IN THE HIGH COURT OF TRIPURA
A G A R T A L A

Crl.A.25 of 2015

Shri Alak Kar Choudhury,
son of late Santi Ranjan Choudhury,
a resident of Kamalpur Town,
P.O. & P.S. Kamalpur,
District : Dhalai, Tripura

…… Appellant(s)

By Advocate :

Mr. S.M. Chakraborty, Sr. Adv.
Ms. B. Chakraborty, Adv.

– V e r s u s –

1. Shri Dilip Singh,
son of Shri Setu Singh,
a resident of Village-West Noagaon,
P.O. & P.S. Kamalpur, District : Dhalai, Tripura

2. The State of Tripura

…… Respondent(s)

By Advocate :

Mr. K. Nath, Adv.

BEFORE
THE HON'BLE MR. JUSTICE S. TALAPATRA

Date of hearing	**:**	04.07.2018
Date of delivery of Judgment and Order	**:**	30.11.2018
Whether fit for reporting	**:**	YES

JUDGMENT & ORDER

This is an appeal under Section 378 of the Code of Criminal Procedure, 1973 from the judgment and order of acquittal dated 11.06.2015 delivered in Crl. A.13 of 2014 by the Additional Session Judge, Unakoti Judicial District, Kamalpur. By the said judgment and

order of acquittal, the judgment and order of conviction and sentence dated 14.07.2014 delivered in C.R.04 of 2012(NR) has been reversed.

2. The complainant has challenged that judgment and order of acquittal dated 11.06.2015. Briefly stated the case of the complainant is that he is a business man by profession and he carries his business on hardware from his shop situated at Kamalpur town. The respondent No.1 is a contractor by profession. The complainant used to allow the respondent to purchase hardware materials viz. cement, rod, paint etc on credit from his shop. When the credit rose to Rs.5,20,000/- the complainant made a demand for payment when the respondent issued a cheque of Rs.5,20,000/- on the SBI, Kamalpur Branch in favour of the complainant to discharge his liability. On 23.07.2012 the complainant presented the said cheque in the bank for encashment but the said cheque was dishonoured for insufficiency of the fund in the account of the respondent. The complainant issued notice demanding payment of the amount as recorded in the dishonoured cheque. But the respondent did not pay any amount within the statutory period as stipulated in the notice and hence the complaint was filed.

3. The complainant adduced three witnesses including himself (PW-1) and in order to rebut, the respondent No.2, herein after the respondent No.1 adduced two witnesses including himself (DW-1). Both the appellant and the respondent adduced documentary evidence including the dishonoured cheque dated 23.07.2012(Exbt.1), the return memo dated 23.07.2012(Exbt.2), the notice dated 01.08.2012(Exbt.3), the postal receipt dated 02.08.2012(Exbt.4) and the original acknowledgment card dated

06.08.2012 signed by the respondent (Exbt.5). The respondent also introduced the saving pass book bearing No.01150060502 of SBI, Kamalpur Branch (Exbt.A) and saving Bank pass book bearing No.0582010609913(Exbt.B).

4. The appellate court has observed that the respondent (the appellant in the appeal) "has shown that he has paid Rs.4,46,000/- to the respondent-complainant and he also admits that he has received the said amount. It is interesting to note that Rs.3,46,000/- is paid by cheque No.639027 dated 28.09.11. 639027 is the immediately next number to 639026 (the impugned cheque of this case). It would appear that 639026 were issued on 23.7.12 while its immediate successor 639027 was issued almost one year earlier on 28.9.11. It would further appear that Rs.1,00,000/- was paid by cheque No.170257 on 1.12.11. Admittedly the contents of cheque No.639026 were not written by the appellant himself. He submits it was given as security for the loan of Rs.3,46,000/-. Thus, the appellant has given rise to a prima facie case by which he has dispelled with the presumption that he had issued the cheque No.639026 to the complainant in discharge of a legally enforceable debt."

5. This was the foundation of reversal finding. For coming to that inference, the evidence of PW-3(Hero Datta) has been completely brushed aside. PW-3 has testified in the trial that he saw the respondent delivering a cheque amounting to Rs.5,20,000/- to the appellant (the complainant). On his query, the complainant subsequently told him that he had sold out some articles to the respondents on credit. PW-2 (Sudip Bose) however has testified that

the appellant deals in cement, rod, paint etc. being an authorized distributor. He has also stated that on demand of the appellant the cheque amounting to Rs.5,20,000/- was given by the respondent.

6. DW-1, the respondent, has stated in the trial that he took a loan of Rs.3,46,000/- with promise of repayment along with 3 percent interest thereon within one year. He paid back the loan by issuing the cheque. When he requested the appellant herein to hand over the blank cheque which he had deposited with him as security, the appellant denied to return such cheque.

