HIGH COURT OF TRIPURA
AGARTALA

CRL.A. NO.9 OF 2018

Shri Pradip Roy
S/o. Lt. Prabhat Roy,
Resident of Ram Krishna Palli of
G.B. (79 Tilla), P.O.-Kunjaban,
P.S.-New Capital Complex,
District-West Tripura,
Pin No.799 006.

---- Appellant

Versus

Shri Bidyut Pal,
S/O. Late Jagadish Pal
Resident of Joynagar, Dashamighat,
P.O.-Agartala, P.S.-West Agartala,
District-West Tripura,
Pin No.799 001.

----Respondent

For the Appellant(s) : Mr. H.K. Bhowmik, Adv.

For the Respondent(s) : Mr. D.C. Saha, Adv.

Whether fit for reporting : YES

HON'BLE MR. JUSTICE ARINDAM LODH

J U D G M E N T & O R D E R

The instant appeal arises out of judgment dated 08.06.2018 passed in connection with case No. NI 205 of 2015 wherein the respondent had been acquitted from the charges levelled against him under Section 138 of the Negotiable

Instrument Act 1881 and dismissed the application filed by the complainant-appellant.

2. Briefly stating, the facts are that the complainant-appellant and the accused-respondent are professional contractors, but, since they did not have any enlistment licence, both of them executed a Government work under the licence of Shri Suman Bhattacharjee of N.G. Bhattacharjee Bricks Constructions Company. The said work was started on 1st April 2011 and ended in the month of December, 2014. It was agreed upon between them that profit and loss would be shared at 50:50 ratio and being mutually decided, the investment of complainant would be 40 per cent of the total capital investment on the condition that he would supervise the entire work including collecting of materials from the market on credit. It is specifically stated in the complaint that the accused-respondent taking advantage of his close relationship with Suman Bhattacharjee had received all the payments of the work and, finally, on 28.01.2014, in presence of Shri Ratan Miah @ Nur Ahmed, Shri Habul Deb and Shri Debasish Roy, both the complainant and the accused-respondent had arrived at the final settlement. After completion of work and finalization of the account, it was revealed that the complainant was entitled to get an amount of Rs.4,79,294/- only from the respondent. It was also found that the complainant was entitled to get back 50 per cent of the total security deposit of Rs.10,00,000/- i.e., Rs.5,00,000/-. According to the complainant,

the respondent had a legal debt of Rs.9,79,294/- towards the complainant and out of the said amount he paid Rs.1,75,000/- by cheque to the complainant which was duly encashed and, therefrom, after encashment of the said cheque, the legal liability of the accused-person towards the complainant stood at Rs.8,04,294/-. The complainant-appellant requested the respondent to pay the balance amount of his debt to him, but, he failed to make any payment. However, finally, the accused-respondent had issued two post dated cheques dated 06.04.2015, out of which one was for Rs.5,00,000/- and another one was Rs.3,04,294/- as security with the assurance that if he failed to pay the total indebted amount within 31.03.2015, the complainant-appellant would deposit these cheques for encashment.

3. It is the further case of the complainant-appellant that on failure to make payment of the amount mentioned in the cheques, he sent a demand notice on 20.04.2015 through registered post asking for payment of Rs.8,04,294/- within a month and the said notice was duly received by the respondent, but, he failed to make the payment. Ultimately, the complainant-appellant had deposited those two cheques bearing No.168338 dated 06.04.2015 and 168339 dated 06.04.2015 drawn on Axis Bank Limited, Agartala against the account of the accused-respondent bearing No.276010200002394 in the Oriental Bank of Commerce, Agartala Branch. But, on 06.07.2015, both the

cheques were returned, being dishonoured on the ground that the account of the accused was closed.

4. Thereafter, the complainant-appellant had issued the statutory demand notice upon the accused-respondent demanding payment of the total amount through registered post, but, it was returned back to the complainant with the note that it was kept deposited in the post office for four days.

5. It was in this backdrop, the complainant filed a case under Section 138 of the Negotiable Instrument Act, 1881 (herein-after referred to as N.I. Act) seeking the remedy incorporated in the said Section.

6. Cognizance of offence was taken under Section 138 of the Negotiable Instrument Act against the accused-respondent and process was issued to procure the attendance of the accused-respondent. On his appearance, in response to the notice issued by the Court, the respondent was enlarged on bail.

