Tripura High Court
Sri Apu Ranjan Debnath vs Sri Dipankar Majumder on 22 March, 2022

HIGH COURT OF TRIPURA
AGARTALA

Crl.Rev.Petn 19 of 2019

Sri Apu Ranjan Debnath,
S/o- Late Narayan Debnath,
R/o- Vill:- Rajnagar, Ward No.4, Udaipur,
PS: R.K. Pur, Dist: Gomoti Tripura.

----Petitioner(s)

Versus

1. Sri Dipankar Majumder,
S/o- Late Sunil Majumder,
Vill- Pitra, Lacherpara, PS- R.KPur,
District: Gomoti Tripura.

2. The State of Tripura,
Represented by Secretary-cum-Commissioner
Department of Home,
Government of Tripura,
PO: Kunjaban, PS: NCC, Agartala, West Tripura.

----Respondents(s)

For Petitioner(s)	:	Mr. D. Sarkar, Adv.
For Respondent(s)	:	Mr. S. Ghosh, Addl. PP.
Date of hearing	:	15.03.2022.
Date of pronouncement	:	22.03.2022.
Whether fit for reporting	:	No

HON'BLE MR. JUSTICE T. AMARNATH GOUD

Judgment & Order

This is an application under Section 397 read with Section 401 of CrPC, 1973 against the Judgment & Order dated 10.12.2018 passed in Criminal Appeal no.42(3) of 2017 passed by Additional Sessions Judge, South Tripura, Udaipur whereby the appeal filed by the respondent No.1 Sri Dipankar Majumder was allowed setting aside the judgment of the CJM in Case No.CR(NI) 70 of 2016 convicting the respondent No.1 to suffer simple imprisonment for 1 year and to pay of Rs.6,00,000/- i.e to suffer simple imprisonment for further period of 6 months for commission of Offence under Section 138 of NI Act. [2] For the sake of brevity the parties are referred to as in the CR (NI) 70 of 2016. The brief fact of the complainant's case is that the accused Sri Apu Ranjan Debnath had friendly relation with the complainant Sri Apu Ranjan Debnath and had taken Rs.3,00,000/- from the complainant with a promise to repay the same very shortly and on 08.06.2015 the accused issued the cheque vide no.445340 in favour of the complainant to discharge his debt and liability and on the same date the complainant deposited the said cheque in his account vide no.8070012400541 lying in the Tripura Gramin Bank, Udaipur Branch and on the same date

the said cheque was dishonoured due to insufficient of fund in his account vide no.30245476465 lying the State Bank of India, Udaipur Branch and on 12.06.2015 the complainant issued demand notice top the accused and on 13.06.2015 accused has received the said notice but failed to pay the money. [3] Having heard the counsel for both the parties, the trial court made the following points for determination:

> (i) Whether the accused Sri Dipankar Majumder on 08.06.2015 issued the cheque No.445340 in for Rs.3,00,000/- in favour of complainant in discharge of his debt and liability?
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> (ii) Whether on 08.06.2015 while the cheque was presented to the Triprua Gramin Bank, Udaipur it was dishounoured by the bank due to insufficient fund in the account of the accused?
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> (iii) Whether the accused even after receipt of the notice of the complainant, did not return the money and did not make arrangement of sufficient fund in his account to make the transaction good and to honour the cheque?

[4] While deciding the Point No.(ii), the trial court has observed that Ext.3 the bank return memo bears the mark and signature of bank officials denoting dishonor of cheque due to insufficient fund in the account of accused. As per Section 146 of NI Act the Court shall, in respect of every proceeding under Chapter XVII, i.e., in respect of proceeding under Section 138 of NI Act as this case, on production of banks slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonor of such cheque, unless and until such fact is disproved. In this case, Ext.3 the bank slip there are Bank officials signature and mark denoting the cheque in question was dishonoured due to insufficient of fund in the account of accused and accused failed to adduce any evidence to disprove such presumption. The accused also failed to bring any material during cross-examination to disprove the said presumption. [5] Thus, therefore, considering all the aspects, the trial court found that the complainant is able to prove the fact that the cheque vide no.445340, dated 08.06.2014 was dishonoured due to insufficient fund in the account of accused and also due to drawers signature differs. Accordingly the point no.(ii) was decided in affirmative and in favour of the complainant.

