

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**CRR 728 of 2019
With
CRAN 4 of 2022**

**Ms. Manjir Chatterjee
Vs.
Sri Sushanta Dutta**

For the Petitioner : Mr. Sourav Chatterjee
Mr. Sayan De
Mr. Shatadru Lahiri
Mr. Safdar Azam
Mr. Kaustav Shome
Mr. Sayan Kanjilal
Ms. Esha Acharya

For the opposite party : Mr. Ayan Bhattacharjee
: Mr. Arnab Sengupta

Heard on : 30.06.2022

Judgment on : 30.09.2022

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the judgment and order dated 28th November, 2018 passed by the court of Additional Sessions Judge Fast Track 2nd Court, City Sessions Court, Calcutta in criminal revisional Application No.

308/2017 present application under section 482 of the code of Criminal Procedure has been preferred. By the impugned judgment learned Appellate Court affirmed the judgment of conviction dated 21.09.2017 passed by learned Metropolitan Magistrate, 14th Court, in C 8925/2006.

2. In the aforesaid proceeding being C 8925 of 2006 the petitioner was asked to stand trial to answer the allegations leveled under section 138 of Negotiable Instrument Act (N.I. Act , 1881).

3. The instant criminal proceeding was instituted against the petitioner on the basis of the petition of complaint filed by the opposite party herein alleging commission of offence by the petitioner under section 138 of the Negotiable Instrument Act, 1881. In the said petition of complaint it has been alleged that with the intention of defrauding the opposite party herein, petitioner used to visit his office while he was serving as AGM of the international banking division of United Bank of India. It is further alleged that petitioner made false representations of her resources to run an export business and the opposite party, being a person with extremely generous and benevolent outlook had helped the petitioner in respect of her proprietorship concerned, namely, M/s. FOLK. By taking advantage of such benevolent personality as well as the official capacity of the opposite party herein, the petitioner borrowed a sum of Rs.18,60,895/- , out of which after long persuasion the petitioner repaid a sum of Rs.10,69,000/- to the opposite party. In spite of repeated requests, the petitioner did not pay the balance amount and accordingly the opposite party herein asked her to repay the balance amount by different letters. The petitioner issued an account-payee cheque in favour of opposite party herein in

respect of outstanding liabilities being no.951441 dated 21.06.2006 for a sum or Rs.8,00000/- drawn on Syndicate Bank, Baguihati Branch. When the said cheque was presented by the opposite party to its banker, it was returned with the remark “insufficient fund”. Opposite party sent legal notice on 17.07.2006 thorough his advocate demanding payment of the dishonoured cheque amount and petitioner inspite of receipt of the said notice on 21.07.2006, has failed to pay the cheque amount. In response to the said demand notice, the petitioner herein sent a reply on 01.08.2006.

4. The petitioner contended that after receiving of summon in the aforesaid complaint in Case No.8925/2006, the petitioner appeared and pleaded not guilty during trial. The opposite party herein in order to prove his case, has only examined himself as the sole witness. The petitioner herein was examined under Section 313 Cr.P.C. The petitioner also deposed as the sole defence witness denying all allegations and also tendered number of documents in evidence which are marked as Exhibit.

5. The learned Trial Court after going through the evidence-on-record and also after examining the evidence adduced by the parties, was pleased to pass the impugned judgment convicting the petitioner under Section 138 of the N.I. Act, 1881, and thereby sentencing her to suffer imprisonment and also to pay compensation.

6. Challenging the aforesaid judgment and order dated 21.09.2017, the petitioner preferred revisional application being Criminal Revision No.308 of 2017 before Additional District and Sessions Judge, Fast Track, 2nd Court, City Sessions Court, Calcutta. Learned Appellate Court after hearing both the

parties was pleased to dismiss the aforesaid revisional application by a judgment and order dated 28.11.2018 and affirmed the judgment of the trial court dated 21.09.2017, passed in C 8925 of 2006. The petitioners being dissatisfied with the judgment preferred this application on the following grounds:-

