ABC 2019 (II) 312 TRI
ACQUITTAL & BAIL CASES

HIGH COURT OF TRIPURA

(Arindam Lodh, J.)

Criminal Revision Petition No. 35 of 2016

Decided on 25 April, 2019

SUBAL CHANDRA GHOSH ***- Petitioner(s).***

Versus

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

Law Covered:- ***(A) Negotiable Instruments Act, 1881 — Section 138 — Acquittal by the Courts below — Defence of lost Cheque — GD entry — not accepted — Signature on cheques admitted by accused — Held, story built up by the accused is concocted & fabricated — his conduct proves that he issued three cheques in favour of the petitioner — acquittal set aside. (Para 14, 39 & 52)***

(B) Negotiable Instruments Act —Section 138 — plea of defence— missing signed cheques — missing GD entry registered — Held, doubtful that the accused made three cheques ready for payment, but, he did not know the actual account holders name and he would make payment after knowing the name of the account holders — plea not tenable. (Para 10)

(C) Negotiable Instruments Act —Section 138(b) — Statutory Notice under — Sending of — requirement of sending through advocate — Held, the section does not speak about that the notice is to be sent through advocate — It is the payee or the holder who will make the demand in writing. (Para 25)

(D) Negotiable Instruments Act, 1881 — Section 138 — vis-à-vis — Income Tax Act — Section 269-SS — Amount advanced not paid in accordance with the provisions of Section 269-SS — will not make the proceeding u/s 138 bad in law — Income Tax return or a compliance of provision of Section 269-SS will not come in the way of filing compliant. (Para 30 & 31)

(E) Negotiable Instruments Act, 1881 — Section 94 & 138(b) — Notice — not containing the signature of the Advocate — Validity of — the notice contains signature of the complainant himself — it is valid notice according to sec. 94. (Para 42)

(F) Negotiable Instruments Act, 1881 — Section 138(b) — Demand Notice — Contents of — Held, the notice must inform the

party to whom it is given— i) That the instrument has been dishonoured (the instrument should be identified in the notice, otherwise the notice will be invalid) — ii) In what way the instrument has been dishonoured(the notice should state whether the instrument has been dishonoured by non-acceptance or non-payment) — iii) that he will be held liable on the dishonoured instrument. (Para 44)

(G) Interpretation of Statute — Negotiable Instruments Act, 1881 — Section 138(b) — Notice — Object of — The object of notice is to give a chance to the drawer of the cheque to rectify his omission & also to protect an honest drawer. (Para 45)

(H) Interpretation of Statute — Negotiable Instruments Act, 1881 — Section 138(b) — Notice — Object of — Intention of legislation — Held, the object of notice of dishonor to endorser is not to demand payment — but clearly to indicate to the party notified that the contrAct arising on the Negotiable Instrument has been broken by the principle debtor — & that the former being a surety, will now be liable for payment. (Para 47)

(I) Negotiable Instruments Act, 1881 — Sections 138 & 142 — Dishonour of Cheque — When it becomes punishable — Three distinct conditions precedent — (i) Cheque ought to have been presented to the bank within a period of six months (now three months) from the date on which it is drawn or within the period of its validity whichever is earlier — (ii) the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid — (iii) the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course within fifteen days of the receipt of the said notice. (Para 49, 50 & 51)

(J) Negotiable Instruments Act —Section 138 — expression 'debt'—includes not only debt but other liability as well. (Para 52)

(K) Negotiable Instruments Act —Section 138 — expression 'liability' denotes STATE of being liable. (Para 52)

(L) Negotiable Instruments Act —Section 138 — The debt or other liabilities for the purpose of attracting the provision are to be legally enforceable. (Para 52)

(M) Negotiable Instruments Act —Sections 118, 138 & 139 — Admission of signature on the cheques by accused — Held, Once this fAct is acknowledged — Sec. 139 r/w 118 mandates a presumption that the cheques pertained to a legally enforceable debt or liability — This presumption is of a rebuttal nature and onus is then on the accused to raise a probable defence. (Para 52)

Facts:- *It was alleged that the petitioner paid `.3,60,000/- to accused in three installments. On receipt of the said amount the accused issued three post dated cheques. All the cheques were dishonoured with the remark 'insufficient funds'. The petitioner served statutory demand notice and having found no response to it, the petitioner filed the complaint.*

The learned Trial Court acquitted the accused holding that:-

i) The complainant has nowhere mentioned the exAct date on which he gave the alleged loan of Rs.3,60,000/- to the accused person.

ii) The complainant did not follow the legal provisions as enshrined in Section 269 SS. Of Income Tax Act, because he did not give any account payee cheque and he did not receive any account payee cheque in connection with the alleged loan money advanced by him.

iii) The complainant did not specify the denomination of the currency notes in the alleged loan transaction.

iv) The demand notice sent by the complainant does not appear to have the endorsement of the advocate.

v) The accused person had already made a GD entry regarding loss of the three cheques almost four month prior to presentation of the cheques.

vi) The complainant has admitted in his cross-examination that he has written the name of the accused in cheques thereby raising serious question mark about the validity of those cheques.

