

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 195 of 2018
With
IA No.: CRAN 1 of 2023

Abhijit Banerjee
Vs.
The State of West Bengal & Ors.

For the Petitioner: Mr. Sandipan Ganguly, Sr. Adv.,
Mr. Somopriyo Chowdhury, Adv.,
Mr. Avishek Bhandari, Adv.,
Mr. Dipayan Dan, Adv.

For the Respondent Nos.2 & 3: Mr. Sourav Chatterjee, Adv.,
Mr. Soumya Nag, Adv.,

Hearing concluded on: 29 August, 2023.

Judgment on: 18 September, 2023.

BIBEK CHAUDHURI, J. : –

1. Order of acquittal in favour of respondents No.2 and 3 dated 28th November, 2017 passed by the learned Judicial Magistrate, 4th Court at Asansol of the charge under Section 138 of the Negotiable Instruments Act registered as C. Case No.53 of 2013 is under challenge in the instant appeal by the complainant/appellant. Shorn of unnecessary details, the case of the appellant is that he as a complainant filed a complaint under Section 138 of the N.I Act alleging, inter alia, that the respondents No.2 and 3 are the Directors of a company under the name and style of M/s Amba Complex Private Limited at Asansol in the district of Paschim

Bardhaman. The appellant is an income tax consultant and he worked for the said company previously in relation to their income tax etc. Since respondents No.2 and 3 were closely acquainted with the appellant they approached him to lend a sum of Rs.30,50,001/- to purchase real estate in the name of the said company on consideration that the appellant would be made a Director of the said company having 1/3 share. The complainant agreed to such proposal and during the period between 7th November, 2009 to 12th January, 2010, he lend a total sum of Rs.30,50,001/- by cheque and cash to purchase real estate property in the name of the said company. However, the respondents did not take any resolution admitting the complainant as one of the Directors of the said company and delayed the matter. Over the said issue the complainant filed civil suit against the respondents/accused persons. On 30th September, 2012 they proposed the complainant for amicable settlement and handed over three cheques amounting to Rs.20,50,001/- in order to discharge their legally enforceable debt/liability in part. They also compromised to pay balance amount of Rs.10 lakhs on the date of withdrawal of the civil suit. The respondent No.2 issued two cheques bearing No.460648 and 460649, both drawn on Bank of Maharashtra, Asansol Branch for a sum of Rs.1300001 and Rs.500000/- respectively. However both the said two cheques were dishonoured on the ground "account closed". The complainant issued statutory notice demanding repayment of cheque amount during the statutory period of time to the respondents. Both the respondents received the notice but they failed and

neglected to make payment of the said amount which prompted the complainant to lodge the complaint under Section 138 of the N.I Act against the respondents.

2. The respondents duly appeared to face trial of the said case before the learned Magistrate, 4th Court at Asansol. They were examined under Section 151 of the Cr.P.C when they pleaded not guilty. During trial the complainant and another witness being an employee of the banker of the complainant were examined. Relevant documents were marked exhibits. The accused persons were examined under Section 313 of the Cr.P.C. However, they did not adduce any evidence in support of their defence.

3. From the trend of the cross examination of the witnesses on behalf of the complainant it is ascertained that the accused persons took a specific plea of denial of the case of complainant of having lend a sum of Rs.30,50,001/- either to the complainant company or to the respondents in their personal capacity. It is however admitted by the respondents that the complainant paid a cheque of Rs.20,50,001/- in favour of company. The respondents also took that, in any event the allegation of the appellant/complainant is that he lent money to M/s Amba Complex Private Limited and not the respondents. Therefore, the company is the main accused in the said proceeding under Section 138 of the N.I Act and the responsibility of the respondents may arise on the basis of the principle of vicarious liability. When the company has not been impleaded as an accused and no money was taken in their personal capacity they are entitled to be acquitted.

4. The learned Magistrate on due consideration of the evidence on record to the respective cases of the parties and legal position with regard to vicarious liability of the Directors of a company and personal liability of the drawer of cheques came to the finding that the complainant failed to prove charge under Section 138 of the N.I Act and passed an order of acquittal in favour of the respondents.

