Additional Court No. 6, Lucknow.

Present: **Shri Ashok Kumar Pathak**
H.J.S.
Presiding Officer,
Additional Court No. 6, Lucknow.
Complaint Case No. 4856/2017.

Pankaj Kumar, S/o- Sri Kali Charan, R/o- 12B/745, Vrindavan Yojna, Raebarely Road, Lucknow.

.........**Complainant**.

Versus

Avnesh Kumar Singh Chauhan, S/o- Dashrath Singh Chauhan Office Add.- R.C. Construction, F-2, Ist Floor, Home Vazir Chamber, Lal Bagh, Lucknow.

........Accused.

U/S-138/142 N.I. Act.
P.S.-Kaiserbagh , Lucknow.

Judgment

Complainant Pankaj Kumar have lodged this complaint U/s 142 Read with Section 138 N.I. Act 1881 against the opposite party Avnesh Kumar Singh Chauhan with the allegations that the complainant was in need of a plot for residential purposes. The opposite party approached the complainant and assured to provide a residential plot to him, as per his needs, in the month of July 2016. Complainant have paid Rs. 7,50,000 (seven lakh fifty thousand) by bank RTGS to the opposite party . The opposite party never provided the residential plot to him. After several demands to return the money and after so many pretext the opposite party have issued the cheque No. 257039 on dated 20.06.2017 of Rs. 7,50,000 (seven lakh fifty thousand) to complainant, which was deposited by him in his bank account on 20.06.2017 to get the money. The banker refused the payment on the ground that payee's account have insufficient funds. Again on 23.06.2017 complainant deposited the cheque in his bank account for getting the money but the payment was again refused due to insufficient funds in the account of opposite party. The complainant demanded his money from the opposite party personally and telephonically but the opposite party did not pay it. Consequently on 30.06.2017 the complainant got the legal notice issued through his counsel to the opposite party by registered post, which was refused and returned by the opposite party. The complainant received back this notice on 05.0702017. Thus the opposite party deliberately and intensionally do not want to return the money to the complainant. Due cause of action have arisen to the complainant to file this complaint against the opposite party within the competent jurisdiction of this court. Accused be summoned, tried and punished U/s 138 N.I. Act

After perusing the contents of the complaint, the affidavit filed under Section 200 Cr.P.C. of complainant in support of his allegations, the cheque in dispute; the bank memo, the copy of the legal notice and dak receipt, on 24.11.2017, I summoned the opposite party Avnesh Kumar Singh Chauhan U/s 138 N.I. Act for trial.

The accused appeared before the court and got himself bailed out. In his statement U/s 251 Cr.P.C on 27.09.2018, accused Avnesh Kumar Singh Chauhan have denied the issuance of the disputed cheque No. 257039 dated 20.06.2017 of Rs. 7,50,000 (seven lakh fifty thousand) and have said categorically that he never issued this cheque. He admitted that though the cheque belongs to him but he neither filled it nor issued it. About the bouncing of the cheque, the accused Avnesh Kumar Singh Chauhan have shown his ignorance. So far legal notice is concerned, accused Avnesh Kumar Singh Chauhan have said that no notice was ever received by him. There was no transaction in between the parties and no money of complainant was ever due upon him, hence he did not return the money. The accused Avnesh Kumar Singh Chauhan have also said that he never knew that when the complainant lifted the cheque in dispute from his office. Further Avnesh Kumar Singh Chauhan said that he got constructed the dilapidated house of complainant as he is related to construction work. The money which complainant have paid to him in lieu of that construction work is being demanded by the complainant.

2. The complainant have produced himself as PW-1, to support the allegations of this complaint, he has

filed his evidence on affidavit as Examination-in-Chief -Paper No. A6/1-7; he was cross-examined by the learned counsel for the accused on 16.02.2019 Paper No. A6/8-9. In documents the complainant have filed the cheque in dispute in original -Cheque No. 257039 dated 20.06.2017 of Rs. 7,50,000 (seven lakh fifty thousand) -Paper No. A5/1; bank return memo dated 28..06.2017 -Paper No. A5/2; the copy of the legal notice dated 30.06.2017 Paper No. A5/3; the dak receipt Paper No. A5/4 and A5/5.

