PRESUMPTION UNDER SECTION 139 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881: ANALYSIS

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Preface:

Section 6 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the N.I. Act) defines the term 'Cheque'. A bare perusal of the definition of the term 'Cheque' shows that cheque is a 'Bill of Exchange' drawn on specified banker and is an order by the drawer on his own agent, that is, bank for payment of certain sum of money to the bearer or the order to person in whose favour cheque is drawn. This order of payment by person to the holder of cheque is not made in casual or cavalier manner just for the sake of fun. This order is made for consideration and that is why Section 139 of the N.I. Act provides that the holder of a cheque is presumed to have received the cheque in discharge of whole or in part of a debt or liability.

Section 139 of the N.I. Act is an example of a "Reverse Onus Clause":

In the matter of: ***Rangappa*** **V/s** ***Sri Mohan***, 2010 (11) SCC 441, a Three-Judge Bench of the Hon'ble Supreme Court of India examined the presumption under Section 139 of the N.I. Act and observed that:

i. In case accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. There can be no doubt that Section 139 of the N.I. Act raises an initial presumption which favours the complainant.

ii. Presumption under Section 139 of the N.I. Act, is in the nature of a 'rebuttable' presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested.

iii. Section 139 of the N.I. Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments.

ISSN 2581 4095
Volume 5 (Annual) – 2019

iv. While Section 138 of the N.I. Act specifies a strong criminal remedy in relation to the dishonor of cheques, the rebuttable presumption under Section 139 of the N.I. Act is a device to prevent undue delay in the course of litigation.

v. Offence made punishable by Section 138 of the N.I. Act can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions.

Accused does not examine himself as a witness:

In the matter of: ***V.S. Yadav* V/s *Reena*** (High Court of Delhi, Crl. A. No. 1136 of 2010, Date of Decision: 21.09.2010, Coram: S.N. Dhingra, J.), it was held that:

i. It is sufficient for the complainant, in case of dishonor of cheque, to prove the debt and liability by making a statement that the cheques were issued by the accused for payment of debt, and merely because the complainant does not remember the exact date on which money was advanced to the accused in lieu of which cheque was issued by the accused to the complainant would not throw doubt on the testimony of the complainant, more so, when the complainant specifically testifies that the accused was advanced money by the complainant.

ii. The statement of accused under Section 281 of the Code of Criminal Procedure, 1973 or under Section 313 of the Code of Criminal Procedure, 1973 is not the evidence of the accused and it cannot be read as part of evidence. The accused has an option to examine himself as a witness.

iii. Where the accused does not examine himself as a witness, his statement under Section 281 of the Code of Criminal Procedure, 1973 or Section 313 of the Code of Criminal Procedure, 1973 cannot be read as evidence of the accused and it has to be looked into only as an explanation of the incriminating circumstance and not as evidence. There is no presumption of law that explanation given by the accused is truthful.

iv. The offence under Section 138 of the N.I. Act is a technical offence and the complainant is only supposed to prove that the cheques issued by the accused were dishonoured, his statement that cheques were issued against liability or debt is

sufficient proof of the debt or liability and the onus shifts to the accused to show the circumstances under which the cheques came to be issued and this can be proved by the accused only by way of evidence and not by leading no evidence.

v. Mere pleading 'not guilty' and stating that the cheques were issued as security, would not amount to rebutting the presumption raised under Section 139 of the N.I. Act. If mere statement under Section 313 of the Code of Criminal Procedure, 1973 or under Section 281 of the Code of Criminal Procedure, 1973 of accused of pleading 'not guilty' is sufficient to rebut the entire evidence produced by the complainant/prosecution, then every accused has to be acquitted. But, it is not the law.

vi. In order to rebut the presumption under Section 139 of the N.I. Act, the accused, by cogent evidence, has to prove the circumstance under which cheques were issued. For example, it is for the accused to prove if no loan was taken why he did not write a letter to the complainant for return of the cheque.

vii. If no loan is given by the complainant to the accused, but the cheques issued by the accused to the complainant are retained by the complainant then it is incumbent upon the accused to protest for the return of the cheques and if still cheques are not returned back to the accused then it is incumbent upon the accused to serve a legal notice to the complainant asking for the return of the cheques.

