N.I. Act. and the learned trial court has arrived at the findings on different context which is beyond the purview of the special enactment and hence, not sustainable.

17. Taking note of the above, the impugned order of acquittal passed by the learned trial court is hereby set aside. The accused/ respondent is convicted under Section 138 of N.I. Act and sentenced him to pay fine of Rs.15,00,000.00 (Rupees fifteen lakh) only, in default S.I. for 1 (one) year.

18. The respondent will deposit the amount before the trial court within a period of 3 (three) months from today failure of which the trial court is at liberty to proceed as per law.

19. Return the LCR with copy of judgment.

Result:- Order of acquittal set aside.

ABC 2019 (II) 296 GAU
ACQUITTAL & BAIL CASES

HIGH COURT OF GAUHATI

(Rumi Kumari Phukan, J.)
Criminal Revision Petition No. 296 of 2017
Decided on 10 July, 2019

M/S OTTIS INFRASTRUCTURE - Petitioner(s).

Versus

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

Law Covered:- ***(A) Negotiable Instruments Act, 1881 — Section 138 — Agreement for sale of flats — Admission of issuance of the cheques by accused — Plea of defence — issued the cheques as security— accused willingly agreed to pay the amount by executing document — while maintaining the conviction the sentence was converted into a fine only— the amount be given to the complainant as a compensation. (Para 17 & 29)***

(B) Negotiable Instruments Act, 1881 — Section 138— Burden of proof — Documents placed before court by complainant —proving of — Admission of execution of documents on the part of the accused— Held, in view of such clear admission — the fAct admitted need not be proved. (Para 17)

(C) Negotiable Instruments Act, 1881 — Section 138— Burden of proof — Documents placed before court by complainant —proving

of — Legal notice — The accused in his reply to the legal notice did not challenged those documents, instead prayed time for payment — fatal to the case of accused drawer. (Para 17)

(D) Negotiable Instruments Act, 1881 — Section 138— Cheques issued for the hiked amount than actually due — Agreements between the parties where the accused consciously agreed to pay such hiked amount with interest due to the delay in fulfilling the terms of agreement — issuance of cheques can not be disputed. (Para 17)

(E) Contract Act, 1872, Section 25(3) — Agreement without consideration void, unless it is in writing — Held, law permits a person to make a promise in writing & signed by him to pay wholly or in part a debt which his creditor might have enforced payment — & when such promise is made it becomes an agreement, which being valid in law turns to an enforceable Contract— when a debtor, whose debt or liability became time barred, promises in writing & signs the same— an enforceable Contract is created — in such case the promisor can be forced to make good his promise. (Para 23)

(F) Limitation Act, 1963— Section 18 — Effect of acknowledgment In writing vis-à-vis — Contract Act, 1872, Section 25(3) — Sharp distinction between — u/s 18, Limitation Act unless valid acknowledgement within the period of time the liability ceased to exist — whereas u/s 25(3), Contract Act such liability can be acknowledged & extended by the debtor by his own wisdom if he promises to pay such debt in writing after the limitation period & it partakes the character of enforceable debt. (Para 24)

(G) Limitation Act, 1963— Section 18 — Effect of acknowledgment In writing vis-à-vis — Contract Act, 1872, Section 25(3) — Negotiable Instruments Act, 1881 — Section 139— Debt barred by limitation — contention of — The accused entered into three agreements in writing with a promise to pay the debt even after the period of limitation — which has made him liable to pay the debt that has been issued by way of cheque— Held, in view of Section 118 and 139 of N.I. Act & Section 25(3) of the Contract Act & in presence of documentary evidence which might amount to acknowledgment reviving the period of limitation — cheque was not drawn in respect of a debt or liability which is completely barred from being enforced under the law — The liability incurred to the accused subsists & cannot be denied, after acknowledging the debt. (Para 25)

(H) Negotiable Instruments Act, 1881 — Section 139— Presumption under — Nature of — Held, the presumption u/s 139 is a

presumption of law as distinguished from presumption of facts — The obligation of the prosecution may be discharged with the help of presumption of law & presumption of facts — unless the accused adduces evidence showing the reasonable possibility of non-existent of presumed facts. (Para 26)

