HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

CRAA No. 243/2014

Reserved on: 06.03.2025
Pronounced on: 07.05.2025

Jagdish Raj Gupta ….. Appellant

Through: Mr. R.S. Thakur, Sr. Advocate with
Mr. Vasharan Thakur, Advocate.

vs

Parshotam Gupta ….. Respondent

Through: Mr. Rahil Raja, Advocate
Mr. Athrav Mahajan, Advocate

Coram: HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

1. This appeal has been directed against judgment dated 11.08.2014, passed by learned Special Railway Magistrate, Sub-Judge, Jammu ["the trial court"] in a complaint titled *"Jagdish Raj Gupta vs. Parshotam Gupta",* vide which the complaint preferred by the appellant came to be dismissed and respondent came to be acquitted of the charge under Section 138 of the Negotiable Instruments Act, 1881 ("NI Act" for short).

2. Before a closer look at the grounds urged in the memo of appeal, it shall be apt to have an overview of the backgrounds facts.

FACTUAL BACKGROUND

3. The gravamen of charge against the respondent is that he borrowed an amount of Rs. 20.00 lacs from the appellant and in lieu, issued a cheque bearing no. 2225230 dated 03.05.2007, drawn on the Citizens Co-operative Bank Ltd., Vinayak Bazar, Jammu. The appellant presented the cheque to his banker, JCC Bank, Jammu for collection, which on presentation came to be dishonoured,

with the endorsement, "Funds Insufficient". Case of the appellant is that since respondent did not refund the loan amount despite due service of demand notice, dated 26.10.2007, upon him within the stipulated period of 30 days, he preferred a complaint under Section 138 of NI Act against the respondent.

4. The respondent entered appearance on 25.01.2008 and his preliminary statement under Section 242 of Code of Criminal Procedure, 1989 ("Cr.P.C." for short) came to be recorded by the trial Court on 02.02.2009, whereby though he admitted the issuance and signing of the impugned cheque as also filling up of the cheque amount, but denied his liability by contending that said cheque was issued by him in relation to some property transaction and there was no balance amount to be paid to the complainant appellant. He also denied the receipt of demand notice, pleaded not guilty and claimed to be tried, prompting the trial court to ask the complainant appellant to adduce evidence.

5. The complainant appellant besides himself appearing in the witness box, examined the concerned postman to prove service of demand notice upon the accused respondent, Sh. Raj Gopal, Manager, Citizen Co-operative Bank Vinayak Bazar Jammu to prove that impugned cheque was dishonoured for the reason of "Insufficient Funds" and Sh. Sham Choudhary, Accounts Clerk of the JCC Bank Talab Tillo, Jammu, to prove the presentation of impugned cheque in his bank in account no. 4877 for encashment and issuance of memo on 25.10.2007 by the banker of the respondent for the reason "Funds Insufficient".

6. On conclusion of the appellant complainant's evidence on 31.05.2010, the incriminating evidence was put to the respondent accused, under Section 342 Cr.P.C. The respondent once again admitted the issuance and signing of the impugned cheque, but denied his liability that it was issued for discharge of legally enforceable debt. The respondent denied having borrowed any amount

from the appellant and contended that cheque in question was issued by him for the purpose of purchasing a land, which could not be purchased, but the appellant complainant, who happens to be his cousin brother, refused to return the cheque. The respondent also denied receipt of demand notice and examined four witnesses in defence to rebut the claim.

7. On conclusion of defence evidence, the appellant came to be re-examined, under Section 540 Cr.P.C. upon an application moved by the respondent, which was not resisted by him.

