# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED: 30th August, 2018

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**SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, ACTING CHIEF JUSTICE**

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## Crl. A. No. 29 of 2017

**Appellant** : Purna Kumar Gurung,
Son of Late Birkha Bdr. Gurung,
Aged about 44 years,
Resident of Upper Burtuk,
Gangtok,
East Sikkim.

**versus**

**Respondent** : Ankit Sarda,
Son of Shri Ravi Sarda,
Resident of Sarda Emporium,
M.G. Marg,
Gangtok.
P.O. Gangtok,
East Sikkim.

**Application under Section 378(4) read with Section 482 of the Code of Criminal Procedure, 1973.**

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**Appearance:**

Mr. Sudhir Prasad, Advocate for the Appellant.

Mr. Jorgay Namka, Ms Panila Theengh and Ms Tashi D. Sherpa, Advocates for the Respondent.

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# J U D G M E N T

Meenakshi Madan Rai, ACJ

***1.*** By the impugned Judgment dated 25.03.2017, in Private Complaint Case No. 79 of 2014, the learned Chief Judicial Magistrate acquitted the Respondent of the offence

under Section 138 of the Negotiable Instruments Act, 1881 (for brevity 'the NI Act') having reached a finding that the Appellant (Complainant before the learned Trial Court) had failed to bring home proof of the existence of a legally recoverable debt or other liability for which the cheque was issued by the Respondent/Accused.

***2.*** The Appellant is before this Court assailing the impugned Judgment.

***3.*** For convenience, a brief factual reference is essential. The Respondent is said to be a share broker, running a business of stocks and shares at M.G. Marg, Gangtok. On the asking of the Respondent, the Appellant invested a sum of Rs.3,00,000/- (Rupees three lakhs) only, in the said business. After a few months he requested the Respondent to return his money, the investment being devoid of profit. In response thereto, the Respondent issued a cheque for Rs.3,00,000/- (Rupees three lakhs) only, to the Appellant on 09.09.2014, drawn on the ICICI Bank, New Market Branch, Gangtok. The Appellant on the same day with the consent of the Respondent deposited the cheque for realisation at the State Bank of India, Gangtok Main Branch, which however was dishonoured by the Banker of the Respondent/Accused and returned to the Appellant's Banker with the remark - "insufficient funds", by their Memo dated 10.09.2014. The

Appellant was informed of the said circumstance. On 01.10.2014, the Appellant issued a legal Notice to the Respondent through his Advocate requiring him to pay the amount of the dishonoured cheque within the statutory period of 15 (fifteen) days from the date of service of Notice. The Notice was sent to the place of business of the Respondent but was returned with the remark – "addressee out of station". Thereafter, on the Respondent having failed to take steps within the statutory period, the Appellant filed a Complaint before the Court of the learned Chief Judicial Magistrate, East Sikkim at Gangtok, who on examining the Complainant found prima facie materials against the Respondent under Section 138 of the NI Act. On completion of trial, the impugned Judgment of acquittal was pronounced.

***4.*** Advancing his arguments for the Appellant, Learned Counsel would canvass that the learned Trial Court while acquitting the Respondent had failed to appreciate that the Respondent had not denied the fact of delivery of the cheque or his signature on the cheque raising the presumption under Section 118 and Section 139 of the NI Act. That, the learned Trial Court erred in holding that the Respondent who is a share broker is not liable to refund the invested amount neither did the Court take into consideration that the Appellant had made part payment of Rs.1,00,000/- (Rupees one lakh) only, on 31.10.2014, as discharge of his debt and liability to