5. Hence the appeal.

6. In the impugned judgment, the learned Magistrate inter alia, held –

- (i) As per the case of the complainant he lent a sum of Rs.30,50,001/- to M/s Amba Complex Private Limited, a company incorporated under the Companies Act having a distinct and separate juristic entity. The appellant never approached company requiring it to discharge its debt.
- (ii) The opposite party Nos.2 and 3 are two separate entities distinct from the company they could not be held liable for the debt of the said company.
- (iii) The respondent No.3 is not at all involved in any manner in the said transactions because the complainant did not pay any money to the respondent No.3 and the said respondents also did not issue any cheque in discharge of any debt or liability.
- (iv) The learned Magistrate relied on the decisions of the Hon'ble Supreme Court in **Rangappa vs. Sri Mohan,**

(2010) 11 SCC 441 and **Krishna Janardhan Bhat vs. Dattatraya G. Hegde, (2008) 4 SCC 54** on the issue of presumption under Section 139 of the N.I Act and came to a finding that the respondent No.2 and 3 sufficiently rebutted the presumption of existence of any legally enforceable debt or liability as provided under Section 139 of the N.I Act, 1881.

7. Thus, the learned Magistrate on the principle of preponderance of probabilities recorded an order of acquittal in favour of the respondents. Mr. Sandipan Ganguly, learned Senior Counsel ably assisted by Mr. Somopriyo Chowdhury, learned Advocate, submits that the learned Magistrate failed to consider that the opposite party No.2 issued two cheques one for Rs.13,00,001/- and the other for Rs.5 lakhs on 30th September, 2012 from his personal bank account in his personal capacity. The said cheques were issued from the account of M/s Amba Complex Private Limited. Respondent No.2 also did not issue the said cheque as a Director of the company. Therefore, by issuing the said two cheques which were exhibited during trial of the case, the opposite party No.2 has admitted his liability by his specific act and conduct. Now he is stopped from denying his liability putting onus upon the company of which he is the Director.

8. Learned Senior Counsel also submits that the respondent No.3 was arrayed as a co-accused because he was present all along during initial offer made by the respondent No.2 to the complainant acceptance of loan

by the respondent No.2 from the complainant, and issuance of cheques in favour of the complainant by respondent No.2. By issuing the said cheque the opposite party No.2 has admitted his liability in his personal capacity. Criminal intention of the respondent No.2 is palpable from the fact that on his direction the account upon which he issued the cheques in favour of the complainant was closed about six months prior to the issuance of cheque.

9. It is further submitted by Mr. Ganguly that there is no ambiguity that a person issuing a cheque in discharge of any debt or either liability is liable under Section 138 of the N.I Act in the event the cheque is dishonoured irrespective of whose debt or liability the drawer of the cheque intends to discharge. The respondent No.2 clearly falls within the ambit the liability in the facts and circumstances of the case and there is no statutory irregularity in issuance of demand notice and filing of the instant case by the appellant. Mr. Ganguly has repeatedly urged that cheques were not drawn from the account of the company and, on the contrary, it was drawn from the personal account of the opposite party No.2. The complainant does not know if the respondent No.2 took the responsibility to discharge the liability of the company. However, the fact remains that when the petitioner issued cheques from his personal account he accepted the liability to discharge the debt upon his shelter. Under the facts and circumstances of the case the principle of vicarious liability is not applicable.