(I) Negotiable Instruments Act, 1881 — Sections 138 & 139— Presumption under — rebuttal of — onus of proof — Held, onus to rebut the presumption lies on the accused — no rebuttal evidence on the part of the accused — either through effective cross-examination or defence evidence — the drawer-accused cannot be absolved from the penal consequences of Section 138. (Para 27)

Facts:- *As per the case of the complainant/respondent the accused took an advance of Rs.8 lakhs from him for two flats and executed an agreement with further undertaking that the accused will return the money if he is unable to provide the flats. He also signed a money receipt regarding such transaction. Subsequently, as the accused failed to provide the flat as agreed upon the accused entered into second agreement on undertaking to pay a sum of `.19 lakhs and paid `.1 lakh to him and undertook to pay the remaining amount of `.18 lakhs in two installments. Then the accused again failed to keep his promise in the terms of the agreement, then the complainant served a demand notice and after receipt of the said notice the accused entered into final agreement with a promise to return an amount of `.23 lakhs along with interest in two installments but the accused failed to pay the amount and on approach of the complainant, the accused agreed to pay an amount of `.25 lakhs with interest and instead of cash payment he issued five numbers of cheques of Rs.5 lakhs each and all of them were returned dishonoured.*

Held:- In the course of the trial the accused/petitioner nowhere denied the execution of any of documents or about issuance of such cheques on his part. The plea of the accused/petitioner is relevant where he has admitted that he has paid Rs.1 lakh out of the Rs.8 lakh he has taken and the accused is entitled to Rs.7 lakh only. Further it is stated that he issued the aforesaid cheques at the time of execution of agreement for security purpose. The said proposition cannot be accepted for the simple reason that nobody will issue cheque for Rs.25 lakh against his liability of Rs.7 lakh. Except giving suggestion he adduced no rebuttal evidence neither there is any effective cross-examination of the complainant's evidence to rebut the statutory presumption that on the day of issuance of such cheques there is no such legally enforceable debt against the petitioner. Expect mere suggestion no any material was brought on record to rebut the

statutory presumption. Thus, the issuance of cheques and the execution of written agreement is not under challenge. (Para-17)

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It can be noted here that in the case of Amulya Patowari (supra) the provision of Section 25(3) of the Contract Act was also discussed and in para 23 and 24 it has been categorically held that law permit a person to make a promise in writing and signed by him to
b pay wholly or in part a debt which his creditor might have enforced payment and when such promise is made it becomes an agreement, which being valid in law turns to an enforceable Contract. It was held that when a debtor, whose debt or liability became time barred, promises in writing and signs the same, an enforceable Contract is
c created and in such case the promisor can be forced to make good his promise. (Para-23)

As a corollary of the discussion and the legal proposition laid in the aforesaid decisions it indicates that panel provisions under Section 138 of N.I. Act would not be attracted if the cheque in
d question is issued against the debt which is not legally enforceable. A sharp distinction lies between the Section 18 of the Limitation Act and Section 25(3) of the Contract Act. Under Section 18 of the Limitation Act unless valid acknowledgement within the period of time the liability ceased to exist whereas under Section 25(3) of the Contract Act such liability can be acknowledged and extended by the debtor
e by his own wisdom if he promises to pay such debt in writing after the limitation period and it partakes the character of enforceable debt. Now in the instant case admittedly the accused/petitioner entered into three agreements in writing with a promise to pay the debt even after the period of limitation which has made him liable to pay the
f debt that has been issued by way of cheque. As has been held in A. V. Murthy in this case also it can be held that in view of Section 118 and 139 of N.I. Act and Section 25(3) of the Contract Act and in presence of documentary evidence which might amount to acknowledgment reviving the period of limitation, the present case is not the one where
g the cheque was drawn in respect of a debt or liability which is completely barred from being enforced under the law. The liability incurred to the accused/petitioner subsists and cannot be denied, after acknowledging the debt as has been indicated above. (Para-24)

The Hon'ble Apex Court in ***Bir Sigh vs. Mukesh Kumar, (2019) 106 ACC 923***, held that unless the contrary is proved, it is to be
h presumed 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. The presumption contemplated under Section 139 of NI Act is a rebuttable presumption but onus of proving that the cheque was not in discharge of any debt or other liability is on the accused, drawer of the cheque. (Para-25)

