* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ***Reserved on : 23rd July 2024***

Pronounced on: 16th August 2024

CRL.A. 1248/2019

AMIT JAIN .....Appellant

Through: Mr. Nitin Kumar Jain, Adv.

versus

SANJEEV KUMAR SINGH & ANR. .....Respondents

Through: Mr. Kunwar Arish Ali, Mr. Yamin, Mr. Yasser Wali, Mr. Zubair Ali, Mr. Abrar Ali, Mr. Tayyab Ali, Mr. S.M. Prasad Advocates (through VC)

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGEMENT

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1. This decision allows present appeal that arose out of ***CRL.L.P 576/2019*** seeking leave to appeal against judgement dated 01st August 2019, passed by Metropolitan Magistrate (02), Shahdara, Karkardooma Courts, Delhi ["***Trial Court***"] in Complaint Case 4851/2018 titled ***Amit Jain v. Sanjeev Kumar Singh & Ors.*** ["***impugned judgement***"]. Therein, respondent was acquitted of offence under Section 138, Negotiable Instruments Act, 1888 ["***NI Act***"]. Leave to appeal was granted by this Court *vide* order dated 22nd October 2019 and matter was renumbered as present appeal.

Background Facts

2. According to appellant, respondent no.1 was his friend and in May 2016, appellant gave a friendly loan of Rs. 3,60,000/- [*Rupees Three Lacs Sixty Thousand only*] without interest, to be repaid by 30th April 2017. Respondent no.1 is the Director of respondent no.2 company M/s Naina Packing Private Limited.

3. In May 2017, repeated requests were made by appellant for recovery of said amount. Subsequently, respondent no.1 issued a cheque bearing no. 863416 dated 03rd July 2019 for a sum of Rs. 1,80,000/- [*Rupees One Lac Eighty Thousand only*] drawn on Bank, Patparganj branch, Delhi ["***the cheque***"] towards part payment Vijaya of the said loan, from respondent no.2 company in a personal capacity.

4. Appellant presented the cheque with his bank, but it returned with the remark "*funds insufficient*" *vide* cheque return memo dated 03rd September 2017. Appellant received the cheque return memo from his bank on 18th October 2017 through Speed Post No. ED38567127IN.

5. Appellant served a legal demand notice dated 06th November 2017 for recovery of the cheque amount through speed post on 07th November 2017; same was duly served on the respondents on 09th November 2019, however, no reply was received. Aggrieved thereby, appellant filed complaint case on 21st December 2017 under Section 138, NI Act before the Trial Court. Summons in the complaint case were issued upon respondents. *Vide* order dated 20th October 2019, Trial Court framed charges against respondent no. 1 to which, he pleaded not guilty and claimed trial.

6. Trial proceeded with appellant as CW1 and he was cross-examined. Statement of respondent no.1 was recorded under Section 313, Code of Criminal Procedure, 1973 ["***CrPC***"] wherein he admitted to the signatures on the cheque in question, however, denied that he had given the cheque to anyone or filling the particulars in it. He also denied receipt of the legal demand notice, denied knowing the appellant/complainant and stated that he had no liability towards the latter. Lastly, he stated that he did not wish to lead any defence evidence. Post final arguments, impugned judgement was rendered acquitting respondents.

Submissions of Appellant

7. Counsel for appellant submitted that Trial Court did not consider the fact that once respondent no.1/accused admitted his signature on the cheque, presumption lies against the accused i.e. accused would have the burden of proof to rebut the presumption. It was stressed that respondents refused to lead defence evidence and were unable to prove his statement under Section 313 CrPC, that the cheque was not given to the appellant or was not known to the appellant.

8. Reliance was placed on decision of the Supreme Court in ***Bir Singh v. Mukesh Kumar***, (2019) 4 SCC 197 which deals with presumption under Section 139 NI Act, basis which, it was contended that since respondent failed to lead evidence post statement under Section 313 CrPC, burden was on the accused/respondent to prove that the cheque was not issued by him. Also, respondents did not bring any material to rebut presumption under Section 139 NI Act, which is in favour of the cheque holder. Counsel for appellant also stated that the

date of the loan was mentioned in the complaint, as opposed to the impugned order, which notes that it has not been mentioned.