3. Accused Avnesh Kumar Singh Chauhan in his statement U/s 313 Cr.P.C. have denied on 22.05.2019 the evidences of the complainant and have said that he never issued any cheque, Pankaj Kumar had cleverly taken away his cheque, he could know about this cheque only when it was dishonoured. Further Avnesh Kumar Singh Chauhan have said that he never received any legal notice and no money was ever due upon him. The complainant is adducing the evidence against him with malafied intentions and wrong case have been filed. Further Avnesh Kumar Singh Chauhan have said that he got the house of complainant constructed for which his money was due upon the complainant. In his defense accused have produced four witnesses-PW1 Anand Kumar Awasthi, who have filed his evidence on affidavit Paper No. A8/1-2; he was cross-examined by the complainant counsel on 20.09.2019 Paper No. A8/3; DW2 Nagendra Singh who have filed his evidence on affidavit Paper No. A9/102; he was cross-examined by complainant on 20.09.2019 Paper No. A9/3; DW-3 Divendra Singh who have filed is evidence on affidavit Paper No. A10/1-2; he was cross-examined by complainant on 07.12.2019 Paper No. A10/3; DW4 Nattha Ram, who have filed his evidence on affidavit Paper No. A11/102 and he was cross-examined by the complainant on 07.01.2020 Paper No. A11/3. In his documentary evidence the accused have filed five papers -Indian Oversees Bank letter dated 21.12.2019 Paper No. A12/1; photocopy of cheque No. 585054 dated 18.12.2001 of Rs. 2000 Paper No. A12/2, photocopy of the passbook of Union Bank Paper No. A12/3-5. At the stage of arguments, the accused have filed one Paper No. A14/1 Bank Certificate dated 27.04.2022, which was admitted. Despite opportunity for rebuttal given to complainant, he have not filed any document against this paper.

4. The complainant have filed the certified copy of

order dated 03.03.2022of Hon'ble High Court passed in Application U/s 482 No. 865 of 2022 Pankaj Kumar vs. State of U.P. and another, in which the Hon'ble High Court have directed the trial court to decided this complaint expeditiously in accordance with the law within the period of two month from the date of receipt/production of certified copy of this order. This order was filed before me on 09.03.2022 hence, the case is to be decided expeditiously before 09.05.2022 if possible.

5. I have heard the arguments at length of learned counsels of both the parties and have gone through the record. I have perused the oral and written evidences adduced by both the parties as well as the law produced by them. I have also perused the written arguments filed by the parties.

6. The preliminary facts constituting an offence U/s 138 N.I. Act are-(i) cheque must be drawn by a person on an account maintained by him with a banker(ii) 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 (iii) this cheque is returned back 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 the agreement made with the bank (IV) the payee of the cheque must give a notice in writing to the drawer of the cheque within 30 days from receipt of the information by him from the bank regarding the return of the cheque unpaid as per the provision of Section 138 (b) N.I. Act,(v) the notice must contain the demand for the payment of the amount due on the cheque (vi) upon the receipt of the notice if the drawer of the cheque fails to make payment within 15 days of the receipt of the notice, prosecution could be lunched within one month thereafter. The time lines stipulated under Sub Clause (a) and (b) of the proviso to Section 138 are mandatory.

7. To prove his case, initially the complainant have to allege and prove that for some debt or other liability, the ***accused have drawn the disputed cheque on an account maintained by him with a banker*** to the complainant for its discharge, in whole or in part and the same cheque is returned by the bank unpaid. Further

the complainant have to allege and prove that the cheque drawn by the accused in his favour was presented by him to his bank within its validity period and when it was dishonoured, thereafter, he issued a legal demand notice within 30 days of the receipt of the information from the bank, regarding the return of the cheque as unpaid and the drawer of the cheque /accused have not paid the cheque amount within 15 days of the receipt of the said notice.

8. The complainant have deposed as PW-1 and have supported the contents of this complaint on oath in Toto. In his Examination-in-Chief at page No. 1 of his affidavit of evidence the complainant Pankaj Kumar have reiterated that: **"जुलाई 2016 में विपक्षी अन्वेश कुमार सिंह चौहान मेरी क्लीनिक पर अपना इलाज कराने आये थे इसी दौरान उन्होंने बताया कि मै प्रापटी का काम करता हूं तथा अगर आप को प्लाट लेना हो तो बताये, मुझे न्यु नेशनल पी0 जी0 कालेज प्रतिभा सिनेमा के पीछे लखनउ में प्लाट देने के वास्ते एडवांस के रूप में रूपया 750000 सात (लाख पचास हजार) मागा। जिसको मैने दिनांक 21.10.2016 को अपने खाता संख्या 000200300023311, से रू0 450000, (चार लाख पचास हजार) तथा अपनी पत्नी के साथ ज्वान्ट एकाउण्ट खाता संख्या 000200300023366 से रू0 300000, (तीन लाख) विपक्षी के एकाउण्ट खाता संख्या 335802000000014 में RTGS किया । जिसके संबंध में बैक द्वारा जारी प्रति इस शपथ पत्र के साथ संलग्न की जा रही हैं ।"**

