IN THE HIGH COURT AT CALCUTTA

CRIMINAL APPELLATE JURISDICTION

APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CRA 94 OF 2014

ANUP AGARWALA

VS

PIYOTOSH BISWAS

For the Petitioner : Mr. Kusal Kumar Mukherjee, Adv.

For the Respondent : Mr. Manas Kumar Das, Adv.
Mr. Aritra Kumar Thokdar, Adv.
Mr. Prabal Das, Adv.

Last heard on : 10.02.2026

Judgement on : 18.05.2026

Uploaded on : 18.05.2026

CHAITALI CHATTERJEE DAS:-

1. This criminal appeal has been filed against the judgement and order of acquittal dated 19.12.2013 passed by the Learned Judicial Magistrate, Tehatta, Nadia in connection with complaint case no. 386C/2012 under Section 138 of the Negotiable Instruments Act. 1881.

Brief fact of the case

2. The case of the appellant in short is that a complaint was lodged by the present appellant against the present respondent before the Learned Court of

ACJM, Tehatta ,Nadia to proceed against him under Section 138/142 of the Negotiable Instruments Act on 14.8.12 alleging dishonour of cheque which was deposited by the complainant as issued by the present respondent on 26.6.12 of Rs. 1,00,000/-and Rs 2,00,000/-.

3. It is the case of the present appellant that there was a good friendship relation between the complainant/ the appellant and the accused person and at the request of the accused person to give him Rs 3,00,000/- as a loan for his personal necessity on good faith the present appellant agreed to give the amount as loan and he paid the said amount of Rs. 3,00,000/- in presence of witness no 1 and 2. The respondent /accused person assured to re-pay the said amount within 3 months but after expiry of the said period despite the demand made by the complainant, the accused delayed the re-payment on various pretext. Lastly on 25.6.12 the accused came to the house of the complainant and gave two cheques bearing no. 294127 dated 26.6.12 of Rs.1,00,000/- and 294126 dated 26.6.12 of Rs. 2,00,000/- of HDFC Bank Limited , to the complainant. The complainant /appellant deposited both these cheques on 26.6.12 at State Bank of India Krishnanagar (Gopinathpur) Branch. But the bank intimated that those cheques were dishonoured due to insufficient fund and to that extent the bank issued a certificate to the complainant. After that on 20.7.21012 the complainant sent a demand notice to the accused person through registered post with A/D by his advocate which was returned with an endorsement "7 days absent" on 7.8.12. The said person did not repay the amount till filing of the complaint accordingly the case was initiated. The Learned Court of ACJM, Tehatta passed the order of issuance of

summon upon the accused person who surrendered before the court and obtained bail. On 26.9.12 the accused person was examined under Section 251 of the Code of Criminal Procedure and the substance of accusation was read over and explained to the accused person who pleaded not guilty and claimed to be tried. After that the evidence on behalf of the complainant started. On completion of the examination the complainant and one Swapan Kumar Ranu the accused person /petitioner was examined under Section 313 of the Code of Criminal Procedure and one Ananta Mondal also deposed as D.W. 2. After hearing the argument of both the Learned Advocates and considering the materials of record the Learned Judicial Magistrate passed the order of acquittal. Being aggrieved thereby this appeal has been filed.

Submissions

4. The Learned Advocate appearing on behalf of the appellant submitted that two cheques were issued by the respondent, the execution of the said cheque was never denied and on 26.6. 2012 these two cheques were dishonoured. The notice of demand was issued within the statutory period and therefore the presumption under Section 139 of N.I. Act was initially discharged. It is settled law that the presumption under this provision is rebuttable but such rebuttal is to be made while giving reply to the demand notice .In this case the notice was not received and returned as '7 days absent as the accused intentionally avoided the service . The accused person never expressed their intention to repay the loan and there was no prima facie rebuttal even at the time of adducing evidence in order to show that the cheques were not issued in discharge of the existing debts or liabilities. The Learned Advocate relied upon

the decision reported in ***Hiten P.Dalal vs Bratindranath Banerjee[1] D.Vinod Shivappa vs Nanda Bellappa[2]*** and ***Subrata Mitra vs Alpana Das[3]*** para 14,15,27 and an unreported Judgement passed by the Learned Co-ordinate Bench in ***CRA 20 of 2021 Sanjay Agarwala vs Ajoy Sarkar passed on December19,2023.***

