# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# NAGPUR BENCH, NAGPUR

## CRIMINAL APPEAL NO. 795/2018

(PRAKASH MADHUKARRAO DESAI **VERSUS** DATTATRAYA SHESHRAO DESAI)

| *Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders.* | *Court's or Judge's order* |
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Shri Pushkar Deshpande, counsel for the appellant.
Shri Rahul Kurekar, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND MRS VRUSHALI V. JOSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : JUNE 13, 2023
DATE ON WHICH ORDER IS PRONOUNCED : AUGUST 19, 2023

The question referred to the Division Bench for being answered reads as under :-

"Whether in case the transaction, is not reflected in the Books of account and/or the Income Tax Returns of the holder of the cheque in due course and thus is in violation to the provisions of Section 269-SS of the Income Tax Act, 1961 whether such a transaction, can be held to be "a legally enforceable debt" and can be permitted to be enforced, by institution of proceedings under Section 138 of the Negotiable Instruments Act ?"

2. The reference arises in the light of the proceedings initiated by the appellant-complainant under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act of 1881'). The complainant had advanced a handloan of Rupees One Lakh Fifty Thousand to the respondent-accused. In lieu of that the accused issued a cheque for the aforesaid amount dated 19.05.2016 drawn in favour of the complainant. The said cheque was dishonoured for want of sufficient funds as per the Bank Advice dated 11.07.2016. On 13.07.2016 a statutory notice was issued under Section 138 of the Act of 1881. The trial Court dismissed the said complaint principally on the ground that the amount stated to be advanced to the accused had not

been shown in the Income Tax returns of the complainant. Being aggrieved by the aforesaid adjudication the complainant has preferred the present appeal under Section 378(4) of the Code of Criminal Procedure, 1973.

3. The learned Single Judge while hearing this appeal under Section 378(4) of the Code of Criminal Procedure, 1973 was confronted with the decisions in *Krishna P. Morajkar Versus Joe Ferrao & Another* [**2013 Cr.L.J. (NOC) 572**], *Bipin Mathurdas Thakkar Versus Samir & Another* [**2015 SCC OnLine Bom 305**] and *Pushpa Sanchalal Kothari Versus Aarti Uttam Chavan* [**2021(5) Mh.L.J. 121**]. These decisions are rendered by the learned Single Judges taking the view that even if the amount in question is not reflected in the Income Tax returns of the complainant the same would not be of much consequence in the proceedings under Section 138 of the Act of 1881. The learned Single Judge then referred to the decision in *Sanjay Mishra Versus Kanishka Kapoor @ Nikki & Another* [**2009(4) Mh.L.J. 155**] delivered by another learned Single Judge that the amount not disclosed in the Income Tax returns by the complainant could not be stated to be an amount due towards a legally enforceable liability. The learned Single judge was unable to agree with what was held in *Krishna P. Morajkar*, *Bipin Mathurdas Thakkar*, and *Pushpa Sanchalal Kothari* (supra). He expressed his agreement with the view taken in *Sanjay Mishra* (supra). Having noticed the aforesaid divergent views and by observing as to whether the benefit of law by invoking Sections 138 to 147 of the Act of 1881, a complainant could be permitted to recover unaccounted cash when such transaction is prohibited by Section 269-SS of the Income Tax Act, 1961 (for short, 'the Act of 1961') being an issue of seminal importance having wide ramifications, the aforesaid question was framed for being answered by the Division Bench vide order dated 25.01.2023. It is in this manner that we are called upon to answer the aforesaid question.

