CRA No. 5504/2020

Deepak Advertisers through Proprietor Deepak Jethwani vs. Naresh Jethwani

Gwalior, Dated :07/12/2020

Shri Arun Dudawat, Counsel for the appellant.

Shri BD Mahour, Counsel for the respondent.

Record of the Court below received and has been uploaded by the office.

With the consent of the parties, case is heard finally through Video Conferencing.

This Criminal Appeal under Section 372 of CrPC has been filed against the judgment dated 13/10/2017 passed by Additional Chief Judicial Magistrate, Gwalior in Criminal Case No.14094/2010, thereby acquitting the respondent by dismissing the complaint filed by the appellant under Section 138 of Negotiable Instruments Act.

The necessary facts for disposal of present appeal in short are that on 09/08/2010, the appellant filed a complaint on the allegation that Proprietor of the appellant firm, namely, Deepak Jethwani and the respondent are good friends and are known to each other for the last several years. The respondent had demanded Rs.3 lac from the appellant on the pretext of meeting out his domestic expenses and accordingly, an amount of Rs.3 lac was paid by way of loan and it was assured by the respondent that he would repay the same within a period of one month. When the appellant demanded his money back, then the respondent gave

a cheque no.297843, dated 10th March, 2010 of Rs.3 lac of ICICI Bank, Gwalior after signing the same and assured that the cheque would get encashed. When the complainant deposited the cheque in Madhya Pradesh Rajya Sahakari Bank Maryadit, Branch Gwalior, then it was returned back on 29/06/2010 with an endorsement that 'Funds are insufficient". Thereafter, the appellant informed the respondent, however, he did not give any satisfactory reply. Accordingly, the complainant sent a statutory notice dated 05/07/2010 by registered post with acknowledgment due as well as by UPC. The registered notice was received by the respondent on 07/07/2010. When the respondent did not repay the amount, then the complaint was filed.

It appears that before the evidence could be recorded, the appellant filed an application for amendment of complaint on the ground that by mistake, it has been mentioned that an amount of Rs.3 lac was paid to meet out the domestic requirements of the respondent but in fact, the respondent had got the advertisement of his shop done by the appellant and in lieu of that advertisement, he had given the cheque of Rs. 3 lacs to the appellant and by mistake, incorrect averments were made in the complaint. However, the said application was rejected.

During the course of trial, the appellant also sought liberty to lead secondary evidence by filing the photo copy of the bills. The said application was allowed by order dated 28/02/2017 and the photo copies

of the bills were permitted to be exhibited. However, it was also observed that the permission to lead the secondary evidence shall be subject to adjudication of admissibility and genuineness of the bills at the time of final hearing.

After recording the evidence of the appellant and his witnesses, the statement of respondent under Section 313 of CrPC was recorded. The respondent thereafter, examined himself and one Ajay Jadon in his defence.

The Trial Court by the impugned judgment dismissed the complaint and the respondent was acquitted.

Challenging the judgment passed by the Court below, it is submitted by the Counsel for the appellant that the Court below has failed to see that in the notice, Ex.P3, the appellant has specifically mentioned that the amount of Rs. 3 lac was payable to the appellant on account of advertisement of shop of the respondent. Thus, the original case of the appellant is that the respondent had given a cheque of Rs.3 lacs towards cost of advertisement of his shop, however, by mistake of the Counsel, incorrect fact was mentioned in the complaint that the loan amount was given by the appellant for meeting out the domestic expenses of the respondent. It is further submitted that the application which was filed for amendment of complaint should have been allowed because the application was moved prior to examination of witnesses of

the complainant. Further, it is submitted that the appellant had examined his counsel, who had drafted the complaint and Sanjay Singh (PW3) has specifically stated that since he was not well, therefore, he had not read the complaint very minutely and on account of his mistake, wrong fact was mentioned that an amount of Rs.3 lac was paid for meeting out the domestic requirements of the respondent. It is further submitted that it is incorrect to say that the cheque was issued by Prapti Collection. It is submitted that Prapti Collection was not the primary accused and since the cheque was issued by the respondent, therefore, not only the notice was issued to the respondent but the complaint was also filed against the respondent.

