IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 685 of 2018

Subrata Bose

-vs.-

Mithu Ghosh

For the Appellant	:	Mr. Niladri Sekhar Ghosh, Ms. Srimoyee Mukherjee, Ms. Sampurna Chatterjee, Mr. Sourav Mondal.
For the State	:	Ms. Faria Hossain, Ms. Mamata Jana.
For the Opposite Party	:	Mr. Debasis Kar, Mr. Arka Tilak Bhadra,
Heard on	:	04.07.2022, 18.07.2022, 28.07.2022 & 23.08.2022.
Judgment on	**:**	**07.11.2022**

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of acquittal dated 05.09.2018 passed by the learned Additional Sessions Judge, FTC-3rd Court, Barrackpore in connection with Criminal Appeal No. 6/2017 wherein the Appellate Court reversed the order of conviction and sentence passed by the learned Judicial Magistrate 5th Court, Barrackpore in C-Case no.

466/2009 (TR Case no. 324/09) under Section 138 of the Negotiable Instruments Act.

The complainant/appellant filed a complaint before the learned ACJM, Barrackpore alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'N.I. Act') against the accused/respondent namely Mithu Ghosh. The allegations made in the petition of complaint were to the effect that the complainant and the accused had business relationship and as such they were known to each other. The accused was chairperson of M/s. Sun Creative Images Pvt. Ltd. and on or about 25.06.07 the complainant entered into an agreement for telecasting a serial 'Ghatak' in Sun TV Bangla. It was agreed by and between the parties that there were number of episodes and each episode was of 23½ minutes. For the said purpose as security deposit a sum of Rs.3,00,000/- was tendered. A further sum was demanded by the accused in order to incorporate the TV channel namely Sun TV Bangla, which the complainant collected from his friends and gave him with a hope that his serial 'Ghatak' would be telecast. It has been alleged that from 26.06.2008 to 12.12.2008 on different dates the complainant paid by cash a sum of Rs.9,70,000/-. In discharge of such debt and legal liability the accused issued an account payee cheque in favour of the complainant for a sum of Rs.9,70,000/- bearing Cheque No. 767432 dated 12.12.08 drawn on Punjab National Bank, G.T. Road Branch, Burdwan. The said cheque was presented several times i.e. on 12.12.08, on 01.01.09, on 27.04.09 and on 14.05.09 and on each occasion the same was dishonoured

with the endorsement 'fund insufficient'. Lastly the cheque was presented with the complainant's banker i.e. United Bank of India, Titagarh Branch on 08.06.09 which was dishonoured vide return memo dated 09.06.09 issued by Punjab National Bank, 18, N.S. Road, Kolkata-1, Branch with the endorsement 'fund insufficient' and the bank return memo along with the dishonoured cheque was received by the complainant on 09.06.09. The complainant sent notice of demand by registered post with A/D dated 23.06.09 through his learned Advocate demanding the amount of Rs.9,70,000/- within 15 days from the date of receipt of the notice. The said notice/letter was sent on23.06.09 vide postal receipt no. 2981 dated 23.06.09 which was returned with postal remarks 'absence' or 'refused' on 02.07.09 and was received by the learned Advocate for the complainant on 14.07.09. The complainant alleges that the accused refused to accept the notice and neglected to pay the amount covered by the dishonoured cheque and as such made herself liable for commission of offence punishable under Section 138 of the Negotiable Instruments Act.

On such complaint being filed before the learned ACJM, Barrackpore, cognizance of the offence was taken and the case was transferred to the Court of the learned Judicial Magistrate, 5th Court, Barrackpore for trial and disposal. Process was issued after considering the initial evidence under Section 200 of Code of Criminal Procedure and under Section 145 of the N.I. Act. The accused appeared before the Court and he was thereafter examined under Section 251 of the Code of Criminal Procedure and the substance of the acquisition was read over to her to which she pleaded not guilty and claimed to be tried.

Records of the case reflect that the sole witness examined in this case is the complainant himself as PW1. The defence did not tender any witness. Number of documents were relied upon by the prosecution which included Ext.1, Cheque; Ext.2 and Ext.2/1, the deposit receipt of UBI, Titagarh Branch dated 12.12.08 and return memo dated 15.12.08; Ext.3 and Ext.3/1, bank deposit slip dated 01.01.09 and return memo dated 02.01.09; Ext.4 and Ext. 4/1, bank deposit slip dated 17.03.09 and return memo dated 19.03.09; Ext.5 and Ext.5/1, deposit slip dated 27.04.09 and return memo dated 28.04.209; Ext.6 and Ext.6/1, deposit slip dated 12.05.09 and bank return memo dated 14.05.09; Ext.7 and Ext.7/1, deposit slip dated 08.06.09 and bank return memo dated 09.06.09; Ext.8, demand notice dated 23.06.09; Ext. 8/1, posted receipt of demand notice dated 23.06.09; Ext.9, envelope which was refused by the accused.

