REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 292 OF 2021
(Arising out of SLP(Crl.) No(s).8498 of 2019)

SUMETI VIJ **...APPELLANT(S)**

VERSUS

M/S PARAMOUNT TECH FAB INDUSTRIES **...RESPONDENT(S)**

WITH

CRIMINAL APPEAL NO(S). 293 OF 2021
(Arising out of SLP(Crl.) No(s).8564 of 2019)

JUDGMENT

Rastogi, J.

1. Leave granted.

2. The appellant is aggrieved by the judgment dated 30th April, 2019 passed by the High Court of Himachal Pradesh holding the appellant guilty of offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act") after

reversal of the finding of acquittal returned by the learned trial Judge by its judgment dated 28th September, 2012.

3. The brief facts of the case which emanates from the record are that the appellant accused approached the complainant- respondent in its factory at Moginand and expressed her desire to purchase non-woven fabric from the complainant. On the basis of order placed by the appellant, non-woven fabric was sold to the appellant vide invoice No.120 dated 01st October, 2010 and invoice No.135 dated 16th October, 2010 amounting to Rs.5,07,062/- and Rs.5,10,000/- which was delivered through public carrier truck bearing Nos. HR-38G-5607 and HP-71-0693 to the appellant accused and in lieu thereof, a cheque bearing No.323930 dated 15th October, 2010 and No.323935 dated 01st November, 2010 were issued by the appellant in the name of the complainant from her account of the Punjab National Bank, Karnal in order to meet the legal existing and enforceable liabilities. The cheques on presentation were returned vide memo dated 19th October, 2010 and 10th November, 2010 from Punjab National Bank, Karnal with a note of "insufficient funds" in the account of the appellant. Two legal notices dated 29th October, 2010 and 19th November, 2010 were sent by the complainant to

the appellant on two addresses. The notices were duly served but the appellant neither responded to the notices nor made any payment in furtherance thereto within the statutory period hence, two separate complaints were filed by the complainant- respondent under Section 138 of the Act against the appellant- accused.

4. The complainant-respondent recorded the preliminary evidence before the learned trial Judge and thereafter, the appellant-accused was directed to be summoned for committing an offence punishable under Section 138 of the Act. After the presence of the appellant had been secured, the learned trial Judge put notice of accusation, vis-a-viz the accused, for an offence allegedly committed by her under Section 138 of the Act whereto she pleaded not guilty and claimed trial.

5. The complainant in order to prove its case against the appellant-accused, has examined three witnesses and placed reliance on the documentary evidence which were duly exhibited and referred to in detail by the learned trial Judge in para 3 of its judgment. On conclusion of recording of complainant's evidence, the statement of the appellant-accused was recorded under

Section 313 of the Code of Criminal Procedure (hereinafter referred to as the “Code”) by the learned trial Judge wherein the appellant-accused claimed innocence and pleaded false implication in the case however, did not lead any evidence in defence.

6. On perusal of the evidence on record, the learned trial Judge returned a finding that the complainant failed to establish that the material/goods were delivered to the appellant in lieu of which, the cheques were issued, and in the absence of burden being discharged by the complainant, the onus to disprove or rebut the presumption could not be shifted to the appellant as referred under Section 139 of the Act. Accordingly, the trial court returned the finding of acquittal of the appellant, which was the subject matter of challenge in appeal before the High Court at the instance of the complainant.

7. The High Court on reappraisal of the evidence on record affirmed that the primary burden was discharged by the complainant that the cheques were issued by the appellant in lieu of the material supplied, and documentary evidence duly exhibited was placed on record to substantiate the claim, and it

was for the appellant-accused to discharge her burden to rebut in defence as required under Section 139 of the Act. In the instant case, the appellant only recorded her statement under Section 313 of the Code. However, no evidence was recorded to disprove or rebut the presumption in defence. Taking into consideration the overall material on record while setting aside the finding of acquittal recorded by the trial Judge, held that the appellant was guilty of committing an offence under Section 138 of the Act and consequently, awarded appropriate punishment of fine/sentence by the impugned judgment dated 30th April, 2019, which is the subject matter of challenge in appeals before us.

