(2024) 12 SHI CK 0057

High Court Of Himachal Pradesh

Case No: Criminal Appeal No. 65 Of 2022

Harish Chauhan	APPELLANT
Vs	
Brajesh	RESPONDENT

Date of Decision: Dec. 20, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 313, 378
- Negotiable Instruments Act, 1881 - Section 118, 138, 139

Hon'ble Judges: Sushil Kukreja, J

Bench: Single Bench

Advocate: Rajiv Sirkeck, Ravinder Singh Jaswal

Final Decision: Allowed

Judgement

Sushil Kukreja, J

1. The instant appeal has been preferred by the appellant-complainant (hereinafter referred to as the complainant) under Section 378 of Criminal

Procedure Code (for short â€œCr.P.C.â€) against the judgment dated 04.03.2022, passed by learned Judicial Magistrate, First Class, Court No.3,

Shimla, H.P., in Criminal Complaint No.65-3 of 2018, whereby the accused (respondent herein) was acquitted for commission of the offence

punishable under Section 138 of the Negotiable Instruments Act (for short, â€œthe NI Actâ€).

2. Briefly stated the facts of the case, as emerge from the record, are that the accused borrowed a sum of Rs.10,00,000/- from complainant on

06.10.2016, which was agreed to be returned by him within a period of six months and in case he failed to return the same within the stipulated period,

he was bound to register the sale deed of his share in the land comprised in Khata Khatauni No.136/228, Khasra Nos.384 & 385 situated at Mohal

Anu, Patwar Circle Gangtoli, Tehsil Rohru, District Shimla, H.P., total measuring 05-14 hectares and Khata Khatauni No.137/234, Khasra No.337 &

378 situated at Mohal Anu, Patwar Circle, Gangtoli, Tehsil Rohru, District Shimla, H.P., total measuring 05-93 hectares, in favour of the complainant.

To this effect, agreement dated 06.10.2016 was also executed between the parties, wherein the accused had acknowledged the receipt of

Rs.10,00,000/. However, the accused neither repaid the aforesaid amount of Rs.10,00,000/- to the complainant within the stipulated period, nor

registered the sale deed as agreed by him, vide agreement dated 06.10.2016. Thereafter, the complainant issued a notice dated 02.11.2017 to him to

register the sale deed of the aforementioned land within a period of fifteen days from the date of receipt of legal notice. After receiving the said

notice, the accused in order to discharge his liability, issued a cheque bearing No.071646, dated 24.11.2017 in the sum of Rs.10,00,000/-, drawn on

State Bank of India, Rohru Branch, District Shimla, HP in favour of complainant. However, when the complainant presented the said cheque for

collection with his banker, the same was dishonoured and returned with the remarks ""funds insufficient"" vide memo dated 28.11.2017. Thereafter, the

complainant issued a legal notice dated 12.12.2017 to the accused on his correct address, through registered AD letter, demanding the cheque amount,

but the said notice was not received by him since he was not found at his home address as per the endorsement on the envelope. Thereafter, the

complainant filed a complaint under Section 138 of NI Act against him before the learned trial Court.

3. Learned trial Court, after having found sufficient material against the accused, put notice of accusation to him, vide order dated 06.12.2018 and on

conclusion of the trial, the learned trial Court acquitted the accused for commission of the offence under Section 138 of the NI Act, hence, the present

appeal by the complainant.

4. Learned counsel for the petitioner-complainant contended that the learned Trial Court has gravely erred in dismissing the complaint, as in the

statement under Section 313 of Cr.P.C., the accused had not denied the issuance of cheque and has miserably failed to rebut the presumption under

Section 139 of the Act. He further contended that the learned trial Court has erred in holding that after issuance of the cheque in question, the

complainant has received a sum of Rs.17,300/- from the accused, since after issuance of the cheque, no amount was paid to the

appellant/complainant. With these submissions, he prayed for setting-aside of the impugned judgment of the Trial Court and acceptance of the instant

appeal.

5. Per contra, learned counsel for the respondent-accused while supporting the judgment of the Trial Court, contended that there was no infirmity in

the findings returned by the learned trial Court as the same were borne out from the record of the case, therefore, the present appeal deserves to be

dismissed.

6. I have heard learned counsel for the appellant/ complainant as well as learned counsel for the respondent/ accused and also gone through the

record carefully.