10. It is also submitted by Mr. Ganguly that the learned Magistrate has wrongly placed the burden of statutory presumption under Section 139 read with Section 118 of the N.I Act. The presumption contemplated in Section 139 read with Section 118 of the N.I Act is always in favour of the holder of a cheque in due course that the drawer of the cheque has issued the same in discharge of legally enforceable debt or liability. Of course such presumption is rebuttable by the accused but in the instant case respondent No.2 failed to rebut such presumption. The respondent No.2 simply denied in course of his examination under Section 313 of the Cr.P.C that he did not take any loan from the complainant. However, he failed to prove as to why he issued two cheques on the same date to the complainant. Referring to a decision in the case of **Mainuddin Abdul Sattar Shaikh vs. Vijay D Salvi** reported in **(2015) 9 SCC 622** it is submitted by the learned Senior Counsel that the respondent/accused received a sum of Rs.74200/- on behalf of M/s Salvi Infrastructure Private Limited a developer company. The respondent issued two receipts to the appellant as the project of the respondent did not materialize the appellant demanded return of money deposited by him the respondent/accused drew one cheque for Rs.74200/- in favour of the appellant which was subsequently dishonoured. The appellant filed a complaint under Section 138 of the N.I Act against the respondent. However, the accused was acquitted on the ground that the company M/s Salvi Infrastructure Private Limited was not made an accused and the respondent was made accused in his personal capacity. The Hon'ble

Supreme Court was pleased to held that admittedly the drawer of the cheque was the respondent, who had drawn the cheque for Rs.74200/- on a bank account maintained by him in his personal capacity towards the refund of the booking amount. Since he is the drawer of the cheque, he is liable to be convicted under Section 138 of the N.I Act, even though the company has not been named as an accused in the notice or the complaint. There was no necessity for the appellant to prove that the said respondent was in charge of the affairs of the company, by virtue of the position he held.

11. Mr. Ganguly, next refers to another judgment of the Hon'ble Supreme Court in the case of **P.J Agro Tech Limited & Ors. vs. Water Base Limited** reported in **(2010) 12 SCC 146**. In the aforesaid decision it is held by the Hon'ble Supreme Court that in order to attract Section 138 of the N.I Act, a cheque which is dishonoured will have to be drawn by a person on an account maintained by him for payment of any amount of money to another person from out of that account for the discharge, in the whole or in the part of any debt or other liability. It is only such a cheque which is dishonoured would attract the provisions of Section 138 of the N.I Act against the drawer of the cheque. In the aforesaid report it is finally held that the cheque which had been dishonoured may have been issued by respondent No.11 for discharging the dues of the appellant No.1 company and its Director to respondent No.1 company and the respondent company may have a good case against appellant No.1 company for recovery of its due before other fora, it would be sufficient to

attract the provisions of Section 138 of the N.I Act. The appellant company and its Directors cannot be made liable under Section 138 of the Act for a default committed by respondent No.11. An Action in respect of a criminal or a quasi criminal provision has to be strictly construed in keeping with the provision alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence of some other person, who under the statute was not liable for the commission of such offence.

12. Mr. Ganguly, next refers to a decision of this Court in the case of **Nopany Education Trust vs. State** reported in **2014 (1) E Cr.N (Cal) 975**. In this report, the decisions of the Hon'ble Supreme Court in **P.J Agro Tech Limited** (supra) and **Mrs. Aparna A. Saha vs. M/s Sheth Developers Private Limited, (2013) 8 SCC 71** were followed and it was held by a Coordinate Bench in the said judgment that the Apex Court has had consistently held that the principle of constructive/vicarious liability so far as the offence under Section 138 of the N.I is concerned is to be restricted to the limited scope as laid down in Section 141 of the said Act and not beyond that. Moreover, such provisions being penal in nature are specially to reconstruct interpretation. When a cheque is issue by a person being the drawer, he is principally liable for dishonor of cheque under Section 138 of the N.I Act.

13. Mr. Ganguly, also relies on **Kishan Rao vs. Shankargouda** reported in **(2018) 8 SCC 165** wherein the scope for drawing the presumption under Section 139 of the N.I Act is discussed. It is held by the Hon'ble

Supreme Court that Section 139 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 for the discharge, in whole or in part, for any debt or other liability. It is further held by the Hon'ble Supreme Court that the presumptions are devices of use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence on insufficient evidence. Under the Evidence Act of presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable). (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is use to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called "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".

14. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Section 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 or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instruments is either proved or admitted. As soon as the complainant discharges the burden of

proof that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act held him to 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 in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

15. Mr. Ganguly also refers to **NEPC Micon Ltd. & Ors. vs. Megma Leasing Ltd.** reported in **(1999) 4 SCC 253**. In this decision it was held by the Hon'ble Supreme Court that dishonouring the cheque on the ground that the account is closed is the consequence of the act of the drawer rendering his account cipher. It is also held by the Hon'ble Supreme Court in paragraph 15:-

“In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the Court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above brush away the cobweb varnish, and show the transactions in their true light (Wilmot C. J.) or (by Maxwell) to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, to an indirect or circuitous manner that it has prohibited. Hence, when the cheque is returned by a bank with an endorsement account closed, it would amount to returning the cheque unpaid

because the amount of money standing to the credit of that account is insufficient to honour the cheque as envisaged in Section 138 of the Act.”

16. In this decision, the Hon’ble Supreme Court referring to the previous decisions on this subject held that it leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. The expression “amount of money... is insufficient” appearing in 138 of the Act is a genus and the dishonor for reasons such as “account closed”, “payment stoped”, “referred to the drawer” are only species to the genesis. Just as dishonor of cheque on the ground that the account has been closed is a dishonor falling in the first contingency referred to in Section 138, was also dishonoured on the ground that the signatures “do not match” or “image in not found” which too implies that the **postponement** signature that do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act.

17. Lastly Mr. Ganguly refers to **Uttam Ram vs. Devinder Singh Hudan & Anr.** reported in **(2019) 10 SCC 287**. In this decision the Hon’ble Supreme Court held that presumption under Section 139 of the N.I Act does indeed include the existence of legally enforceable debt or liability. Bare denial of the passing of the consideration and existence of debt is not enough for the accused to rebut the presumption. In order to rebut the statutory presumptions, an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a

criminal trial. Rather, 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. Apart from adducing during evidence to prove that the consideration did not exist, or that he had not incurred any debt or liability, the accused may also rely upon the circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon the presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions under Sections 118 and 139 of the N.I Act. In a case where cheque is issued by the respondent in favour of appellant and the signature of the respondent has not been disputed, once the cheque is proved to be issued, it carries statutory presumption under Section 139 of the N.I Act. Therefore, conclusion drawn by the Court below to acquit the respondent holding, inter alia, that the complainant issued the cheque in favour of the company M/s Amba Complex Private Limited and in the absence of any pleading of constructive or vicarious liability against respondent No.2 by the appellant does not hold good the trial court, failed to consider that the cheque was issued by respondent No.2 in his personal capacity from his personal gain. Issuance of cheque from the

personal account of the respondent No.2 clearly proves his personal liability to discharge the existing debt and the trial court erred in holding that presumption under Section 139 of the N.I Act should have been drawn in favour of the appellant.

18. Mr. Sourav Chatterjee, learned Advocate for the respondents, on the other hand, submits that the appellant agreed to lend a sum of Rs.30,50,001/- to the M/s Amba Complex Private Limited on the promise made by the private respondents that he would be made a Director of the said company having 1/3rd shares of the company. So, the appellant paid a sum of Rs.30,50,001/- by cheques and cash to the respondents No.2 and 3 for purchasing real estate. The respondents, however, failed to keep their promise and appellant filed a civil suit in the jurisdictional court which is still pending. Subsequently, the private respondents sought to resolve the matter amicably and issued two cheques for a sum of Rs.13,00,001/- and Rs.5 lakhs respectively. Both the cheques were bounced on the ground “account closed”. This was followed by service of notice upon the respondents and lodging complaint under Section 138 of the N.I Act.

19. It is submitted by Mr. Chatterjee, learned Advocate on behalf of the respondent that in the petition of complaint the complainant specifically stated that he made payment of Rs.13,00,001/- in favour of the company. Section 141 of the N.I Act specifically deals with the offences by companies. Section 141 runs thus:-

“141 Offences by companies. —

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:²² [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.— For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.”