[6] While deciding point No.(iii), the trial court has observed that evidence of PW 1 corroborated by Ext.4, the demand notice dated 12.06.2015 Ext.5 the postal receipt dated 13.06.2015 and Ext, the AD card, From Ext. 4 the trial court found that the complaint issued demand notice to accused on 12.06.2015. From Ext5, the trial court found that the complainant through his advocate sent demand notice to accused by registered post with AD. From Ext.6 the trial court found accused received demand notice issued by complainant through his advocate.

[7] In cross-examination, the defence failed to discard the above mentioned evidence. No suggestion is given in cross-examination by defence that accused did not receive any demand notice. No plea is taken and no suggestion is given as to the fact that accused paid money to complainant after receipt of demand notice. Therefore, considering all this aspect, it can be said that the accused even after

receipt of the notice of the complaint, did not return the money and did not make arrangement of sufficient fund in his account to make the transaction good and to honour the cheque. Accordingly, point No.(iii) was decided in affirmative and in favour of the complainant.

[8] The trial court while deciding the point No.(i) has relied on a decision of the apex court in M/S LAXMI DYECHEM vs. STATE OF GUJARAT & ORS reported in (2012) 13 SCC 375, where the apex court has held in the following manner:

> "15. A three-Judge Bench of this Court in Rangappa v. Sri Mohan (2010) 11 SCC 441 has approved the above decision and held that failure of the drawer of the cheque to put up a probable defence for rebutting the presumption that arises under Section 139 would justify conviction even when the appellant drawer may have alleged that the cheque in question had been lost and was being misused by the complainant.
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> 16. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in NEPC Micon Ltd. (supra) that the expression "amount of money ..... is insufficient" appearing in Section 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act."

[9] Thus, considering all these aspects, the trial court found that the complainant Shri Apu Ranjan Debnath has been able to prove the fact the accused Sri Dipankar Majumder issued the questioned cheque in favour of complainant for an amount of Rs.3,00,000/- to indemnify his debts and liability. Accordingly, point No.(i) is decided in affirmative and in favour of complainant but against the accused. [10] After deciding all points and having heard the counsel for length, the trial court has observed in the following manner:

> In the result, I hold, complainant has been able to prove the charge leveled against the accused Sri Dipankar Majumder under Section 138 of NI Act. As such, I do hereby convict the accused under the aforesaid provisions of law.
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> Consideration Under Probation of Offender Act, 1958 :-
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> I have also heard Learned Counsel of both the sides in the matter of granting Probation and considering the nature and gravity of the offence, I am not inclined to extend any benefit to the convict of the Probation of Offenders Act as such type of incident of Cheque bounce are increasing day by day causing loss of faith of public on the cheque transaction and also causing disturbances in the smooth functioning of

commercial and business transactions.

So, considering all, I find no scope to release the convict on Probation.

Hearing on sentence.

Therefore, I have heard the convict on the matter of sentence when he submits that he is a poor person and only earning member of his family and prayed mercy before the Court.

Considering all, I sentence the convict Sri Dipankar Majumder to suffer SI for 1(one) year and to pay a fine of Rs.6,00,000/- (Rupees six lakh) only, in default SI for further 6(six) months under Section -138 of NI Act.

[11] Aggrieved by the order dated 25.08.2017, the defendants filed an appeal being Criminal Appeal No.42(03) of 2017 in the court of the Additional Sessions Judge Gomati Judicial District, Udaipur. [12] The lower appellate court has observed that when accused denies having paid any cheque in discharge of any debt then it is sufficient for the court to draw presumption u/s-139 N.I Act on mere production of signed cheque by the complainant and whether in such cases complainant need not prove I the existence of legally recoverable debt.

[13] It further discussed Section 139 of NI Act which speaks about presumption in favour of holder and it says that "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. [14] The lower appellate court while dealing with Section 139 of the NI Act has inferred that the presumption U/S-139 of the N.I. Act includes the existence of legally enforceable debt or liability. But the aforesaid authorities did never say that the court was bound to draw such presumption on mere presentation of cheque by the complainant. Before drawing presumption U/S-139 of the N.I. Act the court is to be satisfied that the factual basis for the raising of the presumption has been established by the complainant. Moreover the complainant is also under duty to prove his capacity to pay the required amount and in case of execution of agreement before payment it must be shown that the accused was bound to make payment as per agreement.