Further, it is submitted that the Court below has wrongly disbelieved the version of the appellant by saying that the appellant has failed to produce any agreement executed between him and the respondent. It is further submitted that merely because the return memo Ex.P2 does not contain seal of the Bank would not make it doubtful because the respondent himself had examined one Ajay Jadon (DW2), an employee of ICICI Bank and even that witness has not stated that the return memo Ex.P2 was not issued by his Bank. The genuineness of return memo Ex.P2 has not been denied by Ajay Jadon (DW2), then it is incorrect to say that the return memo was not issued by ICICI Bank. Even otherwise, Section 146 of Negotiable Instruments Act, merely

provides, that if the bank's slip contains official mark, then a presumption can be drawn, but that doesnot mean, that in case the bank slip doesnot contain an official mark or seal, then it cannot be proved by the complainant. Further, it is not the case of the respondent that his account had "Sufficient Funds". It is further submitted that since the respondent has not denied his signature on the disputed cheque Ex.P1, therefore, his evidence that he had kept the cheques in his drawer, and the same were stolen, cannot be accepted. It is the case of the respondent himself that he did not try to lodge any report about theft of his cheques prior to filing of the complaint and even otherwise, there is nothing on record to show that any police complaint was ever lodged with regard to theft of cheques. Further, the respondent has admitted that the photographs showing the advertisement of the shop of the respondent are correct. Under these circumstances, it is submitted that the Court below has committed a glaring mistake in dismissing the complaint.

Per contra, the counsel for the complainant has supported the reasons assigned by the Trial Court.

Heard the learned counsel for the parties.

The appellant, in support of his case, has examined himself as PW1 (Deepak Jethwani), Pankaj Ingele (PW2) and Sanjay Singh (PW3), whereas the respondent has examined himself (Naresh Jethwani)as (DW1) and Ajay Jadon (DW2).

The appellant filed the disputed cheque Ex.P1, return memo issued by ICICI Bank Ex.P2, notice ExP3, postal receipt Ex.P4, Deposit Slip Ex.P6, Acknowledgment of receipt of notice, Ex. P.5, Deposit slip of Cheque, Ex. P.6, UPC certificate Ex.P7, photographs of advertisement Ex.P.8 and P.9 and bills Ex.P.10 and Ex.P.11, whereas the respondent has relied upon his Bank Account Statement Ex.D1.

It is the case of the appellant, that the respondent had got the advertisement of his shop done by it, and therefore, an amount of Rs. 3,00,000 was outstanding and accordingly, the disputed cheque was issued. In the notice, Ex. P.3, the above mentioned stand was taken, however, it appears that in the complaint, the stand of the appellant was that since, the respondent was in need of money in order to meet out his domestic requirements, therefore, a sum of Rs. 3 lac was given. However, the appellant, thereafter, filed an application for amendment of complaint. The said application was filed on 15-2-2012 and was dismissed on 8-10-2012 on the ground that not only the application has been filed belatedly, but it would also change the nature of the complaint.

From the ordersheets of the Trial Court, it is clear that the application for amendment was filed prior to cross-examination of complainant, although charge was already framed. Further, in the statutory notice Ex. P3, it was the stand of the appellant, that an amount

of Rs. 3 lac was due as the respondent had got the advertisement of his shop. Thus, this Court is of the considered opinion, that the Trial Court, committed material illegality by rejecting the application filed by the appellant for amendment of the complaint and accordingly, the order dated 8-10-2012 passed by the Trial Court is hereby set aside, and the amendment in the complaint is allowed.

Now, the next question for consideration is that whether the cheque was issued by a proprietorship firm or by respondent, and whether the complaint filed against the respondent is maintainable or not?

It is the case of the appellant, that the advertisement of the shop was got done through the appellant, therefore, a cheque of Rs. 3 lac was given. It is clear from disputed cheque Ex. P.1, that the cheque was issued by the respondent in the capacity of proprietor of Prapti Collection.

Undisputedly, the cheque was issued by the proprietorship firm, however, neither the statutory notice was sent to the proprietorship firm nor has been arraigned as an accused.

Now the next question for consideration is that whether the complaint filed by the appellant against the respondent alone was maintainable, because undisputedly, neither any statutory notice was issued to the proprietorship firm nor the said firm has been arraigned as

an accused.