4. Shri Pushkar Deshpande, learned counsel appearing for the appellant-complainant referred to the judgments rendered by the learned Single Judges that have led to the making of the reference. Relying upon the decisions in *Krishna P. Morajkar*, *Bipin Mathurdas Thakkar* and *Pushpa Sanchalal Kothari* (supra), he submitted that there was no legal bar for seeking enforcement of the liability that is incurred on the dishonour of an instrument notwithstanding the fact that the amount advanced is not shown in the Income Tax returns of the person advancing such amounts. Referring to the decision of the Hon'ble Supreme Court in *Rangappa Versus Sri Mohan* [(2010) 11 SCC 441], it was submitted that the Hon'ble Supreme Court partly overruled its earlier decision rendered by the two learned Judges in *Krishna Janardhan Bhat Versus Dattatraya G. Hegde* [(2008) 4 SCC 54]. The presumption mandated by Section 139 of the Act of 1881 included the presumption of existence of a legally enforceable debt or liability and it was for the accused to raise a defence and rebut the presumption and contest the existence of a legally enforceable debt or liability. The learned Single Judge in *Sanjay Mishra* (supra) had relied upon the judgment of the Hon'ble Supreme Court in *Krishna Janardhan Bhat* (supra) to hold that the alleged liability to repay an unaccounted cash amount that was not disclosed in the Income Tax returns could not be said to be a legally recoverable liability. He therefore submitted that in view of the judgment in *Rangappa* (supra) there being a presumption in favour of the holder of the cheque, it was for the accused to rebut the statutory presumption to enable the Court to hold that there was no legally enforceable liability. Mere absence of the amount advanced/lent to the drawer of the cheque being shown in the Income Tax returns would not be of such importance so as to preclude the holder of the cheque from seeking to recover such liability. The learned counsel referred to the provisions of Chapter XXI and XXII of the Act of 1961. It was urged that by accepting an amount exceeding Rupees Twenty Thousand in cash, the provisions of Section 269-SS of the Act of 1961 would be violated by the drawer of the

cheque-accused and not the payee thereof-complainant. The breach of statutory provisions ought not to benefit the drawer by holding such amount to be not a legally enforceable liability. In such circumstances, it could not be said that the amount in question that had been advanced was under a void transaction. The learned counsel also placed reliance on the decisions in *M/s Gujarat Travancore Agency, Cochin Versus Commissioner of Income Tax, Kerala* [**(1989) 3 SCC 52**], *Hiten P. Dalal Versus Bratindranath Banerjee* [**(2001) 1 SCC 16**] and *Commissioner of Income Tax, Delhi Versus Atul Mohan Bindal* [**(2009) 9 SCC 589**]. It was thus submitted that the aspect whether the accused had rebutted the presumption ought to be examined and the complainant could not be non-suited on the ground that as the amount advanced was not reflected in the Income Tax returns, it was a liability that could not be legally enforced.

5. Shri R.S. Kurekar, learned counsel for the respondent-accused submitted that the question as referred for being answered was required to be answered in the negative. According to him, the view as taken in *Krishna Janardhan Bhat* (supra) as followed by the learned Single Judge in *Sanjay Mishra* (supra) ought to be accepted since the object behind that view was to prevent the recovery of such amount that was stated to have been advanced without being reflected in the Income Tax returns of the complainant. Having violated the provisions of the Act of 1961, the complainant could not seek to take advantage of the situation in such manner. The learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in *Rajaram Sriramulu Naidu (Since deceased) through L.Rs. Versus Maruthachalam (Since deceased) through L.Rs.* [**2023 Live Law (SC) 46**] and **Criminal Appeal No.268 of 2011** [*Dilip Virumal Ahuja Versus Rekha Vithal Patil & Another*]. Since it was open for the accused to rely upon the material submitted by the complainant for raising a probable defence and rebutting the presumption, absence of disclosing the amount advanced/lent in the Income Tax returns was a material circumstance going to the root of the matter and was

sufficient to rebut the presumption in that regard. It was therefore submitted that the learned Single Judge while referring the question to the Division Bench was also of the view that what was held in *Sanjay Mishra* (supra) was correct. That view ought to be upheld.

6. At the outset, we may state that the question as framed deserves to be segregated in two parts for the reason that failure to record a transaction in the books of account and/or the Income Tax returns of the holder of the cheque and violation of Section 269-SS of the Act of 1961 are independent and distinct acts. Both can arise either together or independently. Hence, the question as framed is modified to read as under:-

"Whether in case the transaction is (a) not reflected in the books of account and/or the Income Tax returns of the holder of the cheque in due course and/or (b) is in violation of the provisions of Section 269-SS of the Act of 1961, the same can be held to be a "legally enforceable debt" and can be permitted to be enforced by institution of proceedings under Section 138 of the Act of 1881 ?