- (i)** The opposite party has miserably failed to establish either by documentary or oral evidence the existence of legally enforceable debt or liability on the part of the petitioner, which is a condition precedent to maintain a proceeding under section 138 of N.I. Act, 1881.
- (ii)** Opposite party himself admitted that although he had lent money to the petitioner herein on several occasions, both by cash and cheque but he does not have any document whatsoever to show his source of income, wherefrom he had allegedly lent a some of Rs. 18, 60, 695/- to the petitioner. As such the presumption under illustration (g) of section 114 of the Evidence Act clearly attracts in the instant case.
- (iii)** Learned courts below while passing he judgment failed to appreciate that the presumption under section 139 of the Act is not an irrebuttable one. Moreover the burden of proof may be shifted by presumptions of law or fact and may be rebutted not only by direct or circumstantial evidence, but also by presumptions of law or fact.

- (iv) The ratio laid down by the Hon'ble Apex Court in **Rangappa Vs. Sri Mohan** reported in **AIR 2010 SC 1898** which has been relied by the trial court, is not applicable to the present case in as much as in the said case no reply was given by the accused concerned against the demand notice sent by complainant and for which Apex Court was of the view that the accused therein was not able to contest the existence of legally enforceable debt or liability. On the contrary in the present case, petitioner has been consistent in her stand right from the issuance of her reply dated 01.08.2006 that the cheque in question was issued to the opposite party without giving any date therein, as financial assistance for his ailing father and as such there never existed any legally enforceable debt or liability.
- (v) It is settled position of law that when an accused has to rebut the presumption under section 139 of Act of 1881, 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 case may fail even in appropriate cases, accused may not need to adduce evidences of his or her own.
- (vi) The object of examining accused under section 313 Cr.P.C. is to afford the accused a fair and proper opportunity of explaining circumstances which appears against him but in the present case no specific question was put to the petitioner regarding Exhibit 1

and 3 during her examination under section 313 Cr.P.C. In the complaint, opposite party herein alleged that he had lent a sum of Rs. 18,60,895/- to the petitioner, however in the demand notice no such figure regarding the loan amount has been mentioned and in the evidence also opposite party could not say the total amount of money lent by him to the petitioner, which shows that the opposite party has failed to establish the existence of any legally enforceable debt or liability.

(vii) Petitioner throughout the course of trial stated that she had never signed and /or executed the purported letter dated 21.06.2006 i.e. exhibit 3 and the opposite party herein had manufactured the same to harass the petitioner but the trial court primarily relying upon said document erroneously held that the petitioner admitted her signature on the purported letter dated 21.06.2006 and convicted the petitioner

(viii) Opposite party has categorically admitted his hand writing on the cheque books other personal documents of present petitioner which are marked as Exhibit 'A' and 'B' series, which strengthens the contention of the petitioner that opposite party herein having been entrusted by the petitioner with several blank cheques including cheque in question has misappropriated the same. However such vital aspect was ignored by the courts below. A bare perusal of the record slips marked as exhibit 'B' would also reveal that the entry in respect of the cheque being no. 951442 dated

13.08.2005 i.e. the cheque just preceding the cheque in question being no. 951441, bears the handwriting of the opposite party herein and the same has been admitted by him in his deposition. Such fact once again strengthens the contention of the petitioner that she had handed over the said cheque to the opposite party as financial assistance for treatment of his ailing father, way back in the month of August 2005 and had asked him not to put in the date without consulting the petitioner. Therefore, petitioner never issued the purported letter dated 21.06.2006 marked as Exhibit - '3' to opposite party no.1 admitting her liabilities.

- (ix)** Exhibit 'F', 'J', & 'K' transpires that the opposite party had access to several documents, belonging to the petitioner, which very much strengthen the stand of the petitioner that there was no legally enforceable debt. Exhibit 'L' would unambiguously reveal that the same was given not in respect of only the cheque in question being No. 951441 but also in relation to the several other cheques. The court below failed to appreciate that on 30.03.2006 petitioner had lodged an FIR with Maniktala P.S. which is marked as Exhibit M, M/1 alleging misappropriation of the blank signed cheques and other documents by the opposite party which had been entrusted to him by the petitioner herein and instant proceeding has been subsequently initiated by the opposite party as a counter blast to the lodging of the aforesaid FIR. Learned court below has completely overlooked such evidence of the

petitioner which remained unchallenged and unshaken even after cross-examination.