7. In course of proceeding, charge was framed against the accused-respondent which are as under:-

> *" The allegation of the complainant is that you issued two post dated cheques amounting to Rs.5 lakhs and Rs.3,04,294/- dated 6.4.15 and the complainant presented the said cheques on 4.7.15 and both the cheques were returned dishonoured with reason "account closed" on 6.7.15.*
>
> *Subsequently, the complainant issued demand notice upon you through registered post but you did not*

pay the amount within 15 days of receipt of the notice and it appears that you have committed an offence punishable U/S 138 of NI Act, and within my cognizance."

8. After perusal of the record, it is found that the complainant-appellant submitted his examination-in-chief and he was accordingly cross-examined.

9. On closure of the evidence of the complainant side, the accused-respondent was examined under Section 313(1)(B) of Cr.P.C., to which he denied the entire allegation and declined to adduce defence evidence.

10. Perusal of the examination sheet of the accused-person under Section 313(1)(b) of Cr.P.C. indicates that the accused-respondent had specifically stated therein that he had not given the cheque nor had written the body of the said cheque.

11. After hearing the learned counsels and on appreciation of evidences adduced by the complainant-appellant, the learned Trial Court came to the finding that:-

"*The complainant had failed to prove his case beyond the shadow of reasonable doubt and the accused is entitled to acquittal*".

The sole point for determination is decided in the negative in the light of the above discussion".

12. I have heard the learned counsels appearing on behalf of the parties to the *lis* and perused the entire record.

13. Arguing the case before this Court, Mr. H.K. Bhowmik, learned counsel appearing on behalf of the complainant-appellant contended that the judgment of the learned Trial Court was found to be cryptic in nature as the learned Judge had contradicted himself to arrive at his finding whether the complainant had legally enforceable debt to the accused-respondent. Citing various decisions at the Bar, learned counsel contented that the learned Court below had failed to consider the natural presumption that enforceable debt always lies in favour of the holder of the cheque, as envisaged under Section 138 of Negotiable Instrument Act. According to the learned counsel, the complainant-appellant had been able to prove to the satisfaction of the Court that the cheques were issued by the accused to the complainant for discharge of his legally enforceable debt towards the complainant. In his submission, learned counsel pointed out that the accused-respondent did not come forward to rebut the initial presumption that he had legally enforceable debt towards the complainant.

14. Mr. Bhowmik, learned counsel further submitted that the presumption had to be rebutted by proof and not by a mere explanation. To reinforce his contention, learned counsel tried to persuade this Court that to rebut the evidence adduced by the complainant in a case filed under the N.I. Act, the accused must have adduced evidence, failure of which would render the case of the complainant that the accused had issued the cheque in favour of the complainant in discharge of certain debt or liability towards

the complainant. The learned counsel has eloquently drawn my attention to the evidence led in by the complainant.

15. Mr. Bhowmik, learned counsel for the appellant had placed his reliance upon the following judgments in support of his submission:-

> *1) **AIR 2019 SC 1876** (para 11.1 & 14) judgment of Supreme Court in **Criminal Appeal No(s).132 of 2020** titled as **D.K. Chandel Vs. M/S Wockhardt Ltd. 7 anr**., decided on 20.01.2020.*
>
> *2) Judgment of the Supreme Court passed in **Appeal (Crl.) No(s). 3858/2019** titled as **Pavan Diliprao Dike Vs. Vishal Narendrabhai Parmar** decided on 12.07.2019.*

16. I have gone through the examination-in-chief submitted by the complainant as well as the relevant documents the complainant had relied upon to substantiate his claim which are as follows:-

> *"1. Cheque bearing No.168338 dated 06.04.2015 amounting to Rs.3,04,294/- which is marked as Exbt.1.*
>
> *2. Cheque bearing No.168339 dated 06.04.2015 amounting to Rs.5 lakh which is marked as Exbt.2.*
>
> *3. 2 deposit slips dated 04.07.2015 for the amount of Rs.3,04.294/- and for amount of Rs.5 lakh which is marked as Exbt.3 and Exbt.4.*
>
> *4. Return memo for an amount of Rs.3,04,294/- marked as Exbt.5.*
>
> *5. Return memo for an amount of Rs.5. lakh marked as Exbt.6.*