8. Learned trial Court, having heard the rival contentions and analysed the evidence adduced by the parties, came to the conclusion that complainant appellant had succeeded to prove that impugned cheque was issued by the respondent accused to the complainant, which on presentation for encashment within statutory period of six months was returned by the drawee Bank unpaid, with the endorsement "Funds Insufficient", the respondent accused failed to make the payment within stipulated period of 15 days of the receipt of demand notice served by the appellant complainant within statutory period of 30 days, after the receipt of information from the Bank regarding dishonour of the cheque and complaint was preferred within stipulated period of one month from the date of expiry of statutory period of 15 days, from the date of receipt of notice. However, learned trial Court dismissed the complaint preferred by the appellant, as a consequence of his failure to prove that cheque in question was issued by the respondent in discharge either whole or any part of legally enforceable debt or liability.

CASE OF THE APPELLANT

9. Appellant has questioned the aforesaid conclusion and impugned judgment of the trial court primarily on the ground that since respondent has

admitted the issuance and signing of the cheque, there is presumption in his favour in terms of Sections 118 and 139 of NI Act, which learned trial Court has failed to appreciate in right perspective. According to the appellant, respondent failed to disclose any fact or circumstance during the trial, upon consideration of which learned trial court could believe that consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. It is also contention of the appellant that respondent failed to prove the vague defence that there was any land deal between the parties. Appellant has taken exception to various observations made by the trial Court in the impugned judgment that since impugned cheque was issued by the respondent in the name of a firm and not in his personal capacity, complaint is bad for non-joinder of the firm as a necessary party and failure of the complainant to disclose his source of income and produce his income tax returns.

10. Having heard learned counsel for the parties and perused the record, I have given my anxious consideration to the facts and circumstances attending the case and the case law cited at bar.

ARGUMENTS

11. While Mr. R.S Thakur, learned senior counsel appearing for the appellant, has relied upon **P. Rasiya v. Abdul Nazeer and anr.[1], APS Forex Services Private Limited v. Shakti International Fashion Linkers and ors.[2]** and **Rohitbhai Jivanlal Patel v. State of Gujrat and Anr.[3]** to reiterate the grounds urged in the memo of appeal, Mr. Rahil Raja learned counsel for the respondent

[1] (2022) 3 Crimes 343
[2] AIR 2020 SC 945
[3] 2019 (1) JKJ 85[SC]

has relied upon **M/s Kumar Exports v. M/s Sharma Carpets**[4]**, K. Prakashan v. P. K Surenderan**[5]**, Krishna Janardhan Bhat v. Dattatraya G. Hegde**[6]**, Vijay v. Laxman and anr.**[7] and **Shri Vinay Parulekar v. Pramod Meshram**[8] to defend the impugned judgment for the reasons, on the basis of which, the complaint came to be dismissed by the trial Court.

12. Uncontroverted facts of the case are that respondent issued the cheque in question, which on presentation by the appellant to his Banker, came to be dishonoured with the endorsement "Funds Insufficient". Appellant served a demand notice, dated 26.10.2007 upon the respondent within stipulated period. According to the appellant, when cheque amount was not refunded by the respondent, despite service of demand notice, he preferred the complaint under Section 138 of NI Act in the trial Court.

13. The trial Court took cognizance and summoned the respondent. The respondent, in his statement under Section 242 Cr.P.C., though admitted the signing and issuance of the impugned cheque, but denied his liability by contending that it was issued in relation to some property transaction and there was no legally enforceable debt. Respondent also denied the receipt of demand notice. Therefore, he pleaded not guilty and claimed to be tried.

14. Learned counsels on rival sides are in concurrence to the settled position of law that admission of issuance and signing of a cheque by an accused, gives rise to a statutory presumption that it was drawn for consideration and the holder thereof received the same in discharge of an existing debt, the said presumption, in terms of Sections 118 and 139 of NI Act, can be rebutted by the accused by

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[4] (2009) 2 SCC 513
[5] (2008) 1 SCC 258
[6] [2008 A.I.R. (SC) 1325]
[7] (2013) 3 SCC 86
[8] (2008) CrlJ 2405

bringing on record such facts and circumstances, which may lead the court to conclude, either that the consideration and the debt did not exist or that their existence was so probable that a prudent man would act upon the plea that they did not exist.