7. Before adverting to the merits of the case, it would be apposite to have a look into the legal position. It has been laid down by the Honâ€™ble

Supreme Court in Rohitbhai Jivanial Patel Versus State of Gujarat and another, (2019) 18 SCC 106, that ordinarily, the Appellate Court will not

upset the judgment of acquittal, if the view taken by Trial Court is one of the possible views of matter, however, the same rule with same rigour

cannot be applied in a matter relating to the offence under Section 138 of the NI Act, particularly where a presumption is drawn that the holder has

received the cheque for the discharge, wholly or in part, of any debt or liability. Relevant portion of the aforesaid judgment is reproduced as under:-

â€œ12. According to the learned counsel for the accused-appellant, the impugned judgment is contrary to the principles laid down by this Court in the case of

Arulvelu because the High Court has set aside the judgment of the Trial Court without pointing out any perversity therein. The said case of Arulvelu related to

offences under Sections 304-Band 498-AIPC. Therein, on the scope of the powers of Appellate Court in an appeal against acquittal, this Court observed as

follows:

36. Carefully scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal

particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The

appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record

that the judgment of the trial court is either perverse or wholly unsustainable in law.

The principles aforesaid are not of much debate. In other words, ordinarily, the Appellate Court will not be upsetting the judgment of acquittal, if the view taken

by Trial Court is one of the possible views of matter and unless the Appellate Court arrives at a clear finding that the judgment of the Trial Court is perverse, i.e.,

not supported by evidence on record or contrary to what is regarded as normal or reasonable; or is wholly unsustainable in law. Such general restrictions are

essentially to remind the Appellate Court that an accused is presumed to be innocent unless proved guilty beyond reasonable doubt and a judgment of acquittal

further strengthens such presumption in favour of the accused. However, such restrictions need to be visualised in the context of the particular matter before the

Appellate Court and the nature of inquiry therein. The same rule with same rigour cannot be applied in a matter relating to the offence under Section 138 of the

NI Act, particularly where a presumption is drawn that the holder has received the cheque for the discharge, wholly or in part, of any debt or liability. Of course,

the accused is entitled to bring on record the relevant material to rebut such presumption and to show that preponderance of probabilities are in favour of his

defence but while examining if the accused has brought about a probable defence so as to rebut the presumption, the Appellate Court is certainly entitled to

examine the evidence on record in order to find if preponderance indeed leans in favour of the accused.â€

8. In Kalamani Tex and another Vs. P. Balasubramaniam, (2021) 5 SCC 283, the Honâ€™ble Supreme Court held that the High Court would not

reverse an order of acquittal merely on formation of an opinion different than that of the trial Court, nonetheless, there are numerous decisions of this

Court, justifying the invocation of powers by the High Court under Section 378 CrPC, if the trial Court had, inter alia, committed a patent error of law

or grave miscarriage of justice or it arrived at a perverse finding of fact. The relevant paras of the aforesaid judgment read as under:-

â€œ11. Having given our thoughtful consideration to the rival submissions, we do not find any valid ground to interfere with the impugned judgment. It is true

that the High Court would not reverse an order of acquittal merely on formation of an opinion different than that of the trial Court. It is also trite in law that the

High Court ought to have compelling reasons to tinker with an order of acquittal and no such interference would be warranted when there were to be two

possible conclusions. Nonetheless, there are numerous decisions of this Court, justifying the invocation of powers by the High Court under Section 378 CrPC, if

the trial Court had, inter alia, committed a patent error of law or grave miscarriage of justice or it arrived at a perverse finding of fact.

12. On a similar analogy, the powers of this Court under Article 136 of the Constitution also do not encompass the re-appreciation of entirety of record merely on

the premise that the High Court has convicted the appellants for the first time in exercise of its appellate jurisdiction. This Court in Ram Jag v. State of UP7,

Rohtas v. State of Haryana8 and Raveen Kumar v. State of HP , evolved its own limitations on the exercise of powers under Article 136 of the Constitution and has

reiterated that while entertaining an appeal by way of special leave, there shall not ordinarily be an attempt to re-appreciate the evidence on record unless the

decision(s) under challenge are shown to have committed a manifest error of law or procedure or the conclusion reached is exÂ¬ facie perverse.

13. Adverting to the case in hand, we find on a plain reading of its judgment that the trial Court completely overlooked the provisions and failed to appreciate the

statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable

instrument are established, then these â€˜reverse onusâ€™ clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the

presumption imposed upon him. This point of law has been crystalized by this Court in Rohitbhai Jivanlal Patel v. State of Gujarat in the following words:-

â€œIn the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of

evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who

allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law.