6. Demand notice dated 20.04.2015 along with postal slip in 5 sheets marked as Exbt. 7/1, 7/2, 7/3, 7/4 and 7/5.

7. Confirmation letter dated 13.08.2015 issued by Postal Authority marked as Exbt.8.

8. Demand notice dated 11.07.2015 along with postal slip with 4 sheets marked as Exbt.9/1, 9/2, 9/3 and 9/4.

9. Letter dated 11.08.2015 regarding confirmation of the delivery of the articles from the Postal Department marked as Exbt.10.

10. Envelope along with the notice dated 11.07.2015 bearing endorsement and note of the postal staff marked as Exbt.11."

17. On the other hand, Mr. D.C, Saha, learned counsel appearing on behalf of the accused-respondent mainly focused on the fact that the accused succeeded in discharging his initial burden that he did not issue the said cheques and that the signatures on Exbt-1 and Exbt-2 were not of his and that the alleged cheques were not issued in discharge of any debt of liability in whole or in part. Burden of proof lies on the complainant. No witnesses came forward to support the contention of the complainant. No documentary evidence was produced to prove that such transaction had taken place. Complainant failed to discharge his burden to show that in discharge of any debt or liability, the dishonoured cheques were allegedly issued by the accused-respondent. The complainant did not submit any income tax return to substantiate his ability to make capital investment.

18. Confronting the submissions of the learned counsel appearing on behalf of the appellant, Mr. Saha, learned counsel for the respondent had given much emphasis that it is not necessary in all cases that the accused has to adduce evidence on his behalf to rebut the presumption under Section 139 of the N.I. Act and it can also be rebutted on consideration of the evidence and materials brought on record by the complainant.

19. The learned counsel for the accused-respondent has heavily relied upon the decision of the Apex Court in ***Criminal Appeal No.636 of 2019*** titled as ***Basalingappa Vs. Mudibasappa*** decided on 9th April, 2019.

20. During his examination under Section 313 of Cr.P.C., the accused was noticed about the incriminating materials as surfaced against him from the deposition of the complainant-appellant, to which he replied that "*I cannot say anything*". He further stated that he did not issue any cheque and he received the demand notice. Question No.7 may be reproduced hereunder:-

> *"Q No.7:- Do you have anything else to say about this case?*
>
> *Ans- I have not given the cheque.*
>
> *I have not written the body of the cheque.*
>
> *I am innocent."*

21. Before I delve into the merits of the issues raised by the learned counsel appearing for the parties to the *lis*, I would

like to travel the relevant contentions and principles laid down by the Courts to judge the sustainability of the findings returned by the learned Trial Court.

22. Section 118 of the Negotiable Instrument Act, 1881 is reproduced here-in-below:-

> *"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, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;*
>
> *(b) as to date: date every negotiable instrument bearing a date was made or drawn as 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 negotiable instrument was made before its maturity;*
>
> *(e) as to order of indorsement: that the indorsements 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 form 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."*

23. Section 139 of the Negotiable Instrument Act is also reproduced here-in-under:-

> *" 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."*

24. The Apex Court in ***Basalingappa (supra)*** after taking into account of its various earlier decisions including three Judge Bench decision had summarized the principles in the following manner:-

> *"(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.*
>
> *(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.*
>
> *(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.*
>
> *(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.*
>
> *(v) It is not necessary for the accused to come in the witness box to support his defence."*

25. Again, in the case of ***Anus Rajshekhar Vs. Augustus Jeba Ananth*** passed in ***(Crl.) No(s). 3737-3738/2016***, the Apex Court while dealing with the extent of presumption to be drawn by the Court under Section 139 of the N.I. Act had held as under:

> "Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a "reverse onus clause" the three Judge Bench of this Court in Rangappa (supra) held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities. This Court held thus:
>
> "28 In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."
>
> (**Emphasis Supplied**)"

26. Having regard to the submissions of the learned counsel appearing for the parties and the law enunciated by the Apex Court as set out above, it is now necessary to consider the present case as to whether the complainant-appellant has been able to discharge his liability to establish the presumption under Section 139 of the N.I. Act. Alternately, whether the accused-respondent has been able to rebut the presumption from the evidence and materials brought on record by the complainant-appellant by applying the test of proportionality.