9. Further in his Examination-in-Chief the complainant said on oath that: **"विपक्षी ने वाद में मुझे प्लाट नही दिया। जब मैनें कहा कि अगर प्लाट नही दे रहे हो तो मेरा रूपया 750000 वापस कीजिए तो कई बार निवेदन करने के बाद विपक्षी ने रू0 750000 20.06.2017 को एक चेक संख्या 257039 इण्डियन ओवरसीज बैंक, बक्कास ब्रांच, खुरदही बाजार सुल्तानपुर रोड को दिया तथा कहा कि यह चेक अपने एकाउट में लगा लेना पैसा आ जायेगा"** In his complaint in Para 1, the complainant Pankaj Kumar have said that, he deposited Rs. 7,50,000 from RTGS to the opposite party. Alongwith his affidavit of evidence, complainant Pankaj Kumar have submitted the certified copy of the account statement of his two saving bank accounts standing at Uttar Pradesh Cooperative Bank Ltd., Vidhansabha Road, Lucknow, which reveals that on 21.10.2016 firstly, Rs. 4,50,000 from A/c. No.000200300023311 and then secondly Rs. 300000 from A/c. No. 000200300023363 was transferred to the Account number 3358020000014 of the opposite party-

accused. The complainant Pankaj Kumar have also filed alongwith this evidentary affidavit as Page No. 4 to 7, the photo-state copy of his saving account of Uttar Pradesh Cooperative Bank Ltd., Lucknow which supports and confirm the certificate issued by the bank regarding the RTGS of the said money. Thus, it is preliminary established that Rs. 7,50,000 was given by complainant Pankaj Kumar to the bank account of opposite party Avnesh Kumar Singh Chauhan for getting a plot for his residential purposes; subject to the verification of receiving A/c-as to whom this A/c actually belongs.

10. The main argument of learned counsel for the defence is that the account in which the money of RTGS was transferred by complainant Pankaj Kumar does not belong to the accused Avnesh Kumar Singh Chauhan but it actually belongs to its firm named M/S R.C. Constructions. The bank certificate dated 27.04.2022 of Indian Oversees Bank- Paper No.A14/1filed by the accused reveals that M/S R.C. Construction current **account No. 3358020000014 is a account of Firm and not an account of individual**. The bank certificate dated 31.10.2018 -Paper No.A6/3filed by the complainant Pankaj Kumar as encloser to his affidavit on oath as evidence, also confirm the above account number to which Rs. 7,50,000 were transferred through RTGS.

The perusal of the complaint shows that, nowhere complainant Pankaj Kumar have said that his dealing/transaction was being conducted with the firm of accused Avnesh Kumar Singh Chauhan i.e, with M/S R.C. Construction. Though in para 1 of his complaint, the complainant Pankaj Kumar have mentioned that opposite party is a proprietor of R.C. Construction, Lucknow. The contents of para 2 and para 3 of complaint makes it clear that the complainant have neither said clearly that plot for residential purposes against the RTGS money Rs. 7,50,000 was to be given to him by Avnesh Kumar Singh Chauhan in his individual capacity nor anywhere he have mentioned that the money through RTGS was given to accused Firm M/S R.C. Construction and it was the firm which was liable for the delivery of residential plot to the complainant. The cheque in dispute Paper No. A5/1, does not contain the seal of the firm R.C. Construction Lucknow. As per the legal notice dated 30.06.2017, the copy of which is Paper No. A5/3 is concerned this paper makes it's clear that Sri G.S. Verma, Adv., under the instruction of his client Pankaj Kumar the complainant have issued this notice to Avnesh Kumar Singh Chauhan and not to his Firm M/S R.C Construction, Lucknow through its proprietor Avnesh Kumar Singh Chauhan. As per the contents of para 1 and 2 of the legal notice -Paper No. A5/3, it is evident that the complainant have vehemently emphasized that Avnesh Kumar Singh Chauhan have taken Rs. 7,50,000 through RTGS on 21.10.2016 in his account No. 3358020000014. In this legal notice the complainant have also said clearly that Avnesh Kumar Singh Chauhan have a liability of Rs. 7,50,000 against a plot, in whose respect of, Avnesh Kumar Singh Chauhan have issued Cheque No. 257039 dated 20.06.2017 amounting Rs. 7,50,000 of Indian Oversees Bank Bakkas Branch, Lucknow. The dak receipt Paper No. A5/5; and the corrier receipt Paper No. A5/4; also makes it clear that the legal notice was issued to Avnesh Kumar Singh Chauhan and not to his firm M/s R.C. Construction.