20. When the drawer of the cheque is the person(s) who was in charge of, and was responsible to the company for the conduct of the business of the company, such person(s) as well as the company shall be deemed to be guilty of offence and shall be liable to be proceeding against the punished accordingly. In the instant case, the respondent No.2 did not issue the cheques in question in discharge of his personal debt or liability

but in discharge of the debt or liability of M/s Amba Complex Private Limited. Therefore, the company is the principal offender under Section 141 of the N.I Act and the respondent No.2 might be vicariously liable for the offence committed by the company under Section 138 read with Section 141 of the N.I Act.

21. It is also submitted by Mr. Chatterjee that from the case made out by the complainant/appellant it is found that although creation of debt was in favour of the company, it was not made an accused in the complainant. Therefore, the complainant under Section 138 of the N.I Act against the respondents in their personal capacity was not maintainable. The decision of the trial court in this respect cannot be interfered by this Court.

22. Mr. Chatterjee, further submits that no criminal law has been attributed against the respondent No.3. He was not a signatory to the cheques in question. The complainant/appellant failed to produce any evidence against the respondent No.3 with regard to his personal law. Therefore, the order of acquittal against the respondent No.3 cannot be altered in the instant appeal.

23. Mr. Chatterjee, further submits that since loan was forwarded to the company and not to the respondent No.2 in his personal capacity, presumption under Section 139 of the N.I Act cannot be pressed into service against the private respondents without having arrayed the company as an accused. It is pointed out by the learned Advocate for the respondents that though the respondent did not adduce any evidence in

support of their defence. The respondent No.2 tried to build up a defence during cross examination of the complainant. The defence version is that the complainant was income tax consultant of the respondent No.2. Therefore, the respondent No.2 had left with him some signed blank cheques for the purpose of making payment of income tax etc. The appellant converted two of such cheques into negotiable instruments and lodged a false complaint against the accused persons. It is further submitted by Mr. Chatterjee that according to the appellant he paid Rs.30,50,001/- in favour of the company of the respondents by cheque as well as cash. Out of the said money the complainant was able to prove that he paid a sum of Rs.2,50,000/- by issuing a cheque in the name of M/s Amba Complex Private Limited. Thus, as per the case of the complainant he paid Rs.28,00,001/- to the respondents by cash. The complainant failed to produce any supporting documents in support of payment of money either to the respondents or to the company by cash. He also failed to state the dates on which such payments were allegedly made. In the absence of such evidence the trial court did not believe the case of the complainant and acquitted the accused persons.

24. It is submitted by Mr. Chatterjee, referring to a decision of the Hon'ble Supreme Court in the case of **K. Prakashan vs. P.K Surenderan** reported in **(2008) 1 SCC 258**, that ordinarily a judgment of acquittal should not be reversed when two views are possible. It is now trite that if two views are possible, the appellant court shall not reverse the judgment of acquittal only because another view is possible to be taken. In support

of his contention he refers to **M.S Narayana Menon vs. State of Kerala** reported in **(2006) 6 SCC 39**.

25. Referring to a judgment in the case of **Anss Rajasekhar vs. Augustus Jeba Ananth** reported in **(2020) 15 SCC 348**, it is submitted by Mr. Chatterjee that Section 139 of the N.I Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part of a debt or liability. The expression “unless the contrary is proved” indicates that the presumption under Section 139 of the N.I Act is rebuttable. Thus, Section 139 contemplates “reverse onus clause”. In **Rangappa vs. Sri Mohan, (2010) 11 SCC 441**, the Hon’ble Supreme Court in paragraph 28 held that under:-

“In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of ‘preponderance of probabilities’. Therefore, 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. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.”

26. The learned Advocate for the respondents refers to **Arulvelu & Anr. vs. State** reported in **(2009) 10 SCC 206** that unless a judgment of acquittal is perverse there is no reason to set aside a judgment on the ground that the appellant court’s view is more probable. In **Bhim Singh**

