IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 556 of 2016
Reserved on: 12.12.2023
Date of Decision: 12.01.2024

Satyaveer Singh ...Appellant.

Versus

Suraj ...Respondent.

Coram
Hon'ble Mr. Justice Rakesh Kainthla, Judge.
Whether approved for reporting?[1] Yes.

For the Appellant : Mr. C.M. Thakur, Advocate.
For the Respondent : Mr. Vijay Kumar Verma, Advocate.

Rakesh Kainthla, Judge

The present appeal is directed against the judgment dated 1.10.2016, passed by learned Judicial Magistrate First Class, Court No. 5 (JMFC), Shimla District Shimla, H.P., vide which the respondent (accused before the learned Trial Court) was acquitted of the commission of an offence punishable under Section 138 of the Negotiable Instruments (NI) Act. (The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

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[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

2. Briefly stated, the facts giving rise to the present appeal are that the complainant filed a complaint before the learned Trial Court against the accused for taking action under Section 138 of the NI Act. It was asserted that the complainant is running a cloth shop at Dhalli, Shimla. The accused required money and he approached the complainant with a request to lend him a sum of ₹2.00 lacs for two months as a friendly loan for his personal use. The accused assured to return the amount after two months. The complainant handed over a sum of ₹2.00 lacs to the accused in September 2014. The complainant asked the accused to make the payment in November 2014 as per the promise and the accused issued a cheque (Ex.CW-1/A) for a sum of ₹2.00 lacs drawn on Punjab National Bank, DAV Senior Second Secondary School, Lakkar Bazar, Shimla. The complainant presented the cheque before his Bank, PNB Sanjauli, Shimla, but the cheque was dishonoured by the Bank of the accused vide memo (Ex.CW-1/B) with an endorsement of 'insufficient funds'. The complainant served a legal notice (Ex.CW-1/C) upon the accused through his counsel. This notice was sent through registered cover and a receipt (Ex.CW-1/D) was obtained. The accused failed to make the payment within 15

days mentioned in the notice. Hence, the complaint was filed against the accused for taking action as per the law.

3. Learned Trial Court found sufficient reasons to summon the accused. When the accused appeared, a notice of accusation was put to him for the commission of an offence punishable under Section 138 of the NI Act. The accused pleaded not guilty and claimed to be tried.

4. The complainant examined himself (CW-1).

5. The accused in his statement under Section 313 of Cr.P.C. admitted that the complainant is running a cloth shop at Dhalli. He denied the rest of the complainant's case. He stated that he had handed over a blank cheque to the complainant because he had taken cloth worth ₹20,000/- on credit. He did not make the payment of ₹2.00 lacs because he was not under any obligation to pay this amount. The complainant wanted to extract money from the accused by practising fraud upon him. He examined Chet Ram Sharma in his defence.

6. Learned Trial Court held that there is a presumption under Sections 118 and 139 of the NI Act that the cheque was issued in discharge of legal liability for valid consideration and

the burden shifts upon the accused to rebut this presumption. The accused can rebut this presumption by examining the witnesses or by the cross-examination of the complainant's witnesses. The complainant did not remember the exact date or the week of the month in which the loan was given to the accused. No document was prepared at the time of handing over the money, which is contrary to normal human conduct. The complainant claimed that he had taken a loan of ₹1.00 lac from his brother but he (brother) was not examined. The complainant stated that he had not filed any complaint against any person, but it was duly proved by the testimony of the defence witness that the complainant had filed various complaints for the commission of an offence punishable under Section 138 of the NI Act. The complainant appeared to be a moneylender and he did not have any licence. The complainant advanced an amount of ₹2.00 lacs in cash contrary to Section 269(SS) of the Income Tax Act. The Court will not support an illegal transaction. Therefore, the complaint was dismissed and the accused was acquitted.

7. Being aggrieved from the judgment passed by the learned Trial Court, the present appeal has been filed asserting that the learned Trial Court did not properly appreciate the

material placed before it. The learned Trial Court wrongly held that in case of non-mentioning of the amount in the Income Tax Return, the complaint is liable to be dismissed and the accused is liable to be acquitted. The accused never disputed his signatures on the cheque and learned Trial Court had rightly held that the presumption under Sections 118(a) and 139 of the NI Act applies to the present case. The accused failed to rebut the presumption by providing any satisfactory evidence and learned Trial Court erred in dismissing the complaint. Therefore, it was prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set-aside.

8. I have heard Mr. C.M. Thakur, learned counsel for the appellant-complainant and Mr. Vijay Kumar Verma, learned counsel for the respondent-accused.

9. Mr. C.M. Thakur, learned counsel for the appellant-complainant submitted that the learned Trial Court erred in dismissing the complaint. It was admitted by the accused that the cheque was signed by him; therefore, the burden shifted upon the accused to rebut the presumption and the complainant was not supposed to prove the existence of legally enforceable

debt or liability. Learned Trial Court erred in disbelieving the version of the complainant due to the non-examination of the complainant's brother. Violation of Section 269(SS) of the Income Tax Act does not make the transaction illegal as held by the learned Trial Court. The version of the accused that the cheque was issued as a security for the credit of the clothes purchased by the accused was not established by any evidence and could not have been accepted. Hence, he prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

10. Mr. Vijay Kumar, learned counsel for the accused supported the judgment of the learned Trial Court and submitted that no interference is required with the same.

11. I have given considerable thought to the submissions at the bar and have gone through the record carefully.

12. The present appeal has been filed against a judgment of acquittal. The Hon'ble Supreme Court laid down the parameters of deciding an appeal against acquittal in ***Jafarudheen v. State of Kerala, (2022) 8 SCC 440***, as under:-

"**Scope of Appeal filed against the Acquittal:**

> 25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters."

13. This position was reiterated in ***Siju Kurian versus State of Karnataka 2023 online SCC 429***, wherein it was held:-

> **"15.** One of the main contentions raised by the learned counsel appearing for the appellant is to the effect that the High Court ought not to have interdicted with the judgment of the acquittal passed by the Trial Court and only in the event of the judgment of the Trial court was riddled with perversity and the view taken by the Trial Court was not a possible view, same could have been reversed by relying upon the judgment of this Court in case of ***Murugesan V. State through the Inspector of police(2012) 10 SCC 383*** whereunder it came to be held as follows:
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> > "**33.** The expressions "erroneous", "wrong" and "possible" are defined in the *Oxford English Dictionary* in the following terms:
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> > "*erroneous.*— wrong; incorrect.
> >
> > *wrong.*—(1) not correct or true, mistaken.
> >
> > (2) unjust, dishonest, or immoral.
> >
> > *possible.*—(1) capable of existing, happening, or being achieved.

(2) that may exist or happen, but that is not certain or probable."

34. It will be necessary for us to emphasize that a possible view denotes an opinion, which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion, which can reasonably be arrived at regardless of the fact where it is agreed upon or not by the higher court. The fundamental distinction between the two situations has to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High Court supplanted over and above the view of the trial court."

16. It need not be restated that it would be open for the High Court to re-apprise the evidence and conclusions drawn by the Trial Court and in the case of the judgment of the trial court being perverse that is contrary to the evidence on record, then in such circumstances the High Court would be justified in interfering with the findings of the Trial Court and/or reversing the finding of the Trial Court. In ***Gamini Bala Koteswara Rao* v. *State of Andhra Pradesh (2009) 10 SCC 636: AIR 2010 SC 589*** it has been held by this Court as under:

"**14.** We have considered the arguments advanced and heard the matter at great length. It is true, as

> contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so.