PW-1 Pankaj Kumar complainant have said in his Cross-examination at Page No. A6/8, that: "**R.C. Construction Home** वजीर चैम्बर लालबाग में ही स्थित है। भोपाल हाउस से **R.C. Construction** मुश्किल से 100 मीटर पर है। **R.C. Construction** के मालिक या प्रोपराइटर अनवेश्ज्ञ कुमार सिंह चौहान ही है। मै यह नही जानता हूं कि अनवेश कुमार सिहं चौहान गर्वमेंट कान्ट्रैक्टर भी है। मै **R.C. Construction** के आफिस में 4,6 बार गया हूं बी0बी चडढा को अनवेश कुमार सिंह चाचा जी कहते थे। मै इतनी सब बातें जानता हूं इसलिए बी0बीव चडडा जी अनवेश कुमार सिंह चौहान और मेरी अच्छे संवंध नही रहें मै उन्हे जानता था। "

Further in his Cross-Examination at Page No. A6/9 PW-1 Pankaj Kumar/complainant have said that: "मैने व्रन्दावन जहां मै निवास कर रहा हूं वो मैने 2014–2015 में बनवा लिया था । मेरे आवास के प्रथम तल पर कोई किचन स्थित नही है। मेरे आगन, बाथरूम या कोई भी कास्ट्रक्शन तुडवाकर नही बनवाया गया है । मैने ग्रह प्रवेश नवरात्री 2018 नवम्बर में व्रन्दावन वाले मकान का किया था। अनवेश कुमार सिंह चौहान द्धारा मेरे व्रन्दावन के मकान में उनके द्धारा कोई भी कास्ट्रक्शन या मर्टेरियल मुझे नही दिलवाया गया। अनवेश कुमार सिंह चौहान मेरे व्रन्दावन वाले मकान पर एक बार आये है।" further on the same page this witness have said that: "प्रश्नगत चेक पर नाम मेरे द्धारा भरा गया है बाकी सारी लिखपढी अनवेश कुमार सिंह चौहान द्धारा लिखी गयी है। तारीख में उलेख्खित 7 और चेक के धनराशि में लिखे गये 7 में अन्तर है दोनो एक से नही है अलग अलग लिखावट के

है और यही बात 0 की लिखावट में है।" The bare perusal of cheques Paper No. A5/1 makes it clear that it is dated 20.06.2017. It is pertinent to mention here that no suggestion regarding the M/S R.C. Construction Firm of the accused and its liability have ever been given by the defence during entire Cross-examination, to PW-1 Pankaj Kumar/complainant.

In his statement U/s 251 Cr.P.C. the accused Avnesh Kumar Singh Chauhan has replied to the question No. 1 regarding the issuance of the cheque No. 257039 dated 20.06.2017 of Rs. 7,50,000 in lieu of his liability that he had never issued this cheque, still the cheque belongs to him. The cheque was neither issued nor filled in writing by him. Further in his statement, the accused Avnesh Kumar Singh Chauhan have said that he never received any legal notice, there was no transaction in between the complainant and the accused, no money was ever liable upon him to be paid to the complainant, hence question does not arise to return any money to complainant. Accused Avnesh Kumar Singh Chauhan have taken the '<u>defence of ignorance</u>' about the lifting of the cheque in dispute from his office by the complainant. In his statement U/s 313 Cr.P.C. accused Avnesh Kumar Singh Chauhan have said that he never issued the cheque in dispute, Pankaj Kumar have lifted his cheque and later he came to know that this cheque was dishnoured. He did not receive any notice and he never had any liability. In his statement U/s 251 as well as statement U/s 313 Cr.P.C. it is being alleged by the accused Avnesh Kumar Singh Chauhan that he got the dilapidated house of the complainant constructed, for which Pankaj Kumar had a liability to pay money to him for doing the construction work and the same money is now being extorted (to be taken back) by complainant. From the statement of the accused Avnesh Kumar Singh Chauhan and from the contents of the complainant and the oral evidence of the complainant PW-1 Pankaj Kumar and legal notice issued by complainant to the accused before lodging this complaint, it is evident now that complainant Pankaj Kumar categorically imposes the financial liability of Rs. 7,50,000 upon Avnesh Kumar Singh Chauhan individually and not to his Firm M/S R.C. Construction. Still it is a true fact that, as per bank record the account of cheque in dispute belongs to Firm