Submissions of Respondents

9. On the other hand, counsel for respondents submitted that the impugned order has no infirmity as evidence of appellant/complainant does not prove a loan, or an enforceable debt. Thus, there was no liability of respondents. It was further contended that financial capacity of appellant/complainant was not proved. Hence, impugned order ought to be upheld.

Impugned Order

10. Trial Court took note of the respective submissions, discussed the essential ingredients in order to constitute an offence under Section 138 NI Act, and observed as follows – ***firstly***, accused/respondent admitted the signature on the cheque, and thus, presumption under Sections 118 and 139 NI Act would be attracted; ***secondly***, presumption of liability in favour of complainant has to be drawn and accused ought to dislodge this presumption by raising probable defence; ***thirdly***, no written/documentary proof of loan of Rs. 3.6 lacs exists; ***fourthly***, no interest was charged; ***fifthly***, loan date is also not mentioned in the complaint; ***sixthly***, it does not appear probable that complainant/appellant would give a friendly loan of such amount in cash which was just lying around in his house rather than deposit it in the bank and earn interest; ***seventhly***, complainant/appellant did not examine any witness to prove friendly relations with accused/respondent; ***eighthly***, complainant/appellant did not prove

financial capacity to give loan of said amount; and ***lastly***, in a criminal case, the complainant ought to prove their case beyond reasonable doubt and cannot take advantage of weak defence put up by the accused.

Analysis

11. Heard arguments and perused material placed on record as well as the impugned judgement. This Court is of the view that Trial Court erred in their analysis and conclusion. Respondent/accused having admitted the signature on the cheque, the presumption under Sections 118(a) and 139, NI Act had come into effect. For reference, aforesaid provisions are extracted as under:

> "***118. Presumptions as to negotiable instruments*** *— Until the contrary is proved, the following presumptions shall be made: —*
> *(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;*
> *...*
>
> ***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 section138 for the discharge, in whole or in part, of any debt or other liability.*"

12. The Apex Court in ***Basalingappa v. Mudibasappa*** (2019) 5 SCC 418 concisely summed up legal principles related to presumption under Section 139 NI Act and rebuttal thereof; relevant portions of this decision are extracted as under:

> ***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 following manner:*
>
> ***25.1.*** *Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.*
>
> ***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 preponderance of probabilities.*
>
> ***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.*
>
> ***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.*
>
> ***25.5.*** *It is not necessary for the accused to come in the witness box to support his defence.*

13. In consonance with the principles summarised in ***Basalingappa*** (*supra*), infirmities in the impugned order are discussed herein below.

14. When presumption under Section 139 was raised, Trial Court ought to have conducted proceedings basis that the cheque was issued in discharge of a debt or liability towards the complainant. At this juncture, the onus was on the accused to rebut the presumption under Section 139. Had the accused been successful in rebutting said presumption, the onus would have then shifted onto the

complainant/appellant. The fundamental flaw on part of Trial Court was failing to note effect of the presumption under Section 139 NI Act. As a result, Trial Court erroneously proceeded to deliberate upon want of evidence on part of appellant/complainant i.e. no interest was charged, friendly relations between the parties were not proved, financial capacity not established, and most importantly, guilt of the accused was not proved beyond reasonable doubt.

15. Principles regarding Section 138 proceedings, in particular, of the presumption under Section 139 and the extent of evidence required for rebuttal is usefully captured by Courts in India in the following decisions:

15.1 Supreme Court in ***Rajesh Jain v. Ajay Singh***, (2023) 10 SCC 148, while discussing the correct approach in dealing with presumption under Section 139 observed as under; relevant extracts are reproduced hereunder:

> "***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 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 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. 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 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.*
>
> **…**
>
> ***61.*** *The fundamental error in the approach lies in the fact that the High Court has questioned the want of evidence on the part of the complainant in order to support his allegation of having extended loan to the accused, when it ought to have instead concerned itself with the case set up by the accused and whether he had discharged his evidential burden by proving that there existed no debt/liability at the time of issuance of cheque*."
>
> (emphasis supplied)

15.2 Aforesaid decision was affirmed in a recent judgement of the Supreme Court in ***Triyambak S. Hegde v. Sripad*** (2022) 1 SCC 742. The Court, in ***Triyambak*** (*supra*), also relied upon the decision in ***Basalingappa*** (*supra*) and stated, on facts of the case, as under:

> ***21.*** *Further, though the respondent had put forth the contention that a relative of the appellant was the junior of his advocate and he has used his dominant position to secure the signature on the cheque, there is absolutely no explanation whatsoever to indicate the reason for which such necessity arose for him to secure the signatures of the respondent, if there was no transaction whatsoever between the parties. That apart, the said story even to be examined was put forth for the first time before the High Court. As is evident from the records, the notice issued by the appellant intimating the dishonourment of the cheque and demanding payment, though received by the respondent has not been replied. In such situation, the first opportunity available to put forth such contention if true was not availed. Even in the*

> *proceedings before the learned JMFC, the respondent has not put forth such explanation in the statement recorded under Section 313 CrPC nor has the respondent chosen to examine himself or any witness in this regard. The said contention had not been raised even in the appeal filed before the learned Sessions Judge.*
>
> (emphasis supplied)

15.3 Supreme Court in ***Sumeti Vij v. Paramount Tech Fab Industries*** (2022) 15 SCC 689 observed that statement under Section 313 CrPC is not substantive evidence of defence by accused, and hence, same is insufficient for the purpose of rebuttal of presumption under Section 139 NI Act. Much like the present case, in ***Sumeti Vij*** (*supra*), accused had not replied to legal notices sent, nor had made any payments thereafter. Furthermore, while accused gave a statement under Section 313 CrPC, defence evidence was not led therein even though accused pleaded not guilty and claimed trial. Following observations of the Court therein are instructive; extracted as under:

> "***11.*** *In the instant case, the appellant has only recorded her statement under Section 313 of the Code, and has not adduced any evidence to rebut the presumption that the cheques were issued for consideration. Once the facts came on record remained unrebutted and supported with the evidence on record with no substantive evidence of defence of the appellant to explain the incriminating circumstances appearing in the complaint against her, no error has been committed by the High Court in the impugned judgment [Paramount Tech. v. Sumeti Vij, 2019 SCC OnLine HP 3600] , and the appellant has been rightly convicted for the offence punishable under Section 138 of the Act and needs no interference of this Court.*

15. *It is well-settled that the proceedings under Section 138 of the Act are quasi-criminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.*

16. *Likewise, under Section 139 of the Act, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced by the accused which on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved.*

…

19. *There was no response by the appellant at any stage either when the cheques were issued, or after the presentation to its banker, or when the same were dishonoured, or after the legal notices were served informing the appellant that both the cheques on being presented to its banker were returned with a note that it could not be honoured because of "insufficient funds".*

20. *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 a 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.*

21. *The judgment on which the learned counsel for the appellant has placed reliance i.e. K. Prakashan v. P.K. Surenderan [K. Prakashan v. P.K. Surenderan, (2008) 1 SCC 258 : (2008) 1 SCC (Civ) 182 : (2008) 1 SCC*

> *(Cri) 200] may not be of any assistance for the reason that in the case dealing under Section 138 of the Act, the prosecution has to prove the case and these cases being quasi-criminal in nature are to be proved on the basis of the principles of "preponderance of probabilities", and not on the principles as being examined in the criminal case to prove the guilt of the accused beyond reasonable doubt.*"
>
> (emphasis supplied)

15.4 Cited with approval in ***Sumeti Vij*** (*supra*), it would be helpful to peruse the view taken in ***Kumar Exports v. Sharma Carpets***, (2009) 2 SCC 513, wherein the Apex Court interpreted presumptions in the applicable provisions of NI Act and usefully explained the shifting burden on parties, in a case of Section 139 NI Act; relevant paragraphs of the decision are as under:

> ***15.*** *Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".*
>
> ***14.*** *Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred*

to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

…

17. *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.*

18. *Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.*

19. *The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact*

presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

20. *The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those*

mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

(emphasis supplied)

15.5 Respondent no.1, in his statement under Section 313 CrPC, made various denials, however, admitted to the signature on the cheques to be his own signatures. There is no doubt, as has been held by various Courts in India including this Court and the Supreme Court, that when the signature on the cheque in question is admitted, presumption under Section 139 shall arise. Same is succinctly encapsulated by the Supreme Court in ***K. Bhaskaran v. Sankaran Vaidhyan Balan*** (1999) 7 SCC 510; relevant portion is extracted as under:

"***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 which the cheque bears. Section 139 of the Act enjoins on 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...*"

(emphasis supplied)

15.6 This brings us to yet another flaw in the impugned judgement i.e. conclusion that respondent/accused successfully rebutted the presumption under Section 139 only on the basis of his statement under Section 313 CrPC, having not led any defence evidence. To this effect, observations of a co-ordinate Bench of this Court in ***V.S. Yadav v. Reena*** 2010 SCC OnLine Del 3294 are relevant; same are extracted as under:

8. *The respondent has placed reliance on Krishna Janardhan Bhat v. Dattatraya G. Hegde, 2008 Crl. L.J. 1172, which is also the case relied upon by the Trial Court. In this judgment itself Hon'ble Supreme Court has specifically observed that Court should not be blind to the ground realities and the rebuttal of presumption under Section 139 of N.I. Act would largely depend upon the factual matrix of each case. The Trial Court in this case turned a blind eye to the fact that every accused facing trial, whether under Section 138 of N.I. Act or under any penal law, when charged with the offence, pleads not guilty and takes a stand that he has not committed the offence. Even in the cases where loan is taken from a bank and the cheques issued to the bank stand dishonoured, the stand taken is same. Mere pleading not guilty and stating that the cheques were issued as security, would not give amount to rebutting the presumption raised under Section 139 of N.I. Act. If mere statement under Section 313, Cr. P.C. or under Section 281, Cr. P.C. of accused of pleading not guilty was sufficient to rebut the entire evidence produced by the complainant/prosecution, then every accused has to be acquitted. But, it is not the law. In order to rebut the presumption under Section 139 of N.I. Act, the accused, by cogent evidence, has to prove the circumstance under which cheques were issued. It was for the accused to prove if no loan was taken why he did not write a letter to the complainant for return of the cheque. Unless the accused had proved that he acted like a normal businessman/prudent person entering into a contract he could not have rebutted the presumption under Section 139, N.I. Act. If no loan was given, but cheques were retained, he immediately would have protested and asked the cheques to be returned and if still cheques were not returned, he would have served a notice as complainant. Nothing was proved in this case.*

9. *In this case no evidence, whatsoever, was produced by the accused and the Trial Court travelled extra steps, not permitted by law, to presume that the presumption*

has stood rebutted. I, therefore, set aside the judgment of the Trial Court.

(emphasis supplied)

16. Thus, respondent no. 1 having not led defence evidence, his statement under Section 313 CrPC cannot be read as evidence for the purpose of rebutting presumption raised under Section 139 NI Act. In this light, merely pleading not guilty would not suffice to rebut this presumption either.

17. We often find that acquittals in Section 138 NI Act proceedings place the burden of proving the existence of the debt on the complainant, which is diametrically opposite to the presumption placed on the accused under Section 139 NI Act. The accused often gets away with an acquittal, despite having tendered and even admitting to the cheque, merely because the complainant is unable to produce documents to support the existence of the debt (usually in the form of a friendly loan provided in cash, which does not have any document trail). It would be unwise for the court to not acknowledge that friendly cash loans are provided by parties, sometimes based on small savings of the lender. In these circumstances rather than focussing on the question as to why the accused gave the cheque in the first place (which he or she admits), the complainant is left unhinged for inability to provide any documentation. Often when accused is asked by the court, as to for what purpose they gave the cheque in the first place, a cogent and rational answer is not forthcoming.

18. Presumption under Section 139 read with Section 118 of the NI Act is essentially based on pure common sense. Instead of having the accused prove to the contrary, the accused is acquitted, as in this case,

without having led any defence evidence and purely relying upon the inconsistencies in the affirmative proof provided by the complainant. The law and its application, is therefore turned on its head.

Conclusion

19. In light of the above discussion, this Court is of the view that there was a fundamental error in the approach taken by the Trial Court whereby it went on to dissect the case put up by the appellant, instead of first examining whether the respondents had rebutted the presumption under Section 139 of NI Act.

20. Hence, present appeal is allowed; impugned order is set aside.

21. Appellant will be at liberty to approach the Trial Court for further proceedings.

22. Judgment be uploaded on the website of this Court.

ANISH DAYAL
JUDGE

AUGUST 16, 2024/SM/sc