Serial No. 3

# HIGH COURT OF JAMMU & KASHMIR AND LADAKH
# AT JAMMU

**CRAA No. 82/2017**

Choudhary Piara Singh …..Appellant(s)/Petitioner(s)

Through: Mr. Ajay K Gandotra, Advocate.

**vs**

Sat Pal ….. Respondent(s)

Through: Mr. M. P. Sharma, Advocate.

**Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE**

**ORDER**
**26.09.2024**

**ORAL**

1. Impugned in the instant appeal is judgment dated 28.09.2017 (for short the "impugned judgment") passed by the court of Special Railway Magistrate/ Sub-Judge, Jammu (for short the "Trial court") passed in case titled as "Choudhary Piara Singh Vs. Sh. Sat Pal" arising out of a complaint filed by the appellant herein (for short "the complainant") against the respondent herein (for short "the accused") under Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act of 1881"), whereunder the accused-respondent herein came to be acquitted.

2. Before proceeding to case set up in the instant appeal, a brief background thereof would be appropriate hereunder:-

The complainant/appellant herein in the complaint contended that he is Managing Director of M/s Good Luck Finance Corporation/Hire Purchase Finance Company and that the accused/respondent herein availed a loan from him for purchase of a truck bearing registration No. JK02A-9785 and upon his failure to

liquidate the said loan amount although had made some payments thereof towards the said loan amount, the accused/respondent herein issued a cheque bearing No. 405001 dated 31.01.2007 amounting to Rs. 8,32,909/- in favour of M/s Good Luck Finance Corporation drawn at Citizen's Cooperative Bank Ltd., Ware House Branch Jammu, which cheque came to be presented for its encashment by the complainant/appellant herein through his bank being J&K Bank, Branch Nehru Market, Jammu, however, the same got dishonoured and returned to the complainant/appellant herein along with memo dated 11.04.2007 with the remarks "funds insufficient", whereafter the complainant/appellant herein sent a registered notice to the accused/respondent herein through post which however was returned back on 19.04.2007 with the remark "Addressee refused redirected to sender" whereupon the complainant/appellant herein filed the complaint before the Trial court on 11.05.2007 and the Trial court upon entertaining the complaint took cognizance and issued process against the accused/respondent herein whereafter the accused/respondent herein entered appearance on 05.09.2007 and pleaded not guilty and claimed trial.

3. The complainant/appellant herein besides appearing as his own witness before the Trial court examined two witnesses in support of his case, namely, Madan Lal (Postman) and Sardar Balvinder Singh (Manager J&K Bank, Nehru Market, Jammu), which evidence came to be put to the accused/respondent herein, which came to be denied by the accused respondent herein and consequently led rebuttal evidence

and besides appearing himself as his own witness examined three witnesses on his behalf, namely, Romesh Kapoor (Manager Citizen's Cooperative Bank), Waqil Singh and Krishan Lal.

4. On consideration of the entire case before it, the Trial court in terms of the impugned judgment dismissed the complaint holding that the accused/respondent herein has been able to raise a probable defence that he had issued the blank signed cheque in question along with a blank affidavit at the time of availing of loan from the complainant/appellant herein in the year 1999 and that he had no debt or liability towards the complainant/appellant herein which was legally enforceable qua which the cheque in question could be said to have been issued by him.

5. The complainant/appellant herein has challenged the impugned judgment, inter alia, on the grounds that the same is perverse against the law and facts and that the Trial court failed to appreciate that the accused/respondent herein have had admitted the issuance of cheque in question, besides having admitted his signature thereon as also the handing over of it to the complainant/appellant herein, thus creating a presumption under Section 118 of the Act of 1881 in favour of the complainant herein and that the accused/respondent herein failed to rebut the said presumption, yet the Trial court in terms of the impugned judgment dismissed the complaint against the position of law settled in this regard.