vs. State of Haryana reported in **(2002) 10 SCC 461**, the Hon'ble Supreme Court held that an appellate court entertaining an appeal from the judgment of acquittal by the trial court though entitled to reappreciate the evidence and come to an independent conclusion, it should not do so as a matter of routine. In other words, if from the same set of evidence, two views are possible and if the trial court has taken one view on the said evidence, unless the appellate court comes to the conclusion that the view taken by the trial court is either perverse or such that no reasonable person could come to such conclusion or that such a conclusion of trial court is not based on any material on record, it should not be merely because another view is possible, reversing the finding of the trial court. On the same issue Mr. Chatterjee refers to **State of Uttar Pradesh vs. Awadesh** reported in **(2008) 16 SCC 461**, **Rathinam @ Rathinam vs. State of Tamil Nadu and Anr**, **(2011) 11 SCC 140**, **Jawaswamy vs. State of Karnataka**, **(2018) 7 SCC 219**, **Banareddy & Ors vs. State of Karnataka & Ors**, **(2018) 5 SCC 790**.

27. On due consideration of the submissions made by the learned Counsels on behalf of the appellants and respondents and having gone through meticulously the written notes of argument along with the decision referred by the learned Counsels for the parties I like to record at the outset that there is absolutely no evidence from which criminal law under Section 138 of the N.I Act could be attributed to respondent No.3. Therefore, recording of the order of acquittal in favour of respondent No.3 by the learned Magistrate cannot be called into question.

28. The learned Advocate for the respondents has laid enough stress on the approach of the appellant court while deciding an appeal against the order of acquittal passed in favour of respondents. Series of decisions quoted above are cited by the learned Counsel for the accused. The law on this point is no longer res integra and settled by the Hon'ble Supreme Court in a Three Judges Bench decision in **Rajesh Prasad vs. State of Bihar & Anr.** reported in **(2022) LiveLaw (SC) 33**. It is profitable for us to quote the following paragraphs of the aforesaid judgment hereinbelow:-

“20. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 of the Cr.P.C deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup vs. R. Emperor, **AIR 1934 PC 227(2)** considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of acquittal and observed as under:

“16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice.”

It was stated that the appellate court has full powers to review and to reverse the acquittal.

21. **In *Atley vs. State of U.P.*, AIR 1955 SC 807**, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao J., (as His Lordship then was) in *Sanwat Singh vs. State of Rajasthan*, **AIR 1961 SC 715**:

“9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in ***Sheo Swarup*** case afford a correct guide for the appellate court’s approach to a case disposing of such an appeal; and (3) the different phraseology used in the

judgments of this Court, such as, (i) 'substantial and compelling reasons', (ii) 'good and sufficiently cogent reasons', and (iii) 'strong reasons' are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

The need for the aforesaid observations arose on account of observations of the majority in **Aher Raja Khimavs. State of Saurashtra, AIR 1956 SC 217** which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong."

22. **M.G. Agarwal vs. State of Maharashtra, AIR 1963 SC 200** is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as His Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial."

23. In **Shivaji Sahabrao Bobade vs. State of Maharashtra, (1973) 2 SCC 793**, Krishna Iyer, J., observed as follows:

"In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough

to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents.”

24. This Court in **Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225**, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows:

“While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions.”

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

25. In **Ajit Savant Majagvai vs. State of Karnataka, (1997) 7 SCC 110**, this Court set out the following principles that would regulate and govern the hearing of an appeal by the High Court against an order of acquittal passed by the Trial Court:

“16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted. (

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witnessbox.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.”

26. This Court in **Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225** observed visàvis the powers of an appellate court while dealing with a judgment of acquittal, as under:

“7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then—and then only—reappraise the evidence to arrive at its own conclusions.”

27. This Court in **Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415**, highlighted that there is one significant difference in exercising power while hearing an appeal against acquittal by the appellate court. The appellate court would not interfere where the judgment impugned is based on evidence and the view taken was reasonable and plausible. This is because the appellate court will determine the fact that there is presumption in favour of the accused and the accused is entitled to get the benefit of doubt but if it decides to interfere it should assign reasons for differing with the decision of acquittal.

28. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words:

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

29. In **Nepal Singh vs. State of Haryana– (2009) 12 SCC 351**, this Court reversed the judgment of the High Court which had set aside the judgment of acquittal pronounced by the trial court and restored the judgment of the trial court acquitting the accused on reappraisal of the evidence.