In ***Hiten P. Dalal vs. Bratindra Nath Bannerjee, (2001) 6 SCC 16***, the Hon'ble Apex Court referring to earlier decision, ***AIR 1958 SC 61 (State of Madras vs. Vaidyanthir)*** also reiterated the same propositions that it is obligatory on the part of the court to raise presumption under Section 138 and 139 of NI Act in every case where factual basis for raising of the presumption has been established. It introduced an exception to the general rule as to the burden of proof in criminal cases and shift the onus to the accused. The presumption under Section 139 of NI Act is a presumption of law as distinguished from presumption of facts. The obligation of the prosecution may be discharged with the help of presumption of law and presumption of facts, unless the accused adduces evidence showing the reasonable possibility of non-existent of presumed facts. (Para-26)

The proposition of law which emerges from the decisions referred above is that the onus to rebut the presumption under Section 139 of NI Act lies on the accused and in the present case there being any rebuttal evidence on the part of the accused-petitioner, either through effective cross examination or defence evidence, the drawer of the cheque cannot be absolved from the penal consequences of Section 138 of NI Act. (Para-27)

In view of the discussion and for the reasons above and taking note of the fact that the accused willingly agreed to pay the amount by executing document and also taking note of the fact the complainant is also deprived of getting of his property and they are in the legal battle since long, incurring cost of litigation and depravity etc. while maintaining the conviction under Section 138 of N.I. Act, the sentence is converted into a fine only. The accused is sentenced to pay a fine of Rs.37 lakhs (Rupees Thirty Seven Lakhs) only, in default S.I. of one year. The amount is to be deposited before the trial court within a period of two months from today and the amount be given to the complainant/ respondent as a compensation on due identification. (Para-29)

Counsel:- ***For Petitioner(s):*** *Mr. Mr. AM Bora, Ms. S Kanungoe, Mr. D. Mazumdar Advs.*

For Respondent(s): *Mr. AK Purkayastha, Adv.*

Cases Referred:-

1. *Amulya Patowari vs. Amarendra Choudhury 2013 (5) GLT 201, (Para-8)*
2. *Jaoseph vs. Debassia, 2001 Crl.LJ 24, (Para-8)*
3. *Siotia Steels Ltd. vs National Building Construction Corporation Ltd., 2015 (4) GLT, (Para-9)*
4. *Sheetala Prasad and Others vs. Shrikant and Another, (2010) 2 SCC 190, (Para-12)*
5. *Joitilal Chakraborty vs Deepak Dutta and Others, 1995 Crl.L.J. 930, (Para-12)*
6. *A.V. Murthy vs. D. S. Nagabasavanna, (Para-14)*
7. *Sri Kapaleeswar Temple Mysore vs. T. Tirunavukarase, AIR 1975 Madras 167, (Para-14)*
8. *Bir Sigh vs. Mukesh Kumar, (2019) 106 ACC 923, (Para-25)*
9. *Hiten P. Dalal vs. Bratindra Nath Bannerjee, (2001) 6 SCC 16, (Para-26)*
10. *State of Madras vs. Vaidyanthir, AIR 1958 SC 61, (Para-26)*
11. *Manik Lodhe vs State of Assam and another, (Para-28)*

JUDGMENT & ORDER

RUMI KUMARI PHUKAN, J.: - **1.** Heard Mr. AM Bora, learned senior counsel appearing for and on behalf of the appellant and Mr. AK Purkayastha, learned counsel for and on behalf of respondent No.2.

2. Present revision under Section 397/401 of Code of Criminal Procedure has been preferred against the impugned judgment and order dated 20.10.2016 passed by the learned Additional Sub-Divisional Judicial Magistrate (S) No.II, Kamrup (M), Guwahati in Complaint Case No. 393C/2015 whereby the learned court has convicted the accused to undergo simple imprisonment for 12 months and directed for payment of Rs. 40,00,000/-, as compensation and in default, simple imprisonment for another four months.