After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to

show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the

source of funds for advancing loan to the appellant-accused.â€

9. It is a settled proposition of law that presumption under Section 139 of NI Act is a presumption of law, as distinguished from a presumption of fact,

such a presumption is a rebuttable presumption and the drawer of the cheque may dispel the same. The rebuttal does not have to be conclusively

established, but such evidence must be adduced in support of the defence that the Court must either believe the defence to exist or consider its

existence to be reasonably probable; the standard of reasonability being that of a 'prudent man'. The aforesaid position in law stands settled in the

judgment of the Hon'ble Supreme Court in the matter of Hiten P. Dalal Vs. Bratindranath Banerjee, (2001) 6 SCC 16. While dealing with the

aspect of presumption in terms of Section 139 of NI Act, the Hon'ble Supreme Court observed as under:-

â€œ21.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 ""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.

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 vs. A. Vaidyanatha 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). 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 7 of 36 evidence showing the reasonable possibility of the non- existence of the presumed

fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory

conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved

when, ""after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the

circumstances of the particular case, to act upon the supposition that it exists"". Therefore, the rebuttal does not have to be conclusively established but such

evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably

probable, the standard of reasonability being that of the 'prudent man'.

24. Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram vs Custodian, Evacuee Property, Bombay AIR 1961 SC

1316, this Court held that the presumption of law under Section 118of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of

fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the

subsequent decision of the Constitution Bench in Dhanvantrai Balwantrai Desai vs State of Maharashtra AIR 1964 SC 575, where this Court reiterated the principle

enunciated in State of Madras vs Vaidyanath Iyer (Supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the

Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an

explanation which ""might reasonably be true and which is consistent with the innocence"" of the accused. On the other hand in the case of a mandatory 8 of 36

presumption ""the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act

and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown

that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by

'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before

it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by

proof, the presumption created by the provision cannot be said to be rebutted.....

10. In the matter of Kumar Exports vs. Sharma Carpets, (2009) 2 SCC 513, it has been held by the Hon'ble Supreme Court that Section 118 of the

NI Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration.

The relevant portion of the aforesaid judgment is reproduced as under:-

â€œ13. In a significant departure from the general rule applicable to contracts, Section 118 of the Act provides certain presumptions to be raised. This Section

lays down some special rules of evidence relating to presumptions. The reason for these presumptions is that, negotiable instrument passes from hand to hand on

endorsement and it would make trading very difficult and negotiability of the instrument impossible, unless certain presumptions are made. The presumption,

therefore, is a matter of principle to facilitate negotiability as well as trade. Section 118 of the Act provides presumptions to be raised until the contrary is proved

(i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance,(iv) as to time of transfer, (v) as to order of indorsements,(vi) as to appropriate

stamp and (vii) as to holder being a holder in due course.

14. Section 139 of the Act 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 for the discharge, in whole or in part, of any debt or other liability.

19. The use of the phrase ""until the contrary is proved"" in Section 118 of the Act and use of the words ""unless the contrary is proved"" in Section 139 of the Act

read with definitions of ""may presume"" and ""shall presume"" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under

both the provisions are rebuttable. When a presumption is rebuttable, it only points out 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.â€

11. In the instant case, in support of his case, complainant Harish Chauhan himself appeared in the witness box as CW-1, wherein he reasserted and

reiterated the averments made in the complaint under Section 138 of NI Act. Apart from this, he also deposed that prior to execution of the agreement

dated 6. 10.2016, he had handed over Rs.10,00,000/- to the accused on various dates between September, 2016 to 5th October, 2016. He also placed

on record agreement Ext. CW1/A, notice Ext. CW1/B, postal receipt Ext.CW1/C, acknowledgment Ext. CW1/D, cheque Ext.CW1/E, return memo

Ext.CW-1/F, legal notice Ext.CW1/F, postal receipt Ext. CW1/H and RAD Ext. CW1/J.

12. From the perusal of the evidence of the complainant, it has become clear that the cheque Ext.CW1/E was dishonoured on account of â€œfunds

insufficientâ€ in the bank account of the accused, vide memo, Ex.CW1/F. In light of the evidence on record, the complainant has discharged his initial

burden and it is required to be presumed that the cheque in question was drawn for consideration and the complainant received the same in discharge

of the existing debt. The onus, therefore, shifts upon the accused to establish probable defence so as to rebut such presumption.