27. The defence of the accused-respondent is that he had not borrowed any amount from the complainant-appellant and, therefore, he had no debt or liability to repay any amount to the appellant herein. It is his further defence that he did not issue any cheque (*Exbt-1 & Exbt-2*) in discharge of legally enforceable

debt. From the trend of the cross-examination, it is revealed that it is the specific case of the accused-respondent that there was no partnership or business transaction between him and the appellant and the cheques as alleged were stolen by the appellant.

28. Answering to question No.7 in his examination under Section 313 of Cr.P.C as reproduced *here-in-above*, the accused-respondent stated that "*I have not given the cheque. I have not written the body of the cheque*". To another question, the accused-respondent replied that he had not issued the cheque. There cannot be any dispute in the Bar that dishonour of the cheque on the ground of account of the accused being closed would come under the mischief as contemplated under Section 138 of the N.I. Act. In the instant case, it is the case of the complainant-appellant that after issuance of cheques, the accused-respondent had closed his bank account upon which the cheques were issued.

29. There also cannot be any doubt as emphasized by Mr. H.K. Bhowmik, learned counsel appearing on behalf of the complainant-appellant relying upon the decision of the Supreme Court in ***D.K. Chandel (supra)*** and ***Pavan Diliprao Dike (supra)*** that presumption under Sections 138 and 139 of the N.I. Act always lies in favour of the holder of the cheque.

30. However, it is also well settled by a wealth of decisions of the Apex Court as cited here-in-above that the

presumption to be drawn under Section 138 and 139 of the N.I. Act in favour of the holder of the cheque is always rebuttable and it depends on the facts and circumstances of a particular case.

31. Ultimately, test would be, in my considered view, *whether the complainant being a holder of the cheques has been able to prove that the cheques were issued by the accused in discharge of any enforceable debt or liability. To return the finding of the guilt, the Court had to see whether the accused has been able to rebut the presumption drawn under Sections 138 & 139 of the N.I. Act either by adducing evidence on his behalf or placing his reliance on the evidence and materials brought on record by the complainant i.e., the holder of the cheque himself and in this process, the Court would be guided by preponderance of probability*.

[***emphasis supplied***]

32. The learned Trial Court has correctly arrived at a finding that the mere factum of issue and dishonoring of cheque by the accused to the complainant is not sufficient to criminally implicate the accused under Section 138 of the N.I. Act unless it is proved to the satisfaction of the Court that the cheque was issued by the accused to the complainant in discharge of his legally enforceable debt towards the complainant.

33. In the instant case, the specific case of the complainant is that he and the accused had worked jointly under the license of one Suman Bhattacharjee in executing a

Government work which leads to the liability of the accused. According to complainant, he had an oral partnership agreement and the profit and loss was to be determined at 60:40 ratio and the investment of the complainant would be 40 % as it was decided by them that the complainant would supervise the works and also collect the materials from the market on credit. Naturally, the financial bills would be raised in the name of Suman Bhattacharjee and the payment would be received by Suman Bhattacharjee. Needless to say, it means that Suman Bhattacharjee is the person in whose name the work was executed and the bills also were raised in favour of Suman Bhattacharjee. The said Shri Bhattacharjee would naturally distribute the shares of the complainant and the accused as agreed as per the oral partnership agreement, if the facts as adverted by the complainant is believed. It is further surfaced from the examination-in-chief adduced by the complainant that though they entered into an agreement on 60:40 ratio but the complainant had stated that they deposited security money to the tune of Rs.10,00,000/- out of which he paid Rs.5,00,000/- against security deposit that is in equal share to that of the accused.

