, the case in the legal/demand notice, complainant's case at the trial, as also the plea of the accused in the reply notice, his 313 statement or at the trial as to the circumstances under which the promissory note/cheque was executed. All of them can raise a preponderance of probabilities justifying a finding that there was '*no debt/liability'*. ***[Kumar Exports and Sharma Carpets, (2009) 2 SCC 513]***

43. The nature of evidence required to shift the evidential burden need not necessarily be direct evidence i.e., oral or documentary evidence or admissions made by the opposite party; it may comprise circumstantial evidence or presumption of law or fact.

44. The accused may adduce direct evidence to prove that the instrument was not issued in discharge of a debt/liability and, if he adduces acceptable evidence, the burden again shifts to the complainant. At the same time, the accused may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling the burden may likewise shift to the complainant. It is open for him to also rely upon presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act. The burden of proof may shift by presumptions of law or fact. In Kundanlal's case- (supra) when the creditor had failed to produce his account books, this Court raised a presumption of fact under Section 114, that the evidence, if produced would have shown the non-existence of consideration. Though, in that case, this Court was dealing with the presumptive clause in Section 118 NI Act, since the nature of the presumptive clauses in Section 118 and 139 is the same, the analogy can be extended and applied in the context of Section 139 as well.

45. Therefore, in fine, it can be said that once the accused adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption *'disappears'* and does not haunt the accused any longer. The onus having now shifted to the complainant, he will be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove would result in dismissal of his complaint case. Thereafter, the presumption under Section 139 does not again come to the complainant's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. ***[Basalingappa vs. Mudibasappa, AIR 2019 SC 1983; See also, Rangappa vs. Sri Mohan (2010) 11 SCC 441]***

Our Analysis

46. It is against the backdrop of the afore-stated legal principles that we proceed to consider if there is any interference that is called for.

Point No. (1):

47. The accused has neither replied to the demand notice nor has led any rebuttal evidence in support of his case. The case set up by him needs to be drawn from the suggestions put during the cross examination and from his reply given in the statement recorded under Section 313 of Cr.P.C.

48. It has been suggested to the complainant that accused had not borrowed any loan from him. It was suggested to him that no legal notice had been issued on dishonor of cheque. It was further suggested that the complainant has misused a blank cheque - the said cheque having been obtained from his employee, Gita Sunar, who also happens to be the sister-in law of the accused. It was suggested that Gita Sunar had some financial transactions with the complainant and towards that end, he had received a blank cheque (signed by the accused) from Gita Sunar and misused it. It is pertinent to note that the suggestions mentioned above were denied by the complainant.

49. In her cross examination, Gita Sunar (examined on behalf of complainant as CW.3) has denied the suggestion that she has misused a blank cheque in collusion with the complainant. She has also denied the suggestion that a blank cheque was given to her by the brother-in law of the accused.

50. In the statement recorded under Section 313 of Cr.P.C., the first incriminating circumstance put to the accused was as follows:

"It has come in evidence against you that you along with your wife, Jyoti visited the plaintiff an Orthopaedic Surgeon on 1-3-14, and availed friendly loan from plaintiff from time to time through sister of Jyoti namely Gita Sunar working there, on the plea of need for family requirements, and promised to pay up the "interest moneys as also the entire Principal amounts, what do you have to say about this?

He responded to said suggestion/question as follows:

"*I had taken some money from the plaintiff. I have taken Rupees Twenty Lac from the plaintiff.*"

51. When it was put to him that he has reneged on his promise to pay on several occasions and sought to avoid the complainant by changing his telephone number, the accused denies that he had changed his number but however, *admits that he could not pay the entire sum at one go*. He further admits that he did pay some interest but could not pay the remaining sum since the complainant would increase the outstanding amount every month by one lakh rupees and had been demanding higher amount. As regards the circumstance of return of the cheque, the legal notice and non-reply to the demand notice, he admits of having received the demand notice. He states that he had no knowledge about the dishonor of his cheque since his cheque book and bank passbook were kept in his sister-in-law's house.

52. On an overall consideration of the record, we find that the case set up by the accused is thoroughly riddled with contradictions. It is apparent on the face of the record that there is not the slightest of credibility perceivable in the defense set up by the accused.

53. In his 313 statements, he admits of having taken a loan of Rs 20 lakh and having repaid some interest but in the cross examination of the complainant, a suggestion is made that the accused had no financial dealings with the complainant. Whereas in his 313 statement, the accused states that his cheque book and passbook is kept in his sister in law's house, yet, in the cross examination of Gita Sunar, the accused's sister-in-law, no suggestion is made to that effect. In fact, she has plainly denied that any blank cheque was given to her by her brother-in-law. We find it highly unnatural to presume that the accused would leave his signed cheque leaves and passbook in his sister-in law's house.

Even if he did, there is no reason(s) or motive attributed on part of his sister-inlaw, for her to collude along with the complainant. The accused has also not explained as to why he has not set up his defense at the earliest point, that is, at the stage of receiving the demand notice, even though he admits having received the demand notice in his 313 statement, yet he makes a suggestion to the complainant in his cross examination that no legal notice had been issued. The theory of 'blank cheque' being misused has been suggested, only to be denied by both, the complainant and Gita Sunar-CW-3. No action has been taken by way of registering a police complaint in order to prosecute the alleged illegal conduct of his blank cheque having been misused by CW-3.