While arriving at these findings, the learned Trial Court held that the petitioner had failed to prove his case and thus, acquitted the accused. On statutory appeal, the learned Addl. Sessions Judge also took the same view of the learned Trial Court and, accordingly, affirmed and upheld the said judgment and order.

Held:- It casts doubt in the mind of this Court that he made three cheques ready for payment, but, he did not know the actual account holders name and he would make payment after knowing the name of the account holders. Further, he has stated in his evidence that perhaps he lost the cheque on his way to home from the shop

and, accordingly, on 17.03.2012 itself he informed the police in writing about the loss of those cheques and a missing GD entry was registered with the police station. (Para-10)

In view of the aforesaid evidence laid on behalf of the petitioner and the respondent No.2, I may reach to the conclusion that the story built up by the respondent No.2 is concocted and fabricated and his conduct proves that he issued three cheques in favour of the petitioner. (Para-14)

The language of proviso-B of Section 138 is very plain and simple and it does not speak about that the notice is to be sent through advocate. It is the payee or the holder who will make the demand in writing. (Para-25)

So, in my opinion, it cannot be said that merely because the amount advanced was not paid in accordance with the provisions of Section 269-SS of Income Tax Act, will make the proceeding under Section 138 of the N.I. Act bad in law. (Para-30)

In the fact of the case, the Income Tax return or a compliance of provision of Section 269-SS will not come in the way of filing compliant by the petitioner against the respondent No.2. (Para-31)

In case in hand, I find that the respondent No.2 in course of trial has tried to give a plausible explanation that he lost the aforestated cheques and he also made a missing diary, but, his that effort has failed to persuade this Court and his explanations in this regard are far from plausible explanation, which is required to rebut the evidence and the initial presumption that the cheques were issued by him. So, the explanation given by respondent No.2 in course of trial appears to be difficult to accept in the fact of the case. (Para-39)

In the present case, according to Trial Court, the demand notice did not contain the signature of leanred Advocate which created a question mark about the validity of said demand notice served upon the accused. Here, the Ext-B contains signature of the complainant himself, so it is valid notice according to section 94 of N.I. Act and over and above the accused actually had received that. (Para-42)

In ***K.K. Ravi Vs. D. Kuttappan & anr*** reported in ***AIR 2007 (NOC) 1955 (KER.)*** the Kerala High Court held that giving of demand notice by post is perfectly legal method and a notice in writing put into post before expiry of 30 days or even immediately prior to midnight on the 30th day is sufficient. (Para-44)

The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in Clause (b) of the proviso, the payee or the holder of the cheque in due course is required to give a written notice to the drawer of the cheque within 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. So, the only question to be examined is whether in the notice there was a demand for payment or not. In the case in hand, the Ext.B shows that there was a demand for payment. (Para-45)

The object of notice of dishonor to endorser is not to demand payment but clearly to indicate to the party notified that he contract arising on the Negotiable Instrument has been broken by the principle debtor and that the former being a surety, will now be liable for payment. This is the principal embodied in Section 94 of the N.I. Act. The object of giving notice of dishonor is not demand payment for the party giving notice but to warn the party of his liability and in the case of drawer, to enable him to protect him as against the drawee or acceptor who was dishonored the draft. Generally, where the drawer has no funds belonging to him in the drawee's hands neither the presentment of cheque for payment nor notice of dishonor is necessary to charge the drawer. (Para-47)

The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. (Para-49)

The second condition is that he payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. (Para-50)

The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course within fifteen days of the receipt of the said notice. (Para-51)

It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to section 138 as clauses (a),(b) and (c) thereof that an offence u/s 138 can be said to have been committed by the person issuing the cheque is drawn are

parties against whom the payee of the cheque can have various legal rights, which may have either civil or criminal consequence or perhaps both depending upon the facts of a given case. Section 138 prescribes only one of the consequences, i.e., the prosecution and punishment of only the drawer of the cheque. (Para-52)