7. Petitioner in support of her contention referred:-

(a) ***M.S. Narayana Menon @ Mani Vs. State of Kerala and Another*** reported in **(2006) 6 SCC 39,**

(b) ***Anss Rajashekar Vs. Augustus Jeba Ananth*** reported in **(2020) 15 SCC 348,**

(c) ***John K. Abraham Vs. Simon C. Abraham and another*** reported in **(2014) 2 SCC 236.**

Supporting judgment of conviction awarded by courts below

8. Opposite party on the other hand relied upon following case law:-

(a) ***Bir Singh Vs. Mukesh Kumar*** reported in **(2019) 4 SCC 197,**

(b) ***kishan Rao Vs. Shankargouda*** reported in **(2018) 8 SCC 165,**

(c) ***Kalmani Ted and Another Vs. P. Balasubramanian*** reported in **(2021) 5 SCC 283,**

(d) ***Rangappa Vs. Sri Mohan*** reported in **(2010) 11 SCC 441.**

9. At the very outset it is to be mentioned that the presumption under section 139 of the N.I. Act is a presumption of law. Such presumption of law is to be drawn and court has no option but to draw such presumption. The presumption will live, exist and survive and shall vanish only when the contrary is proved by the accused. Whether the burden has been discharged by the accused will have to be decided by the court in the fact scenario in each case. Section 139 of the Code does not at all permit the court to draw any

presumption of guilt against the accused and there is no burden on any accused to disprove the case of prosecution or to prove his innocence. The presumption under section 139 of the act can help the court to presume that the cheque was issued for the discharge of a legally enforceable debt or liability unless accused discharged his burden to disprove the same.

10. In the present context it is all along argued by the counsel on behalf of the petitioner that there exists no legally enforceable debt or liability. Let us see how far and whether at all accused/petitioner has succeeded in discharging the burden. This criminal proceeding started rolling with the notice sent by the opposite party to the petitioner demanding the cheque amount which is dated 17.07.2006, by which the opposite party herein contended that the impugned cheque got dishonoured and as such opposite party demanded for payment from the petitioner an amount of 8,00,000/- within 15 days from the date of receipt of the notice. On receipt of the said letter the petitioner accused had given a reply on 1st August, 2006. In the said reply the following incidents have been mentioned

(a) That the petitioner is proprietress of a business and in course of her business related work she met the opposite party in 2000 and gradually opposite party became more close to her and taking advantage of her innocence, opposite party won her trust and faith.

(b) The opposite party told petitioner that he was very unhappy with his wife and is separated and she was taking steps for obtaining divorce and promised to marry the petitioner after

such divorce and according to petitioner such promise was made by opposite party with obvious and ulterior motive.

(c) As their relationship became very close opposite party came to her office very often and she trusted opposite party with all her confidential documents and he had total access to her e-mail box, blank signed cheques , blank signed letter heads, bank pass book /statements, pay-in-slip etc and opposite party had also full access to her flat. Opposite party had borrowed Rs. 11,68, 500/- from petitioner which he had failed to repay. When petitioner insisted for repayment of the money, borrowed by him opposite party was avoiding to make contact with her and threatened her with dire consequences.

(d) In the Month of August 2005 opposite party requested the petitioner for giving loan of Rs. 8,00000/- as he was in desperate need of money and as such petitioner issued the cheque in his name without any date and told him not to present the same in the bank without prior intimation to her as she had to arrange the funds in her account.

(e) Petitioner arranged funds to the tune of Rs. 7,00000/- in her account subsequently and issued 3 cheques to opposite party for a sum of Rs. 7,00000/- towards loan and asked him to return the undated cheque No. 951441 i.e. impugned cheque.

(f) Opposite party encashed the 3 cheques for Rs. 7,00000/- and informed petitioner that the impugned cheque No. 951441 along

with 7 other cheques of the bank which were in custody of the opposite party, were lost.

(g) Petitioner believing the words of opposite party by a letter dated 10.11.2005 asked his banker i.e. Syndicate Bank Baguihati Branch to stop payment of all such 8 misplaced cheques including impugned cheque No. 951441.

(h) Petitioner now with fraudulent motive and with intention to cheat her has deposited said cheque No. 951441 inserting the date as 21.06.2006.

