(2006) 08 KL CK 0064

High Court Of Kerala

Case No: Criminal R.P. No. 1144 of 2006

Johnson Scaria		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: Aug. 8, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 357(3)
- Evidence Act, 1872 - Section 105, 114, 3, 4
- Negotiable Instruments Act, 1881 (NI) - Section 133, 138, 139, 39

Citation: (2007) 2 BC 450 : (2006) 134 CompCas 370 : (2006) 4 KLT 290 : (2007) 1 RCR(Criminal) 637

Hon'ble Judges: R. Basant, J

Bench: Single Bench

Advocate: Varghese C. Kuriakose, Praveen K. Joy and Thankom G, for the Appellant; V.V. Surendran, P.A. Harish and C.P. Saji, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

R. Basant, J.
When can the burden on an accused u/s 139 of the N.I. Act be said to be discharged ? What is the nature of the burden on a complainant and an accused in a prosecution u/s 138 of the N.I Act ? Is the decision of the 3-Judge Bench of the Supreme Court in Hiten P. Dalal Vs. Bratindranath Banerjee, in any way altered or changed by the subsequent decision of the Supreme Court in Narayana Menon v. State of Karala 2006 (3) KLT 404 (SC)? These are the interesting questions that arise for consideration in this revision petition.

2. The complainant alleged that Ext.P1 cheque for Rs. 1,96,750/- was issued to him by the petitioner for the discharge of a liability arising in a loan transaction. In the

complaint or in the notice, he did not plead the details. He only averred that the cheque was issued by the accused for the discharge of a liability, which he owed to the complainant. The cheque when presented was dishonoured on the ground of insufficiency of funds. Notice of demand was duly despatched received and acknowledged. It did not evoke any response. Of course later, long after the commencement of the prosecution, Ext.D1 notice was allegedly issued by the accused inter alia to the complainant also. The complainant after scrupulously observing the statutory time table came to court with the present complaint u/s 138 of the N.I. Act.

3. The complainant examined himself as PW.1 end proved Exts.P1 to P7. Though the notice of demand did not evoke any response, the accused in the course of cross examination of the complainant advanced a contention that as a matter of fact only an amount of Rs. 75,000/- was borrowed by the petitioner from the complainant and there was no transaction to discharge which the cheque for an amount of Rs. 1,96,750/- could have been issued on 31.8.2002. Of course one cannot afford not to take note of the incongruity in the stand taken by the petitioner in the cross examination of PW.1. When the complainant was cross examined initially the specific contention was that an amount of Rs. 75,000/- was borrowed and 3 cheques were issued by the accused to the complainant. But later when the complainant was recalled and further cross examined, a different stand was taken. The petitioner sticks to that later stand in this revision petition.

4. According to the accused, only an amount of Rs. 75,000/- was received as loan. Interest was being paid promptly. The complainant demanded return of the principal amount. The accused had no money to discharge the liability. The accused was hence taken by the complainant to one Jose Paul who agreed to advance an amount of Rs. 75,000/-. That amount was availed from Jose Paul and the liability to the complainant was discharged. Jose Paul insisted that the petitioner must hand over 3 blank signed cheques. Accordingly, the petitioner was constrained to handover 3 signed blank cheques to Jose Paul. Later when those blank cheques were demanded, the complainant insisted that more amount must be paid to him. The complainant obtained one signed blank cheque leaf from the said Jose Paul. He is misutilising the same to stake an untenable and unreasonable claim against the petitioner. This appears to be the later different stand taken by the petitioner in the course of cross examination of the complainant after he was recalled.

5. The accused examined himself as DW.1. He examined another witness as D W.2 and the purpose of examination of DW.2 was to urge that DW.2 was present along with himself, the complainant and Jose Paul, when the subsequent loan was availed from Jose Paul. The accused examined DW.3. The purpose of examination of DW.3 was to show that on the date of the cheque i.e. 31.8.2002, on which date, according to the complainant the cheque was issued also, the petitioner was busy with three functions in his family - death anniversary of his mother, house warming of his

brother and the baptism of yet another brother''s son. According to DW.3, the accused was present along with him from morning till the evening. The obvious suggestion is that there was no time for the petitioner to go to the complainant and hand over Ext.P1 cheque on that day.

