

RANGAPPA
v.
SRI MOHAN
(Criminal Appeal No. 1020 of 2010)

MAY 07, 2010

[K.G. BALAKRISHNAN, C.JI., P. SATHASIVAM AND J.M.
PANCHAL, JJ.]

Negotiable Instruments Act, 1881:

ss. 139 and 138 – Presumption in favour of holder – Manner of rebuttal of statutory presumption – Held: Presumption mandated by s. 139 includes existence of legally enforceable debt or liability – It is in nature of rebuttable presumption – Accused can raise a defence wherein existence of legally enforceable debt or liability can be contested – However, initial presumption favours the complainant – Reverse onus clause is included and the same is guided by the test of proportionality – Accused cannot be expected to discharge an unduly high standard of proof – Standard of proof for rebutting presumption is of ‘preponderance of probabilities’ – If accused is able to raise a probable defence which creates doubts about the existence of legally enforceable debt or liability, prosecution can fail – On facts, dishonour of cheque on account of ‘stop payment’ instructions sent by accused – Complaint u/s. 138 – Acquittal by trial court in view of discrepancies in the complainant’s version – Conviction by High Court since accused did not raise a probable defence to rebut the statutory presumption, does not call for interference – Complaint disclosed prima facie existence of a legally enforceable debt or liability – Accused failed to reply to the statutory notice u/s.138.

s. 138 – Applicability of – Held: s. 138 is applicable when cheque is dishonoured on account of ‘stop payment’

A *instructions sent by accused to his bank in respect of post-dated cheque, irrespective of insufficiency of funds.*

B The appellant engaged the services of the respondent-engineer for supervising the construction of his house. The appellant requested the respondent for a hand loan to meet the construction expenses. In view of the acquaintance, the respondent paid the same by way of cash. The appellant issued a cheque for repayment of the said amount. The respondent presented the cheque for encashment. The bank issued a return memo stating that the payment had been stopped by the drawer. Thereafter, the appellant did not honour the cheque within the statutorily prescribed period and also did not reply to the notice u/s. 138 of the Negotiable Instruments Act, 1881. The respondent filed a complaint against the appellant for offence punishable u/s.138 of the Act. The trial court acquitted the appellant u/s.138 in view of some discrepancies in the complainant's version. The High Court holding that the appellant did not raise a probable defence to rebut the statutory presumption, convicted the appellant for commission of offence u/s. 138 of the Act and directed to pay fine of Rs. 75,000/-. Hence the present appeal.

Disposing of the appeal, the Court

F HELD: 1. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in s.138 of the Negotiable Instruments Act, 1881 have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by s.139 of the Act. With respect to the facts of the instant case, it must be clarified that contrary to the trial court's finding, s.138 of the Act can indeed be attracted when a cheque is dishonoured on account of 'stop payment' instructions sent by the accused to his

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bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. [Para 9] [518-D-F]

Goa Plast (Pvt.) Ltd. v. Chico Ursula D'Souza (2003) 3 SCC 232, referred to.

2.1. The presumption mandated by s.139 of the Act does indeed include the existence of a legally enforceable debt or liability. This is in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. 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 s.138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption u/s. 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by s.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 proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. When an accused has to rebut the presumption under s.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

A or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own. [Para 14] [525-G; 526-A-G].

B 2.2. The High Court's view that the accused did not raise a probable defence is accepted. The defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. The instructions to C 'stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very D fact that the accused had failed to reply to the statutory notice u/s.138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made E regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's F version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of G a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been H rebutted even with regard to the materials submitted by

the complainant. Thus, there is no reason to interfere with the final order of the High Court which recorded a finding of conviction against the appellant. [Paras 15 and 16] [526-H; 257-A-G] A

Krishna Janardhan Bhat v. Dattatraya G. Hegde (2008) 4 SCC 54; *Hiten P. Dalal v. Bratindranath Banerjee* (2001) 6 SCC 16; *Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm and Ors.* 2008 (8) SCALE 680; *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal* (1993) 3 SCC 35; *M.M.T.C. Ltd. and Anr. v. Medchl Chemicals & Pharma (P) Ltd.* (2002) 1 SCC 234, referred to. B C

Case Law Reference:

2003 (3) SCC 232	Referred to.	Para 9	D
(2008) 4 SCC 54	Referred to.	Para 10	
(2001) 6 SCC 16	Referred to.	Para 11	
2008 (8) SCALE 680	Referred to.	Para 12	
1993 (3) SCC 35	Referred to.	Para 12	E
(2002) 1 SCC 234	Referred to.	Para 13	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1020 of 2010. F

From the Judgment & Order dated 26.10.2005 of the High Court of Karnataka, Bangalore in Criminal Appeal No. 1367 of 2005. -

Girish Ananthamurthy, P.P. Singh for the Appellant. G

Basava Prabhu S. Patil, B. Subrahmanya Prasad, V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by H

A **K.G. BALAKRISHNAN, CJI.** 1. Leave granted.