17. The Appellate Court may reverse the order of acquittal in the exercise of its powers and there is no indication in the Code of any limitation or restriction having been placed on the High Court in the exercise of its power as an Appellate court. No distinction can be drawn as regards the power of the High Court in dealing with an appeal, between an appeal from an order of acquittal and an appeal from a conviction. The Code of Criminal Procedure does not place any fetter on the exercise of the power to review at large the evidence upon which the order of acquittal was founded and to conclude that upon that evidence the order of acquittal should be reversed.

18. In the case of ***Sheo Swarup v. King Emperor AIR 1934 PC 227***, it has been held by the Privy Council as under*:*

> But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as:
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> 1) The views/opinion of the trial judge as to the credibility of the witnesses;
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> 2) The presumption of innocence in favour of the accused;
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> 3) The right of the accused to the benefit of any doubt; and

> 4) The slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

19. This Court has time and again reiterated the powers of the Appellate Court while dealing with the appeal against an order of acquittal and laid down the general principles in the matter of ***Chandrappa* v. *State of Karnataka* (2007) 4 *SCC 415*** to the following effect:

> **"42.** From the above decisions, in our considered view, the following general principles regarding the powers of the Appellate Court while dealing with an appeal against an order of acquittal emerge:
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> (*1*) An Appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
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> (2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on the exercise of such power and an Appellate court on the evidence before it may reach its own conclusion, both on questions of fact and law.
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> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an Appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an Appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
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> (4) An Appellate court, however, must bear in mind that in case of acquittal, there is a

> double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
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> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the Appellate court should not disturb the finding of acquittal recorded by the trial court."

14. While dealing with the appeal against the acquittal in a complaint filed for the commission of an offence punishable under Section 138 of the NI Act the Hon'ble Supreme Court held in ***Rohitbhai Jivanlal Patel v. State of Gujarat (2019) 18 SCC 106*** that the normal rules with same rigour cannot be applied to the cases under Negotiable Instruments Act because there is a presumption that the holder had received the cheque for discharge of legal liability. The Appellate Court is entitled to look into the evidence to determine whether the accused has discharged the burden or not. It was observed:-

> **12.** According to the learned counsel for the appellant-accused, the impugned judgment is contrary to the principles laid down by this Court in ***Arulvelu [Arulvelum v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288]*** because

the High Court has set aside the judgment of the trial court without pointing out any perversity therein. The said case of ***Arulvelu [Arulvelum v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288]*** related to the offences under Sections 304-B and 498-A IPC. Therein, on the scope of the powers of the appellate court in an appeal against acquittal, this Court observed as follows : (SCC p. 221, para 36)

> "*36.* Careful scrutiny of all these judgments leads to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

The principles aforesaid are not of much debate. In other words, ordinarily, the appellate court will not be upsetting the judgment of acquittal, if the view taken by the trial court is one of the possible views of the matter and unless the appellate court arrives at a clear finding that the judgment of the trial court is perverse i.e. not supported by evidence on record or contrary to what is regarded as normal or reasonable; or is wholly unsustainable in law. Such general restrictions are essential to remind the appellate court that an accused is presumed to be innocent unless proved guilty beyond reasonable doubt and a judgment of acquittal further strengthens such presumption in favour of the accused. However, such restrictions need to be visualised in the context of the particular matter before the appellate court and the nature of the inquiry therein. The same rule with the same rigour cannot be applied in a matter relating to the offence under Section 138 of the NI Act, particularly where a presumption is drawn that the holder has

> received the cheque for the discharge, wholly or in part, of any debt or liability. Of course, the accused is entitled to bring on record the relevant material to rebut such presumption and to show that preponderance of probabilities are in favour of his defence but while examining if the accused has brought about a probable defence so as to rebut the presumption, the appellate court is certainly entitled to examine the evidence on record in order to find if preponderance indeed leans in favour of the accused.
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> **13.** For determination of the point as to whether the High Court was justified in reversing the judgment and orders of the trial court and convicting the appellant for the offence under Section 138 of the NI Act, the basic questions to be addressed are twofold: as to whether the complainant Respondent 2 had established the ingredients of Sections 118 and 139 of the NI Act, so as to justify drawing of the presumption envisaged therein; and if so, as to whether the appellant-accused had been able to displace such presumption and to establish a probable defence whereby, the onus would again shift to the complainant?

15. The present appeal has to be decided as per the judgments of the Hon'ble Supreme Court.

16. The complainant Satyaveer Singh (CW-1) stated that he is running a business of clothes at Dhalli. He knew the accused for 3-4 years. The accused obtained a loan of ₹2.00 lacs in September 2014. He promised to pay the money in two months, however the money was not returned in two months. The accused issued a cheque (Ex.CW-1/A) for discharging his legal liability. This cheque was presented in PNB, Sanjauli but

was dishonoured with the remarks 'insufficient funds'. Memo (Ex.CW-1/B) was issued. He served a legal notice (Ex.CW-1/C) upon the accused by registered letter. The accused failed to repay the money despite the receipt of a valid notice of demand.

17. He stated in his cross-examination that his shop is located near Dhalli Tunnel and is being run in the name and style of Satyaveer Singh. This shop was taken on rent from Sunita. He deals in cloth in retail and not in wholesale. His yearly income is ₹4.00 lacs. He has employed two workers in the shop who were not registered with the Labour Department. He did not remember the date or the week of advancing the loan. However, the loan was advanced in September 2014. He did not sell the cloth on credit from his shop. He had not advanced any loan to any other person. He had taken ₹1.00 lac from his brother and had handed the money to the accused. He admitted that this fact was not mentioned in the complaint. His brother is a driver by profession. He is an income tax payee. He has filed an Income Tax Return for the years 2014-15 and 2015-16. He had not mentioned the amount advanced by him to the accused in his Income Tax Return. He could not produce an Income Tax Return. He had not filed any complaint against any person except the

accused. He admitted that a criminal complaint titled Satyaveer Vs. Jagdeesh was pending in the Court for evidence. He volunteered to say that it was compromised. He admitted that another case was filed against Deen Dayal which was compromised. He denied that he filled name, amount and date himself. The accused is running a bakery shop. He denied that the transaction of the loan is reduced into writing in the normal course of business. The average sale of the shop is ₹2,000/- per day. He denied that a blank cheque was taken by him from the accused in lieu of the sale of cloth to the accused on credit. He denied that he had misused the cheque. He handed over the cheque in the presence of 2-3 persons in his shop. These persons were not cited as witnesses. He denied that the accused had ever taken a loan of ₹2.00 lacs or that his yearly income was not ₹4.00 lacs.

18. This is the entire evidence led by the complainant.

19. It was admitted by the accused that the cheque bears his signature. He explained that the cheque was handed over by him to the complainant as a security for the sale of cloth on credit. It was laid down by this Court in ***Naresh Verma vs.***

Narinder Chauhan 2020(1) Shim. L.C. 398 that where the accused had not disputed his signatures on the cheque, the Court has to presume that it was issued in discharge of legal liability and the burden would shift upon the accused to rebut the presumption. It was observed:-

> "8. Once signatures on the cheque are not disputed, the plea with regard to the cheque having not been issued towards discharge of lawful liability, rightly came to be rejected by learned Courts below. Reliance is placed upon ***Hiten P. Dalal v. Bartender NathBannerji, 2001 (6) SCC 16***, wherein it has been held as under:
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> > "The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."
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> 9. S.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 nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

20. Similar is the judgment in ***Basalingappa vs. Mudibasappa 2019 (5) SCC 418*** wherein it was held:

> 24. Applying the proposition of law as noted above, in the

facts of the present case, it is clear that the signature on the cheque having been admitted, a presumption shall be raised under Section 139 that the cheque was issued in discharge of debt or liability.