6. The courts below concurrently came to the conclusion that the complainant has succeeded in establishing all the elements of the offence punishable u/s 138 of the N.I. Act. The courts further came to the conclusion that the accused has not succeeded in discharging his burden to rebut the presumption u/s 139 of the N.I. Act. Accordingly they proceeded to pass the impugned concurrent judgments.

7. Counsel for the rival contestants have advanced their arguments. The learned Counsel for the petitioner contends that the courts below have erred grossly in coming to the conclusion that the initial burden on the complainant has been discharged and that the burden on the accused u/s 139 of the N.I. Act has not been discharged. The learned Counsel for the petitioner submits that the courts below erred in placing on the shoulders of the petitioner/accused a burden as onerous and as heavy as the initial burden on the complainant who is bound to prove his case beyond doubt; where as the accused is bound to prove his case only on the yardstick of preponderance of possibilities and probabilities as in a civil case. The counsel further submits that both sides having chosen to adduce evidence, the theoretical dispute about the burden of proof must be held to have paled into insignificance and the courts must have considered the question whether the complainant has succeeded in proving his case beyond doubt, without reference to any presumption or the burden of proof.

8. The learned Counsel for the petitioner in support of this contention further urges that significant change has come into existence in the law about the relative burden of proof on the complainant and the accused in a prosecution u/s 138 of the N.I. Act after the dictum in Narayana Menon v. State of Kerala (supra). It is no more the burden of the accused to disprove the case of the complainant. It is enough if the accused discharges his burden u/s 139 of the N.I. Act as in a civil case, where preponderance of possibilities and probabilities is the yardstick.

9. I do not think it necessary to be drawn into a controversy as to whether the decision in Hiten P. Dalal Vs. Bratindranath Banerjee, has in any way altered or modified the dictum in Narayana Menon v. State of Kerala 2006 (3) KLT 404. The answer to that controversy is available in paras. 46 & 47 of the judgment in Narayana Menon v. State of Kerala.

10. I shall first extract paragraph 24 of the decision in Hiten P. Dalai v. Bratindranath Banerjee.

Para.24: Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram v. Custodian, Evacuee Property this Court held that the presumption of law u/s 228 of the Negotiable Instruments Act could be

rebutted, in certain circumstances, by a presumption of fact raised u/s 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 Dhanyantrai v. Kalwantrai Desai v. State of Maharashtra where this Court reiterated the principle enunciated in State of Madras v. Vaidyanatha Iyer 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 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 u/s 114 of the Evidence Act and cannot be hold to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further he 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. (AIR p.580, para. 12).

(See also V.D. Jhingan v. State of U.P. Sailendranath Bose v. State of Bihar and Ram Krishna Bedu Rane v. State of Maharashtra.)

(emphasis supplied)

I shall now extract paragraphs 46 and 47 of Narayana Menon v. State of Kerala below.

Para.46: In Hiten P. Dalal Vs. Bratindranath Banerjee, , a 3-Judge Bench of this Court held that although by reason of Sections 138 and 139 of the Act, the presumption of law as distinguished from presumption of fact its drawn, the Court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal, J. speaking for a 3-Judge Bench, however, opined:

''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.

In other words, provided the facts required to form the basis of a presumption of law exist, 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".

''Para.47. The court however, in the fact situation obtaining therein, was not required to go into the question as to whether an accused can discharge the onus placed on him even from the materials brought on records by the complainant himself. Evidently in law he is entitled to do so.