13. The law is well settled that in order to rebut the statutory presumption, the accused is not expected to prove his defence beyond reasonable doubt

as is expected of the prosecution in a criminal trial. The accused may adduce direct evidence to prove that the cheque in question was not supported

by consideration and that there was no debt or liability to be discharged by him. On the aspects relating to preponderance of probabilities, the accused

has to bring on record such facts and such circumstances which may lead this court to conclude either that the consideration did not exist or that its

non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that the consideration did not exist. It

is settled position of law that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his

burden, yet mere denial would not fulfill the requirements of the rebuttal as envisaged under Sections 118 and 139 of the N.I. Act. Reference can also

be made to the judgment of the Hon'ble Supreme Court in Rangappa vs. Sri Mohan (2010) 11 SCC 441,w herein it has been observed 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. The relevant

paras of the aforesaid judgment are reproduced as under:-

''26. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the

existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However,

this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in

the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally

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

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of

negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the 14 of 36 dishonour of cheques, the rebuttable

presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by

Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually

confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and

interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof.

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.' In the present case on hand, the accused merely denied the case of

complainant and he has not placed sufficient materials before the court to believe his defence. Mere denial of the case of complainant is not sufficient ground to

believe the defence of accused that the complainant has not lent an amount of Rs.30 lakhs to the accused.â€

14. In Rohitbhai Jivanial Patelâ€™s case (supra), it has been held by the Hon'ble Supreme Court that once the accused could not deny his

signatures on the cheque in question that had been drawn in favour of the complainant, therefore, it is required to be presumed that the cheque in

question was drawn for consideration and the holder of the cheque i.e. the complainant received the same in discharge of an existing debt. The

relevant portion of the aforesaid judgment reads as under:-

15. So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 of the NI Act is concerned, apparent it is that the

appellant-accused could not deny his signatures on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by

the accused for a sum of Rs.3 lakhs each. The said cheques were presented to the bank concerned within the period of their validity and were returned unpaid for

the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are

apparent on the fact of the record. The trial court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required

to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e. the complainant received the same in discharge of an

existing debt. The onus, therefore, shifts on the appellant-accused to establish a probable defence so as to rebut such a presumption.

15. The perusal of the record reveals that the learned Trial Court has recorded the statement of the accused under Section 313 Cr.P.C.Â twice,Â

i.e.,Â oneÂ onÂ 09.04.2021Â andÂ anotherÂ on 7. 10.2021. In both the statements the accused had not disputed his signatures on the cheque in

question. However, he stated that a blank security cheque was taken by the complainant. In his statement recorded on 09.04.2021 he stated that he

had not taken the sum of Rs.10,00,000/- as he had only received a sum of Rs.3,00,000/- and at present there was no liability against him and the

cheque had been misused by the complainant. Since the accused had not disputed his signatures on the cheque in question, therefore, it was required

to be presumed that the cheque in question was drawn for a consideration and the holder of the cheque, i.e. the complainant received the same in

discharge of an existing debt. Now, the onus shifts upon the accused to establish a probable defence so as to rebut such a presumption.

16. In defence, the accused had examined four witnesses. Shri Himanshu Panwar, PNB, Branch Office Mall Road, appeared in the witness-box as

DW-1 and he brought the record pertaining to the account of the complainant Harish. As per the said record, Ex.DW-1/A, an amount of Rs.1,00,000/-

was deposited on 10. 08.2017 in the said account by New Shimla Fruit Company. Shri Hem Raj, SBI, Branch Office Rohru, appeared in the witness-

box as DW-2 and he brought the record qua the joint account of accused Brajesh and Munni Devi. As per the said record, accused Brajesh, vide

cheque, Ex. DW-2/B, withdrew an amount of Rs.25,000/- and on 29.12.2016, vide pay-in slip, Ex. DW-2/C, an amount of Rs.25,000/- and on

16.12.2016, vide pay-in slip, Ex. DW-2/D, an amount of Rs.30,000/- was paid to one Prakash Chauhan from the said account. This witness further

stated that on 18.09.2017, vide pay-in slip, Ex. DW-2/F, an amount of Rs.7,300/- and on dated 20.03.2017, vide pay-in slip, Ex. DW-2/E, an amount of

Rs.10,000/- was deposited in the account of Harish Chauhan from the said account.

17. Shri Kamal Kant Pandey, the then Branch Manager SBI, Branch Office Hatkoti, appeared in the witness-box as DW-2/A, and brought the

statement of account pertaining to account of Shri Prakash Chand, Ex. DW-2/A. He stated that on 16.01.2017 an amount of Rs.20,000/- and on

30.01.2017 an amount of Rs.20,000/- had been received from the joint account of Munni Devi and Brajesh.