(i) However, owing to inadvertence the Baguihati Branch has mentioned in the cheque return memo that the cheque was dishonoured on the ground of “insufficient fund” ignoring the stop payment direction made by the petitioner.

11. Now if one sums up the entire defence taken by the petitioner /accused in the very first reply against opposite party’s demand notice, is that the petitioner and the opposite party had developed close relationship and for which the opposite party had total access to petitioner’s e-mail Box, blank Signed Cheques, blank signed letter heads, bank passbook/statement , pay-in-slip etc. and he had also free access to her flat. So far as present impugned cheque is concerned, it was given by the petitioner to the opposite party without mentioning any date as the opposite party requested her for giving the loan of Rs. 8,00000/- because he was in desperate need of money. She gave the impugned cheque but requested him not to present the cheque in the bank

without giving prior intimation to her as she had to arrange for the same and subsequently petitioner arranged funds of Rs. 7,00,000/- and issued 3 cheques to him for a sum of Rs. 7,00,000/- towards loan to him and requested him to return undated impugned cheque. Opposite party encashed Rs. 7,00,000/- but informed petitioner that 8 cheques including the impugned cheque have been lost from his custody and on hearing this petitioner wrote letter to his banker on 10.11.2005 for stop payment in connection with aforesaid cheques including the impugned cheque. Unfortunately the opposite party, in the impugned cheque insert the date as 21.06.2006 and misused the same by presenting the same before the bank to get it dishonoured and with ill motive has initiated the criminal proceeding. Now let us see whether the petitioner/ accused has successfully discharged her burden by proving those contentions to come to a decision whether the impugned cheque involves any legally enforceable debt or not.

12. Opposite party/complainant in this case has deposed as PW1 and in the cross-examination various record slips of Syndicate Bank and application and other documents were shown to him and he admitted his signature and hand writing which are marked as 'A' and 'B' series and which prima facie discloses petitioner's contention that the opposite party/complainant had an access to her bank documents and other documents. Petitioner/accused all along contended that the date appearing in the cheque has not been put by him. The complainant in his cross examination also stated that date in the cheque was not written by him and he does not know who wrote the date. The complainant also admitted that there are two endorsements i.e. putting date 24.07.2005 in

cheque No. 951430 and another endorsement of date 13.08.2005 in connection with cheque No. 951442, which is the next impugned cheque of 951441 and which are marked as exhibit 'B' and 'B/1' were made by him. Complainant further admitted that some of the documents kept in the custody of the accused person where his signatures are appearing. Now at the very beginning complainant/opposite party admitted that he does not have any business relationship with the petitioner accused and as such the question automatically comes, then how he got access to the bank documents and other private documents of the petitioner/accused which again support's petitioner's contention that after acquainted with the petitioner in the year 2000, a close relationship developed between the parties, which prompted the petitioner to give access to her private documents to the opposite party.

13. Complainant /opposite party in his demand notice dated 17.07.2006 marked as exhibit '6' has not mentioned as to what is the total amount of loan he had given to petitioner. He had only stated in the demand notice that the petitioner had taken substantial amount of loan from him in connection with her business from time to time. PW1 in his evidence has stated that he has given accommodation loan to the accused petitioner for the purpose of her business sometime in cash and sometime in cheque but he cannot recollect the date of his payment in cash to the accused person. However, said PW-1 categorically stated, he cannot recollect exact amount of the said loan that he had given to her by cheque and it may be 3,4 cheques . Ultimately opposite party admitted that he has no document to show that he has given loan to the accused person by cheque or by cash. When opposite party categorically stated

in his evidence without mentioning amount that he had given loan to the petitioner by cash and also by cheque, what prevented petitioner to prove those cheques by calling bank records to prove that loan was actually disbursed in favour of petitioner.