Counsel:- ***For Petitioner(s):*** *Mr. B. Banerjee, Adv.*

For Respondent(s): *Mr. S.M. Chakraborty, Ms. P. Sen, Advs.*

Cases Referred:-

1. *Rahul Builders vs Arihant Fertilizers & Chemicals & anr., (2008) 2SCC-321, (Para-16)*
2. *Suman Seth Vs. Ajay K. Churiwal, (2000) 2 SCC-380, (Para-17)*
3. *Krishna Janadhan Bhat vs. Dattatrya G. Hegde, (2008) 4 SCC-54, (Para-19)*
4. *Rangappa vs Sri Mohan , (2010) 11 SCC-441, (Para-29)*
5. *C.N. Dinesha vs. C.G. Mallika, (Para-32)*
6. *Bipin Mathurdas Thakkar vs. Samir @ Sameer Dessai & Anr., (Para-32)*
7. *Dipak Kumar Das Vs Dilip Kumar Das, (Para-33)*
8. *K. Bhaskaran vs. Sankaran Vaidhyan Balan, AIR 1999 SC-3762, (Para-36)*
9. *Keshab Banik vs. Sekhar Banik, (2013) 1TLR -528, (Para-37)*
10. *Rangappa vs Sri Mohan, (2010) 11SCC-441, (Para-38)*
11. *K.K. Ravi Vs. D. Kuttappan & anr, AIR 2007(NOC) 1955 (KER.), (Para-44)*
12. *Sampelly Satyanarayan Rao vs. Indian Renewable Energy Development Agency Ltd., AIR 2016 SC-4363, (Para-57)*

JUDGMENT & ORDER

ARINDAM LODH, J.: - 1. This is a revisional application under Section 397 read with Section 401 of Code of Criminal Procedure, 1973 against the judgment and order dated 25.02.2016 passed by learned Addl. Sessions Judge, West Tripura, Agartala, Court No.2 in Criminal Appeal No. 41 of 2014 affirming the judgment and order dated 24.02.2014 passed by the learned Addl. Chief Judicial Magistrate, West Tripura, Agartala in case No.N.1.98 of 2012 acquitting respondent No.2 herein from all the charges brought against him by the revisional petitioner under Section 138 of the Negotiable Instrument Act, 1881.

2. Briefly stated, the facts of the case, are that the complainant-revisonal petitioner (hereinafter referred to only as the 'petitioner') had filed a written complaint before the learned Chief Judicial Magistrate, West Tripura, Agartala, against the respondent No.2 for an offence committed under Section 138 of the Negotiable Instrument Act, 1881. The learned Trial Court registered the case and after

examining the petitioner took cognizance of the said case and issued notice upon the respondent No.2 to appear before the Court. The respondent No.2 on receipt of the summon appeared before the Court and subsequently he was explained the substance of the accusation under Section 251 of CrPC. The controversy rotates that the petitioner being approached by the respondent No.2 had paid Rs.3,60,000/- to the respondent No.2 in three installments. The respondent No.2 happened to be the neighbour and very close friend of the petitioner. Since the petitioner was not in a position to pay Rs.3,60,000/- he arranged the money of Rs.2,60,000/- from his mother-in-law, Smt. Dulu Rani Ghosh (P.W.-2) and Rs.1,00,000/- from his younger brother, namely Dilip Ghosh (P.W-3). On receipt of the said amount, the respondent No.2 assured and promised the petitioner to return the said borrowed amount within a period of three months from the date of last payment and for that purpose he issued three post dated cheques on Punjab National Bank in favour of the petitioner on 02.04.2012, 13.04.2012 and 08.05.2012 amounting to Rs.1,00,000/-, Rs.1,00,000/- and Rs.1,60,000/- respectively. The said three numbers of cheques were submitted by the petitioner in his account at State Bank of India, Agartala Branch, but, the same were dishonoured with the remark 'insufficient funds' in the account of respondent No.2. The petitioner served statutory demand notice upon the respondent No.2 on 23.07.2012 through registered post. Having found no response to such demand notice, the petitioner filed the complaint as stated above. The petitioner along with his two witnesses adduced evidence as P.W.1, P.W.2 and P.W.3. The respondent No.2 was examined under Section 313 of CrPC where he pleaded not guilty and stood his witness to define the case as D.W.1.

3. In course of trial, the learned Court formulated the following questions for determination:-

> "*1) Whether the cheques vide No.115348, No.559794 and No.115349 were dishonoured when presented for encashment.*
>
> *2) Whether the payee made a demand for payment of Rs.3,60,000/- to the accused person within 30 days of dishonor of the three cheques.*
>
> *3) Whether the accused person received demand notice issued by the payee.*
>
> *4) Whether the accused person had issued the cheques for discharge of liability or debt, in whole or in part.*"