the Appellant subsequent to the filing of the Complaint. That, the books of accounts for the shares were never revealed to the Appellant to indicate the investments made by the Respondent with the Appellant's money. Merely stating that losses incurred without accounts of investment is not justified. It was further contended that the Respondent in his Statement under Section 313 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.) stated that Exhibit-1 was issued for security only and not for encashment while concealing the fact of payment of Rs.1,00,000/- (Rupees one lakh) only, already made by him pursuant to the Complaint lodged by the Appellant. Reliance was placed on ***Don Ayengia vs. State of Assam and another***[1] to buttress his contention that a cheque issued for security purpose would also be covered by the provisions of Section 138 of the NI Act. That, although the account and password thereof is allegedly with the Respondent, he has refused to divulge it to the Appellant. To fortify his submissions strength was drawn from the ratio in ***Hiten P. Dalal vs. Bratindranath Banerjee***[2] *and* ***T. Vasanthakumar vs. Vijayakumari***[3]. That, refusal to accept the Notice posted in the correct address indicates that the Respondent was in fact avoiding the legal Notice but the Notice is deemed to be

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[1] (2016) 3 SCC 1

[2] 2001 SCC (Cri) 960

[3] (2015) 8 SCC 378

served. On this count, reliance was placed on ***C.C. Alavi Haji vs Palapetty Muhammed and Another***[4].

***5.*** The Respondent for his part would contend that the Appellant did not plead or bring on record any documentary proof to show that they had a meeting in which they had reached an agreement whereby the Respondent issued Exhibit-1. The Appellant also failed to file any books of accounts to reveal that the Respondent owed any legally enforceable debt or liability. Pleadings and cross-examination of the Appellant would clearly reveal that he had voluntarily invested his money in the share market and not with the Respondent. That, Section 138 of the NI Act makes it clear that the dishonoured cheque by itself does not give rise to a cause of action as the payment can be made on receipt of the legal notice as contemplated in Section 138(b) of the NI Act. Cause of action emanates on failure thereof to make payment within 15(fifteen) days. Further, the legislative mandate is that the Respondent ought to be given an opportunity to rectify or remedy his mistake. It was argued that based on the evidence adduced by the Appellant, it can safely be assumed that he has failed to establish his case and hence the reliefs prayed for may not be granted in favour of the Appellant. To substantiate his submissions, reliance was placed on ***M.D.***

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[4] (2007) 6 SCC 555

***Thomas vs. P.S. Jaleel and Another***[5]***, D. Vinod Shivappa vs. Nanda Belliappa***[6]***, Bharat Barrel and Drum Manufacturing Company vs. Amin Chand Payrelal***[7]***, M.S. Narayana Menon alias Mani vs. State of Kerala & Anr.***[8]***, Tribhuwan Prasad Singh vs. State of Jharkhand, through C.B.I.***[9] and ***Sudhir Kumar Bhalla vs. Jagdish Chand & etc. etc.***[10]**.

***6.*** The arguments of learned Counsel for opposing parties have been heard *in extenso* and given due consideration. The impugned Judgment, the pleadings, the evidence and documents on record have also been carefully perused by me.

***7.*** The question that requires determination by this Court is whether the learned Trial Court was correct in concluding that the Complainant has failed to establish the existence of a legally recoverable debt for which the cheque was issued by the Accused and thereby acquitted the Respondent.

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[5] (2009) 14 SCC 398

[6] (2006) 6 SCC 456

[7] AIR 1999 SC 1008

[8] AIR 2006 SC 3366

[9] 2008 Cri. L.J. 1170

[10] AIR 2008 SC 2407

***8.*** Since the issue of service of notice has not been contested herein by the Respondent, no discussions need ensue on this point. Suffice it to say that the learned Trial Court duly applying the provisions of Section 27 of the General Clauses Act, 1897, and concluding that Notice was served cannot be said to be erroneous.

***9.*** Coming to the crux of the case, Section 138 of the NI Act deals with dishonour of cheque for insufficiency of funds in the account. A complaint under Section 138 of the NI Act must necessarily reflect the ingredients as laid down by the Section which is elucidated herein below;

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability.