21. This position was reiterated in ***M/S KalamaniTex and another Versus P. Balasubramanian 2021 (5) SCC 283*** wherein it was held:

> "14. Adverting to the case in hand, we find on a plain reading of its judgment that the trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these 'reverse onus' clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystallized by this Court in ***Rohitbhai Jivanlal Patel v. State of Gujarat (2019) 18 SCC 106, 18*** in the following words:
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> > "In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have

> been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused.....”

> 15. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the trial Court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The trial Court fell in error when it called upon the Complainant-Respondent to explain the circumstances under which the appellants were liable to pay. Such an approach of the trial Court was directly in the teeth of the established legal position as discussed above and amounts to a patent error of law.

> 16. No doubt, and as correctly argued by senior counsel for the appellants, the presumptions raised under Section 118 and Section 139 are rebuttable in nature. As held in ***MS Narayana Menon v. State of Kerela (2006) 6 SCC 39, 32***, which was relied upon in Basalingappa (supra), a probable defence needs to be raised, which must meet the standard of “preponderance of probability”, and not a mere possibility. These principles were also affirmed in the case of Kumar Exports (supra), wherein it was further held that bare denial of passing of consideration would not aid the case of the accused.”

22. Similar is the judgment in ***APS Forex Services (P) Ltd. v. Shakti International Fashion Linkers (2020) 12 SCC 724***, wherein it was observed:-

> **7.2.** What is emerging from the material on record is that the issuance of a cheque by the accused and the signature of the accused on the said cheque are not disputed by the accused. The accused has also not disputed that there were transactions between the parties. Even as per the statement of the accused, which was recorded at the time of the framing of the charge, he has admitted that some amount was due and payable. However, it was the case on behalf of the accused that the cheque was given by way of

security and the same has been misused by the complainant. However, nothing is on record that in the reply to the statutory notice it was the case on behalf of the accused that the cheque was given by way of security. Be that as it may, however, it is required to be noted that earlier the accused issued cheques which came to be dishonoured on the ground of "insufficient funds" and thereafter a fresh consolidated cheque of ₹9,55,574 was given which has been returned unpaid on the ground of "STOP PAYMENT". Therefore, the cheque in question was issued for the second time. Therefore, once the accused has admitted the issuance of a cheque which bears his signature, there is a presumption that there exists a legally enforceable debt or liability under Section 139 of the NI Act. However, such a presumption is rebuttable in nature and the accused is required to lead the evidence to rebut such presumption. The accused was required to lead evidence that the entire amount due and payable to the complainant was paid.

9. Coming back to the facts in the present case and considering the fact that the accused has admitted the issuance of the cheques and his signature on the cheque and that the cheque in question was issued for the second time after the earlier cheques were dishonoured and that even according to the accused some amount was due and payable, there is a presumption under Section 139 of the NI Act that there exists a legally enforceable debt or liability. Of course, such presumption is rebuttable in nature. However, to rebut the presumption, the accused was required to lead the evidence that the full amount due and payable to the complainant had been paid. In the present case, no such evidence has been led by the accused. The story put forward by the accused that the cheques were given by way of security is not believable in the absence of further evidence to rebut the presumption and more particularly the cheque in question was issued for the second time after the earlier cheques were dishonoured. Therefore, both the courts below have

> materially erred in not properly appreciating and considering the presumption in favour of the complainant that there exists legally enforceable debt or liability as per Section 139 of the NI Act. It appears that both, the learned trial court as well as the High Court, have committed an error in shifting the burden upon the complainant to prove the debt or liability, without appreciating the presumption under Section 139 of the NI Act. As observed above, Section 139 of the Act is an example of reverse onus clause and therefore, once the issuance of the cheque has been admitted and even the signature on the cheque has been admitted, there is always a presumption in favour of the complainant that there exists legally enforceable debt or liability and thereafter, it is for the accused to rebut such presumption by leading evidence.

23. The learned Trial Court had rightly pointed out that there is a presumption under Section 139 of the Negotiable Instruments Act that the cheque was issued in the discharge of the legal liability. This presumption was explained by the Hon'ble Supreme Court in ***Triyambak S. Hegde Versus Sripad 2022 (1) SCC 742*** as under:

> 11. From the facts arising in this case and the nature of the rival contentions, the record would disclose that the signature on the documents at Exhibits P-6 and P-2 is not disputed. Exhibit P-2 is the dishonoured cheque based on which the complaint was filed. From the evidence tendered before the JMFC, it is clear that the respondent has not disputed the signature on the cheque. If that be the position, as noted by the courts below a presumption would arise under Section 139 in favour of the appellant who was the holder of the cheque. Section 139 of the N.I. Act reads as hereunder:-

> **"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."

12 Insofar as the payment of the amount by the appellant in the context of the cheque having been signed by the respondent, the presumption for the passing of the consideration would arise as provided under Section 118(a) of N.I. Act which reads as hereunder: -

> **"118. Presumptions as to negotiable instruments -**
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> Until the contrary is proved, the following presumptions shall be made: -
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> > (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."

13. The above-noted provisions are explicit to the effect that such presumption would remain until the contrary is proved. The learned counsel for the appellant in that regard has relied on the decision of this Court in ***K. Bhaskaran vs. SankaranVaidhyanBalan&Anr., 1999 (7) SCC 510*** wherein it is held as hereunder:

> "9. As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date on which the cheque bears. Section 139 of the Act enjoins the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. The Trial Court was not persuaded to rely on the interested testimony of DW-1 to rebut the presumption. The

> said finding was upheld by the High Court. It is not now open to the accused to contend differently on that aspect."

14. The learned counsel for the respondent has however referred to the decision of this Court in ***Basalingappa vs. Mudibasappa, 2019 (5) SCC 418*** wherein it is held as hereunder: -

> "25. We having noticed the ratio laid down by this Court in the above cases on Sections 118 (a) and 139, we now summarise the principles enumerated by this Court in the following manner:
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> 25.1. Once the execution of the cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.
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> 25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of the preponderance of probabilities.
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> 25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.
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> 25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.
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> 25.5. It is not necessary for the accused to come into the witness box to support his defence.
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> 26. Applying the proposition of law as noted above,

in the facts of the present case, it is clear that the signature on the cheque having been admitted, a presumption shall be raised under Section 139 that the cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused. In cross-examination of PW1, when the specific question was put that the cheque was issued in relation to a loan of ₹25,000 taken by the accused, PW1 said that he does not remember. PW1 in his evidence admitted that he retired in 1997 on which date he received a monetary benefit of ₹8 lakhs, which was encashed by the complainant. It was also brought in the evidence in the evidence that in the year 2010, the complainant entered into a sale agreement for which he paid an amount of ₹4,50,000 to Balana Gouda towards sale consideration. Payment of ₹4,50,000 being admitted in the year 2010 and a further payment of a loan of ₹ 50,000 with regard to which Complaint No.119 of 2012 was filed by the complainant, copy of which complaint was also filed as Ext. D-2, there was a burden on the complainant to prove his financial capacity. In the years 2010-2011, as per the own case of the complainant, he made a payment of ₹18 lakhs. During his cross-examination, when the financial capacity to pay ₹ 6 lakhs to the accused was questioned, there was no satisfactory reply given by the complainant. The evidence on record, thus, is a probable defence on behalf of the accused, which shifted the burden on the complainant to prove his financial capacity and other facts."