The Supreme Court in the case of **Raghu Lakshminarayanan v. Fine Tubes** reported in **(2007) 5 SCC 103** has held as under :

> **9.** The description of the accused in the complaint petition is absolutely vague. A juristic person can be a company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Company in terms of the Explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Partnership Act.
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> **13.** The distinction between partnership firm and a proprietary concern is well known. It is evident from Order 30 Rule 1 and Order 30 Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in *Ashok Transport Agency* v. *Awadhesh Kumar* wherein this Court stated the law in the following terms: (SCC pp. 569-70, para 6)
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> "*6*. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Partnership Act, 1932. Though a partnership is not a juristic person

> but Order 30 Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order 30 which make applicable the provisions of Order 30 to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order 30 have no application to such a suit as by virtue of Order 30 Rule 10 the other provisions of Order 30 are applicable to a suit against the proprietor of proprietary business 'insofar as the nature of such case permits'. This means that only those provisions of Order 30 can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

A proprietorship firm is neither a Company, nor a partnership firm. It is merely a business name. Although even a partnership firm is not a juristic person, but in view of Order 30 Rule 1 CPC, the partners can sue or be sued in the name of firm. A suit by a proprietorship firm is only by its proprietor. Therefore, Section 141 of Negotiable Instruments Act, would not apply. Thus, the respondent alone can be prosecuted being the proprietor of the proprietorship firm. Accordingly, it is held, that the

Trial Court, committed mistake by holding that since, the proprietorship firm was not arraigned as an accused, therefore, the complaint is not maintainable.

The next question for consideration is that whether the complaint filed by the proprietorship firm is maintainable or not?

The disputed cheque, Ex. P.1 was issued in favor of the appellant. Thus, the complainant is the payee. Section 142 of Negotiable Instruments Act reads as under :

> **142. Cognizance of offences**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
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> (*a*) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
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> (*b*) such complaint is made within one month of the date on which the cause of action arises under clause (*c*) of the proviso to Section 138:
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> Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.
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> (*c*) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.
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> (2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—
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> (*a*) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or
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> (*b*) if the cheque is presented for payment by the

> payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.
> *Explanation*.—For the purposes of clause (*a*), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.

From the plain reading of the above Section, it is clear that the complaint has to be filed by the payee and in the present case, the payee is the Deepak Advertisers and accordingly, the complaint should have been filed by the proprietorship firm only through its proprietor. The Supreme Court in the case of **Shankar Finance & Investments v. State of A.P.** reported in **(2008) 8 SCC 536** has held as under :

> **9.** Section 142(*a*) of the Act requires that no court shall take cognizance of any offence punishable under Section 138 except upon a *complaint made in writing by the payee*. Thus the two requirements are that (*a*) the complaint should be made in writing (in contradistinction from an oral complaint); and (*b*) the complainant should be the payee (or the holder in due course, where the payee has endorsed the cheque in favour of someone else). The payee, as noticed above, is M/s Shankar Finance & Investments. Once the complaint is in the name of the "payee" and is in writing, the requirements of Section 142 are fulfilled. Who should represent the payee where the payee is a company, or how the payee should be represented where payee is a sole proprietary concern, is not a matter that is governed by Section 142, but by the general law.
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> **10.** As contrasted from a company incorporated under the Companies Act, 1956 which is a legal entity distinct from its shareholders, a proprietary concern is not a legal entity

> distinct from its proprietor. A proprietary concern is nothing but an individual trading under a trade name. In civil law where an individual carries on business in a name or style other than his own name, he cannot sue in the trading name but must sue in his own name, though others can sue him in the trading name. Therefore, if the appellant in this case had to file a civil suit, the proper description of the plaintiff should be "Atmakuri Sankara Rao carrying on business under the name and style of M/s Shankar Finance & Investments, a sole proprietary concern". But we are not dealing with a civil suit. We are dealing with a criminal complaint to which the special requirements of Section 142 of the Act apply. Section 142 requires that the complainant should be payee. The payee is M/s Shankar Finance & Investments. Therefore, in a criminal complaint relating to an offence under Section 138 of the Act, it is permissible to lodge the complaint in the name of the proprietary concern itself.

Thus, it is held that the complaint filed by the appellant against the respondent is maintainable.

So far as the merits of the case are concerned, Deepak Jethwani (PW1) was cross-examined by the respondent in detail. The respondent in paragraph 12 of his cross-examination has merely put a question that the acknowledgment of receipt of registered notice Ex.P.5 does not bear signature of the respondent, however, in the entire cross-examination of Deepak Jethwani (PW1), the respondent has not put a single question thereby disputing the signature of the respondent on the disputed cheque Ex.P.1. Even Naresh Jethwani (DW1/respondent) had entered in the witness box but he also did not dispute his signature on the disputed cheque Ex.P.1. Even in his statement under Section 313 of CrPC the

respondent had taken the following defence:-

> मैं निर्दोष हूँ। उक्त प्रकरण झूठा है। परिवादी का 5–6 लोगों का सिंडीकेट है, जो चैक हथिया लेते है व न्यायालय में झूठा प्रकरण प्रस्तुत कर देते हैं।