(emphasis supplied)

11. The 2-Judge Bench in Narayana Menon v. State of Kerala has not in any way doubted, questioned or not followed the dictum of the 3-Judge Bench in Hiten P. Dalai v. Bratindranath Banerjee. It cannot be done also. The Honourable Judges in Narayana Menon v. State of Kerala did not obviously feel any necessity to refer the matter to a larger Bench. The conclusion appears to be inevitable in these circumstances that the dictum in Hiten P. Dalai v. Bratindranath Banerjee holds the field won now. The attempt in Narayana Menon v. State of Kerela, if I have understood the said judgment correctly, was only to disabuse the impression that the burden on the accused u/s 139 of the N.I. Act can be held to be discharged if and only if the accused adduces evidence on his side. That obviously is not the law. In para 47 of the decision in Narayana Menon v. State of Kerala, their lordships have specifically adverted to this aspect. To rebut the burden, the accused can rely not only on the defence evidence adduced by him. He can rely on the broad improbabilities in the case of the prosecution, the improbabilities in the evidence of the witnesses of the prosecution, the acceptability of suggestions made to the prosecution witnesses in the course of cross examination as also defence evidence if any. In short, all circumstances which he as an accused could have relied on to discharge his burden u/s 105 of the Evidence Act can be made use of by him to discharge the burden u/s 139 of the N.I. Act also.

12. Hiten P. Dalai v. Bratindranath Banerjee is authority for the proposition that the presumption u/s 139 of the N.I. Act is a presumption of law and the presumption of law has to be distinguished from an enabling presumption of fact u/s 114 of the Evidence Act. Such presumption of law is to be drawn and the court has no option, but to draw the same in every case where the factual basis for raising the

presumption is established. Once that presumption is drawn, the period of life of this presumption of law is also specified in Section 139 of the N.I. Act. The presumption will live, exist and survive thereafter and shall vanish only when "the contrary is proved" by the accused. The contrary has to be proved. This obligation to prove contrary is not the obligation to disprove the prosecution case in its entirety. The presumption is only on the question whether the cheque is issued for the discharge in whole or in part of any debt or liability. Until the contrary is proved, this presumption will continue to remain.

13. As to what proof is, the answer is very simple. In Hiten P. Dalal v. Bratindranath Banerjee as well as in Narayana Menon v. State of Kerala, the Supreme Court has clearly held that the standard to be followed is the one prescribed in Section 3 of the Evidence Act. The expressions "proved", "disproved" and "not proved" are all defined in Section 3 of the Evidence Act. A fact is said to be proved when the court on a consideration of the matters before it believes in its existence or considers its existence so probable that a prudent man ought to proceed under the circumstances of the particular case on the supposition that such fact exists. Section 4 deals with the 3 categories of presumptions - "may presume", "shall presume" and "conclusive proof. Until and until disproved - that is the contrary is proved, whether we go by Section 139 of the N.I. Act or Section 4 of the Evidence Act, the presumption will hold the fort.

14. Though theoretically the expression proved is the same in a civil case and in a criminal case and while considering the evidence of the complainant and the accused, it is by now trite that in a criminal case in contra distinction to a civil case and the complainant in contra distinction to an accused must establish his case to a higher decree of probability. Consequence of a finding certainly must prompt a prudent mind to insist on different degrees of proof. When deprivation of life, liberty and property are the punitive consequences, every prudent mind will insist on more convincing evidence. Consequence is not irrelevant to a prudent mind when it considers what evidence is necessary to come to a conclusion that a particular fact is proved. That and that alone according to me is the justification, in view of the common language of Section 3 of the Evidence Act, for the presidential insistence on a higher degree of proof from the prosecutor - often romanticised and called the paramount burden on the prosecution to prove its case beyond the shadow of a reasonable doubt. Considering the consequences of deprivation of life, liberty and property the Court as a prudent mind insists on a higher degree of proof from the prosecutor. This is all that the law insists. The yardstick of probability applies in a criminal case also. But higher degree of probability is insisted from a prosecutor. Narayana Menon also only reiterates this principle.