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

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that the cheque amount exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

The Section provides that for a dishonoured cheque the drawer shall be liable for conviction if the demand is not met

within 15(fifteen) days of the receipt of notice. If the cheque amount is paid within the above period or before the complaint is filed, the legal liability under Section 138 of the NI Act, ceases. It was argued by the Respondent that the dishonoured cheque by itself does not give rise to cause of action and the Respondent ought to be afforded an opportunity to remedy his error. Perusal of the records nowhere indicates any such effort on the part of the Respondent to have acted in compliance of this provision to prevent prosecution. Despite opportunity afforded to the Respondent during the cross-examination of the Appellant to disprove the Appellant's case, no contrary evidence whatsoever emerged to that effect nor did he testify despite opportunity afforded to him. It is not denied that the Respondent issued the cheque, Exhibit-1, in the name of the Appellant on an account maintained by the Respondent, for a sum of Rs.3,00,000/- (Rupees three lakhs) only. The signatures appearing on Exhibit-1, being Exhibit-1(a) and Exhibit-1(b), and identified by the Appellant as the signatures of the Respondent have not been denied. That, Exhibit-1 was issued on 09.09.2014 and presented to the Bank on the same date by the Appellant and was returned on 10.09.2014 for want of sufficient fund, is also not denied. In the face of such evidence, the only question that now survives is whether the cheque was made over to the Appellant on account of debt or other liability owed to him by the Respondent.

***10.*** The learned Trial Court was of the considered opinion that the cheque was for neither, therefore, it is to be examined as to whether this finding is correct. Towards this, we may briefly examine what "debt" and "liability" entails. The term "debt" according to Black's Law Dictionary, 10th edition, is;

> *"Liability on a claim; a specific sum of money due by agreement or otherwise*.

The explanation to Section 138 of the NI Act clarifies that the term "debt" referred to in the Section means "legal debt", that is one which is recoverable in a Court of law, e.g. as debt on a bill of exchange, a bond or a simple contract. On the other hand, the term "liability" as per Black's Law Dictionary, 10th edition is;

> *"The quality, state or condition of being legally obligated or accountable."*

"Liability" otherwise has also been defined to mean *all character of debts and obligations, an obligation one is bound in law and justice to perform; an obligation which may or may not ripen into a debt, any kind of debt or liability, either absolute or contingent, express or implied*.

***11.*** That having been stated, at this juncture, we may appropriately consider the provisions of Section 139 of the NI Act. The said Section provides that unless the contrary is proved, the Court shall presume that the holder of a cheque

received the cheque of the nature referred to in Section 139 for the discharge, in whole or in part of any debt or other liability. It would appear that the presumption under Section 139 of the NI Act is an extension of the presumption under Section 118(a) of the NI Act which provides that the Court shall presume a negotiable instrument to be one for consideration. If the negotiable instrument happens to be a cheque, Section 139 raises a further presumption that the holder of the cheque received the cheque in discharge in whole or in part of any debt or other liability. Section 118 of the NI Act uses the phrase "until the contrary is proved" while Section 139 of the NI Act provides "unless the contrary is proved". Section 4 of the Indian Evidence Act, 1872 which defines "may presume" and "shall presume" makes it clear that presumptions to be raised under both the aforesaid provisions are rebuttable.

***12.*** While discussing what a rebuttable presumption is, in ***Kumar Exports vs Sharma Carpets***[11], the Hon'ble Supreme Court would hold that;

> ***19.*** *When a presumption is rebuttable, it only points that the party on whom lies the duty of going forward with evidence on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."*