Presumptions under Section 118 (a) and Section 139 of the N.I. Act:

In the matter of: ***Kishan Rao* V/s *Shankargouda*** (Supreme Court of India, Criminal Appeal No. 803 of 2018, Date of Decision: 02.07.2018, Coram: A.K. Sikri & Ashok Bhushan, JJ.), it was held that:

i. Section 138 of the N.I. 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 of the N.I. Act for the discharge, in whole or in part, of any debt or other liability.

ii. 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.

iii. Under the Indian Evidence Act, 1872 (hereinafter referred to as the IEA), all presumptions must come under one or the other class of the *three* classes mentioned in the IEA, namely, **(1)** "may presume" (rebuttable); **(2)** "shall presume" (rebuttable), and, **(3)** "conclusive presumptions" (irrebuttable).

iv. The term 'presumption' is used to designate an inference, affirmative or dis-affirmative 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".

v. On applying the definition of the word "proved" in Section 3 of the IEA to the provisions of Sections 118 and 139 of the N.I. Act, it becomes evident that in a trial under Section 138 of the N.I. Act, a presumption will have to be made that every negotiable instrument was made/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.

vi. 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 N.I. Act help the complainant 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.

vii. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

viii. Section 118 (a) of the N.I. Act states as follows:

"*Presumptions as to negotiable instruments- Until the contrary is proved, the following presumptions shall be made:*

(a) ***Of consideration****- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."*

ISSN 2581 4095
Volume 5 (Annual) – 2019

Section 139 of the N.I. Act states as follows:

"*Presumption in favour of holder- 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.*"

The use of the phrase "until the contrary is proved" in Section 118 of the N.I. Act and use of the words "unless the contrary is proved" in Section 139 of the N.I. Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the IEA, makes it at once clear that presumptions to be raised under both the provisions, that is, Section 118 of the N.I. Act and Section 139 of the N.I. Act, are rebuttable.

ix. 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.

x. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated.

xi. It needs to be borne in mind that "bare denial" of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is 'probable' has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist.

Dictum in the matter of: *Bir Singh* V/s *Mukesh Kumar*, Supreme Court of India, Criminal Appeal Nos. 230-231 of 2019, Date of Decision: 06.02.2019, Coram: R. Banumathi & Indira Banerjee, JJ.:

ISSN 2581 4095
Volume 5 (Annual) – 2019

In the matter of *Bir Singh* (Supra) it was observed that-

i. The object of Section 138 of the N.I. Act is to infuse credibility to negotiable instruments including cheques and to encourage and promote the use of negotiable instruments including cheques in financial transactions. The penal provision of Section 138 of the N.I. Act is intended to be a deterrent to callous issuance of negotiable instruments such as cheques without serious intention to honour the promise implicit in the issuance of the same.

ii. Having regard to the object of Section 138 of the N.I. Act, it can be stated that, a prosecution based on a second/successive default in payment of the cheque amount is not impermissible simply because no statutory notice had been issued after the first default and no proceeding for prosecution had been initiated. There is no real or qualitative difference between a case where default is committed and prosecution is immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second time or successive times. [See: ***MSR Leathers* V/s *S. Palaniappan & Anr***, (2013) 1 SCC 177]

iii. It is well established principle of law that Revisional Court will not interfere even if a wrong order is passed by a court having jurisdiction, in the absence of a jurisdictional error. It is not for the Revisional Court to re-analyse and re-interpret the evidence on record. [See: ***Southern Sales and Services & Ors* V/s *Sauermilch Design and Handels GMBH***, (2008) 14 SCC 457]

iv. Section 139 of the N.I. Act mandates 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 of the N.I. Act, for the discharge, in whole or in part, of any debt or other liability. **The presumption contemplated under Section 139 of the N.I. Act, is a rebuttable presumption, however, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.**