15. Back to the facts of the case. Primarily we have the evidence of PW.1, the complainant about the circumstances under which Ext.P1 cheque admittedly written on a cheque leaf issued to the petitioner by his bank to operate his account with the

signature of the petitioner admittedly affixed thereon travelled from the possession of the petitioner to the possession of the complainant. His evidence on this aspect is eminently supported by his ability to produce Ext.P1. cheque. The complainant is also armed with the presumption u/s 139 of the N.I. Act. No one has a case that sufficient factual foundation has not been laid to justify the drawal of the presumption u/s 139 of the N.I. Act. The version of the complainant gets further support and assurance from the fact that the notice of demand issued u/s 138 threatening criminal prosecution though duly received and acknowledged, did not evoke any response. It of course is not the law that the more omission to send a reply to a notice of demand shall ipso facto entail a verdict of guilty and conviction. But a prudent man whose standards the court is bound to adopt and import in the adjudication of a criminal case also, must always consider all the relevant inputs. Section 114 of the Evidence Act mandates that a Court must be cognizant of the common course of natural things, human conduct and public and private business in their relationship to the facts of the particular case. So reckoned it is only an unreasonable and puerile mind which will not attribute to the unexplained conduct of not sending a reply to the notice, the importance and significance which it deserves.

16. Any ordinarily prudent human mind placed in such circumstances which the petitioner says he was, is certainly unlikely to remain inactive, silent dumb and mute. If as a matter of fact, Ext.P1 cheque was one which was misutilised by the complainant having obtained the same from the said Jose Paul, the accused as an ordinary prudent person was unlikely to have not responded. Nay it was impossible that he could have remained idle ordinarily unless he had any compelling reason. No such reason is revealed. Conduct offers indications about the truth or otherwise of the contentions and existence or otherwise of facts. I am unable to accept the argument that the courts should have accepted the very convenient excuse advanced by the accused that he had gone to the complainant, met him and discussed the claim in the notice after it was received and that is why he did not issue any reply to the notice.

17. It will only be apposite in this context to refer to the incongruent assertions made in the course of cross examination of PW.1 at two stages. The accused did not send any reply. When he was represented by one counsel initially, he makes suggestions not revealing at all the role of the said Jose Paul in the transaction. It is subsequently at stage two of the cross examination by another counsel when the complainant was recalled that Jose Paul was introduced. Necessary inferences from those circumstances must be drawn by any prudent mind and the courts below according to me did not commit any error in attaching due significance and relevance to the silence of the petitioner on receipt of the notice of demand and to the incongruent defences urged at two different stages of the cross examination of PW.1.

18. The learned Counsel for the petitioner submits that the court may not lose sight of the importance of certain crucial circumstances which the accused wanted to project before the courts below. An amount of Rs. 75,000/- was admittedly received by the petitioner and that amount was received by a cheque on 3.7.2001. Though the complainant in his cross examination earlier said that interest on that amount of Rs. 75,000/- used to be paid, subsequently he took the stand that no interest was paid. In spite of such non payment of interest, the counsel for the petitioner points out that the complainant claims that a further amount of Rs. 1 lakh was paid in cash on 15.4.2002. This version he contends is improbable. He contends that no prudent money lender was likely to have advanced any further amount when even the interest due on a previous transaction remained unpaid. The counsel further points out that though P.W.1 explained the source for the amount of Rs. l lakh by setting up a theory of withdrawal of money from the Dhana Lakshmi bank, the complainant made no attempt whatsoever to substantiate the said contention.