[11] (2009) 2 SCC 513

***13.*** In ***Hiten P. Dalal*** (*supra*) relied on by the Appellant, the Hon'ble Supreme Court would hold as follows;

> *"**20.** That the four cheques were executed by the appellant in favour of Standard Chartered Bank (hereinafter referred to as "the Bank") has not been denied nor was it in dispute that the cheques were dishonoured because of insufficient funds in the appellant's account with the drawee viz. Andhra Bank. Because of the admitted execution of the four cheques by the appellant, the Bank was entitled to and did in fact rely upon three presumptions in support of its case, namely, under Sections 118, 138 and 139 of the Negotiable Instruments Act. Section 118 provides, inter alia, that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration. The presumption which arises under Section 138 provides more specifically that where any cheque drawn by a person on an account for payment of any amount of money for the discharge in whole or in part of any debt or other liability, is returned by the drawee bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque, such person shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. The nature of the presumption under Section 138 is subject to the three conditions specified relating to presentation, giving of the notice and the non-payment after receipt of notice by the drawer of the cheque. All three conditions have not been denied in this case.*
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> ***21.** The appellant's submission that the cheques were not drawn for the "discharge in whole or in part of any debt or other liability" is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that:*
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> *"**139.** 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."*
> *The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.*
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> ***22.** Because both Sections 138 and 139 require that the court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras v.*

*A. Vaidhyanatha Iyer [AIR 1958 SC 61] it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." (Ibid. at p. 65, para 14) Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact."*

***14.*** In ***Kamala S. vs. Vidhyadharan M.J. and Another[12],*** it was held as follows;

> **"*16.*** The nature and extent of such presumption came up for consideration before this Court in *M.S. Narayana Menon Alias Mani v. State of Kerala and Anr.* [(2006) 6 SCC 39] wherein it was held:
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> > "*30.* Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."
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> **17.** This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefore can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. Categorically stating that the burden of proof on accused is not as high as that of the prosecution, it was held;

[12] (2007) 5 SCC 264

> "*33.* Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another."

***15.*** On the anvil of the aforesaid ratiocination, while drawing an analogy with the instant case, the issuance of the cheque and other facts has not been denied as already discussed hereinabove and for brevity is not being reiterated. The Complainant in his evidence has deposed that the accused asked him to invest some money in the stocks and shares which was the trade of the Respondent. This evidence has not been decimated, thereby establishing investment of Rs.3,00,000/- (Rupees three lakhs) only, by the Appellant on the asking of the Respondent. What we are presently concerned with is if the Respondent did not consider the amount as a liability, if not a debt, towards the Appellant then what was the purpose of issuing Exhibit-1, the cheque to the Appellant. The moment the cheque was issued, it provides evidence of the acceptance of his liability and the presumption under Section 139 of the NI Act kicks into place. *Inasmuch* as the Section provides 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 of the NI Act or the discharge in whole or in part of any debt or other liability.

***16.*** The stand taken by the Appellant in his examination under Section 313 of the Cr.P.C. was that the cheque was issued by way of security only and not for encashment. On this aspect, we may look into the meaning of "security". As per the Oxford Dictionary "security" *inter alia*, means "*a thing deposited or hypothecated as pledge for fulfilment of undertaking or payment of loan to be forfeited in case of failure"*. The circumstances of the matter at hand in no way fulfil the ingredients of security as defined *supra* neither was an attempt made to furnish evidence on this aspect by the Respondent. I hasten to add that this Court is aware that the proof so demanded in offences under Section 138 of the NI Act is not to be beyond a reasonable doubt but only extending to a preponderance of probability. This too, was not established by the Respondent.

***17.*** The learned Trial Court in the impugned Judgment opined that the Complainant himself wilfully invested a sum of Rs.3,00,000/- (Rupees three lakhs) only, in stocks and shares through the Accused and no fraud was pleaded to have been played by the Accused in the transaction. The evidence of the Appellant would indicate that it was on the asking of the Respondent that the investment was made. Pausing here for a moment, it is worth mentioning that it is irrelevant for the purposes of Section 138 of the NI Act to put forth a plea of fraud in the transaction, the only consideration is of the

cheque being dishonoured. According to the learned Trial Court, a voluntary investment cannot be construed as debt or any other liability. This may be true if evidence exists to rebut the presumption once a cheque is issued. In Paragraph 19 of the impugned Judgment, the learned Trial Court opined as follows;