15. In that light, it is contended that the very materials produced by the appellant and the answers relating to lack of knowledge of property details by PW-1 in his cross-examination would indicate that the transaction is doubtful and no evidence is tendered to indicate that the

amount was paid. In such an event, it was not necessary for the respondent to tender rebuttal evidence but the case put forth would be sufficient to indicate that the respondent has successfully rebutted the presumption.

16. On the position of law, the provisions referred to in Sections 118 and 139 of N.I. Act as also the enunciation of law as made by this Court needs no reiteration as there is no ambiguity whatsoever. In, ***Basalingappa vs. Mudibasappa (supra)*** relied on by the learned counsel for the respondent, though on facts the ultimate conclusion therein was against raising presumption, the facts and circumstances are entirely different as the transaction between the parties as claimed in the said case is peculiar to the facts of that case where the consideration claimed to have been paid did not find favour with the Court keeping in view the various transactions and extent of the amount involved. However, the legal position relating to presumption arising under Sections 118 and 139 of N.I. Act on a signature being admitted has been reiterated. Hence, whether there is a rebuttal or not would depend on the facts and circumstances of each case.

24. This position was reiterated in ***Tedhi Singh vs. Narayan Dass Mahant 2022 (6) SCC 735*** wherein it was held:

7. It is true that this is a case under Section 138 of the Negotiable Instruments Act. Section 139 of the N.I. Act provides that the Court shall presume 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. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the accused to establish that there is no consideration received. It is in the context of this provision that the theory of 'probable defence' has grown. In an earlier judgment, in fact, which has also been adverted to in ***Basalingappa (supra)***, this Court notes that Section 139 of the N.I. Act is an example

> of reverse onus [see (2010) 11 SCC 441). It is also true that this Court has found that the accused is not expected to discharge an unduly high standard of proof. It is accordingly that the principle has developed that all which the accused needs to establish is a probable defence. As to whether a probable defence has been established is a matter to be decided on the facts of each case on the conspectus of evidence and circumstances that exist.

25. Similar is the judgment in ***P. Rasiya v. Abdul Nazer,*** ***2022 SCC OnLine SC 1131*** wherein it was observed:

> "As per Section 139 of the N.I. Act, 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 discharge, in whole or in part, of any debt or other liability. Therefore, once the initial burden is discharged by the Complainant that the cheque was issued by the accused and the signature and the issuance of the cheque is not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. The presumption under Section 139 of the N.I. Act is a statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the Complainant/holder of the cheque, in that case, it is for the accused to prove the contrary."

26. This position was reiterated in ***Rajesh Jain v. Ajay*** ***Singh, (2023) 10 SCC 148: 2023 SCC OnLine SC 1275*** wherein it was observed at page 161:

> **33.** The NI Act provides for two presumptions: Section 118 and Section 139. Section 118 of the Act inter alia directs that it shall be presumed until the contrary is proved, that

every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that "unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability". It will be seen that the "*presumed fact*" directly relates to one of the crucial ingredients necessary to sustain a conviction under Section 138. [The rules discussed hereinbelow are common to both the presumptions under Section 139 and Section 118 and are hence, not repeated—reference to one can be taken as reference to another]

34. Section 139 of the NI Act, which takes the form of a "*shall presume*" clause is illustrative of a presumption of law. Because Section 139 requires that the Court "*shall presume*" the fact stated therein, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. But this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary as is clear from the use of the phrase "*unless the contrary is proved"*.

35. The Court will necessarily presume that the cheque had been issued towards the discharge of a legally enforceable debt/liability in two circumstances. *Firstly*, when the drawer of the cheque admits issuance/execution of the cheque and *secondly*, in the event where the complainant proves that the cheque was issued/executed in his favour by the drawer. The circumstances set out above form the fact(s) which bring about the activation of the presumptive clause. [***Bharat Barrel & Drum Mfg. Co.* v. *Amin Chand Payrelal*** [***Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal, (1999) 3 SCC 35***]]

36. Recently, this Court has gone to the extent of holding that presumption takes effect even in a situation where the accused contends that a blank cheque leaf was voluntarily signed and handed over by him to the complainant. [***Bir Singh v. Mukesh Kumar [Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197 : (2019) 2 SCC***

(Civ) 309 : (2019) 2 SCC (Cri) 40]]. Therefore, the mere admission of the drawer's signature, without admitting the execution of the entire contents in the cheque, is now sufficient to trigger the presumption.

37. As soon as the complainant discharges the burden to prove that the instrument, say a cheque, was issued by the accused for discharge of debt, the presumptive device under Section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.

38. ***John Henry Wigmore [John Henry Wigmore and the Rules of Evidence: The Hidden Origins of Modern Law]*** *on Evidence* states as follows:

> "The peculiar effect of the presumption of law is merely to invoke a rule of law compelling the Jury to reach the conclusion in the absence of evidence to the contrary from the opponent but if the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption 'disappears as a rule of law and the case is in the Jury's hands free from any rule'."

39. The standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the prosecution is required to prove the guilt of an accused. The accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The accused must meet the standard of "*preponderance of probabilities*", similar to a defendant in a civil proceeding. [***Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184 : AIR 2010 SC 1898]***]

27. Therefore, the Court has to start with the presumption that the cheque was issued in discharge of legal liability and the burden is upon the accused to prove the contrary.

28. In the present case, the learned Trial Court had also concluded that the cheque has a presumption that it was issued in discharge of the legal liability; however, the learned Trial Court proceeded to disbelieve the version of the complainant on the ground that the presumption does not extend to the existence of a legally enforceable debt. Reliance was placed upon the judgment of ***Krishna Janardhan Bhat versus Datta Rai G. Hegde, (2008) 4 SCC 54*** in support of this conclusion. This judgment was considered by the Hon'ble Supreme Court in ***Rangappa v. Sri Mohan, (2010) 11 SCC 441: 2010 SCC OnLine SC 583,*** and it was held that the observations made in ***Krishan Janardhan Bhat*** (supra) may not be correct. It was observed:

> "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."

29. In similar circumstances, the Hon'ble Supreme Court had held in ***Rohitbhai Jivanlal Patel v. State of Gujarat (2019) 18 SCC 106, 18*** that once the presumption had been drawn, the onus shifted to the accused and unless the accused discharged the onus, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of fund or non-examination of the witnesses. It was observed:-

> "18. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused. The aspect relevant for consideration had been as to whether the appellant-accused has brought on record such

> facts/material/circumstances which could be of a reasonably probable defence."

30. It was laid down by the Hon'ble Supreme Court in ***Uttam Ram Versus Devinder Singh Hudan and another (2019) 10 SCC 287*** that the complainant is not to prove the debt as in a civil court in view of the presumption but only to prove that the cheque was issued by the accused. It was observed:

> "20. The Trial Court and the High Court proceeded as if, the appellant is to prove a debt before a civil court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. Dishonour of a cheque carries a statutory presumption of consideration. The holder of the cheque in due course is required to prove that the cheque was issued by the accused and that when the same was presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability."

31. It was laid down in ***P. Rasiya v. Abdul Nazer, 2022 SCC OnLine SC 1131*** that the complainant is not to state the nature of the transaction or the source of funds. It was observed:

> "By the impugned common judgment and order, the High Court has reversed the concurrent findings recorded by both the courts below and has acquitted the accused on the ground that, in the complaint, the Complainant has not specifically stated the nature of transactions and the source of fund. However, the High Court has failed to note the presumption under Section 139 of the N.I. Act. As per Section 139 of the N.I. Act, 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 discharge, in whole or in part, of any debt or other liability. Therefore, once the initial burden is discharged by the Complainant that the cheque was issued by the accused and the signature and the issuance of the cheque are not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. The presumption under Section 139 of the N.I. Act is a statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the Complainant/holder of the cheque, in that case, it is for the accused to prove the contrary. The aforesaid has not been dealt with and considered by the High Court."