15. Mr. Thakur, learned Senior Counsel, appearing for the appellant, is of the view that since respondent did not reply the demand notice, neither paid the cheque amount in question, nor entered the witness box, therefore, he did not deny the existence of liability and the enforceability thereof.

16. *Per contra*, Mr. Rahil, learned counsel for the respondent has argued that an accused is not expected to prove his defence beyond reasonable doubt, as expected from a complainant in a criminal trial and since the respondent raised a categoric plea in his statement under Section 242 Cr.P.C. that impugned cheque was issued by him in connection with a land deal and maintained the said plea, on culmination of complainant's evidence, in his statement under Section 342 Cr.P.C., he had succeeded to rebut the presumption attached to a negotiable instrument, in terms of Sections 118 and 139 of NI Act and it is the appellant complainant who failed to prove the reverse burden that impugned cheque was issued in discharge of a legally enforceable debt.

ANALYSIS

17. At the outset, I do not subscribe to the opinion of learned trial Court that since impugned cheque has been issued by the respondent in the name of a firm and not in his personal capacity, the complaint is bad for non-joinder of the firm as a necessary party. I find legal force in the argument of Mr. Thakur learned Senior Counsel that since impugned cheque was issued by the respondent accused as a sole proprietor of the firm, Jamit Raj Gupta and Sons and it is not a partnership concern, the arraignment of the firm was immaterial. Since

respondent accused has not only admitted the signing of the cheque and the filling of the cheque amount, but also admitted the issuance of the same in favour of the appellant complainant, arraignment of the firm pales into insignificance.

18. I also find substance in the plea urged on behalf of the appellant that once a cheque is admitted to have been issued and signed by an accused, there is a presumption that said cheque was made and drawn for consideration and that the holder of the cheque had received it for discharge in whole or in part of a legally enforceable debt or liability, within the meaning of Sections 118 and 139 of the NI Act. Reliance placed by Mr. Thakur on **P. Rasiya**[1] fortifies and adds sufficient weight to the said plea of the appellant that burden of proving the consideration for dishonor of cheque is not on him but it is the respondent, who is obliged to rebut that a cheque in question had not been issued for discharge of a lawful debt or a liability. According to Mr. Thakur, the respondent by not entering the witness box, has failed to rebut the statutory presumption, therefore, he is liable to be convicted.

NATURE OF PRESUMPTION

19. At the foremost, we need to note the legal principles regarding nature of presumptions to be drawn under the NI Act and the manner in which they can be rebutted by an accused.

20. True it is, that when a cheque is admitted to have been issued and duly signed by a person, the complainant reasonably succeeds to discharge the initial burden that it has been issued towards a lawful payment and once this burden is discharged, it is for the accused to prove that said cheque had not been issued towards discharge of a legal debt but was issued on account of some business transaction or for any other reason.

21. The NI Act incorporates two presumptions in this regard; one containing in Section 118 and other in section 139 thereof; which are set out hereunder for the ease of reference:

> **"118. Presumption as to negotiable instruments.- Until the contrary is proved, the following presumptions shall be made**
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> **(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;**
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> **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."**

22. It is manifest from the aforesaid provisions that while Section 118 of the NI Act *inter alia* directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was drawn for consideration, Section 139 stipulates that unless the contrary is proved, it shall be presumed, that holder of the cheque received it for the discharge of, whole or part of any debt or liability. It is evident that once complainant discharges the initial burden to prove that instrument was executed by the accused, rules of presumption under the aforesaid provisions help him to shift the burden on the accused and said presumptions will remain in operation unless or until the contrary is proved by the accused that instrument was not issued for consideration and in discharge of any debt or liability. However, it needs a specific mention that the statute does not provide the mode and manner in which the presumption attached to a negotiable instrument should be held to have been rebutted. As already stated, learned counsels for the parties are in agreement that accused in a trial under Section 138 of the NI Act has two options; (i) that he can either show that consideration and debt did not exist; or (ii) that under peculiar circumstances of

the case, the non-existent of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed.