5. The Learned Advocate representing the respondent on the other hand raised vehement objection and argued that since the instant appeal has been filed against an order of acquittal, the court must be very careful while reversing the order of acquittal. It is submitted that the cheques were issued on 25th of June, 2012 and on the next date it was placed for encashment that is on 26.6.12. On 27.7.2012 the demand notice was sent. The complainant is silent about execution of any agreement. No acknowledgment receipt of the demand notice either received or produced. The complainant admitted that at the time of the issuance of cheques it was not against any loan but for promoting business. In the examination under Section 313 the appellant specifically denied of taking any loan. It is further argued that the appellant failed to prove that it was not in discharge of debts or liabilities and hence the question of rebuttal does not arise and the Learned Trial Court rightly passed the order of acquittal .The Learned Advocate of the Opposite Party no. 2 relied upon the decision of ***N. Vijay Kumar vs Vishwanath Rao N.[4]*** and prayed for dismissal of the appeal**.**

[1] AIR 2001 SC 3987
[2] (2006) 2 SCC 114
[3] 2025 (2) AICLR 273 (Cal)
[4] 2025 SCC Online SC 873

Analysis

6. Heard the submissions of both the Learned Advocate. In the above factual matrix coupled with the submission it is to be seen whether the Learned Judicial Magistrate rightly passed the order of acquittal or not. Section 138 of Negotiable Instruments Act, 1881 provides *that-*

> *"**138. Dishonour of cheque for insufficiency, etc., of funds in the account**.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless—*

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability."

It is specific case of the complainant that on good faith he gave an amount of Rs. 3, 00,000/- towards the personal necessity of the respondent and the accused person assured him to repay the sum within 3 months. However, on 25.6.12 the accused gave him two cheques of HDFC Bank Limited Berhampore Branch in his name which are 294127 dated 26.6.2012 for Rs. 1,00,000/- and 294126 dated 26.6. 2012 for Rs. 2, 00,000/- to the respondent who deposited before the Bank. Both the parties in this case were attached with a business

relates to Chit Fund. In course of argument it revealed that the CEO of the said company is in correctional home on the allegation of cheating number of persons who invested in their company. According to this witness two cheques were issued by him for using it in the business by the complainant about 2 years ago without any date mentioned on those cheques. After closing the business when he intended to return back those two cheques when the complainant caused delay and taking advantage of his absence in his house the complainant and the witness made a conspiracy and presented those cheques in the Bank which he issued about a year ago. The respondent specifically denied of receiving any money from complaint as loan and hence there is no reason to repay any amount.

7. The respondent did not challenge the signature appearing in the cheque or denied about issuing those two cheques in favour of the complainant. He denied the issuance of the cheque in favour of the complainant on 25.6.12 and that receiving any notice. According to the respondent the complainant was in a Ponzi scheme under him. On behalf of respondent /accused, one Ananta Mondal deposed as OPW and he corroborated that on 21st July, 2012 the accused went to Siliguri to see his ailing mother and returned home after 15 days thereafter. He further corroborated that the complainant was in a Chit fund business namely TVI Express as an agent along with the accused person who also offered him to join in his company. At the time of offering the said proposal he showed him two cheques namely Rs. 1, 00,000/- and Rs. 2,00,000/- respectively signed by the accused person and after some days he came to learn that the Chit Fund business was closed. The accused person in

his examination under Section 313 said that the cheques were not issued to discharge any loan and he did not receive any demand notice and also denied to take any loan from the complainant.

8. The Learned Judicial Magistrate considered the decision relied upon by the appellant before this court reported in ***D. Vinod Shivappa v Nanada Belliappa***[5] where it was held that if a notice is issued and served upon the drawer of the cheque ,no controversy arises .Similarly if the notice is refused by the addressee it may be presumed to be served .But in the third situation where notice could not be served on the address due to non- availability at the time of delivery or premises is found to be locked the law is understood to mean that there has been no service of notice but it was then held by the Hon'ble Supreme Court that it would completely defeat the very purpose of the Act and the unscrupulous person and dishonest drawer would be benefitted as he can then be never prosecuted . It was observed that when the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery ,it will be open to the complainant to prove at the trial by adducing evidence that the endorsement was not correct and the drawer of the cheque qua the addressee with the knowledge of the notice had deliberately avoided to receive the notice .