7. DW-2, one Ratan Majumder has submitted that the appellant had issued a cheque in favour of the complainant putting his signature thereon. He has further submitted that the respondent had taken a loan of Rs.3,46,000/- from the complainant for one year with condition of repayment with three percent interest.

8. Having appreciated the evidence as recorded in the trial, the trial court has observed inter alia as under :

> **"……..The defence evidence is silent as to why such an unpredictable amount was given as loan withholding payment of such a paltry amount. A person who is capable of advancing loan of such a hefty amount, then why would he withhold payment of such a meager amount and thereby settling the deal by advancing such an unpredictable amount. This, sure enough, arouse suspicion. Further, it is also difficult to believe that if the accused had handed over a blank signed cheque to the complainant as security against repayment of the alleged loan and if, even after repayment of the alleged loan the complainant had refused to return back the blank signed cheque the accused abstained from taking any legal action against him.**
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> **36. Furthermore, the unresponsive conduct of the accused regarding the legal notice issued to him by the complainant also shakes the credibility of the defence case so put forward. The accused even after receipt of the legal notice issued to him by the complainant has failed to furnish any reply. It is only at the time of trial the defence was taken by the accused that he had issued a blank signed cheque to the complainant as security for repayment of the allege loan amount. The object underlying service of notice of demand, a condition precedent for filing a complaint u/s 138 of the N.I. Act, cannot be overlooked."**

9. When the respondent was examined under Section 313 of the Cr.P.C. he had narrated the story of taking loan of a sum of Rs.3,46,000/- with condition of repayment along with three percent interest. Further, he had stated that he did not purchase any material from the shop of the appellant. Hence, there cannot be any credit for purchase of those hardware materials. Thus, the solitary point which is material is that whether there existed a liability to be discharged by the respondent (the accused) or whether the respondent has been successful to rebut the existence of such liability, presumed to be reflected in the dishonoured cheque. Further, whether the cheque that was issued by the respondent was a security cheque against the loan as claimed to have obtained by the respondent. The law is to some extent consolidated that the advance cheque issued as the security are not in discharge of any legally enforceable debt **[see Indus Airways(p) Ltd. vs. Magnum Aviation (P) Ltd. reported in (2014) 12 SCC 539 and K. Subramani vs. K. Damodar Naidu reported in (2015)1 SCC 99**.

10. Mr. S.M. Chakraborty, learned senior counsel appearing for the appellant has submitted that it is not in dispute that the cheque has been drawn from the account maintained by the respondent and further that the signature put in the said cheque belongs to the accused. Therefore, in view of the legal principle as well settled by a catena decisions of the apex court, the complainant is entitled to the benefit of statutory presumption under Section 139 of the Negotiable Instrument Act, **[see T. Vasanthakumar v. Vijayakumari reported in (2015) 8 SCC 378].**

11. It is needless to say that similar principles had been culled out in **Rangappa v. Sri Mohan** reported in **(2010) 11 SCC 441**.

Mr. Chakraborty, learned senior counsel has further stated that the defence has failed to probabilize the narrative that the loan was taken and the said security cheque was deposited to the appellant as security against the said loan and after payment of the entire loan the appellant denied to return the cheque. No prudent person would believe such narrative. Hence, the finding as returned by the appellate court suffers from non-appreciation of the evidentiary materials in their perspective.

12. From the other side, Mr. K. Nath, learned counsel while defending the judgment of the appellate court has submitted that the cheque was a security cheque and the appellant was not supposed to deposit it for encashment. There was no transaction of hardware materials and in this regard, the appellant has failed to lay the reliable evidence. He has also placed his reliance in **Indus Airways(p) Ltd. (supra)** to explain the meaning of the expression "debt or other liability" as appearing in Section 138 of the Negotiable Instrument Act. The passages as reproduced hereunder has been relied by Mr. Nath, learned counsel appearing for the respondent :

> **"8. The interpretation of the expression 'for discharge of any debt or other liability' occurring in Section 138 of the N.I. Act is significant and decisive of the matter.**
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> **9. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either**

> **because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an exiting debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability."**

13. Mr. Nath, learned counsel has submitted that when the said cheque was issued there was liability and the cheque was wholly for purpose of security for the loan taken from the appellant. Hence no offence punishable under Section 138 has been made out.

Mr. Nath, learned counsel has thereafter relied the decision of the apex court in **K. Subramani versus K. Damodara Naidu** (supra) where the apex court has observed that capability of the person lending the money has to be proved. Unless that is proved a space would be left to doubt the financial capability. Mr. Nath, learned counsel has submitted that the appellant has failed to prove that he had a business and to sell the hardware materials on credit. Thus, his version is not credible. In the face of it, the plea falls through, inasmuch as, the respondent has clearly admitted of his taking loan from the appellant.

