**IN THE COURT OF THE SESSIONS JUDGE
KOKRAJHAR.**

**Present: N.Talukdar.
Sessions Judge,
Kokrajhar.**

Criminal Appeal No. 17/2023

Sri Ganesh Halder …….Appellant
Versus
Sri Pravin Kumar Gupta ………Respondent

For the Appellant : Mr. Partha Mondal, Advocate

For the Respondent : Mr. P.K. Sarma, Advocate

Heard argument on : 18. 11. 2024

Judgment delivered on : 29.11. 2024

J U D G M E N T

1. The instant appeal is directed against the impugned judgment and order dtd. 10.08.2023 passed by learned Addl. C.J.M., Kokrajhar, in case No. CR(NI) 05/2023, convicting the accused/appellant u/s. 138 of Negotiable Instrument Act, 1881 and sentencing him to pay fine of Rs.10,05,000/- in default of

payment of fine simple imprisonment for four months.

2. For the sake of convenience parties will be referred to hereinafter as per their status in the original case before the learned trial court.

3. The brief fact of the case is that the complainant filed a complaint case being case No. CR(NI) 05/2023, u/s. 138 of Negotiable Instrument Act, stating that the complainant gave an amount of Rs.15,00,000/- as loan to the accused in three installments as Rs.5,00,000/- on 30.11.2019, 11.12.2019 and 07.09.2020 respectively in presence of witnesses. Though the accused promised to repay the entire amount within a short period of time, but failed to repay the same. The complainant sent a whatsapp message to the accused requesting him to repay the amount and thereafter the accused issued a cheque bearing No.637634 dated 10.12.2022 for an amount of Rs.9,50,000/- to the complainant with assurance to repay the balance amount within a short period. On 30.12.2022, the complainant deposited the cheque in his account, maintained at, State Bank of India, Kokrajhar Branch, for encashment, but, same was returned without payment by the bank with the endorsement "payment stopped by the drawer".

Thereafter on 04.01.2023, the complainant sent a Pleaders Notice to the accused requesting him to pay the cheque amount within 15 days from the receipt of the Pleaders Notice. On 11.01.2023, the accused received the said Pleaders Notice but the accused failed to pay the cheque amount to the complainant. Hence, the complainant has filed the case u/s. 138 of Negotiable Instrument Act against the accused.

4. During trial of the case, the complainant examined himself as PW1 and relied on certain documents, which were produced as exhibits. After closure of evidence adduced by the complainant, the accused has been examined u/s. 313 of Cr.P.C.. The accused has declined to adduce evidence in his defence.

5. Learned trial court upon going through the evidence as well as material available on record passed the impugned judgment and order dtd. 10.08.20223 convicting the accused u/s. 138 of Negotiable Instrument Act.

6. Being highly aggrieved and dissatisfied with the impugned judgment and order dtd. 10.08.2023, the accused as appellant preferred the instant appeal on the following grounds:

I) That the accused is innocent and he had no loan amounts to refund to the complainant and the complainant has also not entitled to get any loan due amount from the accused, all the amounts were paid by the accused to the complainant through his Bank Account and the Bank statement showing the transactions submitted & Exhibited by the accused in this case, which the complainant also admitted the same. So there is no subsisting and legally enforceable debt, which the Ld. Court below has not appreciated this point while giving the impugned Judgement.

II) That alleged Loan of Rs. 15,00,000/- was given by the complainant to the accused in three installments @ Rs.5,00,000/- in each installment vide dated 30-11-2019, 11- 12-2019 and 07-09-2020, i.e. the very first installment of the said Loan was given on 30-11-2019, but when in the cross examination of the complainant he stated that on 20.11.2019, the accused issued the cheque to him, i.e. even before the date of first installment was given. And there was no written Agreement also exist. According to the complainant, the accused issued the cheque(s) to the complainant even before taking any loan by the accused i.e. at that time there was even no any subsisting or legally enforceable debt or valid Transactions etc.

III) That the complainant has not comply with the mandatory provision of Section 56 of N.I. Act.

IV) That according to the complainant he has already received a part payment from the accused out of the total loan amount of Rs. 15,00,000/-. He has admitted in cross-examination that he already encased Rs.9,50,000/- (Rupees Nine Lakhs Fifty Thousand)only out of total amount of Rs.15,00,000/- depositing another cheque 637633 on 30.12.2022. In the Pleaders Notice exhibited as Ext.3, demand was also made only for remaining amount. Thus, if the loan amount of Rs.15,00,000/- and Rs. 9,50,000/- has already been received then the remaining amount will be Rs. 5,50,000/-.