**Heard learned counsel for the parties and perused the record.**

6. Having regard to the facts and circumstances of the case noticed in the preceding paras, inasmuch as the record available on the file, coupled with the submissions of the appearing counsel for the parties, the moot question which falls for consideration by this Court would be as to whether the accused/respondent herein discharged his evidential burden contained in Section 139 of the Act of 1881, qua the cheque in question.

7. Before proceeding to advert to the aforesaid question, it would be advantageous and appropriate to refer hereunder to the position of law relating to Section 138 and 139 of the Act of 1881, being relevant and germane herein.

8. The Apex Court in case titled as **M/s Gimpex Private Limited vs. Manoj Goel** reported in **(2022) 11 SCC 705** had held the following structure relating to the ingredients of Section 138 of the Act of 1881:

(i) *The drawing of a cheque by person on account maintained by him with the banker for the payment of any amount of money to another from that account;*

*(ii) The cheque being drawn for the discharge in whole or in part of any debt or other liability;*

*(iii) Presentation of the cheque to the bank arranged to be paid from that account;*

*(iv) The return of the cheque by the drawee bank as unpaid either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount;*

*(v) A notice by the payee or the holder in due course making a demand for the payment of the amount to the drawer of the cheque within 30 days of the receipt of information from the bank in regard to the return of the cheque; and*

HIGH COURT OF JAMMU & KASHMIR AND LADAKH

*(vi) The drawer of the cheque failing to make payment of the amount of money to the payee or the holder in due course within 15 days of the receipt of the notice.*

What emerges from above is that generally speaking the aforesaid ingredients are matters of record and would be available in the form of documentary evidence as early as at stage of filing of the complaint and initiating prosecution. Apart from the above, it is also to be proved that the cheque was issued in discharge of a debt or liability and the burden of proving this fact like the other facts would have ordinarily fallen upon the complaint, however, through the introduction of a presumptive provision contained in Section 139 of the Act, the onus of proving the same has been to be on the accused and thus the Section 139 in that sense is an example of reverse onus provision requiring an accused to prove the non existence of presumed fact i.e. that the cheque was not issued in discharge of a debt/liability.

9. In so far as **Section 139 of the Act of 1881** is concerned, it stipulates that "**Unless 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." And under this Section, the expression "**shall presume**" is illustrative of a presumption of law, in that, Section 139 requires that the court shall presume the facts stated therein and it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of presumption had been established, however, this does not preclude the person against whom the said presumption is raised and drawn from rebutting it and proving

contrary as is clear from the expression appearing in Section 139 (Supra) "Unless the contrary is proved".

Thus, what is manifest from above is that as soon as the complainant discharges the burden to prove that the cheque was issued by the accused for discharge of a debt, the presumptive provision under Section 139 of the Act shifts the burden on the accused and the fact of the presumption in that sense is to transfer the evidential burden on the accused of proving that the cheque was not issued in discharge of any liability and unless this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true without accepting expecting the complainant to do anything further.

The Apex Court in case titled as **Rangappa Vs. Sri Mohan** reported in **(2010) 11 SCC 441** has held that the standard of proof to discharge this evidential burden is not as heavy as that is usually seen in situations where the prosecution is required to prove the guilt of an accused, but the accused must meet the "standard of preponderance of probability", similar to a defendant in a civil proceeding.

Furthermore, the Apex Court in case titled as **Basalingappa Vs. Mudibasappa** reported in **(2019) 5 SCC 418** has laid down that the order to rebut the presumption and to prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested and that the words "**Until the contrary is proved**", occurring in Section 139 (Supra) do not mean that the accused must necessarily prove the negative that the instrument is not issued in discharge of any

debt/liability, but the accused has the option to ask the Court to consider the non existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist.