23. It is trite that to rebut a statutory presumption, an accused is not obliged to prove his defence beyond reasonable doubt, as expected of a complainant in a criminal trial and he need not enter the witness box to discharge the burden of proof. Relevant excerpts of the observations of Hon'ble Supreme Court in **K. Prakashan**[5] captured in Paragraphs 13 and 14 are as below:

> **"13. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118(a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118(a) and 139 are rebuttable in nature. Having regard to the definition of terms "proved" and "disproved" as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-a-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.**
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> **(Emphasis supplied)**
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> **14. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."**

24. A similar view has been expressed by the Apex Court in **Krishna Janardhan Bhat**[6] in the following words:

> **"23. 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 records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different."**

25. In view of the aforesaid exposition of law, the pristine question which begs consideration is the manner in which accused can rebut the statutory presumption.

MODE OF REBUTAL

26. Hon'ble Supreme Court in **M/s Kumar Exports**[4] has held that accused may, by way of direct evidence, prove that negotiable instrument was not supported by consideration and that there was no debt or liability to be discharged by him. It was emphasized that Court need not insist in every case that accused must disprove the non-existent of consideration and debt by direct evidence only and something probable has to be brought on record for shifting the burden back on the complainant. Besides the direct evidence, it was held, that accused can rely upon the circumstantial evidence, the presumption of facts in terms of Section 114 of the Evidence Act and the case set out by the complainant in the complaint or in the statutory notice as also the evidence adduced by the complainant during trial. Relevant excerpts read as:

> **"20. …….The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.**
>
> **21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and**

> **accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."**

27. A similar observation has been made by the Apex Court in **Basalingappa v. Mudibasappa**[9]**.**

28. What is deduced from the above is that accused need not enter the witness box to prove that a negotiable instrument was not supported by consideration and that there was no debt or liability to be discharged by him. Accused can show the "preponderance of probabilities" to rebut the statutory presumption in the following ways:

a. he may adduce direct evidence;
b. he may rely upon the circumstantial evidence;
c. he may bring on record something which is probable;
d. he may rely upon the presumption, in terms of Section 114 of the Evidence Act;
e. he may rely upon the case, set out by the complainant;
f. he may rely upon the averments contained in the statutory notice; or
g. he may rely upon the evidence adduced by the complainant.

29. If the present case is approached with the aforesaid principle of law, it is evident that respondent accused, right from the inception, though admitted the issuance, signing of the impugned cheque as also filling of the cheque amount, but denied that it was issued in discharge of legally enforceable debt. Pertinently, he reiterated and emphasized his stand on culmination of complainant's evidence in his statement under Section 342 Cr.P.C. that cheque in question was issued in connection with some land deal, which did not materialize, but the appellant complainant refused to return the cheque. Thus, the respondent accused by relying upon the said circumstances succeeded to rebut the statutory presumption that cheque in question was neither supported by consideration nor issued in discharge of legally enforceable debt or liability.

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[9] 2019 (2) JKJ 144 [SC]

30. On this rebuttal and the "preponderance of probabilities" raised by the respondent, the evidential burden shifted back upon the appellant to prove the existence of debt. Aside, the respondent adduced evidence in defence by examining four witnesses that cheque in question was issued by him in favour of the appellant in connection with a land deal which did not materialize. It is also in evidence that apart form the impugned cheque, respondent had issued another cheque for an amount of Rs.5.00 lacs in favour of the appellant in connection with some deal, which was en-cashed by him. In addition, an amount of Rs.3.5 lacs was given in cash by the respondent to the appellant. It is categoric stand of the respondent throughout that when land deal did not materialize, neither the appellant complainant refunded the said amount of Rs.8.5 lacs to him, nor returned the cheque in question.