4. Having appreciated the evidence and the materials brought on record, the learned Trial Court has held that:-

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"*i) The complainant has nowhere mentioned the exact date on which he gave the alleged loan of Rs.3,60,000/- to the accused person.*

ii) The complainant did not follow the legal provisions as enshrined in Section 269 SS. Of Income Tax Act, because he did not b *give any account payee cheque and he did not receive any account payee cheque in connection with the alleged loan money advanced by him.*

iii) The complainant did not specify the denomination of the currency notes in the alleged loan transaction.

iv) The demand notice sent by the complainant does not c *appear to have the endorsement of the advocate.*

v) The complainant submitted three cheques for encashment on the month of June and July, 2012 respectively whereas the accused person had already made a GD entry regarding loss of the d *three cheques on 17.03.2012 i.e., almost four month prior to presentation of the cheques.*

vi) The complainant has admitted in his cross-examination that he has written the name of the accused in cheque No.115348 and 115349, thereby raising serious question mark about the validity of those cheques."

5. While arriving at those finding, the learned Trial Court held e that the petitioner had failed to prove his case and thus, acquitted the respondent no.2.

6. On statutory appeal, the learned Addl. Sessions Judge also took the same view of the learned Trial Court and, accordingly, f affirmed and upheld the said judgment and order dated 24.02.2014.

7. Being aggrieved by the said concurrent judgment, the petitioner has preferred this revisional application stating *inter alia* that the findings of both the learned Courts below are perverse and committed serious illegality in interpreting the law of the land.

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8. Mr. Bannerjee, learned counsel appearing for the petitioner has contended that the petitioner has been able to discharge his burden that he paid Rs.3,60,000/- to help his friend i.e., respondent No.2 for the purpose of business. After receipt of the said amount, the respondent No.2 also issued three cheques as stated above which on presentation h were dishonoured due to insufficient fund in the account of the respondent No.2. Besides, P.W.1, the mother-in-law and the brother of

the petitioner also adduced evidence before the learned Trial Court as P.W.2 and P.W.3 respectively. They also have stated that on being approached by the petitioner, the P.W.2 had given Rs.2,60,000/- and P.W.3 had given Rs.1,00,000/-. They further adduced that the said money was paid as loan to the respondent No.2. So, the petitioner has further been able to prove that he has enforceable debt.

9. After being meticulously scanned the evidence of D.W.1 i.e., the respondent No.2, it appears to be very cryptic and vague. In his evidence, the respondent No.2 has stated that sometime he used to make payment in connection with his business by cheque and on 12th March 2012 he had signed three cheques for making payment, but, he did not know the actual account holder's name. So, he kept the cheques blank and ready for payment by inserting the name of the account holders after knowing from the person who would collect the cheques. For this, he also did not put any date on the cheques.

10. It casts doubt in the mind of this Court that he made three cheques ready for payment, but, he did not know the actual account holders name and he would make payment after knowing the name of the account holders. Further, he has stated in his evidence that perhaps he lost the cheque on his way to home from the shop and, accordingly, on 17.03.2012 itself he informed the police in writing about the loss of those cheques and a missing GD entry was registered with the police station.

11. The respondent No.2 nowhere has specifically stated in his evidence that during the period from 10th March 2012 to 17th March 2012 the petitioner had visited his shop and natural question also arises that had he lost the cheques on his way to home from his shop then how the cheques went to the custody of the petitioner. According to me, the respondent No.2 could not show sufficient reason to substantiate his defence by taking the plea of missing of the said cheques issued in favour of the petitioner.

12. Both the Courts below have committed serious error on facts as they even did not consider this aspect of the sequence of transaction, starting from payment of Rs.3,60,000/- to the respondent No.2 and the missing of the cheques.

13. Further, the petitioner served a statutory demand notice upon the respondent No.2. The respondent No.2 has admitted in his deposition that he received the said registered notice in time, but, a second aspect has come to light that after receipt of the said notice the

respondent No.2 came to learn that the cheques were lying with the petitioner and the next natural question under that circumstance is that why the respondent No.2 did not inform the police that the cheques were with the custody of the petitioner. In the cross examination he has stated that " *it is not the fact that I did not inform the police because I actually gave three cheques to the complainant*'. Here also, according to me, the conduct of the respondent No.2 does not seem to be fair enough and it is hard to believe the story that he actually had lost the three cheques.

14. In view of the aforesaid evidence laid on behalf of the petitioner and the respondent No.2, I may reach to the conclusion that the story built up by the respondent No.2 is concocted and fabricated and his conduct proves that he issued three cheques in favour of the petitioner.

15. Mr. S.M. Chakraborty, learned Sr. counsel, assisted by Ms. P. Sen, learned counsel, appearing for the respondent No.2 has strenuously argued about the legality of the demand notice since the said demand notice did not contain the signature of the advocate who served it. According to the learned Sr. counsel, the said demand notice did not confirm the requirements of Section 138 of the Negotiable Instruments Act and the very notice is statutory in nature and, hence, the entire proceeding initiated by the petitioner is null and void.