32. Therefore, in view of the binding precedents of the Hon'ble Supreme Court, the complainant is not required to prove the existence of legally enforceable debt or liability as this is a matter of presumption. Rather, the accused is required to disprove the existence of legally enforceable debt or liability.

33. The accused explained that he had issued a cheque as a security for the cloth purchased by him from the complainant on credit. The complainant specifically stated in his cross-examination that he deals with the cloth on retail and does not have any wholesale business. He specifically denied that he had sold the cloth to the accused on credit; rather he stated that the accused was running a bakery shop. Thus, the complainant has

not accepted the version of the accused that he had sold the cloth to the accused on credit. The accused did not examine himself or any other person to establish that he was running a cloth shop or that he had ever taken the cloth from the complainant on credit. No account books were also produced on record to support this fact. It was held in ***Sumeti Vij vs. Paramount Tech Fab Industries AIR 2021 SC 1281*** that the accused has to lead defence evidence to rebut the presumption and mere denial in his statement under Section 313 is not sufficient to rebut the presumption. It was observed:

> "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 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.*" (Emphasis supplied)"

34. Therefore, the burden could not have been rebutted by merely making suggestions to the complainant or making the statement under Section 313 Cr.P.C.

35. The learned Trial Court was influenced by the fact that the complainant is a moneylender and does not have any licence with him. It was laid down by this Court in ***Rajbir Singh Versus Geeta Devi (2019) 2 B.C. 603*** that the provisions of the Registration Money Lenders Act apply only to the suits and not to the complaint filed u/s 138 of N.I.Act. The Court cannot dismiss the complaint as not maintainable on the ground that the complainant is not a registered moneylender. It was observed:

> "10. The learned trial Magistrate, had, recorded a conclusion, that, the complainant was engaged in the business of money lending, hence, in the face, of the provisions, borne, in Section 3 of the H. P. Registration of MoneyLenders Act, 1976, provisions whereof stand extracted hereinafter:-
>
> > "3. Suits and applications by money-lenders barred, unless money- Notwithstanding anything contained in any other enactment for the time being in force a suit by a money-lender for the recovery of loan or an application by money-lender for the execution of a decree relating to a loan, shall, after the commencement of this Act, be dismissed, unless the moneylender, at the time of institution of the suit or presentation of the application for execution, or at the time of decreeing the suit or deciding the application for execution,-
> >
> > (a) is registered; and

> (i) holds a valid licence, in such, form and in such manner as may be prescribed; or
>
> (ii) holds a certificate from a Commissioner granted under section 10, specifying the loan in respect of which the suit is instituted, or the decree in respect of which the application for execution is presented; or
>
> (iii) if he is not already a registered and licensed money-lender, satisfies the court that he has applied to the Collector to be registered and licensed and that such application is pending; Provided that in such a case, the suit or application shall not be finally disposed of until the application of the money-lender for registration and grant of the licence pending before the Collector is finally disposed of. "

(i) Whereunder an unregistered money lender, is, barred, to enforce his claim, against, his borrower by instituting a civil suit or upon rendition of an affirmative decree, he is forbidden, to realize the decretal amount, through his casting an execution petition, before, the executing court concerned, (ii) hence concluded that the amount, borne, in Ex. CW1/A, being, not a legally recoverable debt or a legally enforceable debt, thereupon, pronounced an order, of acquittal, upon, the respondent/accused. The factual besides evidentiary matrix, for, the learned trial Court, hence, erecting the aforesaid inference, (iii) is, comprised, of the inability, of, the complainant, to, explain the nature of his relationship, with, the accused, (iv) AND also stems, from, his also acquiescing qua his instituting complaint(s), under, Section 138 of the Negotiable Instruments Act, against, one Ranjna Devi, and, one Basant Singh, wherewith whom, he has also not explained his relationship. However, the aforesaid conclusions, are mis-founded, and, are apparently surmisally drawn, (v) given the aforesaid Ranjna Devi, and, Basant Singh, not, being cited, as witnesses, by the

respondent/accused, for, theirs hence rendering testifications, qua their borrowing(s), of, money from the complainant, and, his lending vis-a-vis them, also being accompanied by his charging or levying interest, upon, the principal sum(s). (vi) Also hence, for, theirs rendering testifications, of, in theirs making borrowing(s) from the complainant, theirs holding, no acquaintance with him, and, that in their relevant borrowing(s), from, the complainant, theirs being solitarily guided by the factum of his being an unlicensed professional money lender. However, evidence, in regard aforesaid, is grossly amiss hereat, (vii) thereupon, it was in sagacious, for, the learned trial court, to conclude qua the accused, being an unlicensed professional moneylender, and, his charging interest vis-a-vis the money lent by him vis-a-vis the accused, despite, his being wholly unacquainted, with her, or other borrowers. (viii) More so, when PW-2, espouses, hers, being well known, to the respondent/accused, also, when the relevant transaction, occurred, in the presence of the wife of the complainant, besides with the respondent/accused, not making, any testification, qua the relevant borrowings, made by her, from the complainant, being, a sequel of hers, knowing, the complainant to be engaged in the profession, of, money lending. Furthermore, also when, the borrowings, rather made, from, professional money lenders, by the latter's customers, enjoin also an eruption of clinching proof, qua, charging of interest thereon, by the moneylender, (ix) whereas with no evidence surging forth hereat, in the display of the amount, carried in the dishonoured negotiable instrument, also carrying therein, the apt interest levied or charged thereon. Contrarily, with the existence, of, evidence qua the initial borrowings, made by the respondent/accused, from, the complainant, rather bearing consonance, with, the amount carried, in the dishonoured negotiable instrument, (x) whereupon, it is apt, to, conclude, of no, interest being charged or levied by the complainant, from, the respondent/accused, in the latter making, hence,

borrowings from him. Corollary thereof is, it being unbefitting to conclude, of, the complainant, charging or levying, any interest, on the money lent by him to the apposite borrowers AND hence his being not construable to be a money lender.

11. Be that as it may, even if assumingly, the complainant, is construable to be an unregistered or an unlicensed professional money lender, and, even if assumingly, the bar constituted under Section 3 of the H. P. Registration of Money Lenders Act, 1976, is attracted vis-a-vis the purported business of money lending, carried by the complainant, (i) nonetheless, the bar, is, attracted only, against, institution of a civil suit, and, for realization, through, coercive processes, of, decrees rendered thereon, (ii) the bar obviously, is, not attracted vis-a-vis, the institution of a complaint, under Section 138 of the Negotiable Instruments Act, (iii) given non existence of any specific explicit mandate therein qua the bar encapsulated therein, vis-a-vis, institution of a civil suit, by any unlicensed money lender, for hence his seeking recovery, of, amounts lent by him, to, his borrowers, also being extendable qua the institution of a complaint under Section 138 of the Negotiable Instruments Act, by a money lender against his borrower. Consequently, omission of existence, of, an explicit apposite exclusionary mandate, in Section 3 of the H. P. Registration of Money Lenders Act, 1976, against institution, of, a statutory complaint, by a professional money lender against his borrower, also hence, constrains a conclusion, that, mandate thereof, is, unattractable vis-a-vis institution, of a statutory complaint, by a money lender, against his borrowers, (a) unless evidence surges forth, of the apposite lending being provenly, ingrained, with entrenched prohibitive vices, (b) whereupon, alone the lending, would be construable to be, not, a legally recoverable debt nor a legally enforceable debt, (c) whereas, with no evidence hereat, rather surging forth, qua the sums embodied,

> within, the cheque, hereat carrying, any, entrenched prohibitive vices, thereupon, even if assumingly, the complainant, is, a professional unlicensed money lender, yet the lending made by him vis-a-vis the accused, are, to be construable to be both, a legally recoverable debt besides a legally enforceable debt. (d) More so, when evidently no proof is forthcoming qua the respective borrowings, being made, subject to levying or charging, of, interest thereon."