8. Learned counsel for the appellant submitted that the complainant was not able to prove that the material/goods were ever sent or received by the appellant and in terms of the complaint, the burden was on the complainant to prove that the material/goods were received by the appellant, against which the cheques were received as security and even though the appellant has not placed any evidence to disprove or rebut the presumption in defence, still the complainant has to discharge its burden and has to stand on his own legs. In the absence of the prima-facie burden being discharged by the complainant, mere issuance of

the cheques by the appellant would not have been sufficient to justify that the cheques were issued in discharge of any debt or other liability. In support of his submission, learned counsel for the appellant has placed reliance on the judgment of this Court

in ***K. Prakashan vs. P.K. Surenderan***[1] and ***Indus Airways Private Limited and Others Vs. Magnum Aviation Private Limited and Another***[2]**.**

9. Learned counsel for the appellant further submits that the appellant was able to succeed in creating a doubt in the mind of the court below with regard to the non-existence of the debt or liability, and the learned trial court had returned the finding based on the material available on record. Unless it was found to be perverse or unsustainable, or a case of non-consideration of any relevant material, the High Court was not justified in reversing and setting aside the finding of acquittal recorded by the trial court merely on the ground that the view expressed by the High Court is more plausible with what being expressed by the trial court in its judgment dated 28th September, 2012.

1 (2008) 1 SCC 258
2 (2014) 12 SCC 539

10. Learned counsel for the appellant further submits that the finding recorded by the High Court in the impugned judgment is contrary to the settled principles of law as considered by this Court in appreciating the mandate of Sections 118(a), 138 and

139 of the Act. In consequence thereof, the finding of guilt which has been recorded by the High Court in the impugned judgment is unsustainable in law, and has to be set aside.

11. Per contra, learned counsel for the complainant-respondent while supporting the finding recorded by the High Court in the impugned judgment submitted that there was sufficient material available on record to justify that these cheques were issued with reference to the invoices after delivery of goods, which were duly exhibited, and cheques were issued in lieu thereof. In the sequence of facts, the cheques issued by the appellant, on due presentation to the bank got dishonoured on the ground of “insufficient funds”. The statutory notice was issued to the appellant, who failed to respond. The complaints were filed by placing all documentary evidence in support of the complaint duly exhibited, and three witnesses in support thereof were examined, and was able to establish and discharge the burden of proof. It was for the appellant to come forward with her defence,

and prove to the contrary as envisaged under Section 139 of the Act.

12. In the instant case, the appellant has only recorded her statement under Section 313 of the Code, and has not adduced any evidence to rebut the presumption that the cheques were issued for consideration. Once the facts came on record remained unrebutted and supported with the evidence on record with no substantive evidence of defence of the appellant to explain the incriminating circumstances appearing in the complaint against her, no error has been committed by the High Court in the impugned judgment, and the appellant has been rightly convicted for the offence punishable under Section 138 of the Act and needs no interference of this Court.

13. The object of introducing Section 138 and other provisions of Chapter XVII in the Act appears to be to enhance the acceptability of cheques in the settlement of liabilities. The drawer of the cheque be held liable to prosecution on dishonour of cheque with safeguards provided to prevent harassment of honest drawers. Section 138 primarily relates to a civil wrong and the amendment made in the year 2000 specifically made it

compoundable. The burden of proof was on the accused in view of presumption under Section 139 of the Act and the standard of proof was of "preponderance of probabilities". The N.I. Act including a cheque carrying a presumption of consideration in terms of Sections 118(a) and 139 of the Act which is related to the purpose referred to and reads as under:-

> "**118 Presumptions as to negotiable instruments.** —Until the contrary is proved, the following presumptions shall be made:—
>
> (a) **of consideration** —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;
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> ……..
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> **139. Presumption in favour of holder.**—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

14. There is a mandate of presumption of consideration in terms of the provisions of the Act and the onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act, which reads as under:-

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account**.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any

amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 8 [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless —

(a) the 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;

(b) the payee or the holder in due course of the cheque, as the case may be, 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; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

15. The scope of Section 139 of the Act is that when an accused has to rebut the presumption, the standard of proof for doing so is that of "preponderance or probabilities" which has been examined by a three-Judge Bench of this Court in ***Rangappa vs. Sri Mohan***[3]**,** which reads as under:-

3 (2010) 11 SCC 441

> "**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* [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] 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.
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> **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 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 defendant-accused cannot be expected to discharge an unduly high standard or proof."

16. It is well settled that the proceedings under Section 138 of the Act are quasi-criminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.

17. Likewise, under Section 139 of the Act, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced by the

accused which on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved. In ***Rohitbhai Jivanlal Patel vs. State of Gujarat and Another***[4], this Court has examined the scope of Sections 138 and 139 of the Act, which 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 face 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.
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> …….
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> **17.** On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the 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. This Court has, time and again, emphasised 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 fulfil the requirements of rebuttal as envisaged under Sections 118 and 139 of the NI Act. This Court stated the principles in *Kumar Exports* [*Kumar Exports* v. *Sharma Carpets*, (2009) 2 SCC 513]

4 (2019) 18 SCC 106

"*20*. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non- existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, therefore, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

It was further considered by this Court in ***Uttam Ram vs. Devinder Singh Hudan and Another***[5]***.***

