IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR.JUSTICE AJOY KUMAR MUKHERJEE

CRA 742 of 2019

Kishan Kumar More (HUF)
Vs.
Amit Manpuria

For the Appellant	:	Mr. Sourav Banerjee Ms. Oindrila De
For the Respondent	:	Mr. Rhiddhiman Mukherjee Mr. Mandeep Kaur
For the State	:	Ms. Sreyashee Biswas
Heard on	:	25.03.2025
Judgment on	:	02.07.2025

Dr. Ajoy Kumar Mukherjee, J.

1. The judgment and order of acquittal dated 09.08.2019, passed by the MM 19th court, Calcutta in complaint case no. CS-00113168/2016, in a proceeding under section 138 of the Negotiable Instrument Act (in short N.I. Act) is the subject matter of challenge in the present appeal, preferred under section 372 of the Code of Criminal Procedure.

2. The case of the appellant/complainant, shorn of unnecessary details is to the effect that the appellant/complainant herein was approached by the Respondent herein for borrowing a friendly loan to the tune of Rs. 6,50,000/- . Believing upon the representations made by the respondent herein the appellant agreed to lend him the aforesaid amount at the interest rate of 17% per annum for a period of one year. Subsequently the appellant had issued a cheque to the tune of Rs. 6,50,000/- to the respondent and said cheque was encashed on 31.08.2015. Further case of the appellant is that during the course of such period the opposite party herein, towards interest on the aforesaid borrowed sum of money had issued cheques to the tune of Rs. 16,250/- on 01.012.2015, 16,250/- on 29.02.2016, Rs. 7042/- on 29.03.2016 and Rs. 8,288/- on 25.05.2016 in favour of the appellant.

3. However the respondent did not pay the full interest for the entire period of loan and in discharge of the said existing liability or legal debt, the respondent had issued the impugned cheque bearing no. 000555 dated 18th August, 2016 to the tune of Rs. 6,50,000/- in favour of complainant Kishan Kr. More (HUF). Said cheque was signed by the respondent as authorized signatory of M/S Manpuria Enterprises. Subsequently the appellant herein presented the said cheque for encashment which was returned unpaid with the endorsement "funds insufficient". The appellant received the said cheque with cheque return memo dated 15th September, 2016 through his banker and thereafter a demand notice was issued to the respondent herein in his four different addresses requesting him to pay the cheque amount. On failure to do so, the appellant states that he was compelled to initiate the instant proceeding under section 138 of the N.I. Act.

4. During the course of trial the appellant has adduced evidence as PW-1. The respondent himself deposed as DW-1 reiterating the statement made by him during examination under section 313 of the Code. After considering the rival contentions of both the parties and the evidence along with materials on record, the court below acquitted the respondent herein.

5. Being aggrieved by the said impugned judgment, of acquittal Mr. Sourav Banerjee, learned counsel for the appellant herein contended that the evidence adduced by the parties clearly go to establish that there existed a legally enforceable debt, in connection with which the disputed cheque was issued by the accused person but inspite of such evidence of unimpeachable character and of sterling quality, the court below passed the impugned order of acquittal. The court below failed to appreciate that the appellant herein and the defence witness had revealed the factum of subsequent payment in the nature of interest on the principal loan amount as agreed by and between the parties and both the parties had admitted during their examination before the court that interests have been paid by the respondent and the same has been received by the appellant and inspite of such admitted position about loan transaction and payment of part interest, the order of acquittal has been recorded by the court below, in ignoring the provisions laid down in section 58 of the Evidence Act. Infact in the instant case, all the necessary ingredients as required under section 138 of the N.I. Act had been complied. The money receipt issued by respondent herein has been proved and has been marked as exhibit 3, which clearly reveals that there exists a legally enforceable debt to the tune of Rs. 6,50,000/-. Said exhibit 3 clearly demonstrates that the said amount of loan

was borrowed by the respondent and the same was payable with interest at the rate of 17% per annum.