36. This question was again considered by this Court in ***Bal Krishan Rawat Versus Gian Lal 2020 ACD 984*** and it was held that a loan advanced based on a cheque falls within the exception and is not barred by the H.P Registration of Money Lending Act. It was observed:

> 6(iii) The object of the H.P. Registration of Money Lenders Act, 1976 is to register money-lenders and to regulate their business in Himachal Pradesh. Section 3 of this Act provides that a suit inter-alia for recovery of loan, by a moneylender shall be dismissed unless the moneylender is registered and licensed as such under the Act. Section 3 runs as under:
>
> "3. Suits and applications by moneylenders barred unless the moneylender is registered and licensed.-
>
> Notwithstanding anything contained in any other enactment for the time being in force, a suit by a money-lender for the recovery of a loan, or an application by a money-lender for the execution of a decree relating to a loan, shall, after the commencement of this Act, be dismissed, unless the moneylender, at the time of the institution of the suit or presentation of the application for execution, or at the time of decreeing the suit or deciding the application for execution,-

(a) is registered; and

(i) holds a valid licence, in such form and in such manner as may be prescribed; or

(ii) holds a certificate from a Commissioner granted under section 10, specifying the loan in respect of which the suit is instituted, or the decree in respect of which the application for execution is presented; or

(b) if he is not already a registered and licensed money-lender, satisfies the court that he has applied to the Collector to be registered and licensed and that such application is pending:

Provided that in such a case, the suit or application shall not be finally disposed of until the application of the money-lender for registration and grant of the licence pending before the Collector is finally disposed of."

Thus a money lender at the time of institution of the suit for recovery of loan amount should be duly registered as such under the Act and should hold a valid license of money lending as prescribed in the Act. In case a money lender is not registered and licensed under the Act then he should satisfy the Court that his such application in that regard is pending before the concerned authority, which should be disposed of before the disposal of the recovery suit. Who is a 'money lender' has been defined in Section 2(9) of the Act as under:

"2(9) "money-lender" means a person, or a firm, carrying on the business of advancing loans and includes the legal representatives and the successors-in-interest whether by inheritance, assignment or otherwise, of such person or firm, provided that nothing in this definition shall apply to-

(a) a person who is the legal representative or is by inheritance the successor-in-interest of the estate of a deceased money-lender together with all his rights and liabilities if such person -

(i) winds up the estate of such money-lender:

(ii) realises outstanding loans;

(iii) does not renew any existing loan, or advance any fresh loan;

(b) a bonafide assignment by a money-lender of a single loan to anyone other than the wife or husband of such assignor, as the case may be, or any person, who is descended from a common grandfather of the assignor;"

The 'money lender' advances loans. Section 2(8) defines 'loan' in the following manner:-

"(8) "loan" means an advance whether secured or unsecured of money or in kind at interest and shall include any transaction which the court finds to be in substance a loan, but shall not include -

(a) an advance in kind made by a landlord to his tenant for the purposes of husbandry:

Provided that the market value of the return does not exceed the market value of the advance as estimated at the time of advance;

(b) a deposit of money or other property in a Post Office Savings Bank, or any other Bank, or with a company, or with a co-operative society, or with any employer, as security from his employees;

(c) a loan to or by, or a deposit with, any society or association registered under the Societies Registration Act, 1860 (21 of 1860) or under any other enactment;

(d) a loan advanced by or to the Central Government or any State Government or by or to any local body or panchayat under the authority of the Central Government or any State Government;

(e) a loan advanced by a bank, a co-operative society or a company, whose accounts are subject to audit by a certified auditor under the Companies

> Act, 1956, (1 of 1956) or under any other law for the time being in force;
>
> (f) a loan advanced by a trader to a trader, in the regular course of business, in accordance with trade usage;
>
> (g) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, (26 of 1881) other than a promissory note."

6(iv) Definition of 'loan' assumes significance in determining the applicability of the H.P. Registration of Money Lenders Act, to the facts of the case. Not all kinds of loans are covered under Section 2(8) of the Act. Reference in this regard can be made to the following para from titled ***Gajanan and Others vs. Seth Brindaban, (1970) 2 SCC 360*** where provisions of Central Provinces and Berar Moneylenders Act were being considered:-

> "5....."Moneylender" as defined in cl. (v) of S. 2 means a person who in the regular course of business advances a loan as defined in this Act and it includes his legal representatives and successors in interest. "Loan" as defined in cl. (vii) means an actual advance whether of money or in kind at interest and it includes any transaction which the court finds to be in substance a loan. It does not include inter alia an advance made on the basis of a negotiable instrument other than a promissory note....."

Advances/loans falling within the exceptions (a) to (g) of Section 2(8), fall outside the ambit of the Act. Advancing such kinds of loans, which fall within the exceptions carried out in Section 2(8) of the Act, would not make a person a moneylender in terms of the H.P. Registration of Money Lenders Act. Such a person, who has advanced loans, which are covered within the exceptions of Section 2(8) of the Act is not required to be registered or licensed under the Act as a money-lender. Suit for recovery of the

loan amount, falling in the exceptions (a) to (g) of Section 2(8) of the Act, therefore, cannot be held as not maintainable for want of registration and license as a moneylender under the Act. In the facts of the case, the concurrent factual findings of both the learned Courts below are that various recovery suits had been instituted by the plaintiff in different Courts. This fact had even been acknowledged by the plaintiff in his statement. However, there was no evidence either led by the defendant in support of issue No. 6 or available in any other form before the learned Courts below to conclude that various cases instituted by the plaintiff in different Courts were for recovery of that kind of loan, which was included in the definition of 'loan' under Section 2(8) of the Act. For want of specific evidence in that regard, there could be a possibility that all the recovery suits statedly preferred by the plaintiff were for recovery of those loans, which fell within the exceptions (a) to (g) of Section 2(8) of the Act and, therefore, were excluded from the applicability of the Act. It is also to be borne in mind that the instant case for recovery of the amount was based on a loan advanced in lieu of a cheque. 'Cheque' as per Section 16 of the Negotiable Instruments Act, is a bill of exchange and falls within the definition of 'Negotiable Instrument' as spelt out in Section 13 of the Negotiable Instruments Act. An advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act falls in category (g) of the exceptions to the definition of 'loan' under Section 2(8) of H.P. Registration of Money Lenders Act. In such a scenario, an instant suit for recovery of the amount cannot be held to be not maintainable for want of the plaintiff's registration and license as a money-lender. Findings of learned Courts below to the contrary, therefore, are not sustainable. Point is answered accordingly."

37. Therefore, the learned Trial Court erred in holding that the complaint filed by the complainant being a money ender will not be maintainable.