18. Shri Manjesh, who is attesting witness to execution of agreement, Ex. CW-1/A, appeared in the witness-box as DW-3 and he stated that the

parties to the complaint were known to him. He further stated that in his presence an agreement was executed by the parties, whereby the

complainant agreed to give Rs.10,00,000/- to the accused and as security for repayment, complainant obtained a blank cheque from the accused. This

witness in his cross-examination, admitted the suggestion that it was agreed that if the accused failed to repay the loan, then he would get the sale

deed of his land registered in favour of the complainant.

19. The defence taken by the accused is that he had received a loan of merely Rs.3,00,000/- from the complainant and the cheque in question was

given as a security for the repayment of the said amount and despite repayment of the said amount of Rs.3,00,000/- to the complainant, through his

father (complainant) security cheque has been misused by him by filling up a higher amount therein. In the impugned judgment passed by the learned

Trial Court, it has been observed that apart from self-serving testimony of the accused that he has received a loan of merely Rs.3,00,000/- from the

complainant, there is nothing else to corroborate it, whereas on the other hand, the testimony of the complainant with respect to giving loan of

Rs.10,00,000/- stands duly corroborated by agreement, Ex. CW-1/A. It has also been observed by the learned Trial Court that as per the statement of

account of the complainant, Ex.DW-1/A, though there is an entry of deposit of Rs.1,00,000/- on 10.08.2017, but the same has been made by New

Shimla Fruit Company and there is nothing on record that the accused is the proprietor of the said company, thus receipt of Rs.1,00,000/- by the

complainant from the said company is of no help to the accused. The Trial Court has also observed that since there is nothing on record to prove that

the deposits made in the account of the father of the complainant-Shri Prakash Chand, were made for the part payment of the loan amount, as such

no reliance could be placed on the aforesaid deposits in the account of the complainantâ€™s father.

20. The perusal of the record reveals that the learned Trial Court had non-suited the complainant only on the ground that prior to the issuance of the

cheque dated 24.11.2017, the complainant had received a sum of Rs.17,300/- from the accused, whereas the complainant is claiming the existence of

liability of Rs.10,00,000/-and had not disclosed the repayment of the sum of Rs.17,300/- by the accused. It was further observed by the learned Trial

Court that on 24.11.2017 the liability, which was existing in favour of the complainant was Rs.9,82,700/- and instead the complainant had claimed the

liability in the sum of Rs.10,00,000/- and since the cheque was for an amount more than due by accused, Section 138 of the Act was not attracted.

21. Now, the question which arises for consideration before this Court is as to whether prior to the issuance of cheque dated

24. 11.2017, the complainant had received a sum of Rs.17,300/-from the accused . The accused had placed reliance upon pay-in slips, Ex. DW-2/E

dated 20.03.2017 in the sum of Rs.10,000/- and Ex.DW-2/F dated 18.09.2017 in the sum of Rs.7,300/-, which amountÂ accordingÂ toÂ theÂ

accusedÂ hasÂ beenÂ paidÂ toÂ the complainant from his joint account along with Munni Devi. However, the perusal of the aforesaid pay-in

slips nowhere suggests as to who had deposited the aforesaid amount in the bank account of the complainant. The depositor has not appended his/her

signatures on the aforesaid pay-in slips. DW-2 admitted in his cross-examination that from the perusal of pay-in slips, Ex. DW-2/E and Ex. DW-2/F, it

cannot be ascertained as to who had deposited the amount in the bank account of complainant-Harish. It has also not been proved on record that the

statement of account, Ex. DW-2/A, is with respect to the joint account of the accused Brajesh and Munni Devi. In his cross-examination, DW-2

stated that the account in question is a joint account, but now the said account is single. He admitted that as per statement of account, Ex. DW-2/A,

the account is in the name of Smt. Munni Devi and the name of accused Brajesh has not been reflected therein. DW-2 had not brought any record

with respect to the joint account of Smt. Munni Devi and Brajesh. Therefore, in view of the entire evidence on record, it cannot be said that the

complainant had received a sum of Rs.17,300/- from the accused vide pay-in slips, Ex.DW-2/E and Ex.DW-2/F. The learned Trial Court had erred in

holding that on 24.11.2017 the liability, which existed in favour of the complainant, was Rs.9,82,700/- instead of Rs.10,00,000/- and the cheque in

question was for an amount more than due by the accused and Section 138 of the Act was not attracted. In fact, no cogent and satisfactory evidence

has been led by the accused to rebut the presumption that the cheque was not issued in discharge of any debt or any other liability. Therefore, in the

absence of any cogent and satisfactory evidence on record on the part of the accused, it is presumed that the cheque in question had been drawn for

consideration and the complainant received the same in discharge of an existing debt.