6. Appellant further contended that the ground shown by the court below in support of acquittal is that the demand notice issued upon the respondent herein requesting him to make the lawful payment is invalid and not in form, ignoring the fact that a plain reading of section 138 of the Act, as a whole would leave no room for hesitation that expression '*said amount of money'* occurring in clause (b) and (c) to the proviso to section 138 refers to the words *'payment of any amount of money'* occurring in main section in 138 i.e. the cheque amount. So, the notice under clause (b) to the proviso, demand has to be made for the cheque amount. Learned Magistrate erred in observing that the demand notice was improper in view of the fact that the same did not reveal the rate of interest payable on the principal amount, the money received from the accused or the outstanding dues. Such observation made by trial court is bad in law and liable to be set aside.

7. He further submits that the respondent herein despite the service of a perfectly valid and legal demand notice had failed to make the necessary payment. The dishonest intention on the part of the Respondent is apparent from the fact that cheque was issued in favour of the appellant which upon presentation was returned unpaid with an endorsement from bank stating 'fund insufficient'. Therefore, under no stretch of imagination it can be presumed that there was intention on the part of the respondent herein to legally discharge his liability. The court below failed to appreciate that burden of proof is on the accused in view of the presumption under section 139 of the N.I. Act. The court below also did not consider that mere pleading

"not guilty" and stating that the cheque was issued as "security" would not amount to rebutting the presumption raised under section 139 of the N.I. Act. In order to rebut the presumption under section 139 of the N.I. Act, the accused, by cogent evidence, has to prove the circumstance under which cheque was issued.

8. Appellant's further contention is that section 138 begins with the words *'where any cheque.....'*. The word "any" used therein suggest that for whatever reason a cheque drawn on an account maintained by the drawer with the banker in favour of another person for the discharge of any debt or other liability is dishonoured, the liability of section 138 of the Act cannot be avoided. The language of the statute depicts the intent of the law makers to the effect that wherever there is a default on the part of one in favour of another and in the event, a cheque is issued in discharge of any debt or other liability, there cannot be any restriction or embargo in the matter of application of section 138 of the Act. Infact any "cheque" and "other liability" are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute and any contra interpretation would defeat the intent of the legislature. The order of acquittal thus whimsical and erroneous, both in fact and in law and as such is liable to be set aside.

9. Mr. Rhiddhiman Mukherjee learned counsel appearing for the respondent argued that there is sufficient doubt in favour of the respondent/accused on the point of due date for the payment of the loan amount. Since no timeline was given by the appellant to repay the loan, the liability of the Respondent under section 138 of the N.I. Act does not arise,

due to the ambiguous and uncertain assertion on the part of the complainant regarding due date of payment. The appellant in his demand notice did not state that the alleged loan was given for a period of one year but has said so in the petition of complaint and then again omits the tenure of loan in his affidavit of evidence and deposition. He further contended that the PW-1 admitted in cross examination that he has given the friendly loan to the opposite party but not for the period of one year.

10. Such contradictions are very much material in nature that goes to the root of the case and is fatal since the appellant had not filed any document to show that the loan was given to the respondent for a term of one year. Since the appellant has not issued any loan termination notice to the opposite party before the presentation of the cheque, the criminal proceeding under section 138 of the N.I. Act is pre-mature and not maintainable.

11. Respondent's further contention is that the impugned cheque was given as a security towards repayment of the amount within a time period being stipulated for repayment and it cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque has been issued as security and in this context respondent relied upon the judgment of ***Sripati Sing Vs. The State of Jharkhand and another*** reported in **(2022) 18 SCC 614**. Further case of the respondent is that since the said cheque was pre maturely sought to be encashed, section 138 of N.I. Act does not attract.