V) That the accused has already made payment of entire loan amounts through Bank account, which the complainant has also admitted in his cross-examination.

VI) That the Legal Notice issued to the accused is defective.

VII) That the accused has not issued any cheque to the complainant nor did he put signature in the cheque.

VIII) That the accused filed an FIR against the complainant alleging stealing of 5 numbers of cheque from the accused which has been exhibited as Ext.C.

IX) That there is violation of 87 of N.I. Act. The complainant admitted in his cross-examination that he has himself has written all the hand written parts in the cheque in question i.e. the name, date and amounts etc. Thus, he made material alteration in the cheque after its issuance without the knowledge and consent of the accused.

X) That the accused successfully rebutted all the presumption under N.I. Act by exhibiting documents during evidence. Hence the impugned judgment and order is liable to be set aside.

7. I have heard learned counsels for both the parties and gone through the materials on record. The appellant has also submitted written argument.

8. Before proceeding further, it would be expedient, at this stage, to cast a glance upon the evidence available on record.
9. PW1 is the complainant. In his evidence he has deposed that he filed a complaint case being case No. CR(NI) 05/2023, u/s. 138 of Negotiable Instrument Act, stating that the complainant gave an amount of Rs.15,00,000/- as loan to the accused in three installments as Rs.5,00,000/- on 30.11.2019, 11.12.2019 and 07.09.2020 respectively in presence of witnesses. Though the accused promised to repay the entire amount within a short period of time, but failed to repay the same. The complainant sent a whatsapp message to the accused requesting him to repay the amount and thereafter the accused issued a cheque bearing No.637634 dated 10.12.2022 for an amount of Rs.9,50,000/- to the complainant with assurance to repay the balance amount within a short period. On 30.12.2022, the complainant deposited the cheque in his account, maintained at, State Bank of India, Kokrajhar Branch, for encashment, but, same was returned without payment by the bank with the endorsement "payment stopped by the drawer". Thereafter on 04.01.2023, the complainant sent a Pleaders Notice to the accused requesting him to pay the cheque

amount within 15 days from the receipt of the Pleaders Notice. On 11.01.2023, the accused received the said Pleaders Notice but the accused failed to pay the cheque amount to the complainant. He has exhibited the cheque No. 637633 dtd. 30.12.2022 as Ext.1. The certificate issued by the Bank endorsing to note "payment stopped by the drawer" as Ext.2. The Pleaders Notice sent to the accused by the complainant as Ext.3. The slip of the speed post along with the tracking report as Ext.4.

10. During cross-examination, PW1 has revealed that he has not furnished any document to show that the accused is the proprietor of M/S Bapi Electricals. He has not furnished any loan agreement to show payment of loan the accused. The accused issued the cheque to him on 20.11.2019. The accused did not mention the date in the cheque, which he has put signature. The accused handed over the cheque to him. His house situated at Fakiragram. On that day the accused handed over to him fine numbers of cheques. The accused has only put his signatures both on front side and also on back side of the cheque. He has admitted the suggestion that except his signature other particulars in the cheque were not filled up by the accused. He has admitted that in

Ext.3, Pleader Notice, he mentioned about five cheques, but in the instant case he did not mention about other four cheques. He has also admitted that he had withdrawn Rs.9,50,000/- by encashing cheque No. 637633 dtd. 30.12.2022, which was one of the five cheques given to him by the accused. He has admitted that he sent Ext.3 to accused by asking him to make payment of remaining amount out of the entire loan amount of Rs. 15,00,000/- given to the accused after withdrawal of Rs.9,50,000/- by depositing the cheque. However, he explained that the amount of Rs.9,50,000/-, which he got through the cheque was again returned to the accused when he stated that he would commit suicide. He has further revealed that apart from Rs.15,00,000/-, the accused had other liability of payment to him for other transaction between them.

11. The main points of argument amongst other advanced by learned counsel for the accused/appellant are that there is no legally enforceable debt for payment to the complainant by the accused. The complainant admitted during cross-examination that Rs.9,50,000/- out of loan amount of Rs,15,00,000/- has already been withdrawn by the complainant. In the Pleaders Notice exhibited as

Ext.3 also demand was made only for payment of remaining amount. According to learned counsel for the accused/appellant that the Legal Notice issued to the accused is defective.

12. On the other hand, learned counsel for the respondent/complainant has submitted that the complainant has adduced sufficient evidence to raise statutory presumption u/s. 118/139 of NI Act, which the accused has failed to rebut by adducing any evidence. The learned trial court committed no error by passing the impugned judgment and order of conviction against the accused.