It is not out of place to mention here that once the accused enters into a witness box, then his status becomes that of like any other witness and accordingly, the respondent was under obligation to explain each and every circumstance which was against him. Further, in view of the presumption as provided under Section 139 of Negotiable Instruments Act, the burden was on the respondent to prove that the cheque was not issued in discharge of legally enforceable debt. The respondent in his evidence has stated that Deepak Jethwani (PW1) is his friend and he used to come to his shop very frequently. All papers including the cheques were kept by the respondent in his drawer. When he was in need of cheques, then he checked his drawer and found that three cheques bearing Serial Nos.297841, 297842 & 297843 of ICICI Bank were missing. Therefore, he went to Kotwali Police Station for lodging the FIR but the FIR was not lodged and he was suggested that the respondent may search the cheques, otherwise, FIR would be lodged in the evening. Thereafter, he could not go to the Police Station and only when the appellant filed the complaint, then he went to ICICI Bank and obtained the bank statement Ex.D1. In para 3 of his cross-examination,

he admitted that in advertisement photographs Ex.P.8 and P.9, the photograph of his shop and number of respondent is mentioned. He further stated that after looking at the photographs, he came to know about the advertisement but even thereafter, he did not lodge any complaint to anybody. However, he tried to explain that as the complaint is already pending, therefore, he did not think it proper to make a complaint to any officer as the Court is the Supreme. He further stated that he never made a complaint to the police or any institution with regard to bills Ex.P10 and Ex.P11. In paragraph 4 of his cross-examination, he could not clarify that on which date he realized that the cheques were missing from his drawer. He further admitted that even after receipt of statutory notice, he did not lodge any complaint with the Bank. However, he gave an explanation that since his cheque was not dishonored, therefore, he did not lodge the complaint. He further stated that the return memo does not bear the seal of the Bank and blank memos are easily available and he can also produce the same. In the entire cross-examination, and even in the examination-in-chief, he did not dispute his signature on the cheque, although from the return memo issued by Bank Ex.P2, it appears that the cheque was returned on two counts; (i) Funds Insufficient (ii) Drawer's signatures incomplete/ Differs/ Required. Although the respondent had given suggestion to Deepak Jethwani that the acknowledgment of receipt of notice Ex.P.5

does not bear his signature which was duly denied by Deepak Jethwani (PW1) but the respondent in his evidence did not dispute his signature on the acknowledgment of receipt of notice Ex.P.5, although in paragraph 4 of his cross-examination, he has stated that since he did not receive any notice, therefore, he did not reply. Further, the respondent never filed any application for getting his signatures on the disputed cheque compared with his admitted signatures. Thus, it is clear that the respondent did not dispute his signature on the disputed cheque Ex.P1.

So far as the defence of the respondent, that he had kept cheques in the drawer from where they were stolen is concerned, the same cannot be accepted. Why a person would keep blank signed cheques in his drawer, specifically when he is the sole proprietor of a proprietorship firm? Further, no FIR or police report was ever lodged by the respondent regarding theft of his cheques. Further, the respondent could not disclose the date on which he came to know that his three cheques are missing and also could not disclose the date on which, he had gone to the police station for the first time, to lodge the report regarding missing cheques.

The respondent has tried to project that the ink of other entries on the disputed cheque is different from the ink of the signatures. The respondent has also tried to establish that other entries are not in his handwriting. The question for consideration is that where the signatures

of the drawer of the cheque, are admitted or are proved, then whether the drawer of the cheque would be absolved from his liability only on the ground that the other entries are not in his handwriting? The question is no more *res integra.* The Supreme Court in the case of **Bir Singh Vs. Mukesh Kumar** reported in **(2019) 4 SCC 197** has held as under :

> **32.** The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.
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> **33.** A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.
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> **34.** If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.
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> **35.** It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the

> Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.
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> **36.** Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

Further, this Court has already held that the disputed cheque, Ex.P.1 bears the signatures of the respondent. Section 139 of Negotiable Instruments Act, 1988 provides for presumption that the disputed instrument was issued in discharge of legally enforceable debt. The Supreme Court in the case of **Shree Daneshwari Traders Vs. Sanjay Jain** reported in **(2019) 16 SCC 83** has held as under :