v. Section 139 of the N.I. Act introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the N.I. Act is a **presumption of law**, as distinguished from **presumption of facts**. Presumptions are rules of evidence and do not conflict with the presumption of

innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

vi. In the matter of: ***K.N. Beena* V/s *Muniyappan & Anr***, (2001) 8 SCC 458, it was held that in view of the provisions of Section 139 of the N.I. Act read with Section 118 of the N.I. Act, in case of "dishonor of cheque" the court has to presume that the cheque had been issued for discharging a debt or liability. The said presumption is rebuttable and can be rebutted by the accused by proving the contrary. **But mere denial or rebuttal by the accused is not enough**. The accused has to prove by cogent evidence that there was no debt or liability. **Denials and averments in the reply of the accused are not sufficient to shift the burden of proof on the complainant to prove that the cheque had been issued for discharge of a debt or a liability**. The accused has to prove in the trial by leading cogent evidence that there was no debt or liability.

Excursus:

1. The onus to rebut the presumption under Section 139 of the N.I. Act that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the N.I. Act.
2. A meaningful reading of the provisions of the N.I. Act including, in particular, Sections 20, 87 and 139, makes it clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provision of Section 138 of the N.I. Act would be attracted.
3. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the

ISSN 2581 4095
Volume 5 (Annual) – 2019

cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

4. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the N.I. Act, in absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.
5. The subsequent filling in of an unfilled signed cheque is not an alteration.
6. Once the cheque relates to the account of the accused and he accepts and admits the signature on the said cheque then initial presumption as contemplated under Section 139 of the N.I. 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 established by the accused in order to rebut the presumption is 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 rebuttable evidence.** In other words, the defence raised by way of rebuttal evidence must be probable and capable of being accepted by the court. [See: ***G.L. Sharma* V/s *Hemant Kishor***, High Court of Delhi, Crl. A. 1400/2011 & Crl. M.A. 4777/2014, Date of Decision: 13.01.2015, Coram: Sunita Gupta, J.]
7. It is settled position that when an accused has to rebut the presumption under Section 139 of the N.I. Act, the standard of proof for doing so is that of 'preponderance of probabilities', thus, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. [See: *G.L. Sharma* (Supra)]
8. Presumption under Section 139 of the N.I. Act is mandatory and not general. In the matter of: ***Hiten P. Dalal* V/s *Brantindranath Banerjee***, AIR 2001 SC 3897, it was observed that:
   i. In the case of a discretionary presumption, the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused.

ISSN 2581 4095
Volume 5 (Annual) – 2019

ii. In the case of a mandatory presumption the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the IEA and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one.

iii. The words 'unless the contrary is proved' which occur in Section 139 of the N.I. Act, make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible.

iv. A fact is said to be proved when its existence is directly established or when upon the material before it the court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. **Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.**

9. There is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability is on the accused. This burden of proof the accused has to discharge at the trial.
10. It is not incumbent upon the accused to examine himself or herself in order to discharge the burden of proof and he/she can discharge the burden on the basis of the material, whatsoever, already brought on record.
11. If a complaint preferred under Section 138 of the N.I. Act is vague and bereft of material particulars, then, merely because a cheque was issued by the accused to the complainant and the same was dishonoured when presented for clearance won't be sufficient to attract the penal consequences enumerated under the N.I. Act. The complainant has to aver and *prima facie* establish as to what transactions took place between the complainant and the accused and owing to what reasons and under what circumstances the cheque issued by the accused got returned as dishonoured for want of funds. Merely establishing that the cheque got dishnoured when it was presented for encashment and no payment came forth from the accused despite lapse of 15 days from the date of receipt of statutory notice by the accused is not enough. [See: ***Pine Product Industries & Anr.* V/s *R.P. Gupta & Sons & Anr.***, 2007 (94) DRJ 352]

ISSN 2581 4095
Volume 5 (Annual) – 2019