R.C. Construction whose proprietor is accused Avnesh Kumar Singh Chauhan and this Firm is not impleaded as Accused in present complaint.

11. Learned counsel for the complainant argued that it was never known to the complainant, before filing a bank certificate, regarding the account of cheque-in-dispute, that to which person, either individually to Avnesh Kumar Singh Chauhan or to his Firm M/S R.C. Construction, this account belonged to., but the complainant have had all the dealings with the accused Avnesh Kumar Singh Chauhan and money was transferred to the accused Avnesh Kumar Singh Chauhan as per his instruction. What exactly transpired between the parties and what is legal position as per provision of 138 N.I. Act, both are to be taken into account while deciding the dispute. As per Section 138 N.I. Act where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of the money to another person from out of account for the discharge, in whole or in part, of any debt or other liability is returned by the bank unpaid shall be deemed to have committed an offence.

12. As per the provision of Section 118 and 139 of N.I. Act, presumption as to Negotiable Instruments - (a) of consideration (b) as to date (c) is to time of acceptance (d) as to time of transfer etc., the presumption shall be drawn until the contrary is proved. It shall also be presumed that the holder of a Negotiable Instrument is a holder in due course; provided that, where the instrument has been obtained from its lawful honour, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence of fraud or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

13. The learned counsel of both the parties have shown me the law regarding the presumption U/s 118 and 139 of the N.I. Act and rebuttal by the defence as well as the standard of prove for prosecution and for defence and it would be appropriate here to discuss the latest legal position.

Hon'ble Apex Court in Krishana Rao vs. Shankargouda AIR 2018 Supreme Court 3173 have decided following in Para 18, 19 and 20:-

(a) ***"This Court in Kumar Exports vs. Sharma***

Carpets. 2009 (2) SCC 513: (AIR 2009 SC 1518) had considered the provisions of Negotiable Instruments Act as well Evidence Act. Referring to Section 139, this Court laid down following in paragraphs 14, 15, 18 and 19".

14. "Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part of any debt or other liability".

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

Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumption will

live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and is discharged of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words " unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumption to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose.

Following was held in paragraph 20:

20. In the present case, the trial court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court".

In Para 21 of above ruling, Hon'ble Apex Court have also held-

21. "***Another judgment which needs to be looked into in Rangappa vs. Sri Mohan, 2010 (11) SCC 441: (AIR 2010 SC 1898, Para 14). A three judge Bench of this Court had occasion to examine the presumption under Section 139 of the Act, 1881. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail".***

(b) Learned counsel for the defence have provided law AIR 2008 SUPREME COURT 1325, Krishna Janardhan Bhat vs. Dattatraya G. Hegde, in which the Hon'ble Apex Court have decided the following-

20. **"Indisputably a mandatory presumption is required to be raised in terms of Section 118 (b) and Section 139 of the Act. Section 13 (1) of the Act defines "negotiable instrument" to mean "a promissory note, bill of exchange or cheque payable either to order or to bearer."**

Section 138 of the Act has three ingredients, viz..

(i) that there is a legally enforceable debt;

(ii) That the cheque was drawn from the account of the bank for discharge in whole or in part of any debt or other liability which per-supposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

21. **"The proviso appended to the said section provides for compliance of 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 that a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of holder of the cheque that the same has been issued for discharge of any debt or other liability"**.

23. **"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 records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution of a criminal case is different".

25. **"Furthermore, whereas prosecution must prove that guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which the relies"**.

(c) Learned counsel for the prosecution have provided the law (2010) 11 Supreme Court Cases 441 Rangappa vs. Sri Mohan in which the Hon'ble Apex Court have decided in Para 7 **"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.**

The Hon'ble Apex Court have also discussed the law laid down by its division bench in another case *Krishna Janardhan Bhat vs. Dattatraya G. Hegde* and in view of the above law it is apparent that preponderance of probabilities are to be judged in view of the evidences produced by the prosecution and the defence.