3. The necessary facts of the case is that respondent filed the complaint petition stating that on 08.03.2006 both the accused person and the complainant entered into an agreement on condition that two numbers of residential flats of Ankit Complex, Ulubari, Guwahati, will be provided by the accused to the complainant, who took an advance amount of Rs.8,00,000/- from the complainant for the said purpose. It was further agreed that the accused would return the whole amount with prevailing interest rate thereof, if the complainant desires to withdraw the said amount. Subsequently, the accused person failed to provide any flat to the complainant in terms of the memorandum of agreement. Accordingly, on demand of money by the complainant for returning the amount taken by the accused

person, they mutually entered into an agreement on 22.07.2010 afresh whereby the accused person agreed to return the principal amount along with the interest as total sum of amount of Rs.19,00,000/- to the complainant. The accused person, thereafter, returned an amount of Rs.1,00,000/- only on 22.07.2010 and agreed to return the remaining amount of Rs.18,00,000/- in two installments within three months with effect from 22.07.2010. The accused person again failed to comply with the terms of the second agreement, for which, the complainant issued a demand notice to the accused person on 10.01.2012. After receipt of the said notice, the accused person and the complainant again entered into a final memorandum of agreement on 31.05.2014, whereby the accused person promised to return the amount of Rs.23,00,000/- to the complainant along with interest in two installments i.e., Rs.10,00,000/- on 30.06.2014 and Rs.13,00,000/- on 31.07.2014. As accused failed to provide the flats, lastly, the accused persons also promised to the complainant to pay Rs.25,00,000/- along with interest. The accused person thereafter instead of making cash payment, he issued five numbers of cheques in favour of the complainant. As per instruction of the accused person, the complainant has deposited the above cheques in the Bank account on 01.12.2014 in the SBI, PBB, Nagaon Branch for encashment but those were returned dishonoured due to "insufficient fund" on 17.12.2014. Resultantly, the complainant issued another demand notice to the accused person, which was duly received by the accused on 11.01.2015. In spite of receipt of the notice, the accused person failed to make any payment. Hence, the case under Section 138 of NI Act was filed by the complainant.

4. In support of the allegations made, the complainant examined himself and exhibited certain documents while the defence examined none. Plea of defence is that he issued the cheques as security.

5. At the conclusion of trial, learned trial court held the accused guilty under Section 138 of NI Act and sentenced to simple imprisonment for 12 months and to pay compensation of Rs.40 lakhs since two years have been elapsed from the date of issuance of cheques of Rs.25 Lakhs, it was directed that the accused will undergo simple imprisonment for another 4 months, in default of payment of compensation.

6. Appeal preferred against the said impugned judgment was dismissed and the appellate court upheld the trial court decision vide

judgment and order dated 19.07.2017. Challenging the aforesaid findings of two forums, present revision has been preferred.

7. According to the learned senior counsel Mr. A. M. Borah for the revision petitioner findings of the Appellate Court as well as the trial court is bad in law inasmuch as in the present case the cheque in question was issued beyond the period of limitation so the cheque did not raise any presumption that there was an existing or legally recoverable debt or liability. It is stated that when the cheque was issued the debt or liability incurred by the petitioner stood barred by limitation hence no offence under Section 138 of N.I. Act made out as the cheque was not issued in respect of existing or enforceable debt or liability. It contends although presumption under Section 138 N.I. Act can be raised that the cheque has been issued in discharge of a debt or liability but such presumption can only be drawn if there was an existing or legally recoverable debt or liability.

8. Referring to the case factual aspect of the case in hand it has been submitted by the learned senior counsel for the petitioner that the accused took an advance of Rs.8 lakh from the complainant/ respondent on 08.03.2006 and the cheques in question were issued as on 25.10.2014 and 01.12.2014 and there was no such acknowledgement to release the debt within the period of limitation of three years so such debt is barred by limitation under Section 18 of the Limitation Act and to attract the provision of Section 138 of N.I. Act such a cheque is to be issued against legally enforceable debt. Thus it contended that as the case is hit by Section 18 of the Limitation Act, the provision of Section 25 (3) of the Contract Act will not come into play as regard the criminal offence. Relying on a decision of ***Amulya Patowari vs. Amarendra Choudhury 2013 (5) GLT 201*** it has been contended that dishonor of a cheque by a banker would not necessarily result into an offence punishable under Section 138 N.I. Act if the cheque was issued against such debt is not enforceable in the law. A decision of the Madras High Court ***2001 Crl.LJ 24 Jaoseph vs. Debassia*** which is upheld by the Hon'ble Apex Court in SLP No.1785/2001 has been pressed into to submit that when the cheque in question being barred by limitation, the panel provision under Section 138 N.I. Act is not attracted.