13. Before embarking upon the rival submission advanced by learned counsels for both parties it would be proper to go through the various judgment of Hon'ble Supreme Court with regard to presumption mandated by Section 139 of N.I. Act and the shifting of onus of the accused to rebut the said presumption.

14. Hon'ble Supreme Court in **Kumar Exports vs. Sharma Carpets (2009) 2 SCC 513**, held that "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. 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. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

15. In the decision reported in **Rangappa vs. Sri Mohan: (2010)11 SCC 441**, the honourable Supreme Court held that "27. 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 transaction. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof.

28. 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 of liability, the prosecution can fail. As clarified in the citations, 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."

16. In the decision reported in **Basalingappa vs Mudibasappa, 2019 (5) SCC 418.,** the Honurable Supreme court summarised the principles enumerated in various decisions on Section 118(a) and Section 139 of NI act. The relevant portion of the decision of Honirable Supreme Court is as follows:

"23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i) 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.

(ii) 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.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or 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.

(iv) 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.

(v) It is not necessary for the accused to come in the witness box to support his defence.”

17. Thus the settled provision of law is that once the execution of cheque is admitted Section 139 of NI Act mandates the presumption that the cheque was for the discharge of debt or other liability. However, it is open for the accused to relevant of the evidence laid by him or accused may also rely on materials submitted by the complainant in order to raise a probable defence. The standard of proof for rebutting the presumption is that of preponderance of probability.

18. In the instant case the accused had denied the issuance of any cheque to the complainant. According to him, he did not put signature in the cheque. The Legal Notice issued to him by the complainant is defective within the meaning of clause (b) of Section 138 of N.I. Act and hence the cause of action u/s. 138 of N.I. Act does not arise. Though, the accused did not adduce any evidence, however, he duly cross-examined the PW1, complainant. During cross-examination, PW1, the complainant, has admitted that he had given Ext.3, Legal Notice to accused by asking him to make payment of

remaining amount out of the entire loan amount of Rs.15,00,000/- given to accused after withdrawal of Rs.9,50,000/- by him by way of a cheque. He also explained that the amount of Rs.9,50,000/- which he got through the cheque was again returned to the accused when he stated that he would commit suicide. PW1 has also revealed during cross-examination that he had completed work order work order in the name of accused for an amount of Rs.19,32,000/- and for same as payment of first installment accused had made payment of Rs.8,20,000/- to him, subsequently he had given him Rs.4,000/- for purchase of some article relating to the work and thereafter he again gave Rs.2,00,000/- for payment of G.S.T against purchase of materials for construction. Accused had made payment of Rs.5,20,000/- to him, which also he had taken earlier as loan from him during lockdown for covid-19. Defence has also exhibited through PW1 Ext.A and Ext.B, Bank Account Statements of the complainant. PW1 has also admitted that on 13.04.2020 accused had paid of Rs.10,00,000/- through a cheque bearing No.750102 for some work related to L.T extension line of Dangtol Railway.

19. I have carefully gone through Ext.3, Pleaders Notice. In the Pleaders Notice dtd. 31.12.2022, it has been stated that the accused took loan an amount of Rs.15,00,000/- (Rupees Fifteen Lakh) only on various dates (ie Rs.5,00,000/- on 30/11/2019 Rs.5,00,000/- on 11/12/2019 and Rs.5,00,000/- on 07/09/2020 by executing pasted Agreements) from the complainant for his contractual works. It has also been stated that the complainant has completed a work on behalf of the accused and invested an amount of Rs.21,59,878/- (Rupees Twenty One Lakh Fifty Nine Thousand Eight Hundred Seventy Eight) only for which the accused agreed to pay the bill amount after deducting the paper work cost & GST to the complainant within April/2021 without fail. It has also been stated in the notice that on request of the complainant on several times for repayment of the said amounts, the accused delivered 5 Nos, cheque of State Bank of India, Alipurduar Branch bearing Nos 637633 dated 30/12/2022 for an amount of Rs.9,50,000/- (Rupees Nine Lakh Fifty Thousand) only, which is already been withdrawn, No. 637634 dated 30/12/2022 for an amount of Rs.9,50,000/- (Rupees Nine Lakh Fifty Thousand) only, payment of which is stopped by the drawer, which are duly signed by the accused and the cheque was drawn on

State Bank of India, Alipurduar Branch and payable to the complainant.