38. The learned Trial Court held that a loan of more than ₹20,000/- cannot be advanced in cash and any violation of this provision will make the transaction illegal which will not be supported by the Court. It was laid down by this Court in ***Surinder Singh vs. State of H.P. 2018(1) D.C.R. 45*** that the contravention of Section 269 SS of the Income Tax Act will give rise to a penalty, but will not invalidate the transaction. It was observed:-

> 5. The relevant portion of Section 269 SS of the IT Act reads thus:-
>
> > "(a) the amount of such loan or deposit or the aggregate amount of such loan and deposit' or
> >
> > (b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or
> >
> > (c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is (twenty) thousand rupees or more. Provided....."
>
> 6. Section 271D provides for a penalty for failure to comply with the aforesaid provisions which reads thus:
>
> > "271D. Penalty for failure to comply with the provisions of Section 269-SS - (1) If a person takes or

> accepts any loan or deposit in contravention of the provisions of Section 269-SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.
>
> (2) Any penalty impossible under sub-section (1) shall be imposed by the Joint Commissioner."

7. A collective reading of both the aforesaid Sections would go to show that even though contravention of Section 269-SS of the IT Act would be visited with a strict penalty on the person taking the loan or deposit. However, Section 271D does not in any manner suggest or even provide that such a transaction would be null and void. The payer of money in cash, in violation of Section 269 SS of the IT Act can always have the money recovered.

8. The object of introducing Section 269 of the IT Act has been succinctly set out by the Hon'ble Supreme Court in ***Asstt. Director of Inspection Investigation vs. A.B. Shanthi (2002) 6 SCC 259***, wherein it was observed as under:-

> "8. The object of introducing Section 269-SS is to ensure that a taxpayer is not allowed to give a false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving false entries in his accounts, he shall not escape by giving a false explanation for the same. During search and seizures, unaccounted money is unearthed and the taxpayer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for the so-called lender also to manipulate his records later to suit the plea of the taxpayer. The main objection of Section 269-SS was to curb this menace."

9. In light of the aforesaid observations it cannot but be said that Section 269-SS only provides for the mode of accepting payment or repayment in certain cases so as to counteract evasion of tax. However, Section 269-SS does

not declare all transactions of loan by cash in excess of ₹20,000/- as invalid, illegal or null and void as the main object of introducing the provision was to curb and unearth black money.

10. It would further be noticed that the learned trial Magistrate has acquitted the accused on the ground that the loan has not been shown in the Income Tax Return furnished by the complainant and while recording such finding has placed reliance upon the judgment of the Hon'ble Delhi High Court in ***Vipul Kumar Gupta vs. Vipin Gupta 2012 (V) AD (CRI) 189***. However, after having perused the said judgment, it would be noticed that the amount in the said case was ₹ 9 lacs and it is in that background that the Court observed as under:-

> "9. I find myself in agreement with the reasoning given by the learned ACMM that before a person is convicted for having committed an offence under Section 138 of the Act, it must be proved beyond a reasonable doubt that the cheque in question, which has been made as a basis for prosecuting the respondent/accused, must have been issued by him in the discharge of his liability or a legally recoverable debt. In the facts and circumstances of this case, there is every reason to doubt the version given by the appellant that the cheque was issued in the discharge of a liability or a legally recoverable debt. The reasons for this are a number of factors which have been enumerated by the learned ACMM also. Some of them are that non-mentioning by the appellant in his Income Tax Return or the Books of Accounts, the factum of the loan having been given by him because by no measure, an amount of ₹ 9,00,000/- can be said to be a small amount which a person would not reflect in his Books of Accounts or the Income Tax Return, in case the same has been lent to a person. The appellant, neither in the complaint nor in his evidence, has mentioned the date, time or year when

> the loan was sought or given. The appellant has presented a cheque, which obviously is written with two different inks, as the signature is appearing in one ink, while the remaining portion, which has been filled up in the cheque, is in different ink. All these factors prove the defence of the respondent to be plausible to the effect that he had issued these cheques by way of security to the appellant for getting a loan from Prime Minister Rojgar Yojana. The respondent/accused has only to create doubt in the version of the appellant, while the appellant has to prove the guilt of the accused beyond a reasonable doubt, in which, in my opinion, he has failed miserably. There is no cogent reason which has been shown by the appellant which will persuade this Court to grant leave to appeal against the impugned order, as there is no infirmity in the impugned order."

39. Therefore, in view of this binding precedent, the present complaint could not have been dismissed on the grounds of violation of Section 269(SS) of the Income Tax Act.

40. It was suggested to the complainant that the cheque was filled by some other person. The complainant denied this fact and no evidence was provided to establish this fact. Thus, there is no satisfactory proof of the fact that the cheque was filled by some other person. In any case, it was laid down by the Hon'ble Supreme Court in ***Bir Singh vs. Mukesh Kumar (2019) 4 SCC 197***, that a person is liable for the commission of an offence punishable under section 138 of the Negotiable Instruments Act

even if the cheque is filled by some other person. It was observed:

> "37. 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 the 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.
>
> 38. 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.
>
> 39. 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 the exercise of undue influence or coercion. The second question is also answered in the negative.
>
> 40. 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.

> 41. The fact that the appellant-complainant might have been an Income Tax practitioner conversant with knowledge of the law does not make any difference to the law relating to the dishonour of a cheque. The fact that the loan may not have been advanced by a cheque or demand draft or a receipt might not have been obtained would make no difference. In this context, it would, perhaps, not be out of context to note that the fact that the respondent-accused should have given or signed a blank cheque to the appellant complainant, as claimed by the respondent-accused, shows that initially there was mutual trust and faith between them.
>
> 42. In the absence of any finding that the cheque in question was not signed by the respondent-accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the appellant-complainant, it may reasonably be presumed that the cheque was filled in by the appellant-complainant being the payee in the presence of the respondent-accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the respondent-accused of the charge under Section 138 of the Negotiable Instruments Act."

41. This position was reiterated in ***Oriental Bank of Commerce vs. Prabodh Kumar Tewari 2022 o Supreme (SC) 837*** wherein it was observed:

> "12. The submission which has been urged on behalf of the appellant is that even assuming, as the first respondent submits, that the details in the cheque were not filled in by the drawer, this would not make any difference to the liability of the drawer.

> xxxxxx
>
> 15. A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in the discharge of a liability. The presumption arises under Section 139"

42. Therefore, the cheque is not bad even if it is not filled by the drawer.

43. The accused claimed that the cheque was issued as a security. However, there is no satisfactory evidence to establish this fact. In any case, it was laid down by this Court in ***Hamid Mohammad Versus Jaimal Dass 2016 (1) HLJ 456,*** that even if the cheque was issued towards the security, the accused will be liable. It was observed:

> "9. Submission of learned Advocate appearing on behalf of the revisionist that cheque in question was issued to the complainant as security and on this ground, criminal revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 138 of Negotiable Instruments Act 1881 if any cheque is issued on account of other liability then provisions of Section 138 of Negotiable Instruments Act 1881 would be attracted. The court has perused the original cheque Ext. C-1 dated 30.10.2008 placed on record. There is no recital in cheque Ext. C-1 that cheque was issued as a security cheque. It is well-settled law that a cheque issued as security would also come under the provision of Section 138 of the Negotiable Instruments Act 1881. See ***2016 (3) SCC page 1 titled Don Ayengia v. State of Assam & another***. It is well-settled law that where there

> is a conflict between former law and subsequent law then subsequent law always prevails."