The Hon'ble Supreme Court further discussed Section 27 of General Clauses Act which deals with the presumption of service of a letter sent by post and observed this presumption is rebuttable as he has two option either to concede to the stand of the sendee that he did not receive the notice alternatively to

[5] (2006) 3 SCC (Cri) 114

controvert the stand of the sendee with the risk to prove that in fact he received notice. In this case the appellant did not adduce the evidence of the postal authority.

9. In the instant case primarily the respondent could establish by adducing evidence that he was not present for about 15 days when the other notice was sent to his address. The postal endorsement was that for 7 days the person concerned was absent and therefore it cannot be deemed as 'served'. The accused person at the time of trial established that because of his mother's illness he was not present therefore it cannot be considered that he had deliberately and wilfully avoided the said service. The appellant did not make any further attempt to send the notice further. However the Learned Magistrate was of the view that service of notice upon the accused person was duly proved in the case and the accused failed to prove that he was not present in his house on and from 02.07.2015 to 08.08.2012 but this court failed to accept such conclusion.

10. So far the allegation of receiving the amount as loan of Rs. 3,00,000/ by the respondent followed by issuance of cheques in discharge of his liabilities, the Learned Magistrate considered that the examination of P.W. 1 disclosed that he gave the loan amount in presence of P.W 12 and on 25.6.12 he came to his house handed over two cheques dated 26.6.which were deposited on on 26.6.2012 that is on the same day which got returned on 11.7.2012 . In support of his contention he adduced two witnesses P.W. 2 Swapan kumsr Ranu who said the amount was given by the complainant towards a loan for the personal necessity of the accused and such money was given in his

presence but during cross examination denied that in his presence the complainant gave any amount to the accused and could not say the date or time. The complainant himself failed to give any date when such loan amount was given to the accused person but the hurriedness is very apparent as he deposited the cheque on the date it was issued.

It was the observation of the Learned Court of Magistrate that complainant could not say the personal reason or why he took the loan of Rs. 3,00,000/- however there was no business transaction between the parties and therefore without any knowledge or the necessity of the complainant commits Rs.3,00,000/- without executing any agreement . In absence of any agreement and when the complainant failed to substantiate the date time or month when he gave such loan coupled with the hurriedness shown in presenting the cheque certainly creates a doubt in the mind of the court that the amount at all was given or not and . According to the Learned Court since they were members of the Ponzy scheme mentioned as TVI Express which is a scheme in which an investor get more interest and in addition to the transacted money he would get more interest than bank interest. It was held by the Learned Magistrate that since the main purpose of the scheme was to attract investor by showing some unreasonable growth of money and to attract investor by officer of a higher rank of his lower rank officer by issuing cheque is not improbable. Therefore the case was not proved beyond the reasonable doubt.

11. In the decision as relied upon by the Learned Advocate of the respondent the parties known to each other for the decade and assured a friendly relationship and complainant extended the loan of Rs. 20,00,000/- to the accused and in

discharge of this alleged loan the accused issued a cheque in favour of the complainant but on presentation for encashment the said cheque was dishonoured with an endorsement referred to drawer's bank and insufficient fund in the accused account. Statutory legal notice was sent and in reply the accused denied his liability. The Hon'ble Supreme Court discussed in Section 118 and 139 of the N.I. Act which raised the presumption which are reads 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:
>
> X X X
>
> **139. Presumption in favour of holder.-** It shall be presumed, unless the contrary is porved, 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. The Hon'ble Supreme quoted the paragraph 17 of the decision of ***Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu and others***[6] Firm, this Court observed as under:

[6] (2008)7SCC 655

"17. Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal. In this connection, reference may be made to a decision of this Court in ***Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [(1999) 3 SCC 35].*** *In para 12 of the said decision, this Court observed as under : (SCC pp. 50- 51)*

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118 (a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would

disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non- existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the nonexistence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its nonexistence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist." From the above decision of this Court, it is pellucid that if the defendant is proved to have

discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who would be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. It is also discernible from the above decision that if the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour."

13. In a Three-Judges Bench in ***Rangappa vs Srimohan***[7] where it was held:-

"Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of

[7] (2010)11 SCC 441

proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail.

14. In the decision as relied upon by the Hon'ble Advocate appearing on behalf of the Appellant in ***Subrata Mitra versus Alpana Das and Another. (Supra)*** the Learned Co-Ordinate Bench took note of the decision by the Hon'ble Supreme Court in ***K.N. Bina versus Muniappan and another reported in***[8] and ***Bir Singh versus Mukesh Kumar reported in***[9] and held that once the presumption arises questioning the source of fund runs contrary to the law laid down by the apex court.

