mandatory requirement of issue of notice in terms of clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasize that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque.

13. Now, turning to the case in hand it is to be seen that as against the contention raised by the petitioner about non-service of notice, the respondent has produced certain documents vide annexure D to H to show that such a notice was sent by registered post in the given address and service of same is authenticated by the postal department, which is the sufficient compliance of the condition of 138 of the NI Act. This Court cannot ascertain the authenticity of such report of postal department which is necessarily subject matter of proof.

14. In view of the legal proposition and for the reasons and discussion above, the petition is hereby rejected. Stay order stands vacated. Both the parties are directed to appear before the learned trial Court on 14.06.2019.

***Result*:-** Petition rejected.

ABC 2019 (II) 279 GAU

ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)

Criminal Appeal No. 267 of 2017

Decided on 11 June, 2019

SUNIL DAS ***- Appellant(s).***

Versus

STATE OF ASSSAM & ANR. ***- Respondent(s).***

Law Covered*:-** ***(A) Negotiable Instruments Act, 1881 — Section 138 — Dismissal of case by trial Court — on different parameters that the complainant has not examined the witnesses in whose presence, payment was made — that in how many instalments money was paid— source of income— under what circumstances the cheque was issued— Held, when the accused failed to rebut the statutory presumptions in favour of the complainant/ holder, in due course— parameters decided by trial Court were not relevant to decide a case u/s 138 — The findings of the trial court is perverse

being contrary to the materials on record and the legal provisions under the NI Act— not sustainable— Conviction. (Para 15 & 16)

(B) Criminal Trial — Case u/s 138, Negotiable Instruments Act, 1881 vis-à-vis Criminal case under other provisions— The parameter of deciding a case u/s 138 NI Act is completely different from that of criminal cases— as a case u/s 138 of NI Act can be decided merely raising certain presumption unless rebutted— whereas a criminal case is to be proved beyond all reasonable doubt. (Para 15)

Held:- Turning to the case in hand, it is found that the learned trial court instead of proper appreciation of the provisions under the Act, as discussed, has decided the case on different parameters that the complainant has not examined the witnesses in whose presence, payment was made and that in how many instalments money was paid, what is the source of income, under what circumstances the cheque was issued, which were not relevant to decide a case under Section 138 of NI Act, when the accused failed to rebut the statutory presumptions in favour of the complainant/ holder, in due course. The parameter of deciding a case under Section 138 NI Case is completely different from that of criminal cases, as a case under Section 138 of NI Act can be decided merely raising certain presumption unless rebutted, whereas a criminal case is to be proved beyond all reasonable doubt. (Para-15)

For the reasons above and the legal pronouncement, it can be concluded that the findings of the trial court is perverse being contrary to the materials on record and the legal provisions under the NI Act, and hence, not sustainable. (Para-16)

Cases Referred:-

1. *T. Basant Kumar vs. Bijoy Kumari; (2015) 8 SCC 378, (Para-7)*
2. *T.P. Murugan (dead) through legal representatives vs. Bojan, (2018) 8 SCC 469, (Para-7)*
3. *Krishan Rao vs. Shankar Gowda, (2018) 8 SCC 165, (Para-7)*
4. *Kumar Exports vs. Sharma Carpets, (2009) 2 SCC 513, (Para-9)*
5. *Vijay vs. Laxman and another), (2013) 3 SCC 86, (Para-11)*
6. *K. Subramani vs. K. Damodara Naidu) (2015) 1 SCC 99, (Para-11)*
7. *Rumi Hazarika vs. Anirban Hati Kakoti), (2015) 6 GLR 479, (Para-11)*
8. *C. Antony vs. KG Raghavan Nair, (2003) 1 SCC 1, (Para-11)*

JUDGMENT

RUMI KUMARI PHUKAN, J.: - 1. Heard Mr. RA Choudhury, learned counsel appearing for and on behalf of the appellant and Mr. AHMR Choudhury, learned counsel for and on behalf of respondent No.2.

2. Present appeal under Section 378(4) of Code of Criminal Procedure has been preferred against the order of acquittal passed by the learned Chief Judicial Magistrate, Karimganj, in C.R. Case No. 1243/2014 under Section 138 of the Negotiable of Instrument Act, wherein the learned court has acquitted the accused /respondent No.2 from the charge.