18. In the case at hand, elucidating from the principles, the complainant was able to prove that the appellant placed the order for purchasing non-woven fabric which was sold vide invoice No. 120 dated 01st October, 2010 and invoice No. 135 dated 16th October, 2010 amounting to Rs.5,07,062/- and Rs.5,10,000/- which was delivered through public carrier truck bearing Nos. HR-38G-5607 and HP-71-0693 and in lieu thereof, the cheques bearing No.323930 dated 15th October, 2010 and No.323935 dated 01st November, 2010 in favour of the complainant were issued by appellant in order to discharge her liability. On the cheques being presented for encashment to the State Bank of India, Branch Kala Amb, the same were dishonoured on the ground of "insufficient funds" in the account of the appellant and the same were returned vide memo dated 19th October and 10th November, 2010 by Punjab National Bank, Karnal.

5 (2019) 10 SCC 287

19. Thereafter, two separate legal notices were served by the complainant which were duly received by the appellant and even after receiving the said notices, the appellant neither responded to the notices nor made any payment within the statutory period of fifteen days and only thereafter, two separate complaints were filed by the complainant under Section 138 of the Act against the appellant-accused.

20. There was no response by the appellant at any stage either when the cheques were issued, or after the presentation to its banker, or when the same were dishonoured, or after the legal notices were served informing the appellant that both the cheques on being presented to its banker were returned with a note that it could not be honoured because of “insufficient funds”.

21. That apart, when the complainant exhibited all these documents in support of his complaints and recorded the statement of three witnesses in support thereof, the appellant has recorded her statement under Section 313 of the Code, but failed to record evidence to disprove or rebut the presumption in support of her defence available under Section 139 of the Act.

The statement of the accused recorded under Section 313 of the Code is not a substantive evidence of defence, but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case of the accused. Therefore, there is no evidence to rebut the presumption that the cheques were issued for consideration.

22. The judgment on which learned counsel for the appellant has placed reliance i.e. ***K. Prakashan vs. P.K. Surenderan***[6]

may not be of any assistance for the reason that in the case dealing under Section 138 of the Act, the prosecution has to prove the case and these cases being quasi-criminal in nature are to be proved on the basis of the principles of "preponderance of probabilities", and not on the principles as being examined in the criminal case to prove the guilt of the accused beyond reasonable doubt. So far as other case cited by the learned counsel for the

appellant i.e. ***Indus Airways Private Limited and Others Vs. Magnum Aviation Private Limited and Another***[7], there was sufficiency of material on record to justify that the cheques were issued as advance payment for purchase of goods, and one of the

6 (2008) 1 SCC 258
7 (2014) 12 SCC 539

terms and conditions of the contract was that the entire payment would be made to the supplier in advance. However, much within the time, the supplier-complainant received the letter from the purchasers cancelling the purchase orders and requested the supplier to return both the cheques. The supplier pursuant thereto, sent response asking the purchasers as to when the supplier could collect the payment, and only thereafter, the suppler sent a legal notice to the purchasers and filed a complaint under Section 138 of the Act. In the given circumstances, it was observed by this Court that the complainant had failed even prima-facie that there was a legally enforceable debt or other liability subsisting on the date of drawal of the cheque as contemplated under Section 138 of the Act. This judgment would not be of any help to the appellant in the instant case.

23. When the matter was earlier heard on 01st March, 2021, we directed the learned counsel for the appellant to seek instructions whether his client is ready to make payment of the stated cheque amount in both the criminal appeals i.e. Rs.5,07,062/- and Rs.5,10,000/- and posted the matter for further hearing on 05th March, 2021. Learned counsel for the

appellant on instructions, informed that his client is not willing to discharge the stated amount, and wants to argue the case on merits. After hearing the counsel for both the parties, we reserved the order on 05th March, 2021 and still afforded an opportunity that by 06th March, 2021 evening, the appellant can still re- consider her instructions as noticed by us in the order of 01st March, 2021. It has been informed to us that the appellant is interested to get the outcome of the present appeals on merits.

24. In the given circumstances, the High Court, in our view, has not committed any error in recording the finding of guilt of the appellant and convicting her for an offence being committed under Section 138 of the Act under its impugned judgment, which in our considered view, needs no further interference. Consequently, the appeals are without any substance, and are accordingly dismissed.

25. The bail bonds stand cancelled and the appellant shall either pay the fine, or serve the sentence in compliance with the judgment dated 30th April, 2019 passed by the High Court of Himachal Pradesh.

26. Pending application(s), if any, shall stand disposed of.

……J.
(INDU MALHOTRA)

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……..J.
(AJAY RASTOGI)

NEW DELHI
March 09, 2021