7. With a view to answer the aforesaid question, we may note the relevant statutory provisions that having bearing on the question to be answered :-

Section 118 of the Act of 1881 reads as under :-

> "*118. Presumptions as to negotiable instruments. – Until the contrary is proved, the following presumptions shall be made:-*
> *(a) of consideration. – that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;*
> *(b) as to date. – that every negotiable instrument bearing a date was made or drawn on such date;*
> *(c) as to time of acceptance. – that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;*

*(d) as to time of transfer. – that every transfer of a negotiable instrument was made before its maturity;*

*(e) as to order of endorsements. – that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;*

*(f) as to stamp. – that a lost promissory note, bill of exchange or cheque was duly stamped;*

*(g) that holder is a holder in due course. – that the holder of a negotiable instrument is a holder in due course:*

*Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.*"

Sections 138 and 139 of the Act of 1881 read as under :-

"*138. Dishonour of cheque for insufficiency, etc., of funds in the account. –*

*Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:*

*Provided that nothing contained in this Section shall apply unless –*

*(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;*

*(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the*

*drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*

*(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.*

*Explanation. – For the purposes of this Section, "debt or other liability" means a legally enforceable debt or other liability.*

*139. Presumption in favour of holder. – It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability.*"

8. Section 269-SS of the Act of 1961 reads as under :-

"*Mode of taking or accepting certain loans, deposits and specified sum.*

*269-SS. – No person shall take or accept from any other person (herein referred to as the depositor), any loan or deposit or any specified sum, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed], if, –*

*(a) the amount of such loan or deposit or specified sum or the aggregate amount of such loan, deposit and specified sum; or*

*(b) on the date of taking or accepting such loan or deposit or specified sum, any loan or deposit or specified sum taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or*

*(c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is twenty thousand rupees or more:*

*Provided that the provisions of this section shall not apply to any loan or deposit or specified sum taken or accepted from, or any loan or deposit or specified sum taken or accepted by, –*

*(a) the Government;*
*(b) any banking company, post office savings bank or co-operative bank;*
*(c) any corporation established by a Central, State or Provincial Act;*
*(d) any Government company as defined in clause (45) of section 2 of the Companies Act, 2013 (18 of 2013);*
*(e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:*

*Provided further that the provisions of this Section shall not apply to any loan or deposit or specified sum, where the person from whom the loan or deposit or specified sum is taken or accepted and the person by whom the loan or deposit or specified sum is taken or accepted, are both having agricultural income and neither of them has any income chargeable to tax under this Act:*
*[Provided also that the provisions of this section shall have effect, as if for the words "twenty thousand rupees", the words "two lakh rupees" had been substituted in the case of any deposit or loan where, –*
*(a) such deposit is accepted by a primary agricultural credit society or a primary co-operative agricultural and rural development bank from its member; or*
*(b) such loan is taken from a primary agricultural credit society or a primary co-operative agricultural and rural development bank by its member.]*
*Explanation. – For the purposes of this section, –*
*(i) "banking company" means a company to which the provisions of the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act;*
*[(ii) "co-operative bank", "primary agricultural credit society" and "primary co-operative agricultural and rural development bank" shall have the meanings respectively assigned to them in the Explanation to sub-section (4) of section 80P;]*
*(iii) "loan or deposit" means loan or deposit of money;*

*(iv) "specified sum" means any sum of money receivable, whether an advance or otherwise, in relative to transfer of an immovable property, whether or not the transfer takes place.*]"

9. The provisions of Sections 118, 138 and 139 of the Act of 1881 have been considered in various decisions of the Hon'ble Supreme Court. In *Hiten P. Dalal* (supra) it was held that Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheque. In every case where the factual basis for raising of the presumption is established, it is obligatory for the Court to raise this presumption. In *Rajaram Sriramulu Naidu* (supra) after referring to a recent decision in *Basalingappa Versus Mudibasappa* [**(2019) 5 SCC 418**] it has been observed that once the execution of the cheque is admitted, Section 139 of the Act of 1881 mandates a presumption that the cheque was for a discharge of any debt or other liability. The said presumption is a rebuttable presumption and the onus is on the accused to raise a probable defence. It is open for the accused to rely upon the evidence led by him or he can also rely on the material submitted by the complainant for raising a probable defence. The facts in *Rajaram Sriramulu Naidu* (supra) indicate that the complainant had failed to declare in his Income Tax returns that he had lent an amount of Rupees Three Lakhs to the accused. The accused examined the Income Tax Officer who produced the certified copies of the complainant's Income Tax returns for the relevant period. On that premise the trial Court held that from the income shown in the Income Tax returns it was clear that the complainant did not have financial capacity to lend the money in question. The accused further examined the Officers from the Bank to substantiate his defence. After considering all this evidence, the trial Court found that the case of the complainant that he had given a loan to the accused from his agricultural income was unbelievable. The defence raised by the accused was found to be a possible defence and the accused was held entitled to the benefit of doubt. On this principle the trial court held that the accused had rebutted the presumption and acquitted him. The Hon'ble Supreme Court observed that the defence raised by the appellant

satisfied the standard of preponderance of probabilities. It therefore did not interfere with the acquittal of the accused.