B 2. In the present case, the trial court had acquitted the appellant-accused in a case related to the dishonour of a cheque under Section 138 of the Negotiable Instruments Act, 1881 [Hereinafter 'Act']. This finding of acquittal had been made by the Addl. JMFC at Ranebennur, Karnataka in Criminal Case No. 993/2001, by way of a judgment dated 30-5-2005. On appeal by the respondent-complainant, the High Court had reversed the trial court's decision and recorded a finding of conviction while directing that the appellant-accused should pay a fine of Rs. 75,000, failing which he would have to undergo three months simple imprisonment (S.I.). Aggrieved by this final order passed by the High Court of Karnataka [in Criminal Appeal No. 1367/2005] dated 26-10-2005, the appellant-accused has approached this Court by way of a petition seeking special leave to appeal. The legal question before us pertains to the proper interpretation of Section 139 of the Act which shifts the burden of proof on to the accused in respect of cheque bouncing cases. More specifically, we have been asked to clarify the manner in which this statutory presumption can be rebutted.

F 3. Before addressing the legal question, it would be apt to survey the facts leading up to the present litigation. Admittedly, both the appellant-accused and the respondent-claimant are residents of Ranebennur, Karnataka. The appellant-accused is a mechanic who had engaged the services of the respondent-complainant who is a Civil Engineer, for the purpose of supervising the construction of his house in Ranebennur. The said construction was completed on 20-10-1998 and this indicates that the parties were well acquainted with each other.

H 4. As per the respondent-complainant, the chain of facts unfolded in the following manner. In October 1998, the accused had requested him for a hand loan of Rs. 45,000 in order to meet the construction expenses. In view of their acquaintance,

the complainant had paid Rs. 45,000 by way of cash. On receiving this amount, the appellant-accused had initially assured repayment by October 1999 but on the failure to do so, he sought more time till December 2000. The accused had then issued a cheque bearing No. 0886322, post-dated for 8-2-2001 for Rs. 45,000 drawn on Syndicate Bank, Kudremukh Branch. Consequently, on 8-2-2001, the complainant had presented this cheque through Karnataka Bank, Ranebennur for encashment. However, on 16-2-2001 the said Bank issued a return memo stating that the 'Payment has been stopped by the drawer' and this memo was handed over to the complainant on 21-2-2001. The complainant had then issued notice to the accused in this regard on 26-2-2001. On receiving the same, the accused failed to honour the cheque within the statutorily prescribed period and also did not reply to the notice sent in the manner contemplated under Section 138 of the Act. Following these developments, the complainant had filed a complaint (under Section 200 of the Code of Criminal Procedure) against the accused for the offence punishable under Section 138 of the Act.

5. The appellant-accused had raised the defence that the cheque in question was a blank cheque bearing his signature which had been lost and that it had come into the hands of the complainant who had then tried to misuse it. The accused's case was that there was no legally enforceable debt or liability between the parties since he had not asked for a hand loan as alleged by the complainant.

6. The trial judge found in favour of the accused by taking note of some discrepancies in the complainant's version. As per the trial judge, in the course of the cross-examination the complainant was not certain as to when the accused had actually issued the cheque. It was noted that while the complaint stated that the cheque had been issued in December 2000, at a later point it was conceded that the cheque had been handed over when the accused had met the complainant to obtain the

A work completion certificate for his house in March 2001. Later, it was stated that the cheque had been with the complainant about 15-20 days prior to the presentation of the same for encashment, which would place the date of handing over of the cheque in January 2001. Furthermore, the trial judge noted that

B in the complaint it had been submitted that the complainant had paid Rs. 45,000 in cash as a hand loan to the accused, whereas during the cross-examination it appeared that the complainant had spent this amount during the construction of the accused's house from time to time and that the complainant had realised

C the extent of the liability after auditing the costs on completion of the construction. Apart from these discrepancies on part of the complainant, the trial judge also noted that the accused used to pay the complainant a monthly salary in lieu of his services as a building supervisor apart from periodically

D handing over money which was used for the construction of the house. In light of these regular payments, the trial judge found it unlikely that the complainant would have spent his own money on the construction work. With regard to these observations, the trial judge held that there was no material to substantiate that the accused had issued the cheque in relation to a legally

E enforceable debt. It was observed that the accused's failure to reply to the notice sent by the complainant did not attract the presumption under Section 139 of the Act since the complainant had failed to prove that he had given a hand loan to the accused and that the accused had issued a cheque as

F alleged. Furthermore, the trial judge erroneously decided that the offence made punishable by Section 138 of the Act had not been committed in this case since the alleged dishonour of cheque was not on account of insufficiency of funds since the accused had instructed his bank to stop payment. Accordingly,

G the trial judge had recorded a finding of acquittal.