9. Another limb of argument of the learned counsel for the petitioner is that although certain documents that has been exhibited before the trial court but same is not admissible in law as content of

the document and the signature thereon is not proved. It is submitted that there is no evidence as to who has written those documents and under what circumstances. To buttress his submission reliance is placed decision rendered in ***2015 (4) GLT Siotia Steels Ltd. vs National Building Construction Corporation Ltd.,*** wherein it has been held that mere production and marking of a document as Exhibit cannot be held to be due prove of its content.

10. The next alternative argument of the learned counsel for the petitioner even if as per agreement liability of Rs.23 lakh is made out but how the cheque for Rs.25 lakh was issued is not explained by the complainant and the cheque is not legally enforceable for the amount of Rs.25 lakh and the learned court has not taken into account about above aspect as well as the fact that the petitioner has already returned an amount of Rs.1 lakh and it is urged that even in admission of accused under Section 313 Cr.P.C. is not valid unless the aforesaid aspect is proved.

11. Refuting the submission of the learned counsel for the petitioner, it has been replied by the learned counsel for the respondent Mr. Purkayastha that we should remind ourselves that the role of the revisional court is limited and it cannot re-appreciate the evidence and the fact which was not challenged and proved before the trial court, unless there appears gross illegality in appreciation of evidence resulting miscarriage of justice.

12. Pointing towards the evidence on record and the plea of the accused and his statement under Section 313 Cr.P.C. it has been argued that no such document is denied by the accused/petitioner in course of trial rather he has admitted due execution of those all documents in his statement under Section 313 Cr.P.C. There is no remote whisper that the accused was a layman and unable to take proper plea or to explain the circumstances about execution of those documents. It has been vehemently argued that facts admitted need not be proved. The petitioner now is estopped from challenging all these matter as it was neither challenged before the trial court nor any argument was advanced on the subject. Reliance has been placed on the decision ***(2010) 2 SCC 190 Sheetala Prasad and Others vs. Shrikant and Another*** where it is held that the scope of criminal revision application is very limited and the court cannot substitute its own view for the view taken by the lower appellate court, while the lower appellate court has duly appreciated the evidence on record.

Yet in another decision ***Joitilal Chakraborty vs Deepak Dutta and Others 1995 Crl.L.J. 930*** it has been held that the revisional court has to be wary and circumspect while making appraisal of evidence of the lower court and not to be interfered unless glaringly inconsistence evidence was accepted by the trial court resulting miscarriage of justice. The revisional court should be slow in disturbing the findings of the court below.

13. On the other hand, there is a serious debate on the scope and applicability of the provision of Section 25 (3) of Contract Act in a case under Section 138 N.I. Act to cast liability upon the accused person so as to establish that the cheque issued by the accused/ petitioner is legally enforceable or not. It is to be noted on this issue the learned counsel for the petitioner side has basically relied upon the decision of the Madras High Court Jaoseph vs. Debassia (supra) upheld by the Hon'ble Supreme Court in SLP as mentioned above and also the decision of Amulya Patowari (supra). Mr. Purkayastha, the learned counsel for the respondent has however referring to the same decision of Amulya Patowari (supra) it has been stated that the Hon'ble High Court as well as the Hon'ble Supreme Court in SLP (referred above) nowhere stated that the provision of Section 25(3) of Contract Act will not be applicable to an offence under Section 138 N.I. Act rather it has been held specifically in Amulya Patowari (supra) that such a debt is that when such a promise is made acknowledging to pay such debt in writing and signed by the person concerned, to make such payment of debt, such a promise being valid in law turns into an enforceable Contract in terms of section 25 (3) of Contract Act and it has the overriding effect of the provision under Section 18 of the Limitation Act.