Though the learned counsel for the accused sought to rely upon the aforesaid decision to urge that absence of the income being disclosed in the Income Tax returns was sufficient to hold that the debt was not legally enforceable, we do not find that this is the ratio in *Rajaram Sriramulu Naidu* (supra). The acquittal of the accused was not on the ground that the amount advanced by the complainant was not disclosed in the Income Tax returns and hence the debt was not legally recoverable. On the contrary the Hon'ble Supreme Court has referred to the presumption under Section 139 of the Act of 1881 that when the execution of the cheque is admitted the same mandates the presumption that the cheque was for the discharge of any debt or other liability. The acquittal of the accused was because the defence raised by him satisfied the standard of preponderance of probabilities that the complainant had no capacity to lend the amount of Rupees Three Lakhs to the accused.

10. In *Asstt. Director of Inspection Investigation Versus A.B. Shanthi* [**(2002) 6 SCC 259**] the constitutional validity of Sections 269-SS and 271-D of the Act of 1961 was challenged. While considering the said challenge it was observed that the object of introducing Section 269-SS was to ensure that a tax payer is not allowed to give false explanation for his unaccounted money and if he has given false entries in his account he cannot escape by giving false explanation for the same. The object sought to be achieved was to eradicate the evil practice of making of false entries in the account books and later giving explanation for the same. Upholding the validity of Section 269-SS of the Act of 1961 it was held that the same was neither violative of Article 14 of the Constitution of India nor that it was enacted without legal competence. While considering the challenge to Section 271-D of the Act of 1961 reference was made to Section 273-B that provides that notwithstanding anything contained in the provisions of Section 271-D, no

penalty would be imposable on the person or the assesse as the case may be for any failure referred to in the said provision if it was proved that there was reasonable cause for such failure. If the assesse was able to prove that there was reasonable cause for failure to take a loan otherwise than by account payee cheque or account payee demand draft then penalty may not be levied. It was further observed in paragraph 21 as under : -

> "*21. ..... If there was a genuine and bona fide transaction and if for any reason the taxpayer could not get a loan or deposit by account-payee cheque or demand draft for some bona fide reasons, the authority vested with the power to impose penalty has got discretionary power.*"

The challenge to the validity of Section 271-D of the Act of 1961 was also turned down. It is thus clear that acceptance of an amount exceeding Rupees Twenty Thousand in cash attracts penalty under Section 271-D of the Act of 1961 but such acceptance does not nullify the transaction. Infact, the penalty can be waived on showing reasonable cause. Hence, violation of Section 269-SS by the drawer of the cheque would not render the amount in question non-recoverable.

11. In *Krishna Janardhan Bhat* (supra) an amount of Rupees One Lakh Fifty Thousand was advanced by the complainant. The cheque drawn towards aforesaid amount came to be dishonoured. The case of the complainant came to be accepted principally on the ground that the accused did not step into the witness box. This order of the trial court was affirmed by the Appellate Court. The Karnataka High Court maintained the aforesaid decision. Before the Hon'ble Supreme Court, it was held that the Courts committed an error in proceeding on the basis that for proving the defence an accused was required to step into the witness box and unless he did so he would not be discharging his burden. On the premise that the Courts had approached the case by applying incorrect legal principles in the facts of the case, the conviction of the accused came to be set aside.

12. The learned Single Judge in *Sanjay Mishra* (supra) referred to the decision in *Krishna Janardhan Bhat* (supra) and proceeded to hold that Section 139 of the Act of 1881 merely raises a presumption that the cheque was drawn in discharge of a debt or other liability. It was further observed that the existence of a legally recoverable debt was not a matter of presumption under Section 139 of the Act of 1881 as held in *Krishna Janardhan Bhat* (supra). On that premise it was held that to attract Section 138 of the Act of 1881 the debt had to be a legally enforceable debt as per the 'explanation' to Section 138 of the Act of 1881. Since there was no presumption under Section 139 of the Act of 1881 that the debt was a legally recoverable debt, the liability to repay unaccounted cash amount could not be said to be a legally enforceable liability within the meaning of 'explanation' to Section 138 of the Act of 1881. By holding that if such liability was held to be a legally enforceable debt the same would render the explanation to Section 138 of the Act of 1881 nugatory. On that premise, it was held that the complainant had failed to establish that the cheque was issued towards discharge of a legally recoverable debt.