14. Moreover the PW-1 stated in his cross examination stated that many times he had given money to the accused/petitioner but he could not recollect how many times he had given money. He stated that he started making payment in the month of December 2003 and ended making payment in the month of August 2005, though he has no receipt to show that he had given money to the accused person. Opposite party/complainant also admitted in his cross-examination that he did not file any civil suit against the accused person for recovery of loan amount. Furthermore he stated in evidence that he does not recollect whether he was called upon on 30.03.2006 at the police station on the basis of complain lodged by petitioner. Petitioner has made out specific case that when the opposite party had demanded the loan of Rs. 8,00000/- she had issued the impugned cheque sometimes in the month of August 2005 and said cheque was undated and he also requested the opposite party not to present the cheque to the bank as she had to arrange for the fund. She further contended that subsequently she arranged for Rs. 7,00000/-and issued 3 cheques and requested opposite party to return the impugned cheque amounting to Rs. 8,00000/-. However, at that point of time opposite party/complainant told him that said cheques were lost from his custody and on hearing this the petitioner had made direction to her banker for stop payment in respect of aforesaid eight cheques. It appears from exhibit 'L' that

the petitioner on 10.11.2005 i.e. much before the issuance of the demand notice by the opposite party had made direction to his banker for stop payment in connection with eight cheques including the impugned cheque being No. 951441. Petitioner also filed copy of written complainant and in the said written complain on 30.03.2006 i.e. long before the issuance of demand notice, petitioner herein alleged that the opposite party had access to her e-mail box, blank signed cheques, blank signed letter heads, bank pass book /statements, pay-in-slip etc and that the opposite party has borrowed a substantial amount of money from her which he has not repaid and he is now avoiding petitioner and in the said complaint dated 30.03.2006, she has specifically alleged that she has received information that the complainant/opposite party is trying to take advantage for monetary gains by using blank signed document and cheque in his possession and taking advantage to his access to her e-mail Box. It also appears that the petitioner accused was not only consistent in her plea made in the written complain, reply to demand notice and also in respect of her instruction of stop payment letter dated 10.11.2005 but also she is consistent while she was examined under section 313 of Cr.P.C. While she was examined under section 313 of Cr.P.C she categorically stated that on request of the complainant for the purpose of treatment of his father he took impugned cheque of Rs. 8,00,000/- and instructed her to put her signature on it without mentioning date and as per the request she wrote on the cheque and put her signature without mentioning the date. She categorically stated that the cheque was given to the complainant in the month of August 2005 and all the cheques and related

papers in relation to her account were in the custody of the complainant since complainant had been staying with her from January 2005 to August 2005. However, she stated that after getting impugned cheque of Rs. 8,0000/- in the month of August 2005, the complainant left her flat but kept her blank signed cheques in his custody. She also stated in her statement under section 313 Cr.P.C. that when complainant left her flat and did not return in the month of August 2005, she instructed her banker to stop payment against those cheques which were in the custody of the complainant.

15. Not only that she is also very much consistent in her defence while she faced dock as DW-1. She specifically stated that from January 2005 he used to stay at her flat at DumDum Park and he resided with her till August 2005 and had taken every sort of decision of the household matters. She also stated that in August 2005 opposite party informed him that for the treatment of his ailing father he is in need of money and had convinced her to give the cheque of Rs. 8,00000/- which she had duly signed and filled up but the date was not mentioned on the cheque, since she knew that there was no money in the account and she has also stated that when opposite party encashed the other three cheques in September, 2005 but stopped to make contact with the petitioner, then the petitioner became desperate and informed the matter to some authorities and also instructed her banker for stop payment. She also stated that thereafter she lodged FIR at Maniktala P.S. on 30.03.2006. In her cross examination she had categorically denied the execution of exhibit 3 stating that she had never executed any such document and she is very specific that taking advantage of some blank signed papers in his custody the

opposite party has misused it and procured the document. Such evidence of DW-1 remains unshaken during cross-examination.

16. In view of aforesaid discussion it is quite clear that though the opposite party/complainant has proved the cheque along with demand notice and letter marked as exhibit 3, in support of his contention that the cheque was drawn by the petitioner in discharge of legally enforceable debt and the burden under section 139 was upon the petitioner accused to disprove the said legal presumption it appears that the petitioner has successfully discharged the burden by showing that there existed no legally enforceable debt in connection with impugned cheque and as such judgment impugned passed by the courts below are liable to be set aside. In view of above CRR 728 of 2019 along with CRAN 4 of 2022 are hereby allowed. The impugned judgment of conviction passed by learned courts below are hereby set aside and the petitioner is accordingly acquitted and she may be released from her bail bonds.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)