14. Reliance has also been placed to the decision of Hon'ble Supreme Court in ***A.V. Murthy vs. D. S. Nagabasavanna*** to counter the submission of the learned counsel for the petitioner on the point of applicability of Section 25 (3) of Contract Act wherein it has been held that revisional court in a case under Section 138 N.I. Act erred in law in quashing the complaint proceeding on the ground that the debt or liability was barred by limitation and there is no legally enforceable debt or liability against the drawer. The plea of non-existence of such debt or liability could be agitated before the trial court as a defence. It has also been held that in view of Sections 118 and 139 of the N.I. Act, Section 25 (3) of the Contract Act, 1872 and in presence of documentary evidence which amounts to acknowledgement reviving the period of

limitation, it was not the one where the cheque was drawn in respect of a debt or liability which was completely barred from being enforced under the law. However, these matters are to be agitated before the magistrate by way of defence that there is no legally enforceable debt and unless such a plea is agitated before the trial court the same cannot be challenged before the revisional court. On the same point the decision of Madras High Court ***AIR 1975 Madras 167 Sri Kapaleeswar Temple Mysore vs. T. Tirunavukarase*** is also pressed into to submit that when a debtor entered into fresh obligation with the creditor in a time barred debt, to pay the liability it satisfies the condition of Section 25 (3) of Contract Act and will amount a fresh Contract and it is an enforceable by the law.

15. Bearing in mind the above rival contentions we may now turn the matters on record. To understand the case between the parties it would be useful to make reference to the evidence and document that was adduced before the trial court and the plea of the accused/petitioner etc.

16. So far as the case of the complainant/respondent it was his case that the accused took an advance of Rs.8 lakhs from him on 08.03.2006 by executing document vide Ext.18 to provide in two flats as mentioned in the agreement with further undertaking that he will return the money if he is unable to provide the flats. He also signed a money receipt vide Ext.19 regarding such transaction. Subsequently, as the accused/petitioner failed to provide the flat as agreed upon the accused entered into second agreement on 22.07.2010 vide Ext.17 undertaking to pay a sum of Rs.19 lakhs and paid Rs.1 lakh to him and undertake to pay the remaining amount of Rs.18 lakhs in two installments. Then the accused again failed to keep his promise in the terms of the agreement, then the complainant served a demand notice upon the accused on 10.01.2012 and after receipt of the said notice the accused entered into final agreement dated 31.05.2014 with a promise to return an amount of Rs.23 lakhs along with interest in two installments vide Ext.16 but the accused/petitioner failed to pay the amount and on approach of the complainant, the accused agreed to pay an amount of Rs.25 lakhs with interest and instead of cash payment he issued five numbers of cheques of Rs.5 lakhs each vide Ext.1, Ext.3, Ext.5, Ext.7 and Ext.9 and all cheques were returned dishonoured. The complainant has also produced the legal notice that was sent to the accused/petitioner as on 10.01.2012, vide Ext.15 and the demand notice issued on 05.01.2015, Ext.12 prior to filing of the

present case. The accused in his reply to the demand notice vide Ext.21 has sought for 20 days' time to release the payment.

17. In the course of the trial the accused/petitioner nowhere denied the execution of any of documents or about issuance of such cheques on his part. The plea of the accused/petitioner is relevant where he has admitted that he has paid Rs.1 lakh out of the Rs.8 lakh he has taken and the accused is entitled to Rs.7 lakh only. Further it is stated that he issued the aforesaid cheques at the time of execution of agreement for security purpose. The said proposition cannot be accepted for the simple reason that nobody will issue cheque for Rs.25 lakh against his liability of Rs.7 lakh. Except giving suggestion he adduced no rebuttal evidence neither there is any effective cross-examination of the complainant's evidence to rebut the statutory presumption that on the day of issuance of such cheques there is no such legally enforceable debt against the petitioner. Expect mere suggestion no any material was brought on record to rebut the statutory presumption. Thus, the issuance of cheques and the execution of written agreement is not under challenge.