13. The judgment in *Krishna Janardhan Bhat* (supra) was considered by the Larger Bench of three learned Judges of the Hon'ble Supreme Court in *Rangappa* (supra) and after referring to its earlier decision especially in *M.M.T.C. Ltd. Versus Chico Ursula D'Souza* [**(2002) 1 SCC 234**], it was observed in paragraph 26 as under : -

> "*26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of*

> *a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.*"

From the aforesaid it can be seen that in *Rangappa* (supra) it has been held that the presumption mandated by Section 139 of the Act of 1881 includes the existence of a legally enforceable debt or liability. The observations in *Krishna Janardhan Bhat* (supra) to that extent were held to be not correct. It has been further held that the offence made punishable by Section 138 of the Act of 1881 could be described as a regulatory offence as bouncing of a cheque was largely in the nature of a civil wrong whose impact was usually confined to the private parties involved in commercial transactions. Reverse onus clauses were stated to usually impose evidentiary burden and not a persuasive burden. If the accused is able to raise a probable defence that creates a doubt about the existence of a legally enforceable debt or liability, the prosecution could fail.

14. We find that the ratio of the decision in *Rangappa* (supra) is clear that the presumption mandated by Section 139 of the Act of 1881 includes the presumption as regards existence of a legally enforceable debt or liability. This presumption has been held to be in the nature of a reverse onus clause that has been included in furtherance of the legislative object of improving the credibility of the negotiable instruments. At the same time, it has been clarified that the said presumption is rebuttable and it would be open for the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. It is thus clear that once the execution of the cheque/instrument is admitted, the initial presumption under Section 139 of the Act of 1881 favours the complainant that there exists a legally enforceable debt or liability. While rebutting such presumption it would always be open for the accused to raise all permissible defences including the defence that the complainant had failed to disclose the amount that has been stated to have been advanced/lent to the accused in his Income Tax returns.

The complaint which is otherwise maintainable under Section 138 of the Act of 1881 is not liable to be dismissed at the threshold only on the ground that the complainant had failed to disclose the amount mentioned in the cheque in his Income Tax returns. The presumption under Section 139 of the Act of 1881 being in the nature of an initial statutory presumption in favour of the complainant, it will have to be rebutted by the accused as any other legal presumption. It hardly needs any reiteration that the standard of proof for rebutting such presumption is on the basis of preponderance of probabilities.

15. The decisions in *Krishna Janardhan Bhat* and *Rangappa* (supra) were considered by the learned Single Judge in *Krishna P. Morajkar* (supra). It was observed that on the question of presumption about the existence of a legally enforceable debt or liability, the decision in *Krishna Janardhan Bhat* (supra) had been expressly overruled. Thereafter reference was made to Sections 269-SS and 273-B of the Act of 1961 and it was held that the restriction of cash advances was infact on the taker and not the person who makes the advance. The penalty for taking such advance or deposit in contravention of Section 269-SS was to be suffered by the one who took the advance and it was impermissible for invoking said provisions to prevent a person from recovering the advances that he has made. The decision in *Sanjay Mishra* (supra) was also cited but since the learned Single Judge therein had based his decision on *Krishna Janardhan Bhat* (supra) the same was excluded from consideration. The learned Single Judge then proceeded to decide the appeal on its merits and after setting aside the judgment of the appellate Court, the judgment of the trial Court convicting the accused was restored.

The aforesaid decision in *Krishna P. Morajkar* has been followed in the subsequent decisions in *Bipin Mathurdas Thakkar* and *Pushpa Sanchalal Kothari* (supra).

In *Dilip Virumal Ahuja* (supra) the acquittal of the accused was ordered as he had successfully rebutted the presumption under Section 139 of the Act of 1881. This was after considering the evidence led by the parties.

16. At this stage, it would be necessary to refer to certain decisions that are relevant in the context of the question to be answered.

In *Jayantilal M. Jain Vs. M/s. J.M.Sons & Others* [(1991) 3 BCR 694], a learned Single Judge of this Court was seized with two summary suits based on a bill of exchange. While seeking leave to defend, a plea was raised by the defendants that the amount in question was not liable to be recovered since there was breach of provisions of Section 269-SS of the Act of 1961. On that premise bar under Section 23 of the Indian Contract Act, 1872 (for short, the Act of 1872) was also sought to be raised. The learned Single Judge relied upon earlier judgment in Civil Revision Application No.573 of 1990 where an identical plea was raised and it was held that the prohibition under Section 269-SS of the Act of 1961 was against taking or accepting any amount in cash and not against giving such amount in cash. It was held that the bar under Section 23 of the Act of 1872 was not attracted in such case.