12. He further submits that there is sufficient doubt in favour of the respondent/accused on existence of 'altered situation' preventing a legally

enforceable debt at the time of presentation of cheque. Respondent clarified the point by arguing that 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 understanding between the parties is a *sine qua non,* not to present the cheque which was issued as security. The cardinal rule is that when a cheque is given towards security, the loan could be repaid through any other mode in between the date on which the cheque is drawn to the date on which the cheque matures. It is only where the loan is not repaid through any other mode within the due date that the cheque would be made for presentation. If the loan has been discharged before the due date or if there is an 'altered situation' then the cheque shall not be presented for encashment.

13. In this context reliance has been placed by respondent upon ***Dasharath Bai Trikam Bhai Patel Vs. Hitesh Mahendra Bhai Patel and another*** reported in **(2023) 1 SCC 578**. Since in the instant case the respondent has already paid a sum of Rs. 2,50,000/- to the appellant and the mediator and no cross examination was put to the accused to that effect, the appellant accepted the case of the respondent and as such there is 'altered situation' in terms of the aforesaid judicial pronouncement which further disentitles the appellant for a successful prosecution under section 138 of N.I. Act.

14. His another limb of argument is that from the demand notice, petition of complaint, affidavit of evidence and deposition of the appellant/complainant, it can be observed that the appellant in his demand notice did not state that the alleged loan is payable with an interest at the rate of 17% per annum but has said so in the petition of complaint and then again omits the tenure of loan in his affidavit of evidence and deposition. Since the demand notice is the base of any prosecution under section 138 of N.I. Act, the case of the appellant in his demand notice and in his petition of complaint are not distinct and different.

15. He further argued that the appellant is a Hindu Undivided Family (HUF) being represented by a Karta namely Kishan Kr. More/complainant, but such complainant admitted that he has not filed any money lending license nor the said HUF possess any money lending license or business. PW1 also admitted that he has not produced any document to show that the HUF had the capacity to provide such loan. Accordingly the complainant cannot claim any interest going against the prohibition laid down in Bengal Money Lenders Act, 1940 and the loan so advanced without a money lending licence does not attract prosecution under section 138 of the N.I. Act. In this context he also placed reliance upon ***D. Saroja Vs. A Sukavanamma***, reported in **2023 SCCOnline 4442**.

16. In this context he further contended that the appellant also admitted in his cross examination that his loan amount and interest amount are not shown in the income tax return for the relevant period, which makes the very fact of loan being advanced by the appellant as illegal and barred by law.

17. He further argued that in answer to question no.4, in his examination under section 313, the Respondent has stated that he had issued the cheque as a security and has specifically asked one Mr. Pramod Shaw, who was acting as an informal mediator between the parties, not to present the cheque for encashment. It is trite law that to discharge the burden under section 139 of the N.I. Act, the opposite party need not step into the witness box as the burden of proof upon the accused is merely of preponderous of probability and therefore the answer to question no. 4, during examination under section 313 makes it clear that the cheque was issued as security and thereby he has discharged the burden under section 139 of the N.I. Act.

18. In this context appellant also argued the limited scope of the High Court to interfere in the judgment of acquittal. The impugned judgment of acquittal is well reasoned and even if two views are possible from the facts and circumstances of the case, the appellate court should not reverse a judgment of acquittal only because another view is possible and in such cases the appellate court should not interfere with the finding of acquittal recorded by the court below. Infact the view taken by the trial court is reasonably possible view on evidence and as such the order of acquittal should not be lightly interfered with, even if the appellate court believe that there is some evidence pointing out the finger towards the accused. Aa such respondent prayed for dismissal of the instant appeal.

Decision

19. Learned Trial court while passed the judgment had framed 9 points and practically held all points in favour of complainant/appellant except point no.1 namely whether accused issued the cheque in discharge of any

legally enforceable debt or not. Appellant herein deposed during trial as PW1 and proved 12 documents and on the contrary accused deposed as DW1 but he has not exhibited any document. He was also examined under section 313 of Cr.P.C.