(d) In *M.S. Narayana Menon alias Mani vs. State of Kerala and another the Hon'ble Apex Court* **have laid down the following law in Para 29,32,38 and** 45- **" In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118 (a) of the Negotiable Instruments Act, the court shall presume a negotiable instrument to be for consideration unless and until after**

considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for said purpose, the evidence adduced on behalf of the complainant could be relied upon. It is not necessary for the defendant to disprove the existence of consideration by way of direct evidence. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which the accused relies. The accused need not disprove the prosecution case in its entirety. Moreover, the onus on an accused is not as heavy as that of the prosecution. It may be compared with that on a defendant in a civil proceeding”.

(e) Hon’ble Apex Court in K. Prakashan vs. P.K. Surenderan (S.C.) have laid down the following law in para 14 regarding the matter U/s 138 N.I. Act **“It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability”**.

(f) Hon’ble Apex Court have laid down the following law in case -M/s Kumar Exports vs. M/s Sharma Carpets- **“The accused in a trial U/s 138 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 presumption and accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial”**.

14. In view of the law laid down by the Hon'ble Apex Court regarding the standard of proof and the preponderance of probabilities, it is clear that the accused need not to disprove the prosecution case in its entirety and the onus on an accused is not as heavy as that of the prosecution, which may be compared with that on a defendant in a civil proceeding.

15. Accused have produced four defence witnesses. DW-1-Anand Kumar Awasthi have said in his Examination-in-Chief on oath as per affidavit Paper No. A8/102, that the opposite party Avnesh Kumar Singh Chauhan is the proprietor of M/S R.C. Construction Company. He was working as Peon in this company. Complainant Pankaj Kumar used to come in the office of company and use to sit in the office even in the absence of Avnesh Kumar Singh Chauhan. There use to be signed cheques placed in draws on the table of the company. In his cross-examination this witness have said that for about last one year he left the company; still he works for the company temporarily whenever company calls him. He has admitted in his further cross-examination that he is deposing before the court as per advice of his employer. This witness have never said on oath that the complainant Pankaj Kumar have lifted the cheque in dispute stealthily from the office of the M/S R.C. Construction Company.

DW-2 Nagendra Singh have said on oath that he is working for last seven years as supervisor in R.C. Construction Company. Some money was due upon the complainant towards the construction work done by the company. Complainant use to come to the office of the company in presence of and even in absence of the opposite party. The building material as well as the labour were supplied for the construction of complainant by him. He got the house of the complainant constructed with the help of Raj Mistry Ramnath. There use to be some blank cheque signed by the opposite party for delivering this cheque to the parties in absence of opposite party in the office of company. In his cross-examination this witness have admitted that he was not doing the office work; he use to come to the office in the morning for his attendance and reporting. This witness have also not said anywhere in his evidence that the complainant Pankaj Kumar either lifted or had an opportunity to lift, from the office of the construction company of opposite party, the cheque in dispute.

DW-3 Divendra Singh have said in his Examination-in-Chief in his affidavit of evidence at Paper No. A10/1 that the complainant Pankaj Kumar and opposite party Avnesh Kumar Singh Chauhan both use to come to the shop of Late Brij Bhusan Chadda (chacha). Opposite party Avnesh Kumar Singh Chauhan constructed the house of complainant Pankaj Kumar for about 3.-4 years. For stone installation, he sent mistry Rakesh Tiwari to complainant Pankaj's House. In his cross-examination this witness have said that Avnesh Kumar Singh Chauhan have fetched him for this evidence but the payment of mistry Rakesh Tiwari is still due.

DW-4 Nathu Ram have said in his Examination-in-Chief in his affidavit of evidence at Paper No. A11/1 that on the instruction of the proprietor of the company Avnesh Kumar Singh Chauhan he supervised the construction work for about 4 months at the house situated at Vrindavan Colony, Lucknow. In his cross-examination this witness have admitted that he works in company hence, he is giving evidence for company. The theory of defence that the complainant wants to extort money from the opposite party Avnesh Kumar Singh Chauhan by deliberately lifting the cheque in dispute from the office of R.C. Construction Company does not appear to be appropriate and tenable, as usually the money is paid by a person whose house is being constructed, to the person who have constructed the house of the owner; Thus money for construction could have been given by complainant to accused Avneh Kumar Singh Chauhan,either in cash or by cheque and not vice-versa. In present case the cheque is alleged to have been issued by Avnesh Kumar Singh Chauhan and not by complainant Pankaj kumar.