16. In support of his contention, the learned Sr. counsel has relied upon the decision of the Apex Court in ***Rahul Builders vs Arihant Fertilizers & Chemicals & anr.*** reported in ***(2008) 2SCC-321*** wherein the Apex Court in para-10 has observed thus:-

> "*10. Service of a notice, it is trite, is imperative in character for maintaining a compliant. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso(b) appended to Section 138 of the Act, the compliant petition would not be maintainable. The parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evidence from the use of the phraseology " payment of the said amount of money". Such a notice has to be issued within a period of 30 days from the date of receipt of information from the back in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A*

penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under the cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. As omnibus notice without specifying as to what was the amount due under the dishonored cheque would not subserve the requirement of law".

17. The learned Sr. counsel also pressed into service another decision in ***Suman Seth Vs. Ajay K. Churiwal*** reported in ***(2000) 2 SCC-380***, wherein the Apex Court Stated thus:-

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

18. The learned Sr. counsel appearing for the respondent No.2 based on the aforesaid decisions have submitted that the petitioner in the complaint has not stated specifically what amount he borrowed from his mother-in-law and his younger brother. Mr. Chakaborty, learned Sr. counsel has further argued that the petitioner also should have disclosed about the income of his mother-in-law as well as the younger brother to substantiate the fact that they were capable of giving such amount to the petitioner.

19. Placing reliance upon the case of ***Krishna Janadhan Bhat vs. Dattatrya G. Hegde*** reported in ***(2008) 4 SCC-54***, the learned Sr. counsel has urged that the loan amount as alleged by the petitioner was not paid by way of a account payee cheques, which is violative of Section 269-SS of the Income Tax Act, wherein the Apex Court at para-26 has held that:-

" 26. The courts below failed to notice that ordinarily in terms of Section 269-SS of the Income Tax Act, any advance taken

by way of any loan of more than Rs. 20,000/- was to be made by way of an account payee cheque only"

20. I have given my thoughtful consideration to the submissions advanced by the learned Sr. counsel as to whether the statutory demand notice fulfill the requirements of Section 138 of the N.I Act or not? This takes me to visit the legal notice dated 23.07.2012 issued in the letter head of Sri Arun Kumar Sarkar, learned Advocate. A glance of the said notice reveals that it contains the cheque numbers with the amount as are stated in the complaint petition as well as in the evidence of P.W.1. It has also been stated when and how it was presented to the drawee bank of the respondent No.2 and the note reflected in the return memo of the said bank reflecting the reason for dishonour of those cheques. It has also been stated that the respondent No.2 demanded Rs.5,00,000/- with the intention to start a new business in his mechanical workshop. Further, it has also been mentioned in the notice that he arranged Rs.3,60,000/- from his mother-in-law and his younger brother. In the notice, the petitioner has requested the respondent No.2 to return the said amount of Rs.3,60,000/- within 15 days from the date of receipt of the notice otherwise legal steps would be taken against him. It is also stated that failure to realize the said amount would accrued interest as well as cost.

21. Section 138 of the Negotiable Instruments Acts, 1881 reads as follows:-

> ***" 138. Dishonour of cheque for insufficiency, etc., of funds in the account.***- *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of that Act, be punished with imprisonment for [a term whichmay be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless-*

a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

b) the payee or the holder in due course of the cheque, as the chase may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

C) The drawer of such cheque fails to make the payment of he said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

22. A bare reading of the said provision clearly proves that the legal notice dated 23.07.2012 (Exbt-10) does not suffer from any infirmity and, in my opinion, fulfills all the ingredients of the said provision of Section 138 of the Negotiable Instruments Act.

23. It is also necessary to consider the plea of the respondent No.2 that he received the legal notice which has been marked as Exbt-B, but, the said notice does not contain the signature of the issuing advocate and for this reason, the learned Sr. counsel for the respondent No.2, has urged that the legal notice is null and void and should not be said to be a notice under Section 138 of the N.I. Act.

24. From the legal notice marked as Exbt-10 (by P.W.1) and Exbt-B (by D.W. 1), it is found that both the Exbt-10 and Exbt-B contain the endorsement of complainant as he put his signature on every pages of the notice being the holder of the cheques.

25. The language of proviso-B of Section 138 is very plain and simple and it does not speak about that the notice is to be sent through advocate. It is the payee or the holder who will make the demand in writing.