31. The case set out by the appellant complainant is that respondent accused borrowed an amount of Rs.20 lacs from him, in lieu whereof, impugned cheque came to be issued by him in his favour. However, the appellant neither in his complaint nor in his statement in the trial Court on 20.11.2009 nor in his re-examination on 26.12.2013 disclosed the date on which the loan amount of Rs.20 lacs was advanced by him to the respondent. Learned Sr. Counsel for the appellant has relied upon **Rohitbhai Jivanlal Patel**[3] to submit that impugned judgment of acquittal recorded by the trial court has proceeded on irrelevant consideration that appellant did not mention the date of advancement of loan or that same was not disclosed by him in his statement before the Court. The argument of learned Sr. Counsel is legally flawed.

32. An observation made by a Court, having regard to a particular background of facts and circumstances, cannot be applied mechanically to every case. The said observation is required to analyzed and visualized in the context of the

matter and the nature of enquiry before the Court. The reliance placed by learned counsel for the appellant on **Rohitbhai Jivanlal Patel**[3] is completely misplaced and distinguishable for the following reasons.

33. In the said case, the case set out by the complainant was that he had an office in Windor Plaza at Akalpuri, Vadodara. He used to visit the shop of his friend, Sh. Jagdishbhai in the same locality. The accused, also had a shop near the shop of Sh. Jagdishbhai and in due course, they became good friends. The complainant alleged that accused demanded a sum of Rs. 22,50,000/- as loan, he extended the loan for a short term by collecting money, in piecemeal from his business group. On his regular demand, accused gave him seven cheques on different dates and also an acceptance for repayment on a stamp paper. However, the said cheques, on presentation before the Bank for collection were returned unpaid for different reasons. With these allegations and assertions, complainant preferred seven complaints against accused. In the trial, the complainant, besides oral and documentary evidence, himself appeared as a witness and also examined aforesaid, Jagdishbhai as a witness. On conclusion of complainant's evidence, accused, in his statement under Section 313 Cr.P.C., not only denied any money transaction with the complainant, but also denied the issuance of any cheque or acceptance of repayment on a stamp paper, regarding any legal debt in favour of the complainant. Pertinently, it was asserted by the complainant that several years in the past, he had some transaction with said Sh. Jagdishbhai, the cheques and the blank stamp paper lying with Sh. Jagdishbhai were fraudulently misused for unlawful recovery of money from him. However, it is significant to note that he did not lead any evidence in support of his assertions made by him during his examination under Section 313 Cr.P.C. Except bare denial of debt and putting suggestions about the alleged dealing to

Sh. Jagdishbhai, accused failed to discharge his burden of bringing on record such material which could tilt the preponderance of probabilities in his favour.

34. In the aforesaid case, pertinently, the defence plea of the accused that money was given as hand loan by his friend Sh. Jagdishbhai got falsified by the version of said Jagdishbhai only, who was examined on behalf of the complainant. Pertinent in this respect shall be the suggestions put forth by the accused to said Jagdishbhai in his cross-examination. Sh. Jagdishbhai, denied the suggestion of the accused in his cross-examination that for the amount given to the accused, he had taken seven blank cheques and a stamp paper without signatures. He also denied any quarrel between him and the accused in the matter of payment of interest. He also denied that there was no financial dealing between the complainant and the accused. He also denied that there was any dealing between him and the accused and therefore, there were his signatures, and signatures of the accused and there was no signatures of the complainant on the stamp paper. Therefore, it is evident from the facts of the aforesaid case that apart from bare denial of liability in his statement under Section 313 Cr.P.C. and the aforesaid suggestions made by the accused to Sh. Jagdishbhai, those were emphatically denied by him, the accused did not produce any evidence to rebut the presumption under Sections 118 and 139 of NI Act and to show preponderance of probabilities in his favour. It is in this background that Hon'ble Supreme Court held that approach of trial court was at variance with the principles of presumption in law. It was noticed by the Supreme Court that since accused had issued a duly signed stamp paper, in the nature of an acknowledgement, about the existence of debt and his liability to pay the same to the complainant and Sh. Jagdish Bhai signed the said acknowledgement as a witness and therefore, rest of the issues regarding the date of advancement of

loan, source of funds with the complainant, receipt of transactions or inconsistencies in the complainant's evidence were immaterial.