16. After discussing at length the oral and documentary evidence on record as well as the pleadings of the parties, it is now apparent that Rs. 7,50,000 was transferred by complainant Pankaj Kumar on 21.10.2016 to the A/c No. 335802000000014 and as per evidence on record and bank certificate dated 21.12.2019 Paper No. A12/1 and bank certificate dated 27.04.2022 Paper No. A14/1 this accounts belongs to M/S R.C. Construction company. As per this bank certificate Paper A14/1 the exact account number of M/S R.C. Construction Firm is current A/c No. 3358020000014. As per this bank

certificate the account number of the cheque in dispute, as mentioned above, it, does not belong to individual Avnesh Kumar Singh Chauhan and is being operated in the name of Firm M/S R.C. Constructions Company. Admittly as per para 1 of the complaint Avnesh Kumar Singh Chauhan the opposite party/accused is the proprietor of the Firm R.C. Construction Company. Hence the cheque in dispute belongs to the Firm M/S R.C. Construction Company which was being operated by the Proprietor of this Firm Avnesh Kumar Singh Chauhan the accused. The cheque in dispute does not belong individually to Avnesh Kumar Singh Chauhan. Since complainant Pankaj Kumar have given Rs.7,50,000 through RTGS to this account of M/S R.C. Construction Company, hence the complainant knew from the very inceptions that dealing and transaction took place between him and the proprietor of this construction Firm and the account number of the cheque in disputes belong to the Firm M/S. R.C. Construction Company. In above circumstances the liability to return the money of the complainant i.e., Rs. 7,50,000 was with the Firm M/S R.C. Construction-a juristic person, and accused/opposite party Avnesh Kumar Singh Chauhan was not as an individual, responsible for the above mentioned money of the complainant. Moreover, the bank account of the cheque in dispute, as per the complainants allegations in his complaint does not belong to the accused/opposite party Avnesh Kumar Singh Chauhan.

As per provision of Section 138 N.I. Act where any cheque drawn by a person on account maintained by him with a bank for payment of any amount of money to another person from out of that account for the discharge, of any debt or other liability, is returned by the bank unpaid, only then such person shall be deemed to have been committed an offence punishable under the provision of this Section. In the present case the bank account of the disputed cheque belongs to the Firm M/S R.C. Construction and not to the accused Avnesh Kumar Singh Chauhan individually. Since the cheque in dispute was not issued by the accused Avnesh Kumar Singh Chauhan individually and since the liability of Rs. 7,50,000 was due upon the Firm M/S R.C. Construction and not upon the accused Avnesh Kumar Singh Chauhan individually and since Avnesh Kumar Singh Chauhan have not issued the cheque in dispute in his individual capacity for the discharge of the said economic liability hence, ingredients of the offence mentioned in Section 138 of the N.I. Act are not present in the complaint itself. Thus the prosecution fails in want of the ingredients of the offence mentioned in the provision of Section 138 N.I. Act and the accused Avnesh Kumar Singh Chauhan deserves to be acquitted.

Order

The accused Avnesh Kumar Singh Chauhan is acquitted U/s 138 N.I. Act. His sureties and personal bond are hereby discharged.

Date- 11.05.2022

(Ashok Kumar Pathak)
Presiding Officer,
Additional Court No.-6,
Lucknow.

The judgment was assigned dated and pronounced, explained in Hindi by me in open Court today.

Date- 11.05.2022

(Ashok Kumar Pathak)
Presiding Officer,
Additional Court No.-6,
Lucknow.

Additional Court No.6, Lucknow
Case No. 4856/2017

Pankaj Kumar vs. Avnesh Kumar Singh Chauhan.

Dated/-11.05.2022

Complainant called. Complainant Pankaj Kumar with his ld. counsel Sri G.S. Verma, Adv., and accused Avnesh Kumar Singh Chauhan alongwith his counsel Sri Kuldeep Bajpai, Adv., are present.

Judgment is handed over and signed dated 11.05.2022 in open court.

Order

The accused Avnesh Kumar Singh Chauhan is acquitted U/s 138 N.I. Act. His sureties and personal bond are hereby discharged.

Date- 11.05.2022

(Ashok Kumar Pathak)
Presiding Officer,
Additional Court No.-6,
Lucknow.