26. Neither in **Rahul Builders (Supra)** nor in **Suman Sethi (Supra)** the Apex Court has held that the notice have to be served through only the Advocate. The said authorities only laid the principles that the ingredients of Section 138 of N.I. Act have to be followed and the contents about the amount of the cheque and demand of cost, interest and other expenses must be in specific terms to subserve the requirements of Section 138 of the N.I. Act. So according to me, the citation as referred to and relied upon by the

learned Sr. counsel will not help him in any manner in deciding the points raised in this appeal.

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27. Consequently, the findings of both the Courts below that the initiation of proceeding is bad in law because the notice sent upon the respondent No.2 was bad in law due to absence of signature of learned Advocate in the said notice is erroneous in law and is liable to be set aside.

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28. None of the findings of the learned Trial Court as well as the lower Appellate Court as discreetly mentioned in the preceding paragraphs that the petitioner nowhere has stated the exact date on which he gave the alleged loan or there is no specification of denomination of the currency note used in the loan transaction and the absence of endorsement of the advocate are bad in law. I already have held that the plea of the respondent No.2 that he lost three cheques leading him to make G.D. entry with the police station is not believable story and the both the learned Courts below had committed serious error in appreciating the evidence of the petitioner as well as the respondent No.2.

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29. While dealing with the next point of the argument of Mr. Chakraborty, learned Sr. counsel that the loan was not given through account payee cheque as is required under Section 269-SS of the Income Tax Act relying upon the decision of **Krishna Janardhan Bhat (Supra),** wherein a Division Bench of the Apex Court dismissed the petition under Section 138 of N.I. Act on the ground that the complainant failed to follow the legal provisions as enshrined in Section 269-SS of the Income Tax Act. But the said judgment has been overruled by three judges Bench of the Hon'ble Supreme Court in ***Rangappa vs Sri Mohan*** reported in ***(2010) 11 SCC-441*** wherein the Apex Court upheld the order of the High Court convicting the appellant. It was held that the principle of **Krishna Janardhan Bhat (Supra)** is in conflict with the statutory provisions as well as the established line of precedence of the Apex Court.

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30. So, in my opinion, it cannot be said that merely because the amount advanced was not paid in accordance with the provisions of Section 269-SS of Income Tax Act, will make the proceeding under Section 138 of the N.I. Act bad in law.

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31. In the fact of the case, the Income Tax return or a compliance of provision of Section 269-SS will not come in the way of filing compliant by the petitioner against the respondent No.2.

32. Similar issue was dealt upon by Hon'ble Karnataka High Court in ***C.N. Dinesha vs. C.G. Mallika,*** in **Criminal Revision Petition No.536 of 2014** decided on **06.04.2017** and by Hon'ble Bombay High Court in ***Bipin Mathurdas Thakkar vs. Samir @ Sameer Dessai & anr.*** in **Criminal Revision Application No. 53 of 2014** decided on **05.02.2015**.

33. In regard to application of Section 269-SS of Income Tax Act in deciding the dispute under Section 138 of the Negotiable Instruments Act was also considered by this Court in ***Dipak Kumar Das Vs Dilip Kumar Das*** in **Crl. Rev. P No.57 of 2010** decided on **05.02.2016** wherein this Court has discarded the applicability of this provision and upheld the judgment and conviction of the accused.

34. Accordingly, the findings of the both the Courts below that non-compliance of the provision of Section 269-SS of the Income Tax Act declaring the compliant as bad in law is devoid of merit and is not sustainable in the fact of the present case.

35. While deciding the issues of whether the cheques were dishonoured when presented for the encashment, both the Courts below have found that the post dated cheques contained the signature of the respondent No.2 which on presentation for encashment were dishonoured.

36. In ***K. Bhaskaran vs. Sankaran Vaidhyan Balan,*** reported in ***AIR 1999 SC-3762*** at para-9, the Apex Court has held that:-

> *" 9. As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption."*

37. In ***Keshab Banik vs. Sekhar Banik*** reported in ***(2013) 1TLR -528*** the Hon'ble High Court of Tripura has held that in Para-9 that:-

> *" 9. Section 94 of the N.I. Act prescribes the very mode of giving notice which reads thus:*
>
> *94. Mode in which notice may be given-Notice of dishonor may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared as insolvent, to his*

assignee,; may be oral or written; may, if written, be sent by post; and may be in any form; but it must in from the party to whom it is given, either in express terms or by reasonable intendment that the instrument has been dishonored, and in what way, and that he will be held liable thereon; and it must be given a reasonable time after dishonor, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.

The above provision makes it clear that the notice, if duly directed, shall serve the purpose of law"

38. It would be apposite to take note of decision of the Apex Court in ***Rangappa vs Sri Mohan,*** reported in ***(2010) 11SCC-441,*** wherein the Apex Court had held in Para-16 that:-

"16. All of these circumstances led the High Court to conclude that the accused had not raised a probable defence to rebut the statutory presumption. It was held that:

6. Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the N.I. Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption.