10. Keeping in mind the aforesaid position of law and reverting back to the case in hand, record reveals that the accused/respondent herein availed a loan from the complainant/appellant herein for purchase of a vehicle in the year 1999 and in furtherance of availing of said loan executed certain documents and that the said loan came to be provided to the accused/respondent herein by the complainant/appellant herein by way of two cheques amounting to Rs. 2,50,000/- covered by two cheques amounting to Rs. 2,00,000/- and Rs. 50,000/-,which cheques came to be deposited by the accused/respondent herein in his newly opened bank account in Citizen's Cooperative Bank, Branch Ware House, Jammu on 22.03.1999, in which account, the said cheques came to be deposited by the accused/respondent herein on 23.03.1999. It also emerges from the record that the said bank issued a cheque book in favour of the accused/respondent herein containing cheques bearing Nos. from 402001 up to 405010 and out of the said cheques, the cheque in question bearing No. 405001 qua which the complainant/appellant herein filed the complaint against the accused/respondent herein, whereunder the instant appeal has arisen, two other cheques bearing Nos. 405002 and 405003 both dated 22.04.1999 have had been issued by the accused/respondent herein for an amount of Rs. 1,00,000/- and 1,50,000/- respectively in favour of one Badri Nath from whom the accused/respondent herein purchased the vehicle in respect of

which the complainant/appellant herein had provided loan to the accused/respondent herein. It is an admitted fact that the cheque in question bearing No. 405001 (Supra) bears the date of 31.01.2007.

Further perusal of the record available on the file manifestly reveals that the complainant/appellant herein had contended that after availing the loan of Rs. 2,50,000/- at the rate of 16% interest, the accused/respondent herein purchased the vehicle and, however, did not liquidate the loan amount, after paying few instalments in furtherance thereof and upon his failure to repay the said loan, a settlement came to be arrived at between the complainant/appellant herein and the accused/respondent herein which resulted into issuance of the cheque in question dated 31.01.2007 amounting to Rs. 8,32,909/- issued in the name of M/s Good Luck Finance Corporation, by the accused respondent herein, which cheque got dishonoured after being presented for encashment by the complainant/appellant herein.

On the contrary, record reveals, in particular the defence set up by the accused/respondent herein and the evidence led by him before the Trial court, that the cheque in question have had been taken as blank by the complainant/appellant herein as a guarantee besides a blank affidavit at the time of availing of loan by him in the year 1999 and that the said cheque came to be misused by the complainant/appellant herein in the year 2007. A deeper and closer examination of the statement of the complainant/appellant herein reveals that the complainant/appellant herein has not anywhere either stated in his statement or proved while leading evidence in support of his case that the loan amount covered in the cheque

HIGH COURT OF JAMMU & KASHMIR AND LADAKH

in question had been the accumulated amount of loan amounting to Rs. 8,32,909/-. Even no documentary evidence in this regard has been produced by the complainant/appellant herein. It is significant to note here that the loan amount granted by the complainant/appellant herein to the accused/respondent herein was admittedly of Rs. 2,50,000/- to be repaid by the accused/respondent herein to the complainant/appellant herein within a period of three years commencing from the year 1999 along with an interest @ 16% and out of said loan amount, according to the statement of the accused/respondent herein an amount of Rs. 90,600/- had been paid back to the complainant/appellant herein and in presence of this position the complainant/appellant herein, however, as has been noticed in the preceding paras, has nowhere either in his statement or by way of oral or documentary evidence, has mentioned that the remaining outstanding amount payable by the accused/respondent herein to him got accumulated to the tune of Rs. 8,32,909/-. How the amount of Rs. 8,32,909/- covered by the cheque in question has been worked out to be payable by the accused respondent to the complainant appellant herein is nothing short of a mystery, more so, in view of the contradictory statements made by the complainant/appellant herein before the Trial court that the cheque in question came to be furnished by the accused/respondent herein in the year 2007, upon arriving at a settlement in his office which settlement as well has not surfaced and that the amount of cheque was filled in by his accountant therein the cheque as also the date contained in the cheque in question.