19. I have rendered my very anxious consideration to these aspects. The complainant is not obliged to prove the original transaction or original consideration as he is expected in a suit for recovery of money. The foundation of liability u/s 138 of the N.I. Act is the issue of the cheque for consideration and not the existence of the original consideration. The significance and efficacy of Section 138 of the N.I. Act will be lost if courts were to insist on proof of the original transaction and original consideration in every indictment u/s 138 of the N.I. Act. That certainly is not the law. In every prosecution u/s 138 of the N.I. Act, the criminal court does not have to adjudicate on the liability to discharge which the cheque is alleged to be issued. That is the scheme of the Act. Of course, when the accused discharges his burden u/s 139 of the N.I. Act, the court would turn back to the complainant to establish his case about the liability beyond doubt. But that situation can arise only when the burden on the accused is discharged successfully u/s 139 of the N.I. Act. I have no hesitation to agree that it is not the burden on the complainant in every case - so long as the presumption u/s 139 stands, to plead, prove and establish the original transaction/original consideration to discharge the liability in which the cheque is issued. That would make Section 138 cumbersome. Assignment of such a burden on the complainant will do disservice to the object, purpose and the legislative dream which prompted the legislature to enact Section 138 of the N.I. Act namely the introduction of a commercial morality among the polity where cheque transactions will be as effective, efficient and efficacious as cash transactions. That is essential and necessary in a vibrant modern economy.

20. The learned Counsel for the petitioner then contends that the oral evidence of DWs. 1 to 3 was not properly considered by the courts below. DW.1 is the accused. His version is inherently unconvincing. He is a money lender himself. The convenient and specious plea that a blank signed cheque was handed over as security in a loan transaction cannot readily and naively be accepted and swallowed by courts. In doing so, the indictee is attributing to himself an improbable, artificial and

indifferent conduct to claim exculpation from liability. The laudable commercial morality which the legislature seeks to usher in by introduction of Section 138 into the statute book will be frustrated and stultified if courts were to readily and meekly accept and swallow such an explanation. If such a laudable commercial morality were to prevail, account holders will also have to deal with their cheques carefully, cautiously and reasonably and not without diligence, indifferently unreasonably and irrationally. Even today such a defence may not be impossible or impermissible in a prosecution u/s 138 of the NI Act. But the burden must rest squarely and heavily on the person who wants to attribute to himself such an irresponsible and indifferent conduct - that he handed over a signed blank cheque, to claim exculpation from liability. The self serving evidence of PW.1, in the light of his inconsistent conduct on receipt of the notice of demand and in advancing incongruent versions at different stages in the cross examination of PW.1, is certainly not sufficient to discharge that burden on the accused.

21. We now come to DW.2. DW.2 claims to be present when the transaction with Jose Paul took place. Jose Paul himself was introduced subsequent to the first stage of cross examination. Even in the second stage of cross examination, when the theory of Jose Paul was introduced, there is no semblance of a suggestion to PW.1 that DW.2 was present to witness that transaction.

22. Less said about the transaction with Jose Paul the better. Absolutely nothing has been produced except the self serving testimony of DWs. 1 & 2 to show that there was any transaction between the petitioner and said Jose Paul. Exts.D2 to D7 account books of the petitioner are made available to prove the alleged payment of interest to the complainant. But there is no contention even that they would show the transaction with Jose Paul. Though it is contended that the amount received from Jose Paul was made use of to discharge the liability to PW.1, nothing is produced to prove that such payment was made to PW.1 and the liability discharged. In these circumstances, the evidence of DWs. 1 & 2 according to me was rightly rejected by the courts below.

23. We then come to the evidence of DW.3. DW.3''s name does not appear during the examination of PW.1, DW.1 & DW.2. He descends into the case from thin air only at the stage of his examination. He is pressed into service to speak that the petitioner was available with him on 31.8.02 during the time the three functions were going on. Significantly PW.1 was not asked about the time at which Ext.P1 cheque dt. 31.8.2002 was issued by the petitioner and received by him. Even if DW.3 were believed, it is not inconsistent with the case of the complainant that the cheque dt. 31.8.2002 that is, Ext.P1 was handed over by the petitioner to the complainant on that date at some time other than the time that DW.1 and DW.3 were together at the functions.

24. The learned Counsel for the petitioner contends that u/s 138 of the N.I. Act, three ingredients for the cheque appear to be absolutely essential.

(1) The cheque must have been drawn by the indictee.

(2) Such drawal of the cheque must have been for payment of money to another person.

(3) That such drawal and payment must be for the discharge of a legally enforcible debt/ liability.