44. It was laid down by the Hon'ble Supreme Court in ***Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Limited 2016(10) SCC 458*** that issuing a cheque toward security will also attract the liability for the commission of an offence punishable under Section 138 of N.I. Act. It was observed:-

> "10. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in ***Indus Airways Private Limited versus Magnum Aviation Private Limited (2014) 12 SCC 53*** with reference to the explanation to Section 138 of the Act and the expression "for the discharge of any debt or other liability" occurring in Section 138 of the Act. We are of the view that the question of whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. *If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.*
>
> 11. Reference to the facts of the present case clearly shows that though the word "security" is used in clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of instalments. The repayment becomes due under the agreement, the moment the loan is advanced and the instalment falls due. It is undisputed that the loan was duly disbursed on 28th February 2002 which was prior to the date of the cheques. Once the loan was disbursed and instalments have fallen due on the date of the cheque as per the agreement, the dishonour of such cheques would fall

under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.

12. Judgment in ***Indus Airways (supra)*** is clearly distinguishable. As already noted, it was held therein that liability arising out of a claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with a criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of a cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque, there was a debt/liability in praesenti in terms of the loan agreement, as against the case of ***Indus Airways (supra)*** where the purchase order had been cancelled and a cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as an advance for the purchase order which was cancelled. Keeping in mind this fine but the real distinction, the said judgment cannot be applied to a case of the present nature where the cheque was for repayment of loan instalment which had fallen due though such deposit of cheques towards repayment of instalments was also described as "security" in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of the purchase order which is cancelled and that of a loan transaction where the loan has actually been advanced and its repayment is due on the date of the cheque.

13. The crucial question to determine the applicability of Section 138 of the Act is whether the cheque represents the discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from the

> discussion of the said cases in the judgment of this Court." (Emphasis supplied)

45. This position was reiterated in ***Sripati Singh vs. State of Jharkhand AIR 2021 SC 5732***, and it was held that a cheque issued as security is not a waste paper and complaint under Section 138 of the N.I. Act can be filed on its dishonour. It was observed:

> 16. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of the amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.
>
> 17. When a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of

> repaying the loan amount or such financial liability in any other form and in that manner, if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be an understanding between the parties is a sine qua non to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in proceedings initiated under Section 138 of the N.I. Act. Therefore, there cannot be a hard and fast rule that a cheque, which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an 'on-demand promissory note' and in all circumstances, it would only be civil litigation to recover the amount, which is not the intention of the statute. When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation.

46. Therefore, even if the cheque was a security cheque, it would not absolve the accused of his criminal liability.

47. The accused denied for want of knowledge that the cheque was dishonoured due to insufficient funds. The memo of dishonour (Ex.CW-1/B) shows that the cheque was dishonoured with the endorsement, ‘funds insufficient’. There is a

presumption under Section 146 of the NI Act regarding the correctness of a memo of dishonour. The accused did not lead any evidence to rebut this presumption. Therefore, the version of the complainant that the cheque was dishonoured due to insufficient funds has to be accepted as correct.

48. The complainant stated that he issued a notice (Ex.CW-1/D) to the accused through his counsel. He has proved the notice (Ex.CW-1/D). This receipt mentions the same address as was mentioned in the complaint, the notice of accusation and the statement of the accused. Therefore, it was sent to the correct address. It was laid down by the Hon'ble Supreme Court in ***Ajeet Seeds Ltd. Versus K. Gopala Krishnaiah 2014 AIR(SCW) 4321*** that Section 27 of the General Clauses Act raises a presumption regarding the delivery of a letter sent to a correct address. It was observed:

> 10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that the service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice.

> Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

49. The accused claimed that he had not received the notice; however, he did not read any evidence to lead the presumption. Therefore, his plea is not acceptable.

50. In any case, it was laid down in ***C.C. Allavi Haji vs. Pala Pelly Mohd. 2007(6) SCC 555*** that the person who claims that he had not received the notice has to pay the amount within 15 days from the date of the receipt of the summons from the Court and in case of failure to do so, he cannot take the advantage of the fact that notice was not received by him. It was observed:

> "It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. *Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of the complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act.* In our view, any

> other interpretation of the proviso would defeat the very object of the legislation. As observed in ***Bhaskaran's case*** (supra), if the giving of notice in the context of Clause (b) of the proviso was the same as the receipt of notice a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."(Emphasis supplied)

51. The accused has not paid any money to the complainant. Thus, it was duly proved that the accused had failed to pay the money despite the receipt of the notice.

52. Thus, it was duly proved that the cheque was issued in discharge of the legal liability, wherein dishonoured due to insufficient funds and the accused failed to make the payment despite the receipt of a valid notice of demand; hence, the complainant had succeeded in proving his case beyond reasonable doubt and learned Trial Court erred in holding otherwise.

53. The learned Trial Court considered the presumption but failed to apply it correctly. The learned Trial Court was distracted by Section 269(SS) of the Income Tax Act and the complainant being a moneylender which were irrelevant considerations while deciding the complaint under Section 138 of the NI Act as noticed above. Learned Trial Court had taken a

view which could not have been taken by any reasonable person. The judgment of the learned Trial Court proceeds in ignorance of the settled position of law and the same is liable to be interfered with even in an appeal against the acquittal.

54. It was laid down in ***Rajesh Jain (supra)*** that when the Court failed to consider the presumption under Section 139 of the Negotiable Instruments Act, its judgment could be interfered with. It was observed at page 166:

> **54.** As rightly contended by the appellant, there is a fundamental flaw in the way both the courts below have proceeded to appreciate the evidence on record. Once the presumption under Section 139 was given effect to, the courts ought to have proceeded on the premise that the cheque was, indeed, issued in discharge of a debt/liability. The entire focus would then necessarily have to shift on the case set up by the accused since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the court can straightaway proceed to convict him, subject to the satisfaction of the other ingredients of Section 138. If the court finds that the evidential burden placed on the accused has been discharged, the complainant would be expected to prove the said fact independently, without taking the aid of the presumption. The court would then take an overall view based on the evidence on record and decide accordingly.
>
> **55.** At the stage when the courts concluded that the signature had been admitted, the court ought to have inquired into either of the two questions (*depending on*

the method in which the accused has chosen to rebut the presumption): Has the accused led any defence evidence to prove and conclusively establish that there existed no debt/liability at the time of issuance of cheque? In the absence of rebuttal evidence being led the inquiry would entail: Has the accused proved the non-existence of debt/liability by a preponderance of probabilities by referring to the "*particular circumstances of the case*"?

56. The perversity in the approach of the trial court is noticeable from the way it proceeded to frame a question at trial. According to the trial court, the question to be decided was "*whether a legally valid and enforceable debt existed qua the complainant and the cheque in question (Ext. CW I/A) was issued in discharge of said liability/debt*". When the initial framing of the question itself being erroneous, one cannot expect the outcome to be right. The onus instead of being fixed on the accused has been fixed on the complainant. A lack of proper understanding of the nature of the presumption in Section 139 and its effect has resulted in an erroneous order being passed.

57. Einstein had famously said:

> "If I had an hour to solve a problem, I'd spend 55 minutes thinking about the problem and 5 minutes thinking about solutions."

Exaggerated as it may sound, he is believed to have suggested that the quality of the solution one generates is directly proportionate to one's ability to identify the problem. A well-defined problem often contains its own solution within it.

58. Drawing from Einstein's quote, if the issue had been properly framed after careful thought and application of judicial mind, and the onus correctly fixed, perhaps, the outcome at trial would have been very different and this litigation might not have travelled all the way up to this Court."

55. Therefore, in view of the above, the present appeal is allowed, the judgment passed by the learned Trial Court is set aside and the accused is convicted of the commission of an offence punishable under Section 138 of the NI Act.

56. Let the accused be produced on **6.3.2024** for hearing him on the quantum of sentence.

(Rakesh Kainthla)
Judge

12th January, 2024
(Chander)