14. Having perused the records and appreciated the submission of the learned counsel appearing for the parties this court would initially rely a decision of the apex court in **T. Vasanthakumar versus Vijayakumari** reported in **(2015) 8 SCC 378** . In **Vijayakumari**(supra) the apex court restated the principle of **Rangappa**(supra) where it has been enunciated as under :

> **"7. We have heard the learned Counsel appearing for the Appellant as also the learned Counsel appearing for the Respondent. The complainant has alleged that the money (loan) was advanced to the Defendant on 20-05-2006 in relation to which the cheque was issued to him by the Defendant on 16-01-2007. The cheque was for Rs. 5 lakhs only, bearing No. 822408. It is of great significance that the cheque has not been disputed nor the signature of the Defendant on it. There has been some controversy before us with respect to Section 139 of Negotiable Instruments Act as to whether complainant has to prove existence of a legally enforceable**

> **debt before the presumption Under Section 139 of the Negotiable Instruments Act starts operating and burden shifts to the accused. Section 139 reads as follows:**
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> > **139. Presumption in favour of the 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.**
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> **8. This Court has held in its three judge bench judgment in Rangappa v. Sri Mohan (2010) 11 SCC 441:**
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> > **The presumption mandated by Section 139 includes a presumption that there exists a legally enforceable debt or liability. 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 Respondent complainant.**
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> **9. Therefore, in the present case since the cheque as well as the signature has been accepted by the accused Respondent, the presumption Under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability. To this effect, the accused has come up with a story that the cheque was given to the complainant long back in 1999 as a security to a loan; the loan was repaid but the complainant did not return the security cheque. According to the accused, it was that very cheque used by the complainant to implicate the accused. However, it may be noted that the cheque was dishonoured because the payment was stopped and not for any other reason. This implies that the accused had knowledge of the cheque being presented to the bank, or else how would the accused have instructed her banker to stop the payment. Thus, the story brought out by the accused is unworthy of credit, apart from being unsupported by any evidence."**
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> **[Emphasis added]**

15. Even though in this case the cheque was dishonoured for not having sufficient money in the account of the respondent, the principle of **Rangappa** (supra) would apply. According to this court, attempt to rebut the foundational evidence in respect of the enforceable debt or liability as laid by the appellant (the complainant) has failed. Even the conduct of the respondent leads to an adverse presumption against him. For example, when the appellant denied to return the cheque or by notice demanded payment of the amount recorded in the cheque he did not take any action in response. It is evidently clear that :

(i) the respondent failed to explain why he did not inform the police or any other person that the appellant had denied to return the cheque which is according to him a security cheque against the loan taken by him for an amount of Rs.3,46,000/-. Even DW-2 did not state that at the time of handing over the cheque of Rs.3,46,000/- the respondent had ever demanded the return of the so called "security cheque". Absence of corroboration has struck at the root reliability or of the statement made by the respondent (DW-1).

(ii) That apart when the respondent (the accused) received the notice demanding payment of the amount to the extent of Rs.5,20,000/- why the respondent (the accused) did not reply by stating that he was not liable to pay any amount as the respondent had deposited the said cheque as security.

16. Another plea as raised by Mr. Nath, learned counsel that there is no evidence that the appellant had business has fallen through for the statement made by the respondent (DW-1) where he has stated that he used to visit the shop of the complainant but had never purchased anything from the shop of the complainant prior to the year 2012. Even DW-2 has also categorically stated that the transaction, admitted or denied, had taken place in the shop of the appellant (the complainant). Thus, this court is of the view that the complainant, the appellant herein has discharged his burden but the respondent has utterly failed to rebut the statutory presumption under Section 118 and 139 of the N.I. Act. Hence, the impugned judgment and order of acquittal is set aside inasmuch as for gross non-appreciation of the evidentiary material, the finding of acquittal turns out to be perverse.

17. As consequence, the impugned judgment and order is set aside and quashed. The judgment of conviction dated 14.07.2014, delivered in C.R.04 of 2012 (N.I. Act) is restored on affirmance. However this court would modify the sentence to a fine of Rs.5,20,000/- for commission of offence punishable under section 138 of the N.I. Act and in default of the payment of the said fine, the respondent (the accused) shall suffer simple imprisonment for one year. On realization of fine the entire amount shall be paid to the appellant (the complainant). The fine shall be paid within a period of one month when the records would be received by the trial court. In default, the trial court shall issue warrant of arrest against the appellant for remanding him to suffer the sentence of imprisonment.

In the result, the appeal is allowed.

Send down the records forthwith.

JUDGE

Sabyasachi B