20. Thus, in the Demand Notice also it has been stated that the complainant has already withdrawn an amount of Rs.9,50,000/- paid through cheque by the accused. In cross-examination, PW1, the complainant, has admitted the withdrawal of said amount of Rs.9,50,000/-. Though he stated that the said amount was returned to the accused when he stated that he would commit suicide, but there is nothing on record to substantiate that the withdrawn amount of Rs.9,50,000/- has been again returned back to the accused. There is no statement of the complainant in his complaint in this regard. What is important to note is that in the Legal Notice, demand is made for payment of remaining dues/amount within 15 days from the date of receipt of the notice.

21. It is manifest from the language of the complaint as well as evidence adduced by the complainant that he filed complaint against the accused for dishonor of the chaeque issued by the accused for repayment of loan amount of Rs.15,00,000/-(rupees fifteen lakh) only. However demand notice is demanding payment of remaining

amount of loan amount of Rs.15,00,000/-(rupees fifteen lakh) only as well as invested amount of Rs.21,59,878/- (Rupees Twenty One Lakh Fifty Nine Thousand Eight Hundred Seventy Eight) only, for the work completed by the complainant on behalf of the accused. The demand notice is inconsistent with the case of the complainant as appears from his written complaint in the case.

22. In the decision reported in **M/S. Rahul Builders vs M/S. Arihant Fertilizers & Chemical, 2007 AIR SCW 7008,** the honourable Suoreme Court in respect of service of proper notice U/S 138 of NI act, held as follows:

"9. We have noticed hereinbefore the notice dated 31.10.2000 issued by the appellant to Respondent No. 1. An information thereby was only given that the cheque when presented was returned "unpassed" by the bank authorities on the plea that the account had been closed. It was averred that in such a situation the complainant was free to take any legal steps against the accused to get the amount of his pending bills. By the operative portion of the said notice, the respondent was called upon to remit the payment of his pending bills, otherwise suitable action shall be taken.

10. Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". Such a notice has to be issued within a period of 30 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An

omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Respondent No. 1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills, i.e., Rs. 8,72,409/-. The noticee was to respond to the said demand. Pursuant thereto, it was to offer the entire sum of Rs. 8,72,409/-. No demand was made upon it to pay the said sum of Rs. 1,00,000/- which was tendered to the complainant by cheque dated 30.04.2000. What was, therefore, demanded was the entire sum and not a part of it.

23. In **Suman Sethi Vs. Ajay K. Churiwal and Another, (2000) 2 SCC 380,** the honorable Apex Court has stated as follows:

"8. It is a well-settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. the cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to the "said amount" there is also a claim by way of interest, cost etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving the break-up of the claim the cheque amount, interest, damages etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, the notice might well fail to meet the legal requirement and may be regarded as bad.

This Court had occasion to deal with Section 138 of the Act in Central Bank of India & Anr. v. M/s. Saxons Farms & Ors., JT (1999) 8 SC 58 and held that the object of the notice is to give a chance to the drawer of the cheque to rectify his omission. Though in the notice demand for compensation, interest, cost etc. is also made drawer will be absolved from his liability under Section 138 if he makes the payment of the amount covered by the cheque of which he was aware within 15 days from the date of receipt of the notice or before complaint is filed."

24. Learned counsel for the accused/appellant has relied on the decision of Hon'ble Gujarat High Court reported in **Dashrathbhai Trikambhai Patel vs**

Hitesh Mahendrabhai Patel and another, AIR OnLine 2022 Gujarat 314, wherein the honorable Gujrat High Court followed the ratio laid down by honorable Apex Court in **M/S. Rahul Builders vs M/S. Arihant Fertilizers & Chemical** and **Suman Sethi Vs. Ajay K. Churiwal and Another.**

25. In the present case on hand, in the legal notice (Ext.3) issued to the accused, no demand for payment of the cheque amount was made. In the case of **M/S. Rahul Builders vs M/S. Arihant Fertilizers & Chemical (supra)** the honourable Supreme Court has stated that an omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Hence, the legal notice issued in the present case is found to be defective and it falls short of its legal requirement and it does not disclose a cause of action U/S 138 of NI Act.

26. In that view of the matter, I am of the considered view that the learned trial court committed manifest error by deciding that the legal notice is not defective and as such, the impugned judgment and order dtd. 10.08.2023 is liable to be interfered.

27. In the result the appeal is allowed on contest. The impugned judgment and order dated 10.08.2023, passed in C.R. Case No. (NI) 05/2023, U/S. 138 of N.I. Act, is hereby set aside.

28. Send down the original case record being C.R. N.I. Case No. 05/2023 to the learned trial Court alongwith a copy of this Judgment and Order.

Given under my hand and seal of this Court on this the 29th day of November, 2024.

Dictated & corrected by me.

Sessions Judge, **Kokrajhar.**	**Sessions Judge,** **Kokrajhar.**