22. The learned Counsel for the accused lastly contended that the complainant had not filed his Income Tax Return and had also failed to disclose his

source of income, therefore, it cannot be said that the cheque in question was issued in discharge of any legal liability or enforceable debt. However, in

the facts and circumstances of the present case, this contention of the learned counsel for the accused is devoid of any merits. Mere non filing of

Income Tax return by itself would not mean that the complainant had no source of income.

23. The Hon'ble Supreme Court had held in Tedhi Singh v. Narayan Dass Mahant, (2022)6 SCC 735 that the complainant need not prove his financial

capacity in the matter until and unless the same has been contended by the accused in his reply to the legal demand notice as only then the

complainant would know that the same is being questioned. It had further been held that it is also open to the accused to establish the very same

aspect by producing the relevant documents and by examining his witnesses. The relevant para of the aforesaid judgement reads as under:-

â€œ10.The Trial Court and the First Appellate Court have noted that in the case under Section 138 of the N. I. Act the complainant need not show in the first

instance that he had the capacity. The proceedings under Section 138 of the N. I. Act is not a civil suit. At the time, when the complainant gives his evidence,

unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant

to initially lead evidence to show that he had the financial capacity. To that extent the Courts in our view were right in holding on those lines. However, the

accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable

which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very

same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross

examination of the witnesses of the complainant. Ultimately, it becomes the duty of the Courts to consider carefully and appreciate the totality of the evidence and

then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has

established a probable defence"".

24. In the case on hand, admittedly, reply to the legal demand notice was never forwarded on behalf of the accused/petitioner. Moreover, the accused

has also failed to demonstrate during the trial by examining his witnesses and by producing the relevant documents that the complainant did not have

the financial capacity for advancing loan to the accused rather the testimony of the complainant with respect to giving loan of Rs.10,00,000/- to the

accused stands duly corroborated by agreement, Ex. CW-1/A. The claim of the accused regarding financial capacity of the complainant does not

stand as non filing of income tax is a matter between the revenue and the assessee. If the assessee has not disclosed his income in the Income Tax

return, then the Income tax department is well within its rights to reopen the assessment of income of the assessee and to take action as per the

provisions of Income Tax Act. This court cannot jump to the conclusion that presumption under Section 139 of NI Act stands rebutted, merely

because of non filing of the Income Tax Return by the complainant unless, the petitioner makes out a probable defence, as to how the cheque has

gone in the hands of the complainant. Thus, even though, the complainant has not filed his Income Tax Return, the same cannot be a ground to reject

his claim to prosecute the accused under Section 138 of NI Act.

25. On overall appraisal of the material available on record, it is the considered opinion of this Court that the accused has failed to discharge his burden

to rebut the statutory presumption whereby the complainant has proved the guilt of the accused that he (accused) is liable to pay the amount covered

under the cheque. There is no substance in the probable defence of the accused, whereas the complainant has discharged his burden and proved the

guilt of the accused. On perusal of the judgment passed by the learned trial Court, it is clear that it had failed to appreciate the statutory presumption

drawn under Sections 118 & 139 of NI Act. The reasons given by the learned trial Court in its judgment for acquitting the accused are perverse and

not at all sustainable. The accused has failed to rebut the statutory presumption drawn against him under Section 138 of NI Act. All the basic

ingredients of Section 138 as well as Sections 118 and 139 of NI Act are apparent in the facts and circumstances of the present case. There is

sufficient evidence to come to the conclusion that the cheque Ext. CW1/E was issued by the accused and received by the complainant in discharge of

an existing debt as such the accused has committed an offence punishable under Section 138 of NI Act.

26. Accordingly, the appeal is allowed and the impugned judgment dated 04.03.2022, passed by the learned Judicial Magistrate, First Class, Court

No.3, Shimla, H.P., is quashed and set aside. Consequently, the accused is convicted for commission of the offence punishable under Section 138 of

the Negotiable Instruments Act. List the case for presence of the accused on 24th Â December, 2024, for being heard on quantum of sentence.