35. Contrary to the aforesaid case, the respondent/accused, in the present case, took a categoric stand in his statement under Section 242 Cr. P.C. that cheque in question was issued in connection of a land deal, to the knowledge of the complainant/appellant from the very inception of the trial. He cross-examined complainant's witnesses in the said context. Pertinently, he maintained and reiterated his stand, in his statement under Section 342 Cr.P.C. [corresponding to Section 313 of Central Cr.P.C.] on culmination of the complainant's evidence and chose to enter the defence. It is pertinent to underline that respondent accused, in the present case, not only asserted that cheque in question was signed and issued by him in connection with a land deal, but he produced defence evidence in support thereof.

36. The case in hand, contrary to **Rohitbhai Jivanbhai Patel**[3]**,** is not a case of mere denial of liability, but the respondent accused adduced evidence in support of his line of defence that cheque, in question, was issued by him to the appellant/complainant in connection of purchase of land. Therefore, the date of advancement of loan and the source of funds assume significance in this case.

37. Hon'ble Supreme Court, in a similar fact situation in **Vijay**[7] has held that failure on the part of the complainant to specify the date of advancement of loan is a glaring loophole in the case of the complainant. Relevant observation is as below:

> **"12. Applying the ratio of the aforesaid case as also the case of K.N. Beena v. Muniyappan; (2001) 8 SCC 458:2002 SCC (Cri) 14 when we examine the facts of this case, we have noticed that although the respondent might have failed to discharge the burden that the cheque which the respondent had issued was not signed by him, yet there appears to be a glaring loophole in the case of the complainant who failed to establish that the cheque in fact had been issued by the**

> **respondent towards repayment of personal loan <u>since the complaint was lodged by the complainant without even specifying the date on which the loan was advanced nor the complaint</u> indicates the date of its lodgement as the date column indicates "nil" although as per the complainant's own story, ….."**
>
> **(Emphasis Supplied)**

38. An identical view has been expressed by Hon'ble Supreme Court in **Basalingappa**[9]. Relevant observation, for the facility of reference, is extracted below:

> **"26. There is one more aspect of the matter which also needs to be noticed. In the complaint filed by the complainant as well as in examination-in-chief the complainant has not mentioned as to on which date, the loan of Rs. 6 lakhs was given to the accused.....**
>
> **xxx x xxx xxx**
> **xxx x xxx xxx**
>
> **27. Thus, there is a contradiction in what was initially stated by the complainant in the complaint and in his examination-in-chief regarding date on which loan was given on one side and what was said in cross-examination in other side, which has not been satisfactorily explained....."**

39. A similar view has been taken by the Bombay High Court in **Shri Vinay Parulekar**[8] in the following words:

> **"18. Complainant's evidence further show that although he is claiming that he had paid a total sum of Rs. 8 Lacs, for which two cheques in question in the two appeals were given to him, <u>he has not been able to state as to when the said sum was paid by him and whose money it was</u>……"**
>
> **(Emphasis Supplied)**

40. It is evident from the afore-quoted case law that failure on the part of complainant to specify the date of advancement of loan, goes to the root of the complainant's case.

<u>SOURCE OF INCOME</u>

41. Another circumstance underlined by the trial court to dismiss the complaint preferred by the appellant is that he has not proved by cogent and reliable evidence, the source of huge sum of Rs.20.00 lacs, stated to have been

advanced by him to the respondent/accused. Learned trial Court made this observation in the background that appellant admitted in his cross-examination that he runs a Ration Depot/Karyana Shop and his monthly income was Rs.15 to 20 thousand only. The appellant complainant, reiterated this monthly income in his re-examination. Learned trial court is of the view that after deducting monthly expenditure of the appellant, his monthly income turns out to be around Rs. 15,000/- per month only and it was not possible for a man having a monthly income of around Rs. 15,000/- to advance a huge sum of Rs. 20.00 lacs to somebody.