What is required to be establish by the accused in order to rebut the presumption in different from each case under given circumstances. But the fact remains that a mere plausible explanation is not expected from the accused and it must be more than a plausible explanation by way of rebuttal evidence. In other words, the defence raised by way of rebuttal evidence must be probable and capable of being accepted by the Court.

The defence raised by the accused was that a blank cheque was lost by him, which was made use of by the complainant. Unless this barrier is crossed by the accused, the other defence raised by him. Whether the cheque was issued towards the hand loan or towards the amount spent by the complainant need not be considered.

Hence, the High Court concluded that the alleged discrepancies on part of the complainant which had been noted by the trial court were

not material since the accused had failed to raise a probable defence to rebut the presumption placed on him by Section 139 of the Act. Accordingly, the High Court recorded a finding of conviction."

39. In case in hand, I find that the respondent No.2 in course of trial has tried to give a plausible explanation that he lost the aforestated cheques and he also made a missing diary, but, his that effort has failed to persuade this Court and his explanations in this regard are far from plausible explanation, which is required to rebut the evidence and the initial presumption that the cheques were issued by him. So, the explanation given by respondent No.2 in course of trial appears to be difficult to accept in the fact of the case.

40. It is one thing to say that issuance of notice is one of the ingredients for maintaining the compliant, but, it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence u/s 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved.

41. In Black's Law Dictionary, "giving of notice" is distinguished from "receiving of the notice.". " A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it. "A person "receives" a notice when it is duly delivered to him or at the place of his business. In Maxwell's "interpretation of Statues," the learned author has emphasized that "provisions relating to giving of notice often receive liberal interpretation."

42. In the present case, according to Trial Court, the demand notice did not contain the signature of leanred Advocate which created a question mark about the validity of said demand notice served upon the accused. Here, the Ext-B contains signature of the complainant himself, so it is valid notice according to section 94 of N.I. Act and over and above the accused actually had received that.

43. The demand notice, either by express or by reasonable intendment, must inform the party to whom it is given:

i) That the instrument has been dishonoured (the instrument should be identified in the notice, otherwise the notice will be invalid);

ii) In what way the instrument has been dishonoured(the notice should state whether the instrument has been dishonoured by non-acceptance or non-payment); and

iii) that he will be held liable on the dishonoured instrument.

a **44.** In ***K.K. Ravi Vs. D. Kuttappan & anr*** reported in ***AIR 2007 (NOC) 1955 (KER.)*** the Kerala High Court held that giving of demand notice by post is perfectly legal method and a notice in writing put into post before expiry of 30 days or even immediately prior to midnight on the 30th day is sufficient.

b **45.** The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect an honest drawer. Service of notice of demand in Clause (b) of the proviso, the payee or the holder of the cheque in due course is required to give a written notice to the drawer of the cheque within 30 days from the date of **c** receipt of information from the bank regarding the return of the cheque as unpaid. So, the only question to be examined is whether in the notice there was a demand for payment or not. In the case in hand, the Ext.B shows that there was a demand for payment.

d **46.** The accused himself admitted in his cross- examination said that he actually gave three cheques to the complainant, meaning thereby the accused made false G.D. Entry, and it has no value in the eye of law. Here, from the conduct of the accused, it is clear that he did not recognize any importance to the purported notice since it was not signed by the concerned Advocate. The accused in his 313 **e** statement admitted that he has received the notice. Further, it is not the case of the accused-respondent that the appellant-complainant has fraudulently used the letter head of the Advocate concerned.

47. The object of notice of dishonor to endorser is not to demand payment but clearly to indicate to the party notified that he **f** contract arising on the Negotiable Instrument has been broken by the principle debtor and that the former being a surety, will now be liable for payment. This is the principal embodied in Section 94 of the N.I. Act. The object of giving notice of dishonor is not demand payment for the party giving notice but to warn the party of his liability and in **g** the case of drawer, to enable him to protect him as against the drawee or acceptor who was dishonored the draft. Generally, where the drawer has no funds belonging to him in the drawee's hands neither the presentment of cheque for payment nor notice of dishonor is necessary to charge the drawer.

h **48.** Proviso to Section 138 of N.I. Act, 1881, however, is all important and stipulates three distinct conditions precedent, which

must be satisfied before the dishonor of a cheque can constitute an offence and become punishable.

49. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier.

50. The second condition is that he payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

51. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course within fifteen days of the receipt of the said notice.

52. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to section 138 as clauses (a),(b) and (c) thereof that an offence u/s 138 can be said to have been committed by the person issuing the cheque is drawn are parties against whom the payee of the cheque can have various legal rights, which may have either civil or criminal consequence or perhaps both depending upon the facts of a given case. Section 138 prescribes only one of the consequences, i.e., the prosecution and punishment of only the drawer of the cheque.