A learned Single Judge of the Delhi High Court in *Sheela Sharma vs. Mahendra Pal* [2016 ACD 1022] while considering similar contentions raised in defence in proceedings under Section 138 of the Act of 1881 has referred to the decision of this Court in *Jayantilal M. Jain* (supra) and after referring to various other decisions held that the transaction in question would not be hit if the bar under Section 269-SS of the Act of 1961 was attracted.

A learned Single Judge of the Madras High Court in *K.T.S.Sharma Versus Subramanian* [2001(4)CTC 486] has considered similar contentions based on Section 269-SS of the Act of 1961, Section 23 of the Act of 1872 as well as the doctrine of '*pari delicto*'. It was held therein that violation of Section 269-SS attracts penalty under Section 271D, the object is to protect the Revenue and the contract cannot be regarded as prohibited by implication. The doctrine of '*pari delicto*' would not be attracted so as to make the contract void if it was not the object of the parties at the time when the transaction was entered into to circumvent or defeat the provisions of the Act of 1961.

In *Mohammed Iqbal & Others vs. Mohammed Zahoor* [**ILR 2007 Karnataka 3614**] it has been held that Section 269-SS does not declare all transactions of loan by cash in excess of Rs.20,000/- as invalid, illegal or null and void. Referring to the decision in *Assistant Director of Inspection Investigation* (supra), it was observed that the object behind introducing the said provision was to curb and unearth black money. Referring to the provisions of Section 271-D and Section 273-B of the Act of 1961, it was observed that even though contravention of Section 269-SS resulted in a stiff penalty being imposed on the person taking the loan or deposit, the rigor of Section 271D was whittled down by Section 273B on the proof of *bona fides*. Hence such transactions could not be declared to be illegal, void and unenforceable. Similar view has been taken by the learned Single Judge of the Himachal Pradesh High Court in **Criminal Appeal No.295 of 2017** (*Surinder Singh Versus State of H. P. & Another*) decided on 03.11.2017. These decisions have been thereafter followed by the said High Courts in their subsequent decisions.

17. It can thus be said that the validity of Section 269-SS of the Act of 1961 having been upheld in *Assistant Director, Inspection Investigation* (supra), breach thereof being subjected to penalty under Section 271-D with a further provision for waiving the penalty under Section 273-B of the Act of 1961, it will have to be held that such transaction in violation of Section 269-SS of the Act of 1961 at the behest of the drawer of a cheque cannot be treated as null and void. Similar is the case when there is an omission of any entry relevant for computation of total income of such person to evade tax liability under Section 271-AAD of the Act of 1961. Such person, assuming him to be the payee/holder in due course, is liable to be visited by penalty as prescribed. Such act is not treated to be statutorily void. We may in this context refer to paragraph 4 of the decision in *M/s Gujarat Travancore Agency, Cochin* (supra) wherein reference has been made to the following statement in *Corpus Juris Secundum*, Volume 85 page 580, paragraph 1023 :

> "*A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of a criminal penal laws.*"

Further, in *Atul Mohan Bindal* (supra), the penalty referred to in Section 271(1)(c) of the Act of 1961 has been referred to as a civil liability and not one which is criminal or quasi-criminal in nature.

Thus, in the light of statutory presumption under Sections 118 and 139 of the Act of 1881, it would be for the accused to rebut such presumption in the light of what has been held in *Rangappa* (supra).

18. In view of the aforesaid discussion, it is held that a transaction not reflected in the books of accounts and/or Income Tax returns of the holder of the cheque in due course can be permitted to be enforced by instituting proceedings under Section 138 of the Act of 1881 in view of the presumption under Section 139 of the Act of 1881 that such cheque was issued by the drawer for the discharge of any debt or other liability, execution of the cheque being admitted. Violation of Sections 269-SS and/or Section 271-AAD of the Act of 1961 would not render the transaction unenforceable under Section 138 of the Act of 1881. The decisions in *Krishna P. Morajkar*, *Bipin Mathurdas Thakkar* and *Pushpa Sanchalal Kothari* (supra) lay down the correct position and are thus affirmed. The decision in *Sanjay Mishra* (supra) with utmost respect stands overruled.

19. In view of aforesaid answer, the appeal be placed before the learned Single Judge for its adjudication on merits.

(MRS. VRUSHALI V. JOSHI, J.) (A. S. CHANDURKAR, J.)

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