30. The circumstances under which an appeal would be entertained by this Court from an order of acquittal passed by a High Court may be summarized as follows:

A) Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed upto the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [**State of U.P. v. Sahai, AIR 1981 SC 1442**]

Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [**Arunachalam v. Sadhananthan, AIR 1979 (SC) 1284**]

An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion

which justifies acquittal. [**State of Haryana v. Lakhbir Singh, (1990) CrLJ 2274 (SC)**]

B) However, this Court has on certain occasions, set aside the order of acquittal passed by a High Court. The circumstances under which this Court may entertain an appeal against an order of acquittal and pass an order of conviction, may be summarised as follows:

i) Where the approach or reasoning of the High Court is perverse:

a) Where incontrovertible evidence has been rejected by the High Court based on suspicion and surmises, which are rather unrealistic. [**State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207**]

For example, where direct, unanimous accounts of the eyewitnesses, were discounted without cogent reasoning; [**State of UP v. Shanker, AIR 1981 SC 879**]

b) Where the intrinsic merits of the testimony of relatives, living in the same house as the victim, were discounted on the ground that they were 'interested' witnesses; [**State of UP v. Hakim Singh, AIR 1980 SC 184**]

c) Where testimony of witnesses had been disbelieved by the High Court, on an unrealistic conjecture of personal motive on the part of witnesses to implicate the accused, when in fact, the witnesses had no axe to grind in the said matter. [**State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207**]

d) Where dying declaration of the deceased victim was rejected by the High Court on an irrelevant ground that they did not explain the injury found on one of the persons present at the site of occurrence of the crime. [**Arunachalam v. Sadhanantham, AIR 1979 SC 1284**]

e) Where the High Court applied an unrealistic standard of ‘implicit proof’ rather than that of ‘proof beyond reasonable doubt’ and therefore evaluated the evidence in a flawed manner. [**State of UP v. Ranjha Ram, AIR 1986 SC 1959**]

f) Where the High Court rejected circumstantial evidence, based on an exaggerated and capricious theory, which were beyond the plea of the accused; [**State of Maharashtra v. Champalal Punjaji Shah, AIR 1981 SC 1675**] or where acquittal rests merely in exaggerated devotion to the rule of benefit of doubt in favour of the accused. [**Gurbachan v. Satpal Singh, AIR 1990 SC 209**].

g) Where the High Court acquitted the accused on the ground that he had no adequate motive to commit the offence, although, in the said case, there was strong direct evidence establishing the guilt of the accused, thereby making it unnecessary on the part of the prosecution to establish ‘motive.’ [**State of AP v. Bogam Chandraiah, AIR 1986 SC 1899**]

ii) Where acquittal would result in gross miscarriage of justice:

a) Where the findings of the High Court, disconnecting the accused persons with the crime, were based on a perfunctory consideration of evidence, [**State of UP v. Pheru Singh, AIR 1989 SC 1205**] or based on extenuating circumstances which were purely based in imagination and fantasy. [**State of Uttar Pradesh v. Pussu 1983 AIR 867 (SC)**]

b) Where the accused had been acquitted on ground of delay in conducting trial, which delay was attributable not to the tardiness or indifference of the prosecuting agencies, but to the conduct of the accused himself; or where accused had been acquitted on ground of delay in conducting trial relating

to an offence which is not of a trivial nature. [**State of Maharashtra v. ChampalalPunjaji Shah, AIR 1981 SC 1675**].”

29. Thus, an order of acquittal can be interfered with on the ground of (a) perversity (b) non-consideration of incontrovertible evidence (c) disbelieving the testimony of witnesses on an unrealistic conjecture (d) non-consideration of direct and cogent accounts of eye-witnesses (e) non-consideration of the testimony of natural witnesses on the ground of interestedness (f) imposition of unrealistic standard of “implicit proof” rather than that of the proof beyond reasonable doubt (g) rejection of circumstantial evidence on exaggerated and capricious theory (h) rejection of circumstantial evidence based on an exaggerated and capricious theory which are beyond the plea of the accused (i) order of acquittal resulting in gross miscarriage of justice (j) perfunctory consideration of evidence (k) acquittal caused on the ground of delay etc.