42. Learned Senior Counsel for the appellant, in his usual vehemence would submit that since it is not the case of the respondent in defence before the trial Court, therefore, learned trial court has proceeded on irrelevant and immaterial consideration that appellant had failed to disclose his source of income and produce the income tax return.

43. As already discussed in detail, Hon'ble Supreme Court in **M/s Kumar Exports**[4] has ruled that when an accused has to rebut the presumption under Section 139 of NI Act, the standard of proof is "preponderance of probabilities and if he succeeds to raise a probable defence which creates a doubt about the existence of legally enforceable debt, the prosecution fails." It was clarified by the Apex Court that to rebut the said presumption, accused need not appear in the trial and necessarily lead direct evidence in order to prove that negotiable instrument was not supported by consideration and there was no debt or liability to be discharged by him. He may bring on record facts and circumstances or rely upon the circumstantial evidence or rely upon case of the complainant or the evidence adduced by the complainant.

44. Relevant in this respect, shall be an observation made by a three Judge Bench of Hon'ble Supreme Court in **Rangappa v. Sri Mohan**[10]**,** excerpt whereof reads as below:

> **"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."**
>
> **(Underlined to lay emphasis)**

45. If we approach the present case, with the aforesaid principle of law, expounded by Hon'ble Supreme Court in mind, there is no doubt that respondent/accused has succeeded to bring on record certain facts and circumstances, upon consideration of which, it may be believed that consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. The respondent-accused has been able to introduce preponderance of probabilities to rebut the initial presumption in favour of the appellant complainant for the following reasons.

46. The appellant complainant in his initial statement in the trial Court, stated in cross examination that he had given a cash of Rs.20.00 lacs to the accused at his home in the presence of his brothers, Joginder Lal and Rajinder Kumar and his friend, Romesh Verma. However, he failed to examine anyone of them during the trial. It is pertinent to mention that on conclusion of the defence evidence, counsel for the respondent accused made an application for re-examination of the complainant under Section 540 Cr.P.C., which was allowed

[10] (2010) 11 SCC 441

by the trial court on no objection of the appellant complainant. The appellant came to be re-examined by the trial court on 26.12.2023 where he projected altogether a new story by stating that he advanced cash loan to the accused in his house, where he was alone. It may be underlined that complainant, in order to substantiate his source of income, claimed in re-examination that he borrowed an amount of Rs. 3-4 lacs from his elder brother Joginder Lal and Rs. 5-6 lacs from this younger brother Rajinder Kumar. Be it noted that, complainant neither mentioned this fact of borrowing money from his brothers in his complaint nor in his initial examination-in-chief in the trial court on 20.11.2009. I concur with the observation of learned trial court that a sum of Rs. 20.00 lacs is not a small amount, particularly in view of the fact that appellant complainant has stated that he runs a ration depot/Karyana Shop and his monthly income was around Rs. 15,000/- only.

47. Another significant aspect of the matter, underscored by the trial Magistrate is that complainant failed to produce his income tax return before the trial court. It needs attention that re-examination of the complainant was deferred because he had stated that he is an income tax payee and could produce his income tax return. However, on further examination on 26.12.2013, he failed to produce his income tax return, despite the fact, he had stated during his re-examination on 26.12.2013 that income tax return was lying with his Advocate and he could produce the same.

48. Facts and circumstances of the present case are somewhat identical to **Basalingappa[9].** In the said case also, the accused having admitted his signatures on the cheque, there was presumption under Section 139 of NI Act that impugned cheque was issued in discharge of debt or liability. The complainant, PW-1 admitted in his evidence that he retired in 1997 and received monetary

benefits of Rs.8.00 lacs which he had encashed. It was also brought in evidence that in 2010, the complainant entered into sale agreement and paid an amount of Rs.4.50 lacs as sale consideration. He also admitted to have paid Rs.50,000/- with respect to which, a complaint in 2012 was filed by the complainant. It was held by Hon'ble Supreme Court that there was burden on the complainant to prove his financial capacity because, during his cross examination, when financial capacity to pay Rs. 6.00 lacs to the accused was questioned, there was no satisfactory reply given by him. It was observed by the Supreme Court that the said evidence on record i.e. statement of the complainant was probable defence on behalf of the accused and it shifted the burden on the complainant to prove his financial capacity. Relevant excerpt contained in paragraph 24 reads as below:

> **"24. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on cheque having been admitted, a presumption shall be raised under Section 139 that cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused. In cross-examination of the PW1, when the specific question was put that cheque was issued in relation to loan of Rs.25,000/- taken by the accused, the PW1 said that he does not remember. PW1 in his evidence admitted that he retired in 1997 on which date he received monetary benefit of Rs. 8 lakhs, which was encashed by the complainant. It was also brought in the evidence that in the year 2010, the complainant entered into a sale agreement for which he paid an amount of Rs.4,50,000/- to Balana Gouda towards sale consideration. Payment of Rs.4,50,000/- being admitted in the year 2010 and further payment of loan of Rs.50,000/- with regard to which complaint No.119 of 2012 was filed by the complainant, copy of which complaint was also filed as Ex.D2, there was burden on the complainant to prove his financial capacity. In the year 2010-2011, as per own case of the complainant, he made payment of Rs.18 lakhs. <u>During his cross-examination, when financial capacity to pay Rs.6 lakhs to the accused was questioned, there was no satisfactory reply given by the complainant. The evidence on record, thus, is a probable defence on behalf of the accused, which shifted the burden on the complainant to prove his financial capacity and other facts.</u>"**
>
> **(Underlined for Emphasis)**

49. Hon'ble Supreme Court in **Basalingappa**[9] has clearly held that when evidence was laid before the court to indicate that apart from the loan of Rs.

6.00 lacs given to the accused, within two years, amount of Rs.18 lacs in question was given by the complainant and his financial capacity was questioned, it was incumbent upon on the complainant to have explained his financial capacity.

50. A similar observation came to be made by Bombay High Court in **Shri Vinay Parulekar**[8] in the following words:

> **"20. The complainant also was not able to disclose the source of such a large amount of Rs. 8 Lacs in the case and he has at various times claimed that the money belonged to his aunt and that she had given it to the accused and then he has claimed that he had taken this amount from his friends, relatives and it was his own savings and given the same to the accused. Admittedly, the complainant was unemployed from 1985 onwards and he had no source of income. It is against this backdrop, it was incumbent upon the complainant to produce some material on record to substantiate his claim. It is unconceivable that such a person would get such a huge sum and that to in cash, either as a loan from friends or by way of charity. The complainant has not examined either Sushila Tendulkar or his friends or relatives in support of his contention that they had given him such a huge sum in cash....."**

CONCLUSION

51. For what has been observed and discussed, what comes to the fore is that the accused need not enter the witness box to rebut the statutory presumptions under Sections 118 and 139 of NI Act and prove his defence beyond reasonable doubt. The standard of proof on the accused, in such cases, is mere "preponderance of probabilities". An accused can show the preponderance of probabilities by way of direct evidence or circumstantial evidence or presumption of facts under Section 114 of Evidence Act or he may choose to rely upon the case set out by the complainant or the evidence adduced by him during the trial. Prosecution fails, if accused succeeds to raise the defence, sufficient to create a doubt about the existence of legally enforceable debt. It is also incumbent upon the accused to prove his source of income, in case it is questioned by the accused during the trial.

52. Having regard to the aforesaid, I do not find any illegality or impropriety muchless perversity in the impugned judgment of acquittal recorded by learned trial court. Hence, present appeal being devoid of merit is dismissed and impugned judgment is upheld.

(Rajesh Sekhri)
Judge

Jammu
07.05.2025
Paramjeet

Whether the judgment is speaking? ***Yes***
Whether the judgment is reportable? ***Yes***