[15] It is also observed by the lower appellate court that again complainant also stated in his evidence that he agreed to pay the said money when a deed of agreement was executed between him and the appellant but the complainant failed to produce such agreement though he explained in cross-examination that he handed over the deed of agreement to the complainant. But such explanation appears not to be sufficient because the deed of agreement is a bilateral document and after execution each party retains a copy of it and so by mere saying that he handed over the deed is not going to prove the existence of any agreement on the basis of which the complainant allegedly paid Rs.3,00,000.00 to the appellant. [16] Thus the complainant failed to prove the basic materials like the date of payment of money, date of agreement, existence of agreement, source of fund etc., before the Trial Court but unfortunately the Ld. Trial Court proceeded to draw the presumption U/S-139 of the N.I. Act without any proof of the basic materials for drawing such presumption and

shifted the burden to the accused to rebut the presumption by holding in 2nd para of para-13 of the judgment in the following manner:

[17] "In cross□examination P.W.1 also deposed that he has not submitted any document about the rubber plantation of the accused and he has not mentioned the date on which the accused demanded money to him and he has not mentioned his source of money and no document is filed about his source of money. In my view, the above mentioned material brought in the cross-examination of PW1 is not fatal for the case of complainant for as per Section 118 and 139 of the NI Act it can be presumed that the holder of a cheque is a holder in due course and the said cheque was issued for discharging debt or liability and burden to rebut the said presumption lies upon the accused and, in this case, the accused failed to discharge the said burden". [18] It is further stated by the lower appellate court that the law is very clear that the drawing of presumption U/S-139 of the N.I. Act is not automatic or casual on mere presentation of cheque. The existence of facts required to form the basis of a presumption of law must precede before drawing of presumption U/S-139 of the N.I. Act and on proof of such basis by the complainant the court is bound to draw presumption U/S-139 of the N.I. Act and in that eventuality burden shifts on the accused to rebut the presumption.

[19] It is a settled position that the standard of proof for rebutting the presumption under Section 139, is that of 'preponderance of probabilities' and in rebutting such presumption, accused can rely on the materials submitted by the complainant in order to raise such a defence and if such materials are conceivable then in such cases accused may not need to adduce evidence of his own.

[20] In this case even though complainant failed to provide the basic materials for drawing the presumption U/S-139 of the N.I. Act, accused by cross-examination of the complainant pointed the non furnishing of dates of payment of money by the complainant, non-production of deed of agreement which was the basis for payment of money, non disclosure of fund when complainant initially expressed his inability to pay the money to the appellant, and such materials, according to this court, are sufficient to discharge the burden of rebutting the presumption.

[21] Finally, the lower appellate court held that the complainant failed to prove its case against the respondent No.1 herein in the Trial Court and so the respondent No.1 is entitled to be acquitted. [22] By the order dated 10.02.2018, the lower appellate court has observed in the following manner:

> "23. Thus in the light of the aforesaid observations the judgment impugned cannot be allowed to be sustained and so the Judgment and order of Conviction dated 25.08.2017 passed by the Learned Chief Judicial Magistrate, Gomati Judicial District, Udaipur, in Case No. C.R.(NI) 70 of 2016 convicting the appellant who was sentenced to suffer SI for one year and to pay a fine of Rs.6,00,000.00, ID to suffer SI for further period of six months for commission of offence U/S-138 of the N.I. Act, is set aside by acquitting the appellant."

[23] Aggrieved by the order dated 10.02.2018 passed by the lower appellate court, the complainant-petitioner herein has approached this court.

[24] During the argument, counsel for the petitioner Mr. D. Sarkar submitted that a cheque bearing No.445340 dated 08.06.2015 of Rs.3,00,000/- of State Bank of India was given by the accused. For the purpose of encashment, the petitioner submitted the said cheque on the same date in his account vide no.8070012400541 lying the Tripura Gramin Bank, Udaipur Branch and on the same date the said cheque was dishonoured due to insufficient fund in the bank of the respondent. Aggrieved thereby, the petitioner issued a demand notice to the respondent to which the respondent has not given any reply. [25] Counsel for the petitioner, Mr. Sarkar also submitted that the order dated 25.08.2017 of the trial court is just and proper and need not be interfered by this court. To support his contention Mr. Sarkar, counsel for the petitioner has placed his reliance on a judgment passed by this high court on Keshab Banik vs. Sekhar Banik reported in (2013) 1 TLR 528 wherein the high court has observed in the following manner:

> "6. I have meticulously gone through the complaint and the evidence or record. Except denial there is nothing in the cross-examination of PW1 regarding the alleged-advance of Rupees on lakh to the accused by the complainant and issuance, of the cheque by the accused assuring repayment of the amount.
>
> Section 138 has been incorporated to protect the holder of a negotiable instruments in due course. If a cheque is issued and the payee presented the cheque for encashment and it is dishonoured for not having the adequate amount in the account of the drawer of the cheque and he is informed by a notice by the payee and if it is found that still the drawer of the cheque fails to make the payment, he is liable to be booked under section 138 of the N.I Act."