30. The Hon’ble Supreme Court in **Ganesha vs. Sharanappa & Anr.** reported in **(2014) 1 SCC 87** held that in a case where the finding of the acquittal is recorded on account of misreading of evidence, non-consideration of evidence and perverse appreciation of evidence nothing prevents the High Court from setting aside the order of acquittal at the instance of the informant. Bearing the aforesaid principles in mind let me now consider as to whether the impugned judgment of acquittal is based on perverse appreciation of evidence, misreading or non-consideration of material evidence against the respondents.

31. In examination-in-chief the complainant/appellant as PW1 stated that he came in acquaintance with the accused persons since the first part of November, 2009 and they proposed him to become a Director of M/s Amba Complex Private Limited and told him that his association will promote the said company to a profitable one. The PW1 accepted the proposal of the accused persons and they being the Directors asked him to lend a sum of Rs.30,50,001/- to purchase real estate in favour of the said company in return of 1/3rd share of the company. On the expectation to be the Director of the said company he lend a loan of Rs.2,50,001/- by issuing a cheque drawn on Allahabad Bank, Asansol Branch in favour of the company of the accused persons and during the period between 7th November, 2009 and 12th January, 2010, he had lent a total sum of Rs.30,50,001/- by cash and cheque to purchase real estate property in favour of M/s Amba Complex Private Limited. Learned Magistrate held that the complainant gave loan to the company to M/s Amba Complex Private Limited and not the Directors of the company in their personal capacity. Therefore, the company was the principal accused under Section 138 read with Section 141 of the N.I Act. The learned Magistrate failed to appreciate that respondent No.1 issued the cheques in question from his personal account in his personal capacity and the said cheques were dishonoured on the ground that the respondent No.1 closed the said account about six months before issuance of the cheque. The fact of the case is almost similar to the facts involved in **Mainuddin Abdul Sattar Shaikh vs. Vijay D. Salvi** (supra)

32. As drawer of the cheque respondent No.1 is liable to be under Section 138 of the N.I Act.

33. The learned Magistrate held that the respondent No.1 might be vicariously liable; however without impleading the company and in the absence of any pleading of vicarious liability against the respondents they were entitled to be acquitted. In case of a company being the principal offender, the theory of vicarious liability or imputed liability as a legal rule is introduced in Section 141 of the N.I Act because of the fact that a company being a juristic person is represented by an individual or group of individuals in the capacity of Managing Director or the person involved in the day to day affairs of the company.

34. If the Managing Director or Joint Director of the company takes personal responsibility to discharge the debt or liability which the company owed and issued cheque in his/their capacity, the said person is solely liable as drawer of the cheque.

35. On careful perusal of the entire evidence on record this Court finds that the learned Magistrate recorded an order of acquittal on misreading of evidence and the evidence on record is sufficient to hold the respondent No.2 liable for committing offence under Section 138 of the N.I Act.

36. The instant appeal is accordingly allowed.

37. The order of acquittal is set aside. The respondent No.1 is held guilty for committing offence under Section 138 of the N.I Act. The order of acquittal passed in favour of respondent No.3 is not interfered with and

the order acquitting the respondent No.3 passed by the learned Magistrate is affirmed.

38. The respondent No.2 is convicted accordingly and sentenced to undergo simple imprisonment for a period of six months. The respondent No.2 is also directed to pay compensation of Rs.36 lakhs being double the cheque amount with simple interest thereon at the rate of 9% per annum to the appellant/complainant in default of payment of said compensation, the respondent will have to undergo simple imprisonment for further period of six months.

39. Let the trial court record along with the copy of this judgment be sent to the court below directing the respondent to surrender before the trial court forthwith to undergo sentence.

40. If the respondent fails to appear before the trial court within 10 days from the date of communication of the order, it is open for the trial court to issue warrant against the respondent No.1.

41. The instant appeal is accordingly allowed on contest.

(Bibek Chaudhuri, J.)