20. At the outset relevant portion of the impugned judgement leading to acquittal may be reproduced below for the sake of discussion:-

> *"in the letter of complaint the complainant has stated that he has provided a friendly loan for a period of 1 year with interest @ 17% per annum to the accused with the consent of other member of HUF. But granting loan @ 17% per annum was not mentioned in his affidavit in chief as well as on demand notice (Ext.6). he has not also mentioned the period of granting loan to the accused in his affidavit in chief as well as on demand notice (ext.6). Though there is admission in the part of the accused person regarding borrowing Rs. 6,50,000/- from the complainant but he has not admitted the interest on the principal amount or the period of granting loan. No written agreement has been produced by the complainant to substantiate his claim regarding interest and period of loan. Moreover the contention of the defence is that the accused has not received any loan termination notice from the complainant. The date of termination of loan was also not mentioned in the demand notice. In the cross examination of PW1 he has stated that as per his demand the accused has paid interest time to time and at present he could not say how much money the accused has paid to him as interest. As PW-1 has not averred about the interest and the period of loan in his examination in chief filed by supported by affidavit, it cannot be hold that the interest was 17% per annum and the loan was for 1 year. Even for argument sake, if it is hold that the interest and period of loan as stated in the complaint is true, then also it cannot be said that the liability of the accused was Rs. 6,50,000/- on the date of execution of the cheque i.e. 18.08.16 as PW-1, himself admitted that interest was paid and he could not say how much money was paid as interest. No statement of account regarding repayment of loan was produced by the complainant. The claim of the accused is he has paid Rs. 2,50,000/- to mediator Pramod Sharma and the complainant. So there is no unanimity of version regarding existing liability and complainant also could not prove the existing liability of the accused was Rs. 6,50,000/- on the date of execution of the impugned cheque."*

21. In the case of ***Maruti Udyog Ltd. Vs. Narender and ors.,***, reported in **(1999) 1 SCC 113** it was held that by virtue of section 139 of N.I. Act, the court has to draw a presumption that the holder of the cheque received the cheque for discharge of a debt or liability until the contrary is proved. A similar view has also been taken by the Apex Court in ***K. N. Beena Vs.***

Muniyappan and another reported in **(2001) 8 SCC 458,** where it has been held that under section 139 of N.I. Act, the court has to presume in a complaint under section 138, that the cheque has been issued for a debt or liability. Relying upon the aforesaid judgment, the supreme Court in ***M/s M.M.T.C Ltd. and another Vs. M/s Medchl Chemicals and Pharma (P) and another*** reported in **(2002) 1 SCC 234** held as follows:-

> ***17.*** *There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability."*

22. Learned court below while passed the impugned judgment was quite aware about the legal presumption laid down in section 139 of the N.I Act and he has made specific observation that in the instant case the burden shifted to the accused to prove that the cheque was not issued in discharge of his existing liability though accused has taken the defence that he had handed over the cheque as security of loan.

23. In fact in the instant case the complainant filed and proved money receipt wherein accused acknowledged the receipt of Rs. 6,50,000/- as a loan at an interest of 17% per annum and the accused failed to substantiate why he raised objection when the document was admitted in evidence. Accused not even challenged his signature appearing in exhibit 3. While he was examined under section 313, in answer to question no.3, he admitted that for business purpose he took loan of Rs. 6,50,000/- in 2016 and in answer to question no. 4 he said loan was given thorough the mediator Pramod Sharma. He further stated in answer to question no.4 that he asked said mediator Pramod not to present the cheque for encashment as his

company was suffering over dispute between two brothers and shortly company will start to function and payment will be made but complainant did not pay heed to such request and placed the cheque for encashment. While said accused deposed as DW-1 he nowhere stated that he did not take the loan or he issued cheque as security but his only contention in examination-in-chief is that he paid Rs. 2,50,000/- to mediator Pramod and complainant. However, he did not bring said Pramod as witness to substantiate his aforesaid alleged payment nor proved any document in respect of such alleged payment.