7. However, on appeal against acquittal, the High Court reversed the findings and convicted the appellant-accused. The High Court in its order noted that in the course of the trial

H proceedings, the accused had admitted that the signature on

the impugned cheque (No. 886322, dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable. In respect of the accused's stand that he had lost a blank cheque bearing his signature, the High Court noted that in the instructions sent by the accused to his Bank for stopping payment, there is a reference to cheque No. 0886322, dated 20-7-1999. This is in conflict with the complainant's version wherein the accused had given instructions for stopping payment in respect of the same cheque, albeit one which was dated 8-2-2001. The High Court also noted that if the accused had indeed lost a blank cheque bearing his signature, the question of his mentioning the date of the cheque as 20-7-1999 could not arise. At a later point in the order, it has been noted that the instructions sent by the accused to his bank for stopping payment on the cheque do not mention that the same had been lost. However, the correspondence does refer to the cheque being dated 20-7-1999. Furthermore, during the cross-examination of the complainant, it was suggested on behalf of the accused that the complainant had the custody of the cheque since 1998. This suggestion indicates that the accused was aware of the fact that the complainant had the cheque, thereby weakening his claim of having lost a blank cheque. Furthermore, a perusal of the record shows that the accused had belatedly taken up the defence of having lost a blank cheque at the time of his examination during trial. Prior to the filing of the complaint, the accused had not even replied to the notice sent by the complainant since that would have afforded an opportunity to raise the defence at an earlier stage. All of these circumstances led the High Court to conclude that the accused had not raised a probable defence to rebut the statutory presumption. It was held that:

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A '6. Once the cheque relates to the account of the accused
 and he accepts and admits the signatures on the said
 cheque, then initial presumption as contemplated under
 Section 139 of the Negotiable Instruments Act has to be
 raised by the Court in favour of the complainant. The
 B presumption referred to in Section 139 of the N.I. Act is a
 mandatory presumption and not a general presumption,
 but the accused is entitled to rebut the said presumption.
 What is required to be established by the accused in order
 to rebut the presumption is different from each case under
 C given circumstances. But the fact remains that a mere
 plausible explanation is not expected from the accused
 and it must be more than a plausible explanation by way
 of rebuttal evidence. In other words, the defence raised by
 way of rebuttal evidence must be probable and capable
 D of being accepted by the Court. The defence raised by the
 accused was that a blank cheque was lost by him, which
 was made use of by the complainant. Unless this barrier
 is crossed by the accused, the other defence raised by him
 whether the cheque was issued towards the hand loan or
 towards the amount spent by the complainant need not be
 E considered. ...'

Hence, the High Court concluded that the alleged discrepancies
 on part of the complainant which had been noted by the trial
 court were not material since the accused had failed to raise
 F a probable defence to rebut the presumption placed on him by
 Section 139 of the Act. Accordingly, the High Court recorded
 a finding of conviction.

8. In the course of the proceedings before this Court, the
 contentions related to the proper interpretation of Sections
 G 118(a), 138 and 139 of the Act. Before addressing them, it
 would be useful to quote the language of the relevant provisions:

H *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, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration; A

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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 extend to two years, or with fine which may extend to twice the amount of the cheque, or with both: B C D E

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. F

(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 G H

A (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.

B *Explanation.* – For the purposes of this section, ‘debt or other liability’ means a legally enforceable debt or other liability.

C 139. *Presumption in favour of holder.*– It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt, or other liability.

D 9. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act. With respect to the facts of the present case, it must be clarified that contrary to the trial court’s finding, Section 138 of the Act can indeed be attracted when a cheque is dishonoured on account of ‘stop payment’ instructions sent by the accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. This position was clarified by this Court in *Goa Plast (Pvt.) Ltd. v. Chico Ursula D’Souza*, (2003) 3 SCC 232, wherein it was held:

G “Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the

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statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque. In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138. A contrary view would render S. 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong: ..."