15. In the instant case the question was not about the source of fund but whether at all any amount was taken as a loan and the cheque were issued in discharge of any debt or liability .The issuance of the cheque was admitted and it is settled proposition of law that once the holder of a cheque received the

[8] (2001) 8 SCC 451
[9] (2019) 4 SCC 197

cheque the evidential burden lies on the accused to prove that the cheque was not received by the Bank towards the discharge of any debt or liability. Apparently no date is disclosed either by the complainant or by the witness who in fact denied about witnessing anything .Therefore the factual aspect both the parties were engaged in a Ponzy scheme which raises the probability of issuance of the cheque for the purpose of their business and this court find substance in the view taken by the Learned Magistrate that presumption under Section 139 of the Negotiable Instrument Act cannot be said to be substantiated.

16. In the decision as relied upon in ***Sanjoy Agarwala Versus Ajoy Sarkar*** passed by the Learned Co-Ordinate Bench on 19th December, 2023 in CRA 20 of 2021 . A loan was taken by the accused on two occasions and promised to repay and an agreement was entered between the parties to that effect. The accused issued an account payee cheque which was dishonoured due to insufficient fund. The demand notice was sent which was duly served but no payment of the said cheque was made and accordingly the complaint was lodged under Section 138 of Negotiable Instrument Act. In that case taking note of the accused of ***Hiten P.Dalal vs. Bratindranath Banjerjee reported in***[10] the Hon'ble Court held that both Section 138-139 requires that the Court "shall presume" the liability of the drawer of the cheques were drawn , it is obligatory to raise the presumption in every case where the factual basis for the raising of such presumption had been established. The Hon'ble Supreme Court took note of the decision of ***State of Madras versus A. Vaidyanatha***

[10] AIR 2001 Supreme Court 3896

Lyer[11] **,** in the said decision the Learned Hon'ble Bench also discussed the legal standards to constitute an offence under Section 138 of the Negotiable Instrument Act and the prosecution ought to have establish the essential ingredients for the offence which were mentioned in "paragraph 9" which is as followed.

> *9. Before handling with the facts of the present case it would be apposite to focus on the legal standards to constitute an offence under Section 138 of the NI Act. The prosecution must fulfill all the essential ingredients for offence;*
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> • *the cheque was drawn by a person on an account maintain by him for payment of money and same is presented for payment within a period of three months 9 from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> • *The cheque was drawn by the drawer for discharge of any legally enforceable debt or other liability;*
>
> • *The cheque was returned unpaid by the bank due to either insufficiency of funds in the account to honour the cheque or that it exceeds the amount arranged to be paid from the account on an agreement made with that bank;*
>
> • *A demand of the said amount has been made by the payee or holder in due course of the cheque by a notice in writing given to the drawer*

[11] AIR 1958 SC 61

within 30 days of the receipt of the information of the dishonour of cheque from the bank;

- *The drawer fails to make payment of the said amount of money within 15 days from the date receipt of the notice.*

Conclusion

17. Therefore from the above it is a settled proposition of law as can be found that the cheque to be drawn by the drawer for discharge of any legally enforceable debt or other liability. Even if it is considered that in the instant case the cheques were issued by the respondent which were placed and it was dishonoured Section 138 of Negotiable Instrument Act cannot be attracted since the complainant/ appellant failed to prove that the cheque was drawn by the drawer for discharge of any enforceable debt or other liability. Considering the nature of business in which both of them were engaged coupled with absence of any specific details of the loan when paid to the accused in absence of any agreement between the parties and non-service of demand notice upon the respondent who has primarily established his absence on the ground of the illness of his mother he never had any occasion to give the reply to the said notice and his denial in examination under Section 313 Cr.P.C. about taking any loan ,gives this court to draw a statutory conclusion that the rebuttal is conclusively established . Therefore considering all establish of the matter this court fails to consider the case of the appellant and hence finds no merit in the appeal.

18. Accordingly this CRA is stands dismissed. The judgement and order passed by the Learned Additional Chief Judicial Magistrate is affirmed.

19. All connection applications are hereby disposed of.

20. Copy of the T.C.R. be sent down to the concerned Court.

21. Urgent Photostat certified copies of this order, if applied for, be supplied to the parties upon compliance of all necessary formalities.

[CHAITALI CHATTERJEE (DAS), J.]