3. The present appellant, as complainant has filed a complaint petition before the court of Chief Judicial Magistrate, Karimganj to the effect that he is a cultivator and also worked in a query and he had good relation with the accused person (Tapan Kumar Das), who was introduced by one Gautam Poddar and Manna Dey. Due to such business relation with the accused, the accused borrowed Rs.5 Lakhs from the complainant and thereafter issued two Nos. of cheques of Rs.2.50 Lakhs each dated 19.09.2014 in favour of the complainant towards the payment of such debt. The cheques were deposited in the Bank on 23.09.2014 but the same was returned dishonoured on the ground of "insufficient fund". The same was informed to the accused person and the accused requested the complainant to deposit the same after some time. Then again on 17.10.2014, the cheques were deposited by the complainant but the same were again returned dishonoured on the same ground ("insufficient fund"). Thereafter, the complainant served an Advocate Notice demanding money but as the same was not responded to, a complaint petition under Section 138 of NI Act was filed, on the basis of which the C.R. Case No.1243/2014 was registered under Section 138 of NI Act.

4. The accused /respondent entered his appearance and contested the case and denied the charge framed against him under Section 138 of the NI Act. During the course of trial, complainant examined himself and other two witnesses in support of his case and defence examined none.

5. The learned trial court, at the conclusion of the trial, held the accused/appellant not guilty and acquitted from the charge. Challenging the legality and validity of the aforesaid order of acquittal, the complainant has preferred the present appeal on the ground that the trial court has committed grave error in law as well as facts while arriving at the decision. It contends that learned trial court has failed to appreciate the evidence and overlooked the admitted facts and circumstances which is consistent with the hypothesis of guilt of the accused/respondent. It has been challenged that the learned trial court

failed to draw the statutory presumption under Section 118 of the NI Act that the court has to draw the presumption that the drawer has issued the cheque for consideration unless any contrary is proved. Similarly, the learned trial court has failed to take note of the Exhibit-10, dated 18.11.2014, which was issued by the accused/respondent in reply to the legal notice, praying time for payment.

6. The learned counsel for the appellant, Mr. RA Choudhury has also drawn the attention of this Court to different facts of the case and submitted that the appellant has proved his case by firmly establishing the fact that the cheque was issued by the accused person against the debt and there being no denial to the signature and content of the cheque issued by the accused /respondent and any rebuttal evidence to prove the contrary that no such cheque was issued to the appellant in discharge of his legal liability, the learned court was under an obligation to raise the statutory presumption against the accused/respondent under Section 139 of NI Act as well as the presumption under Section 118 of the NI Act.

7. Learned counsel for the appellant has relied upon the decisions of ***(2015) 8 SCC 378 (T. Basant Kumar vs. Bijoy Kumari); (2018) 8 SCC 469 (T.P. Murugan (dead) through legal representatives vs. Bojan)*** and ***(2018) 8 SCC 165 (Krishan Rao vs. Shankar Gowda)***, wherein it has been held that once a cheque has been signed and issued in favour of the holder of cheque, there is statutory presumption under Section 139 of NI Act that the cheque is issued in discharge of a legally enforceable debt or liability. However, said presumption is a rebuttable one. Issuer of cheque can rebut that presumption by adducing credible evidence that the cheque was issued for some other purposes, such as, security for the loan.

8. Reference has been made to the decision in T. Basant Kumar (supra), wherein it has been held that once the signature and the cheque has been accepted by the accused-respondent, the presumption under Section 139 would operate. Thus, the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability.

9. In the case of Krishna Rao (supra) reference has been made to the case of ***Kumar Exports vs. Sharma Carpets (2009) 2 SCC 513***, as below?

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

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

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

10. Learned counsel for the respondent has, however, contended that the findings of the learned trial court is based on proper appreciation of entire matters on record including the facts and circumstances. It is submitted that the appellant being a cultivator has not clarified his status as to how he can provide such huge amount as loan to the accused. Further, that the complainant has also failed to prove the factum of delivery of such money to the accused by examining witnesses, in whose presence the money was paid, neither the appellant produced any relevant documents to prove such delivery/transaction. Over and above, the appellant also failed to prove as under what circumstances he has paid the money, in how many instalments and hence, the case of the appellant is doubtful to prove that the cheque was issued against any legal liability.