25. The counsel contends that the presumption u/s 39 of the NI Act may help the complainant only in discharging the burden to prove the third party and can have no bearing while considering requirements 1 and 2 referred above. The language of Section 139 certainly supports this contention of the learned Counsel for the petitioner. This to me is what the Honourable Judges of the Supreme Court in Narayana Menon v. State of Kerala said when their Lordships observed that the accused has no burden to disprove the case of the complainant. The presumption u/s 139 of the N.I. Act cannot help the court to presume that the cheque was drawn, ie., written, signed and delivered by the accused. It can only help the Court to presume that the cheque was issued for the discharge of a legally enforcible debt or liability. I find no difficulty in accepting that proposition, but certainly the presumption u/s 114 of the Evidence Act as also the evidence of the complainant as P.W.1 and the admitted stand taken by the accused will all have to be considered to decide whether the cheque was drawn and issued for payment. That burden has also been satisfactorily discharged by the complainant in this case.

26. The use of presumptions and the doctrine of burden of proof are certainly of crucial assistance in the adjudication of guilt. Who will fail if a fact is not established ? Who will fail if the presumption is not drawn ? Who will suffer if the presumption once drawn is not rebutted ? These questions will certainly have to be considered in the fact scenario in each case. It will be impermissible to accept the contention that the significance of the presumption will be lost and the complainant must bear the burden to prove that the cheque was issued for the discharge of a legally enforceable debt/liability merely because the accused had gone into the witness box to advance a totally unacceptable version. By accepting such a plea, this Court will be virtually depriving the complainant of the advantage of a presumption which the legislature has advisedly conceded to him in his armoury. Merely because the accused has adduced some evidence the presumption u/s 139 and the burden to rebut that presumption cannot pale into insignificance. I cannot accept that plea so broadly stated. Whether the burden has been discharged and whether the respective obligations of the complainant and the accused to prove their case/version have been discharged will of course have to be decided by the Court in the fact scenario in each case.

27. I may now attempt to summarise the law on this aspect.

i) The burden is always on the prosecution to prove the offence against an indictee in all prosecutions and a prosecution u/s 138 of the N.I. Act is no exception to that

general rule.

ii) The expression ''proved'' is defined u/s 3 of the Indian Evidence Act and that definition applies to civil and criminal cases. Any ''prudent man'' whose standards the courts are u/s 3 of the Evidence Act directed to follow, shall and the court must hence, insist on a higher degree of probability, in a criminal case (where the consequence of deprivation of life, liberty and property ensues) before the prosecutor''s burden is held to be discharged. This and this alone is directed by law by the axiomatic insistence on proof beyond doubt - which is at times romanticised and called proof beyond reasonable doubt and proof beyond the shadow of a reasonable doubt. The purpose of such insistence is only to caution courts that they must be able to enter a conclusion of guilt "without hesitation" on the materials available.

iii) One ingredient of the offence u/s 138 of the N.I. Act can be presumed against the accused u/s 139 of the N.I. Act and that is that the cheque if it is proved to have been issued, has been issued for the due discharge of a legally enforceable debt/ liability. Section 139 does not permit the drawing of any other presumption. Execution and issue of the cheque have to be proved to draw the presumption u/s 139 and Section 139 does not shift the burden to prove execution and issue of the cheque.

iv) Section 139 of the N.I. Act does not at all permit the courts to draw any presumption of guilt against the accused and there is no burden on any accused to disprove the case of the prosecution or to prove his innocence.

vi Admission of signature in a cheque goes a long way to prove due execution. Possession of the cheque by the complainant similarly goes a long way to prove issue of the cheque. The burden rests on the complainant to prove execution and issue. But u/s 114 of the Evidence Act appropriate inferences and presumptions can be drawn in each case on the question of execution and issue of the cheque depending on the evidence available and explanations offered.

vi) If the other ingredients of Section 138 of the N.I. Act are proved beyond doubt, they along with the presumption u/s 139 are sufficient to persuade a court to conclude that the offence is proved. At this stage it has to be considered whether the accused has discharged his burden u/s 139 to "prove the contrary".