> *"**19.** Next the complaint and evidence of CW1 is that a settlement was reached through oral agreement to refund the principal invested amount and thus accused issued Exhibit 1 for a sum of ₹ 3,00,000/- which got dishonoured on presentation. First there is no evidence as to the terms of oral agreement. Secondly careful examination of the evidence of CW1 merely states an oral agreement to refund the principal amount for which Exhibit 1 was issued. This agreement is void as there is no consideration from CV1 but merely a unilateral payment from the accused which even if this agreement is taken into account per se it shows no existence of debt or other liability attracting the offence under section 138 of NI Act. No doubt there is an existence of presumption under section 118(a) of NI Act for consideration for negotiable instruments but the presumption can be rebutted. That the facts pleaded by the complainant and his evidence itself has no foundational facts upon which the presumptions under Section 139 and 118 (a) could be raised as there existed no legally recoverable debt or liability or consideration for the oral agreement. The argument of Ld Counsel for complainant that the accused repayed ₹ 1,00,000/- is sufficient to show that there exists the debt and liability cannot also be considered. The repayment of ₹ 1,00,000/- by accused during the pendency of trial can amount to a evidence of conduct but for forgoing discussions that there was no consideration at all in the oral agreement, it would not be sufficient to provide the fact upon which presumption under section 139 could be raised."*

***18.*** Having perused the observations of the learned Trial Court, it may be reasoned that obviously there would be no evidence of an oral agreement by simple virtue of the fact that it was an oral agreement. Despite opportunity afforded to the Respondent, the fact of such oral agreement between the

parties was not decimated during cross examination. The reasoning that the agreement is void for allegedly being devoid of consideration from the Complainant but was merely a unilateral payment from the Accused is also unclear. Although, the learned Trial Court was of the opinion that there is an existence of presumption under Section 118(a) of the NI Act which can be rebutted, he has failed to indicate how the Respondent has rebutted the presumption. The argument of the learned Trial Court that the facts pleaded by the Complainant and his evidence has no foundational facts upon which the presumptions under Section 139 and Section 118(a) of the NI Act, in my considered opinion is erroneous *inasmuch* as the Appellant has relied on Exhibit-1, the cheque, and the signatures of the Respondent therein, which were not denied by the Respondent and Exhibit-6, his Evidence on Affidavit, in which the facts have been put forth before the learned Trial Court and remained unstained during cross-examination. The issuance of Exhibit-1 as already explained leads to the irrevocable conclusion of acceptance of liability. The reasoning of the learned Trial Court that the repayment of Rs.1,00,000/- (Rupees one lakh) only, by the Respondent during the pendency of the trial can amount to an evidence of conduct but it would not suffice to raise a presumption under Section 139 of the NI Act does not impress.

***19.*** In view of the foregoing discussions, I find that the Appellant has proved his case.

***20.*** Consequently, the Appeal is allowed.

***21.*** The impugned Judgment is set aside.

***22.*** The Respondent is convicted of the offence under Section 138 of the NI Act.

***23.*** He is sentenced to undergo simple imprisonment of one month.

***24.*** He shall also pay compensation of Rs.2,00,000/- (Rupees two lakhs) only, within two months from today to the Appellant in terms of Section 357(3) of the Cr.P.C. with interest at the rate of 9% per annum on the above stated amount from the date of filing of the Complaint before the learned Trial Court, failing which the learned Trial Court shall take necessary steps for realisation of the said amount in accordance with law.

***25.*** The Appellant shall surrender before the Court of the learned Chief Judicial Magistrate, East Sikkim at Gangtok, within sixty days from today, to undergo his Sentence. Should there be failure on his part to surrender, the learned Trial Court shall issue a non-bailable warrant of arrest against the

Respondent/Convict and thereafter commit him to jail for serving the Sentence.

***26.*** Copy of this Judgment be transmitted to the learned Trial Court for information and compliance.

***27.*** Records be remitted forthwith.

***28.*** No order as to costs.

**( Meenakshi Madan Rai )**
**Acting Chief Justice**
**30.08.2018**

Approved for reporting : Yes

Internet : Yes

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