54. Nothing significant has been elicited in the cross-examination of complainant to raise any suspicion in the case set up by the complainant. Other than some minor inconsistencies, the case of the complainant has been consistent throughout as can be noticed from a perusal of the complainant, demand notice and affidavit evidence. In fact, the signature on the cheque having not been disputed, and the presumption under Section 118 and 139 having taken effect, the complainant's case stood satisfied every ingredient necessary for sustaining a conviction under Section 138. The case of the defense was limited only to the issue as to whether the cheque had been issued in discharge of a debt/liability. The accused having miserably failed to discharge his evidential burden, that fact will have to be taken to be proved by force of the presumption, without requiring anything more from the complainant.

55. As rightly contended by the appellant, there is a fundamental flaw in the way both the Courts below have proceeded to appreciate the evidence on record. Once the presumption under Section 139 was given effect to, the Courts ought to have proceeded on the premise that the cheque was, indeed, issued in discharge of a debt/liability. The entire focus would then necessarily have to shift on the case set up by the accused, since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the Court can straightaway proceed to convict him, subject to satisfaction of the other ingredients of Section 138. If the Court finds that the evidential burden placed on the accused has been discharged, the complainant would be expected to prove the said fact independently, without taking aid of the presumption. The Court would then take an overall view based on the evidence on record and decide accordingly.

56. At the stage when the courts concluded that the signature had been admitted, the Court ought to have inquired into either of the two questions (*depending on the method in which accused has chosen to rebut the presumption*): Has the accused led any defense evidence to prove and conclusively establish that there existed no debt/liability at the time of issuance of cheque? In the absence of rebuttal evidence being led the inquiry would entail: Has the accused proved the nonexistence of debt/liability by a preponderance of probabilities by referring to the *'particular circumstances of the case"*?

57. The perversity in the approach of the Trial Court is noticeable from the way it proceeded to frame a question at trial. According to the trial Court, the question to be decided was *'whether a legally valid and enforceable debt existed qua the complainant and the cheque in question (Ex. CWI/A) was issued in discharge of said liability/debt'*. When the initial framing of the question itself being erroneous, one cannot expect the outcome to be right. The onus instead of being fixed on the accused has been fixed on the complainant. Lack of proper understanding of the nature of the presumption in Section 139 and its effect has resulted in an erroneous Order being passed.

58. Einstein had famously said:

"If I had an hour to solve a problem, I'd spend 55 minutes thinking about the problem and 5 minutes thinking about solutions".

Exaggerated as it may sound, he is believed to have suggested that quality of the solution one generates is directly proportionate to one's ability to identify the problem. A well-defined problem often contains its own solution within it.

59. Drawing from Einstein's quote, if the issue had been properly framed after careful thought and application of judicial mind, and the onus correctly fixed, perhaps, the outcome at trial would have been very different and this litigation might not have travelled all the way up to this Court.

60. Coming to the finding of High Court, we find again, there has been fundamental error in the approach with which the High Court has proceeded to consider the evidence on record. In paragraph 6 of the impugned order, the High Court finds that the complainant has proved the issuance of cheque, which means that the presumption would come into immediate effect. In paragraph 13, it rightly observes that the burden is on the accused to rebut such presumption. In the very next paragraph, it finds that the accused has rebutted the presumption by putting questions to the complainant and explaining the circumstances under section 313 Cr.P.C.

61. There is no elucidation of material circumstances/basis on which the Court reached such conclusion. It notes the allegation made in the complaint that the complainant had given the loan on 01.03.2014 and on several dates thereafter. Based on this averment, the High Court rather shockingly concludes that: *"If the complainant had given loans on various dates, he must have maintained some document qua that, because it was not a one-time, loan but loan along with interest accrued on the principal, which made the amount to Rs.6,95,204/-."* Therefore, according to the High Court, 'the burden was primarily on the complainant to prove the debt amount'.

62. The fundamental error in the approach lies in the fact that the High Court has questioned the want of evidence on part of the complainant in order to support his allegation of having extended loan to the accused, when it ought to have instead concerned itself with the case set up by the accused and whether he had discharged his evidential burden by proving that there existed no debt/liability at the time of issuance of cheque.

63. In the teeth of the aforesaid analysis, we have not the slightest of hesitation in concluding that this case calls for interference, notwithstanding that both the courts below have concurrently held in favour of the accused. Since we have answered point No:(i) in the negative, the need to examine point No:(ii) does not arise.

64. Hence, we proceed to allow the appeal by setting aside the judgment of the High Court of Punjab and Haryana at Chandigarh rendered in CRM-A No.148 of 2020 dated 01.02.2022 and allow the complaint filed under Section 138 of Negotiable Instruments Act, 1881 and convict the respondent accused with fine of twice the amount of the cheque namely Rs.13,90,408/- (Rupees thirteen lakh ninety thousand four hundred and eight only) failing which he shall undergo simple imprisonment for one year.