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10. It has been contended on behalf of the appellant-accused that the presumption mandated by Section 139 of the Act does not extend to the existence of a legally enforceable debt or liability and that the same stood rebutted in this case, keeping in mind the discrepancies in the complainant's version. It was reasoned that it is open to the accused to rely on the materials produced by the complainant for disproving the existence of a legally enforceable debt or liability. It has been contended that since the complainant did not conclusively show whether a debt was owed to him in respect of a hand loan or in relation to expenditure incurred during the construction of the accused's house, the existence of a legally enforceable debt or liability had not been shown, thereby creating a probable defence for the accused. Counsel appearing for the appellant-accused has relied on a decision given by a division bench of

A this Court in *Krishna Janardhan Bhat v. Dattatraya G. Hegde*, (2008) 4 SCC 54, the operative observations from which are reproduced below (S.B. Sinha, J. at Paras. 29-32, 34 and 45):

"29. Section 138 of the Act has three ingredients viz.:

- B (i) that there is a legally enforceable debt
- (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and
- C (iii) that the cheque so issued had been returned due to insufficiency of funds.

D 30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. *Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in*

E *favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.*

F 31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

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H 32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional

right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different.

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34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is 'preponderance of probabilities'. 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 he relies."

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(emphasis supplied)

Specifically in relation to the nature of the presumption contemplated by Section 139 of the Act, it was observed;

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"45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have been rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same."

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(emphasis supplied)

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A 11. With respect to the decision cited above, counsel
 appearing for the respondent-claimant has submitted that the
 observations to the effect that the 'existence of legally
 recoverable debt is not a matter of presumption under Section
 139 of the Act' and that 'it merely raises a presumption in favour
 B of a holder of the cheque that the same has been issued for
 discharge of any debt or other liability' [See Para. 30 in *Krishna
 Janardhan Bhat* (supra)] are in conflict with the statutory
 provisions as well as an established line of precedents of this
 Court. It will thus be necessary to examine some of the extracts
 C cited by the respondent-claimant. For instance, in *Hiten P.
 Dalal v. Bratindranath Banerjee*, (2001) 6 SCC 16, it was held
 (Ruma Pal, J. at Paras. 22-23):

D "22. Because both Sections 138 and 139 require that the
 Court 'shall presume' the liability of the drawer of the
 cheques for the amounts for which the cheques are drawn,
 ..., it is obligatory on the Court to raise this presumption
 in every case where the factual basis for the raising of the
 presumption has been established. It introduces an
 E exception to the general rule as to the burden of proof in
 criminal cases and shifts the onus on to the accused (...).
 Such a presumption is a presumption of law, as
 distinguished from a presumption of fact which describes
 provisions by which the court may presume a certain state
 of affairs. Presumptions are rules of evidence and do not
 F conflict with the presumption of innocence, because by the
 latter all that is meant is that the prosecution is obliged to
 prove the case against the accused beyond reasonable
 doubt. *The obligation on the prosecution may be
 discharged with the help of presumptions of law or fact
 G unless the accused adduces evidence showing the
 reasonable probability of the non-existence of the
 presumed fact.*

H 23. In other words, provided the facts required to form the

basis of a presumption of law exists, the discretion is left with the Court to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man.”

(emphasis supplied)

12. The respondent-claimant has also referred to the decision reported as *Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm & Ors.*, 2008 (8) SCALE 680, wherein it was observed:

“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. ...”

This decision then proceeded to cite an extract from the earlier decision in *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal*, (1993) 3 SCC 35 (Para. 12):

A “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
B 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
improbably or doubtful or the same was illegal, the onus
C 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
D 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
E 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. The
court may not insist upon the defendant to disprove the
existence of consideration by leading direct evidence as
F 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
G 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 non-existence
H was so probable that a prudent man would, under the*

circumstances of the case, act upon the plea that it did not exist."

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(emphasis supplied)

Interestingly, the very same extract has also been approvingly cited in *Krishna Janardhan Bhat* (supra).

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13. With regard to the facts in the present case, we can also refer to the following observations in *M.M.T.C. Ltd. and Anr. v. Medchl Chemicals & Pharma (P) Ltd.*, (2002) 1 SCC 234 (Para. 19):

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"... The authority shows that even when the cheque is dishonoured by reason of stop payment instruction, by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the 'stop payment' instructions were not issued because of insufficiency or paucity of funds. *If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out.* The important thing is that the burden of so proving would be on the accused. ..."

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(emphasis supplied)

14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in *Krishna Janardhan Bhat* (supra) may not be correct. However, this does not in any way cast doubt on the

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A correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability

B can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. 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

C 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

D 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 proportionality should guide the construction and interpretation of reverse onus

E clauses and the accused/defendant cannot be expected to discharge an unduly high standard or 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

F 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. As clarified in the citations, the accused can rely on the materials submitted

G by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

15. Coming back to the facts in the present case, we are

H in agreement with the High Court's view that the accused did

not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. Furthermore, the instructions to 'stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant.

16. In conclusion, we find no reason to interfere with the final order of the High Court, dated 26-10-2005, which recorded a finding of conviction against the appellant. The present appeal is disposed of accordingly.

N.J.

Appeal disposed of.