[26] Reliance has also been made by Mr. Sarkar on a decision of this high court in Dipankar Majumder vs. Sandipan Ghosh and Anr reported in (2017) 1 TLR 492 wherein the court has observed in the following manner:

> 7. The basic principle of applying a precedent in the criminal jurisprudence is that the ratio that has been laid down by a particular judgment has to be first construed in the backdrop of its peculiar circumstances. If the facts and circumstances are identical and not subject to distinction then only the principle as laid can be applied. But there can be another way of looking at the precedent is that when the precedent interprets a provision having due regard to the scheme of the Act that can be imported for purpose of applying in the future cases. In this case, the petitioner did not adduce any evidence and the complainant, the respondent No.1 herein, has proved that he provided the loan much before the cheques were issued. On the face of such evidence it cannot be held that the cheques [Exbt.1 and 2] were issued for securing the loan. Moreover, when the cheques are admitted by the petitioner issued the court is bound to presume under Section 139 read with Section 118 of the N.I. Act that the cheques were issued for discharging in whole or in part of any debt or other liability. The law has developed and now it is no more res integra that under Section 139 of the N.I. Act a statutory presumption which has a evidentiary value can be drawn. The question that has to be examined whether the presumption stood rebutted or not. That must

therefore be determined keeping in view the other evidence on record. In Krishna Janardhan Bhat vs. Dattatraya G. Hegde reported in (2008) 4 SCC 54 the apex court has observed as under:

"A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration."

8. In M.S. Narayana Menon alias Mani vs. State of Kerala & Anr. (supra), it has been held that once the accused is found to discharge his initial burden, it shifts to the complainant. In Bharat Barrel & Drum Mfg. Co. vs. Amin Chand Payrelal reported in (1999) 3 SCC 35, the apex court had occasion to observe on interpreting the Section 118(a) of the Act as follows:

"Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen' with a doubt...."

[Emphasis added] [27] Mr. Sarkar has also placed his reliance on another decision of this high court in Beno Roy vs. Rajib Ghosh reported in (2018) 2 TLR 463, where in the court has observed in the following manner:

"34. Section 118 of the NI Act, which deals specially with the special rule of evidence under the NI Act, 1881 provides the rule of presumption as to ramification of the

negotiable instrument. It provides further that, 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- 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 the 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 indorsements - that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps - 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 is a holder of a negotiable instrument in due course: Provided that, where instrument has been obtained for 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."

[28] Finally Mr. Sarkar, counsel for the petitioner has placed his reliance on a decision of the apex court in Rangappa vs. Sri Mohan reported in (2010) 11 SCC 441, wherein the apex court has observed in the following manner:

12. Furthermore, the trial judge erroneously decided that the offence made punishable by Section 138 of the Act had not been committed in this case since the alleged dishonour of cheque was not on account of insufficiency of funds since the accused had instructed his bank to stop payment. Accordingly, the trial judge had recorded a finding of acquittal. However, on appeal against acquittal, the High Court reversed the findings and convicted the appellant-accused.

13. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on the impugned cheque (No. 886322, dated 8- 2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of

the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable.

20. The counsel appearing for the appellant- accused has relied on a decision given by a division bench of this Court in Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54, the operative observations from which are reproduced below:

"29. Section 138 of the Act has three ingredients viz.:

(i) that there is a legally enforceable debt

(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different.

* * *

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is `preponderance of probabilities'. 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 he relies."

[29] After perusing the entire records and having heard the submission made by the counsel for the petitioner, this court is of the view that the basic ingredients which are required for transaction is not disputed. It has been well established fact that there was good acquaintance between the petitioner and the respondent No.1 prior to the transaction took place. Neither there is any dispute relating to the issuing of demand notice by the petitioner to the respondent No.1. The only dispute, according to the respondent No.1 is with the order dated 25.08.2017 passed in CR(NI) 70 of 2016 by the trial court.

[30] In view of the above discussion, the instant criminal revision liable to be allowed. The order of the lower appellate court dated 10.12.2018 is set aside. The respondent No.1 is sentenced to pay fine of Rs.3,00,000/-(Rupees three lakhs only) in default simple imprisonment for one year under Section 138 of the NI Act.

[31] Accordingly, the criminal revision petition is allowed and disposed of.

JUDGE Dipak