18. On the next in his statement under Section 313 Cr.P.C. readily admitted all about issuance of the cheques and about the execution of the agreement and only plea he raised is that he issued the cheques as security. In view of such admission of execution of all documents and cheques on the part of the accused, there cannot be any challenge as regard the execution of documents that the documents were not duly proved. The decision relied on by the petitioner is of no help to the petitioner in view of such clear admission because the fact admitted need not be proved. The accused in his reply to the legal notice vide Ext.21 has also not challenged those documents, instead prayed time for payment. Another question raised in this petition that how as against the debt of Rs.8 lakh one can be liable to pay Rs.25 lakh? Answer of the same lies in the agreements made between the parties where the accused/petitioner consciously agreed to pay such hiked amount with interest due to the delay in fulfilling the terms of agreement. Again after issuance of such cheques to the complainant, there being no contrary evidence that the cheque was issued on threat or coercion etc. same cannot be disputed before this revisional court.

19. Coming to the last but crucial question that has been raised in this case that debt is barred by limitation and there was no legally

enforceable debt or liability as against the petitioner so the petitioner cannot be fasten with any criminal liability, is now to be appreciated, having regard to the facts as well as the legal proposition that has been discussed above.

20. Let us appreciate the provisions of Section 18 of Limitation Act and Section 25 of Contract Act. Section 18 of the Limitation Act reads as follows:

> *"S.18. (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed...."*
>
> *Section 25 of the Contract Act reads as follows:*
>
> *" 25. An agreement made without consideration is void unless-*
>
> *(1).....*
>
> *(2).....*
>
> *(3) it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.*
>
> *In any of these cases, such an agreement is a Contract....."*

21. In the decisions referred by the petitioner Jaoseph vs Debassia, and Amulya Patowari was rendered in a given situation when cheque was issued apparently after the period of limitation and there was no valid acknowledgement of the debt within the period of limitation, so it was held that debt was not legally enforceable at the time of issuance of cheque. In the said cases, the contention raised by the complainant side that issuance of cheque can be treated as a promise to pay by the accused within the purview of Section 25(3) of the Contract Act was not considered, as there was no valid written acknowledgement of liability. **Addressing the said contention it was held in para 7 of the Jaoseph vs. Debassia (supra) that no doubt the promise to pay time barred cheque is valid and enforceable, if it is made in writing and signed by the person to be charged therewith**.

22. As regard the scope and applicability of Section 25 (3) Contract Act in A.V. Murthi (supra) it has been clearly held that in paras-5, 6 and 7 of the judgment that under Section 118 of N.I. Act there is a presumption that until the contrary is proved, every negotiable instrument was drawn for consideration and under Section 138 of the Act it shall be presumed, unless contrary is proved that the holder of a cheque received the cheque of the nature referred to in Section 138 of the Act for discharge, in whole or in part of any debt or liability. It is said that under sub-section 3 of Section 25 of the Indian Contract Act, 1872, a promise made in writing and signed by the person to be charged therewith or by his agent or specially authorized in that behalf to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of the limitation of suits is a valid Contract. Similarly, the Madras High Court in Sri Kapaleeswar (supra) in para 6 of the judgment has also held that though a debt might have began time barred on the debt, a debtor entered into fresh obligation with the creditor to pay the liability, the said obligation, if it satisfies the conditions laid down in Section 25 (3) of the Indian Contract act, will amount to fresh Contract in the eye of law and can certainly be made the basis of an action for recovering the amount promised and acknowledged there in by the debtor. While the Section 18 of Limitation Act deals with an acknowledgment meant by an debtor within the period of limitation the Contractual obligation which a debtor enters into under the terms of Section 25 (3) has no reference whatsoever to the acknowledged debt within the time or not. In that sense the provision of Section 25 (3) is far wider in scope than the acknowledgment contemplated in Section 18 of Limitation Act. The Contract entered into under Section 25 (3) is an independent and enforceable Contract and has no reference to be debt under the Contract being a live one in the sense that it had not became barred under the law of limitation.

23. It can be noted here that in the case of Amulya Patowari (supra) the provision of Section 25(3) of the Contract Act was also discussed and in para 23 and 24 it has been categorically held that law permit a person to make a promise in writing and signed by him to pay wholly or in part a debt which his creditor might have enforced payment and when such promise is made it becomes an agreement, which being valid in law turns to an enforceable Contract. It was held that when a debtor, whose debt or liability became time barred, promises in writing and signs the same, an enforceable Contract is created and in such case the promisor can be forced to make good his promise.