34. Now, on minute reading of the said evidence adduced by the complainant, it is found that the complainant did not anywhere mention about the total estimated cost of work which they executed in the name of Suman Bhattacharjee. That apart, it appears hard to digest for this Court that when the

complainant had invested by way of depositing 50 % of the security deposit equal to that of the accused, then, why the complainant and the accused had decided to invest at 60:40 ratio. Ironically, Suman Bhattacharjee in whose name the work was executed was not cited as witness by the complainant to substantiate the statement of the complainant that the work was executed in the name of Suman Bhattacharjee and bills were raised in the name of Suman Bhattacharjee and to substantiate this important aspect that Suman Bhattacharjee had paid the entire amount out of the said bills to the complainant and the accused. Again, the complainant has deposed in his evidence that he came to learn from the accused that Suman Bhattacharjee had paid the entire amount of bill he received out of the work but the complainant had failed to produce Suman Bhattacharjee to substantiate this statement for the reasons best known to him. In my opinion, Suman Bhattacharjee is the best person to lay evidence and substantiate the accusation levelled against the accused-respondent by the complainant-appellant.

35. On further appreciation and evaluation of the deposition of the complainant, it transpires that on negotiation to pay a sum of Rs.5,00,000/- and Rs.4,79,294/-, the former being the money against the security deposit and the latter being the money out of the profit of the work which the complainant was entitled to receive from the accused, the accused-respondent had agreed to pay, the said sum of Rs.9,79,294/-. But none of the

negotiators namely, Ratan Miah @ Nur Ahmed, Habul Deb and Debasish Roy came forward to substantiate this fact as stated by the complainant. Even the complainant did not cite those persons as witnesses to substantiate the accusations levelled against the accused-person. Furthermore, the complainant has stated that the accused had paid Rs.1,75,000/- on 18.04.2014 through a cheque which was duly encashed out of his share of profit of Rs.4,79,294/- but he did not produce any bank statement to justify said fact.

36. In furtherance thereof, on scrutiny of record, it is found that the complainant even did not produce a single scrap of paper to substantiate his statement that he had procured any material to execute the work by producing any such person. Even the complainant has failed to produce the work order against which he and the accused had entered into agreement to execute such work in the name of Suman Bhattacharjee. Even the complainant did not cite the said Suman Bhattacharjee as one of the witnesses in the complaint.

37. In my considered view, failure of the complainant to produce any proof either oral or documentary relating to the joint work executed by him with the accused not only create a shadow of doubt regarding his case but also leads to an adverse inference against him under Section 114(g) of the Indian Evidence Act.

38. Further, learned Trial Court has correctly held that the complainant has also not produced any document to show his source of income or the source of his capital by which he had allegedly funded 40 % of the Government work jointly with the accused and this fact also goes against him.

39. I have noticed in the case of ***Anus Rajshekhar(supra)***, the Supreme Court had taken into consideration as to whether complainant was able to establish the source of funds which he has alleged to have utilized as a part of his investment. In the said case, it has been observed that:-

> *"Besides what has been set out above, an important facet in the matter was that the complainant failed to establish the source of funds which he is alleged to have utilized* for the disbursal of the loan of Rs.15 lakhs to the appellant.*"*

40. In the instant case also, I don't find any such materials wherefrom it can be garnered that the complainant was able to establish the source of his fund to invest his share of 50 % against the security deposit of Rs.10 lakhs in total and further investment at the ratio of 40 % for the execution of the works.

41. In my conscious consideration of the law as contemplated in Sections 138 and 139 of the N.I. Act, existence of legally enforceable/recoverable debt is not a subject of presumption under Section 139 of the N.I. Act. This provision only raises a presumption in favour of the holder of the cheque that the same has been issued in discharge of any debt or any other liability.

42. On critical analysis of the facts and circumstances coupled with the evidence and materials brought on record, in my conscious view, the accused-respondent has successfully rebutted the presumption under Section 139 of the N.I. Act and the defence story stands probabalised keeping in view the law enunciated by a three Judge-Bench of Supreme Court in ***Ranggapa Vs. Sri Mohan*** passed in **Criminal Appeal No.1020 of 2010** reported in **(2010) 11 SCC 441** and subsequently, in the case of ***Anss Rajashekar(supra)*** and ***Basalingappa(supra).*** The defence of the accused-respondent that there was absence of a legally enforceable debt, was rendered probable on the basis of the materials on record. Consequently, the order of acquittal passed by the learned Trial Court was found to be justified.

43. In the above conspectus, the instant appeal stands dismissed. The impugned judgment of the Trial Court acquitting the accused-respondent from the charge levelled against him is affirmed and upheld. As a corollary, the instant criminal appeal stands dismissed.

44. Send down the L.C.Rs.

JUDGE

suhanjit