11. Relying on the decisions of ***(2013) 3 SCC 86 (Vijay vs. Laxman and another), (2015) 1 SCC 99 (K. Subramani vs. K. Damodara Naidu)*** and ***(2015) 6 GLR 479 (Rumi Hazarika vs. Anirban Hati Kakoti)***, it has been contended that the appellant has failed to prove that the cheuqe was issued against legally recoverable debt and the conduct of the appellant itself dubious. When the accused/ respondent has offered a plausible explanation regarding the issuance of cheque, the presumption under Section 118 and 139 of the NI Act cannot be drawn in favour of the accused respondent. It is contended that High Court cannot, in appeal, substitute its finding merely because another contrary opinion was possible on the basis of materials on record, unless findings of the trial court are perverse and contrary to the materials on record and the appellate court should refrain from re-appreciation of evidence. [Ref. to ***(2003) 1 SCC 1 (C. Antony vs. KG Raghavan Nair)***].

12. Rival submissions of the learned counsel appearing on and behalf of both the parties is considered and I have also gone through the evidence on record as well as the impugned judgment.

13. So far as the contention of the learned counsel for the accused-respondent is concerned that the complainant failed to prove the delivery of loan to the respondent, and has no such source of income/ capacity to provide such loan, it is to be noted that apart from cultivator, the complainant is also stated to be working in a query. He has also stated that he borrowed the money from one Debu Paul to gave the same to the accused, which itself reveals that he has not provided the money from his own source. On the other hand,

projected story of the respondent is that he has given the said cheque (blank) to one Manna Dey and the appellant/complainant by dishonestly took the cheque from said Manna Dey and filed this false case. But, the fact remains that the accused has not disputed his signature and handwriting over the cheque in question and it is discernible that cheque was issued in the name of appellant in own handwriting of the accused but said Manna Dey was not examined in support his contention. The factum of any hostile relation between Manna Dey and the accused is also not brought on record. If on one hand, the case of the complainant is questioned for nonproduction of witness from whom money was collected by the complainant then, the same question can be raised as to why the accused did not examined Manna Dey to whom he issued the cheque and how the cheque came to the hands of the complainant. The story made by the accused is not worthy of credence.

14. Under the provisions of the Negotiable Instrument Act, the court is statutorily required to raise presumption in favour of the holder of the cheque under Section 118 and 139 of the NI Act. The accused on the other hand can rebut the presumption by way of effective cross-examination or by adducing evidence or from the case of the complaint itself. The onus of proving that the cheque was issued in discharge of debt or liability rests upon the drawyer of the cheque. Section 139 of the Act is an exception to the general view as to the burden of proof and it shift the onus on the accused. The obligation of prosecution can be discharged with the help of presumption of law and presumption of facts unless the accused adduced evidence showing the reasonable possibility of non-existence of presumed fact. It is immaterial that a cheque may have been filled by another person other than the drawyer if such cheque is duly signed by the drawyer. Where the cheque is otherwise valid, the penal provision of Section 138 would be attracted.

15. Turning to the case in hand, it is found that the learned trial court instead of proper appreciation of the provisions under the Act, as discussed, has decided the case on different parameters that the complainant has not examined the witnesses in whose presence, payment was made and that in how many instalments money was paid, what is the source of income, under what circumstances the cheque was issued, which were not relevant to decide a case under Section 138 of NI Act, when the accused failed to rebut the statutory

presumptions in favour of the complainant/ holder, in due course. The parameter of deciding a case under Section 138 NI Case is completely different from that of criminal cases, as a case under Section 138 of NI Act can be decided merely raising certain presumption unless rebutted, whereas a criminal case is to be proved beyond all reasonable doubt.

16. For the reasons above and the legal pronouncement, it can be concluded that the findings of the trial court is perverse being contrary to the materials on record and the legal provisions under the NI Act, and hence, not sustainable.

17. Resultantly, the impugned judgment and order of the learned trial court is hereby quashed and set aside and the accused-respondent is hereby convicted under Section 138 of the NI Act and sentence to pay fine of Rs.7.0 Lakhs (Rupees Seven Lakhs), in default, rigorous imprisonment for 6 (six) months. The amount of fine, if realized be given to the complainant (appellant herein), as compensation.

18. The accused-respondent is also directed to deposit the fine amount, mentioned above, before the trial court within a period of 3 (three) months from today.

19. The appeal stands allowed.

20. Return the LCR.

***Result*:-** Appeal allowed.

ABC 2019 (II) 286 GAU
ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)
Criminal Appeal No. 177 of 2018
Decided on 20 June, 2019

SRI SANJAY KR. SINGH ***- Appellant(s).***

Versus

STATE OF ASSSAM & ANR. ***- Respondent(s).***

Law Covered*:-** ***(A) Negotiable Instruments Act, 1881 — Section 138 — dishonour of cheque of amount `.11 lakh — Acquittal by trial Court — on the ground that the cheque was issued as a security cheque— The accused never disputed the issuance of cheque