24. As a corollary of the discussion and the legal proposition laid in the aforesaid decisions it indicates that panel provisions under Section 138 of N.I. Act would not be attracted if the cheque in question is issued against the debt which is not legally enforceable. A sharp distinction lies between the Section 18 of the Limitation Act and Section 25(3) of the Contract Act. Under Section 18 of the Limitation Act unless valid acknowledgement within the period of time the liability ceased to exist whereas under Section 25(3) of the Contract Act such liability can be acknowledged and extended by the debtor by his own wisdom if he promises to pay such debt in writing after the limitation period and it partakes the character of enforceable debt. Now in the instant case admittedly the accused/petitioner entered into three agreements in writing with a promise to pay the debt even after the period of limitation which has made him liable to pay the debt that has been issued by way of cheque. As has been held in A. V. Murthy in this case also it can be held that in view of Section 118 and 139 of N.I. Act and Section 25(3) of the Contract Act and in presence of documentary evidence which might amount to acknowledgment reviving the period of limitation, the present case is not the one where the cheque was drawn in respect of a debt or liability which is completely barred from being enforced under the law. The liability incurred to the accused/petitioner subsists and cannot be denied, after acknowledging the debt as has been indicated above.

25. The Hon'ble Apex Court in ***Bir Sigh vs. Mukesh Kumar, (2019) 106 ACC 923***, held that unless the contrary is proved, it is to be presumed 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. The presumption contemplated under Section 139 of NI Act is a rebuttable presumption but onus of proving that the cheque was not in discharge of any debt or other liability is on the accused, drawer of the cheque.

26. In ***Hiten P. Dalal vs. Bratindra Nath Bannerjee, (2001) 6 SCC 16***, the Hon'ble Apex Court referring to earlier decision, ***AIR 1958 SC 61 (State of Madras vs. Vaidyanthir)*** also reiterated the same propositions that it is obligatory on the part of the court to raise presumption under Section 138 and 139 of NI Act in every case where factual basis for raising of the presumption has been established. It introduced an exception to the general rule as to the burden of proof in criminal cases and shift the onus to the accused. The presumption under Section 139 of NI Act is a presumption of law as distinguished

from presumption of facts. The obligation of the prosecution may be discharged with the help of presumption of law and presumption of facts, unless the accused adduces evidence showing the reasonable possibility of non-existent of presumed facts.

27. The proposition of law which emerges from the decisions referred above is that the onus to rebut the presumption under Section 139 of NI Act lies on the accused and in the present case there being any rebuttal evidence on the part of the accused-petitioner, either through effective cross examination or defence evidence, the drawer of the cheque cannot be absolved from the penal consequences of Section 138 of NI Act.

28. There appears no error in appreciation of matters on record by the court below while arriving at the decision but going by the Ext.16 that is the last agreement between the parties where the petitioner has agreed to pay an amount of Rs.23 lakh and there being no any other document to show about the undertaking to pay Rs.25 lakh the liability of the accused/petitioner can be restricted to the said amount of Rs.23 lakh in terms of the agreement and the complainant is not entitled to an amount of Rs.25 lakh as has been held in ***Manik Lodhe vs State of Assam and another*** that holder of cheque will not be presumed to hold the cheque for an amount which is more than the debt or liability of the drawer of the cheque. The accused-petitioner has already paid Rs.1 lakh (Rupees One Lakh) only and Rs.2 Lakhs (Rupees Two Lakhs) only is found to be excess against the admitted liability.

29. In view of the discussion and for the reasons above and taking note of the fact that the accused willingly agreed to pay the amount by executing document and also taking note of the fact the complainant is also deprived of getting of his property and they are in the legal battle since long, incurring cost of litigation and depravity etc. while maintaining the conviction under Section 138 of N.I. Act, the sentence is converted into a fine only. The accused is sentenced to pay a fine of Rs.37 lakhs (Rupees Thirty Seven Lakhs) only, in default S.I. of one year. The amount is to be deposited before the trial court within a period of two months from today and the amount be given to the complainant/respondent as a compensation on due identification.

30. The revision is partly allowed as indicated above.

31. Return the LCR along with the copy of the judgment.

Result:- Revision partly allowed.

July 2019