24. The language of section 138 of the N.I. Act makes it clear that the liberty was always with the complainant to make claim either whole or in part. In this context the reliance can be placed upon the judgment of ***I.C.D.S Ltd. Vs. Beena Shabeer and another*** reported in **AIR 2002 SC 3014.**

25. Much has been argued by the learned Counsel for the Respondent that complainant admitted in the demand notice and evidence that accused has paid interest from time to time and as such existing claim cannot be Rs. 6,50,000/-,since complainant has received Rs. 47,830/- towards interest from the accused. In this context the reply of the complainant is that the interest of the principal amount of Rs. 6,50,000/- at the rate of 17% per annum as stated In exhibit-3 for one year comes to Rs. 1,10,500/- in which Rs. 37,830/- has been paid and Rs. 62,670/- is still due on account of interest. Therefore, the claim of the complainant is Rs. 6,50,000/- plus 62,670/- and as such even if the accused paid some amount towards interest, the claim of Rs. 6,50,000/- was existing on the date of the issuance of the cheque by the accused.

26. In this context the case of the appellant in para 4 of the complaint may be reproduced below:

> *"That the accused had paid Rs. 16,250/-, 16,250/-, 7042, and 8288 on 01/12/2015, 29/02/2016,29/03/2016 and 25/05/2016 respectively by cheques to the complainant as part payment of interest as appears from the statement of the account of the banker of the complainant i.e. Vijaya Bank, N.S. Raod Brach, Kolkata and did not pay the full interest for the entire period of loan."*

27. So even if some amount of interest was paid by the accused it cannot be said that amount mentioned in notice and complaint is not a legally recoverable/enforceable debt. In the complaint it has specifically stated that loan was given for a period of one year with interest at the rate of 17% per annum. No contrary document or evidence has been placed by accused, though burden was upon him, to prove that the loan was not for one year only or that he was not agreed to pay any interest.

28. The issue raised by accused that the cheque was issued towards security is clearly an afterthought as despite receipt of notice, accused did not give any reply stating the same as "security". Moreover it is now settled law that even if cheque is given towards security, still it can be enforceable. In ***Sripati Singh Vs. State of Jharkhand and another*** reported in **(2022) 18 SCC 614** Supreme Court held in para 21 as follows:-

> ***"21.*** *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 time-frame 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 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 the NI Act would flow."*

22. *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 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 a proceeding initiated under Section 138 of the NI 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 a 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.***"***

29. In the case of ***Sampelly Satyanarayan Rao Vs. Indian Renewal Energy Development Agency Ltd***, reported in **(2016) 10 SCC 458** it was held as follow:-

9. *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 [Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd., (2014) 12 SCC 539 : (2014) 5 SCC (Civ) 138 : (2014) 6 SCC (Cri) 845] with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section 138 of the Act. We are of the view that the question 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.*

10. *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 28-2-2002 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, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.*

30. Therefore even keeping in mind the limited scope of the High Court in interfering a judgment of acquittal, I am constrained to say that the

impugned judgment is not based on the evidence and document placed before the court and the view taken by the court below is not reasonable and possible view on evidence. As such the same is liable to be set aside.

31. In view of the aforesaid discussion **CRA 742 of 2019** is allowed.

32. The Respondent Amit Manpuria is hereby convicted for committing offence punishable under section 138 of the N.I. Act. He is accordingly sentenced to pay fine of Rs. 12 lakhs within 60 days from the date of the judgment, in default to suffer simple imprisonment for 6 months. If the said amount of fine is paid by the convict/respondent herein the same shall be given to the complainant appellant towards compensation. However, if the convict fails to pay the fine amount, trial court shall take all steps including issuance of warrant of arrest to ensure attendance of convict before court below to execute sentence as ordered by this Court.

33. Send the trial court record at once from the court wherefrom it was called for along with one copy of judgment.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(DR. AJOY KUMAR MUKHERJEE, J.)