53. Here, the appellant gave an amount of Rs.3,60,000/- to the respondent No.2 in three installments and at the same time the respondent No.2 issued post-dated three Nos. cheques in favour of the appellant.

54. In **Rangappa(supra)**, the Apex Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises, it is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. A post-dated cheque is a well recognized mode of payment.

55. Another question that arises for consideration in this appeal whether the post dated three cheques issued by the Accused (Respondent No.2) as an advance could be considered in discharge of

legally enforceable debt or other liability, and if so, whether the dishonor of such cheques amounts to an offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, ' the N.I. Act')

56. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability'. The provision includes not only debt but other liability as well. The word 'liability' denotes the state of being liable. The debt or other liabilities for the purpose of attracting the provision are to be legally enforceable. Section 138 treats dishonored cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. In the trial, the accused had admitted that the signature on the impugned Cheques were indeed his own. Once this fact is acknowledged, Section 139 read with Section 118 of the N.I. Act mandates a presumption that the cheques pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and onus is then on the accused to raise a probable defence.

57. The Apex Court in ***Sampelly Satyanarayan Rao vs. Indian Renewable Energy Development Agency Ltd.*** reported in ***AIR 2016 SC -4363*** held that the post dated cheque issued as security towards payment of installments of a loan transaction will come under the purview of Section 138 of the Act is, whether the cheque represents advance payment without there being subsisting debt or liability .

58. There is a English proverb that: " *Compassion & sympathy have no role to play where a rule of law is required to be enforced & Law cannot afford any favourite other than truth.*

59. True, it is, that the Apex Court in the long line of decisions has held that unless an order passed by Magistrate is perverse or the view taken by the Court is wholly unreasonable or there is non-consideration of any relevant materials or there is palpable misreading of records, the revision Court will not be justified in setting aside the order, merely because another view is possible. While viewing so, the Apex Court has further held that if the findings of the Courts below, which decision is sought to be revised, is shown to be perverse or untenable to law or is grossly erroneous and glaringly unreasonable or where the decision is based on no material or where the material are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the Courts may not interfere with decision in exercise of their revisional jurisdiction.

60. Keeping the aforesaid legal principles in mind though the exercise of revisional jurisdiction of this Court under Section 397 to 401 of the Code of Criminal Procedure is required to be sparingly exercised, but, according to me, if the decisions of the Courts below appear to be perverse or untenable in law or in grossly erroneous or glaringly unreasonable or where the decision is based on no materials or where the materials facts are wholly ignored or judicial discretion vested with the Courts are exercised arbitrarily or capriciously then, this Court will definitely exercise its jurisdiction vested upon it under Section 397 to 401 of the CrPC.

61. In the light of the discussions made in the preceding paragraphs, while dealing with the issues relevant to determine as to whether the petitioner has been able to make out a case to attract the provisions of Section 138 of Negotiable Instrument Act, and after meticulous scrutiny of the evidence laid by the PWs and D.W.-1 as well as the materials available on record, I am of the view that the decisions arrived at by both the Courts below are perverse and unwarranted on both the points of facts and law and thus, are not sustainable.

62. Accordingly, the judgments and order dated 24.02.2014 passed by learned Addl. Chief Judicial Magistrate, West Tripura, Agartala and affirmed by learned Addl. Sessions Judge, West Tripura Agartala on 25.02.2016 are hereby set aside being devoid of merit.

63. As I hold that the complainant has successfully made out a case of dishonour of cheques as his legally enforceable debt arises, the conviction is to be recorded against the respondent No.2. i.e. Sri Subrata Chowdhury and accordingly, said Sri Subrata Chowdhury is hereby convicted for commission of offence under Section 138 of the Negotiable Instruments Act. I have considered all the aspects and accordingly, he is sentenced to pay a fine of Rs.3,60,000/-(rupees three lakhs sixty thousand only). This fine amount shall be paid to the complainant as compensation. However, if the convict fails to pay the fine amount, he shall suffer simple imprisonment for 6(six) months.

64. It is made clear that if the payment as directed above is not paid within the said stipulated period of six months, then, the respondent No.2 i.e., Sri Subrata Chowdhury has to surrender before the Officer-in-charge, West Agartala, police station just on the date of expiry of the said six months, otherwise, the petitioner-complainant may approach the appropriate police authority to ensure the arrest of the respondent No.2 to suffer the sentence as declared above.

65. With the above observation and direction, the instant revision petition is allowed and accordingly stands disposed. No costs.

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***Result*:-** Revision petition allowed.

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