vii) The presumption is one of law. The accused most prove the contrary. He must prove the contrary to satisfy the definition of the expression "proved" in Section 3 of the Evidence Act. Throwing up many possibilities is not sufficient. He must prove the contrary to the satisfaction of a prudent mind. Of course, the higher standard of proof beyond reasonable doubt will not be insisted from him. His burden is akin to that of a litigant in a civil case. Not any fanciful possibility but a practical probability which the court is able to accept as true adopting the standards of a prudent man, will have to be established by the accused to succeed in his attempt to rebut the

presumption.

viii) It is not at all necessary to insist that defence evidence must be adduced. Admissions by the complainant and his witnesses, broad probabilities and improbabilities, suggestions made to witnesses in the course of cross examination, stand taken by the accused in his 313 examination, defence evidence if any. In short all materials which a criminal court may take into consideration while deciding whether the burden on the accused has been discharged u/s 105 of the Evidence Act, can all be taken into reckoning to decide whether the burden has been discharged. With all these materials, the accused must establish that his case that the cheque was not issued for the discharge of any legally enforcible debt/liability. Is true and acceptable - Not that it is a more possibility but that it is a practical probability which is true and acceptable. In deciding that, all contra possibilities end probabilities against the accused will also be considered by the Court. Whose version - whether that of the accused or that of the complainant, rhymes better with probabilities will have to be considered and only if the answer is in favour of the accused can he succeed in his attempt to rebut the presumption. The improbability of a prudent person, who must be assumed to know the law, signing and handing over a signed blank cheque will also have to be considered certainly by a Court while deciding whether such burden on the accused has been discharged.
ix) If the burden on the accused u/s 133 to prove contra is successfully discharged, then the prosecution must fail for the reason that the complainant without the aid of such presumption has not been able to prove the crucial ingredient u/s 138 of the N.I. Act beyond doubt. The presumption u/s 139, till the burden on the accused remains undischarged, can certainly persuade the Court not to look for any evidence on that aspect.

28. I am in these circumstances of the opinion that the burden on the complainant stands discharged satisfactorily and beyond doubt. The accused has failed to establish his case. The challenge raised on merits must in these circumstances fail. No other contentions are raised on merits.

29. The learned Counsel for the petitioner then prays that leniency may be shown on the question of sentence. I find merit in that prayer. I have already adverted to the principles governing imposition of sentence in a prosecution u/s 138 of the N.I. Act in the decision reported in Anilkumar v. Shammi 2002 (3) KLT 852. I do not find any compelling circumstances in this case which can persuade me to insist on imposition of any deterrent substantive sentence of imprisonment. Leniency can be shown to the petitioner, but subject of course to the compulsions of adequately, justly and fairly compensating the victim of the crime (PW.1) who has by now been compelled to fight three rounds of legal battle at various levels and to wait from 2002 for the redressal of his grievances. The challenge raised in this revision petition can succeed only to the above extent.

30. In the result:

a} This Crl. R.P. is allowed in part;

b} The impugned verdict of guilty and conviction of the petitioner u/s 138 of the N.I. Act are upheld;

c) But the sentence imposed is modified and reduced. In supersession of the sentence imposed on the petitioner by the courts below, he is sentenced to undergo imprisonment till rising of court. He is further directed u/s 357(3) Cr. P.C. to pay an amount of Rs. 2,20,000/- (Rupees Two Lakhs Twenty Thousand only) as compensation and in default to undergo SI for a period of 3 months. If realised the entire amount shall be released to the complainant.

31. The petitioner shall appear before the learned Magistrate on or before 16.10.2006 to serve the modified sentence hereby imposed. The sentence shall not be executed till that date. If the petitioner does not so appear, the learned Magistrate shall thereafter proceed to take necessary steps to execute the modified sentence hereby imposed. Needless to say the amount if any deposited during the pendency of the proceedings before the courts below shall be given due credit and the same shall be released forthwith to the complainant.