11. On the contrary, perusal of the statement of the accused/respondent herein made before the Trial court during the course of leading evidence manifestly tends to show that the accused/respondent herein has in explicit terms has deposed that the cheque in question had been provided by him to the complainant/appellant herein at the time of availing of loan as a security whereafter he had opened a bank account in the Citizen's Cooperative Bank under the instructions of the complainant/appellant herein and that the cheque in question was blank even without bearing a date, though signed by him and same came to be retained by the complainant/appellant herein at that relevant point of time as security against the loan which was availed by the accused/respondent herein having thus established that the cheque in question was not issued in discharge of a debt liability.

Herein it would be advantageous in this regard to refer to the judgment of the Apex Court passed in case titled as **Rajesh Jain Vs. Ajay Singh** reported in **(2023) 10 SCC 148** wherein following has been laid down at paras 41, 42, 43 and 44:-

> *"**41.** In other words, the accused is left with two options. The first option of proving that the debt/liability does not exist—is to lead defence evidence and conclusively establish with certainty that the cheque was not issued in discharge of a debt/liability. The second option is to prove the non-existence of debt/liability by a preponderance of probabilities by referring to the particular circumstances of the case. The preponderance of probability in favour of the accused's case may be even fifty-one to forty-nine and arising out of the entire circumstances of the case, which includes: the complainant's version in the original complaint, the case in the legal/demand notice,*

*complainant's case at the trial, as also the plea of the accused in the reply notice, his Section 313 Cr. P.C. statement or at the trial as to the circumstances under which the promissory note/cheque was executed. All of them can raise a preponderance of probabilities justifying a finding that there was "no debt/liability" [**Kumar Exports v. Sharma Carpets reported in (2009) 2 SCC 513**]*

***42.** The nature of evidence required to shift the evidential burden need not necessarily be direct evidence i.e. oral or documentary evidence or admissions made by the opposite party; it may comprise circumstantial evidence or presumption of law or fact.*

***43.** The accused may adduce direct evidence to prove that the instrument was not issued in discharge of a debt/liability and, if he adduces acceptable evidence, the burden again shifts to the complainant. At the same time, the accused may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift to the complainant. It is open for him to also rely upon presumptions of facts, for instance those mentioned in Section 114 and other sections of the Evidence Act. The burden of proof may shift by presumptions of law or fact. In case titled as **Kundan Lal vs. Custodian (Evacuee Property)** reported in **AIR 1961 SC 1316** it has been held that when the creditor had failed to produce his account books, this Court raised a presumption of fact under Section 114, that the evidence, if produced would have shown the non-existence of consideration. Though, in that case, this Court was dealing with the presumptive clause in Section 118 NI Act, since the nature of the presumptive clauses in Section 118 and 139 is the same, the analogy can be extended and applied in the context of Section 139 as well.*

***44.** Therefore, in fine, it can be said that once the accused adduces evidence to the satisfaction of the Court that on a*

*preponderance of probabilities there exists no debt/liability in the manner pleaded in the complaint or the demand notice or the affidavit-evidence, the burden shifts to the complainant and the presumption "disappears" and does not haunt the accused any longer. The onus having now shifted to the complainant, he will be obliged to prove the existence of a debt/liability as a matter of fact and his failure to prove would result in dismissal of his complaint case. Thereafter, the presumption under Section 139 does not again come to the complainant's rescue. Once both parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. [**Basalingappa vs. Mudibasappa reported in (2019) 5 SCC 418** and **Rangappa vs. Sri Mohan reported in (2010) 11 SCC 441**].*

12. In view of the aforesaid position of law and having regard to what has been observed, considered and analyzed hereinabove, it cannot by any stretch of imagination be said that the Trial court in the matter has faulted or committed any illegality or perversity or else wrongly dismissed the complaint of the complainant/appellant herein.

13. Viewed thus, **there is no merit in the instant appeal, which accordingly is dismissed**.

**(JAVED IQBAL WANI)**
**JUDGE**

**Jammu**
26.09.2024
*Sahil Padha*

Whether the order is speaking: Yes/No.
Whether the order is reportable: Yes/No.