> **17.** Under Section 138 of the Negotiable Instruments Act, once the cheque is issued by the drawer, a presumption under Section 139 of the Negotiable Instruments Act in favour of the holder would be attracted. Section 139 creates a statutory presumption that a cheque received in the nature referred to under Section 138 of the Negotiable Instruments Act is for the discharge in whole or in part of any debt or other liability. The initial burden lies upon the complainant to prove the circumstances under which the cheque was issued in his favour and that the same was issued in discharge of a legally enforceable debt.
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> **18.** It is for the accused to adduce evidence of such facts and circumstances to rebut the presumption that such debt does not exist or that the cheques are not supported by consideration.
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> **19.** Considering the scope of the presumption to be raised under Section 139 of the Act and the nature of evidence to be adduced by the accused to rebut the presumption, in

Kumar Exports v. *Sharma Carpets*, the Supreme Court in paras 14-15 and paras 18-20 held as under: (SCC pp. 519-21)

"*14. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.*

15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means 'taking as true without examination or proof'.

* * *

18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is

proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. 91When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

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."
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> (emphasis supplied)

It is next contended by the Counsel for the respondent that the appellant has failed to prove that the cheque was issued in discharge of legally enforceable debt.

Considered the submissions made by the Counsel for the parties.

It is the case of the appellant, that the respondent had given a contract for advertisment of his shop and accordingly, hoardings and pamphlets on the body as well as seats of a bus were affixed. The photographs Ex P8 and P.9 have been filed by the appellant. The respondent has also admitted that the photographs contain his number and photo of the shop. He also admitted that he never made any

complaint with regard to the advertisement. The bills Ex. P.10 and P.11 have also been produced by the appellant. Further, the respondent has taken a false stand that the cheques were stolen from his drawer. Under these circumstances, it is held that the respondent had issued the cheque in discharge of legally enforceable debt.

It is next contended by the Counsel for the respondent that the return memo Ex. P2 is not proved. Considered the submissions made by the Counsel for the parties.

As per the return memo Ex.P2, issued by ICICI Bank, the cheque was returned on two counts; (i) Funds Insufficient (ii) Drawer's signatures incomplete/Differs/ Required.

So far as insufficiency of funds is concerned, it is not the case of the respondent that he had sufficient funds in his account. So far as the drawer's signature incomplete is concerned, it is not the case of the respondent that the disputed cheque Ex.P1 does not bear his signature. So far as the stand of the respondent that since the return memo Ex.P2 issued by ICICI Bank does not bear the seal of the Bank and, therefore, the same cannot be relied upon is concerned, the said submission of the counsel for the respondent cannot be accepted. The return memo Ex. P2 bears signature of an officer of ICICI Bank. The respondent has examined Ajay Jadaon (DW2), an employee of ICICI Bank, who did not try to prove that the return memo Ex.P2 was never issued by the Bank.

On the contrary, it appears that when the counsel for the appellant tried to put a question to Ajay Jadon (DW2) with regard to return memo Ex.P2, then it was objected by the respondent's counsel. Further, Section 146 of N.I.Act provides for presumption, but it doesnot provide that unless and until, the return memo bears the seal of the bank, it cannot be read in evidence. In the present case, the appellant has proved beyond reasonable doubt that the return memo, Ex. P.2 was duly issued by ICICI Bank.

Thus, this Court is of the considered opinion, that the appellant has successfully established that the disputed cheque, Ex. P.1 was issued by the respondent in discharge of his legally enforceable debt, which stood bounced due to in-sufficient funds. Accordingly, the judgment dated 13/10/2017 passed by Additional Chief Judicial Magistrate, Gwalior in Criminal Case No.14094/2010 is hereby set aside and the respondent is hereby convicted under Section 138 of Negotiable Instruments Act.

So far as the question of sentence is concerned, as per Section 138 of Negotiable Instruments Act, the imprisonment for a term which may extend to 2 years and fine which may extend twice the amount of the cheque can be imposed. However, as this Court is not intending to impose jail sentence of more than 1 year, therefore, in the light of

Section 143 of Negotiable Instruments Act, it is not necessary to hear the respondent on the question of sentence.

Considering the totality of the facts and circumstances of the case, the respondent is awarded jail sentence of rigorous imprisonment of 1 year and is also directed to pay compensation of Rs. 5 lacs which shall be payable to the appellant.

The compensation amount be deposited within a period of one month from today, failing which the respondent shall undergo the jail sentence of 3 months.

The respondent is directed to surrender before the Trial Court, on or before 31st of December 2020.

The appeal is **Allowed.**

(G.S. Ahluwalia)
Judge

MKB