PW1, Subrata Bose, complainant in his evidence stated that the affidavit-in-chief which was filed was drafted as per his instruction and he signed the same after going through the contents in each of the pages. The complainant in course of his examination-in-chief on dock also identified the cheque bearing no.767432 dated 12.12.08 drawn on Punjab National Bank, Bardhaman Branch, amounting to Rs.9,70,000/- which was issued by the accused Mithu Ghosh. The witness also identified the deposit slips by way of which the same cheque was presented on 12.12.08, 01.01.09, 17.03.09, 27.04.09, 12.05.09 and 08.06.09; the witness also identified bank return memos in respect of each of the presentation so made which were dated 15.12.08, 02.01.09, 19.03.09,

28.04.09, 14.05.09 and 09.06.09, the deposit slips and the bank return memos were respectively marked as Ext.2 and Ext.2/1, Ext.3 and Ext.3/1, Ext.4 and Ext.4/1, Ext.5 and Ext.5/1, Ext.6 and Ext.6/1 and lastly Ext.7 and Ext.7/1. The demand notice which was sent to the accused dated 23.06.09 was marked as Ext.8 by the Court and the postal receipt in respect of the demand notice was marked as Ext.8/1, while the envelope which was refused by the accused was marked as Ext.9. The complainant prayed for relief before the Court. The complainant was confronted in cross-examination to which he answered he did not tender any trade license before the Court, he did not tender any copy of his income tax returns before the Court and he did not file any copy of the agreement before the Court. The complainant was again cross-examined on 08.06.16 on the said date he was confronted regarding the transaction in respect of which he answered that the transacted amount was not shown in his account, neither in the complaint or in evidence he has supplied or deposed regarding the exact date of transaction. The witness stated that the amount involved in the transaction was paid by cash and at the relevant point of time he was maintaining two bank accounts one at United Bank and one at ABN Amro Bank. It was further stated by the witness that he did not make any payment through the said bank accounts and he had borrowed the said amount from his acquaintances namely, Abhijit Das, Anup Modak, Jhotirmay Das and Krishnendu Nath. The witness was again cross-examined on 02.05.09 when he was confronted with the question regarding the factum of borrowing of the money, the witness answered that he would adduce evidence of his friends

whose names he mentioned earlier as witness. But on a suggested question that the accused never issued the cheque, the same was denied by the complainant.

The learned trial Court by its judgment dated 07.01.17 was pleased to convict the accused/respondent and sentence her to pay compensation of Rs.19,40,000/- (Rupees nineteen lakh and forty thousand) only in default to suffer Simple Imprisonment for four months. The issues which weighed with the learned trial Court for arriving at the finding of guilt were the documentary evidence relating to the cheque, the deposit slips, the return memos, the demand notice along with the copies of the notice being refused by the accused remaining un-challenged by the accused in course of the trial. What further weighed with the learned trial Court was the decision of the Hon'ble Supreme Court in Hiten P Dalal –Vs. – Bratindranath Banerjee reported in (2001) 6 SCC 16 and Maruti Udyug Ltd. Vs. Narendra reported in (1999) 1 SCC 113, wherein it has been held by the Hon'ble Supreme Court that by virtue of Section 139 of the N.I. Act the Court has to draw a presumption that the holder of the cheque received the cheque for discharge of a debt or liability until the contrary is proved. According to the learned trial Court although the complainant in the instant case has produced number of documents which would satisfy the requirements of the Negotiable Instrument Act yet the defence/accused did not produce a single document and the defence case was only a case of mere denial. What further weighed with the learned trial Court was that although the complainant relied upon number of documents and also orally deposed to

prove his case but the accused neither filed any documents or examined any witness to rebut the prosecution case. The learned trial Court after considering the overall oral and documentary evidence which surfaced in course of the trial of the case was of the opinion that the surrounding circumstances, probabilities/improbabilities and prevailing laws leads to the conclusion that the prosecution/complainant has been able to prove the case under Section 138 of the N.I. Act and as such convicted the accused and imposed sentence as stated above.

Being aggrieved by the order of conviction and sentence passed by the learned Trial Court in C-Case no. 466/2009 (TR Case no. 324/09) the accused preferred an appeal being Criminal Appeal no. 06./17 the said appeal was finally heard out by the learned Additional Sessions Judge, FTC 3rd Court, Barrackpore, 24 Parganas North. The learned Appellate Court after finally hearing both the parties was pleased to set aside the judgement and order of conviction and sentence so passed by the learned trial Court on 07.01.17 and acquitted the accused/appellant. The reasons which weighed with the learned Appellate Court was that no agreement for telecasting of the TV Serial was produced by the complainant/respondent, neither the trade licence or the income tax return was produced before the learned Trial Court. According to the appellate Court the complainant has admitted that he maintained two bank accounts one with the United Bank of India and other with ABN Amro Bank. During the relevant period of transaction the friends name according to the complainant never reflected in his tax accounts nor was it reflected by any

documents and the oral evidence of the persons who gave the money to the complainant was also not available in evidence. The appellate Court assigned two reasons that from the natural conduct it is not believable that a person would borrow money of Rs.9,70,000/- from five persons in cash for lending the same to another person and that too without any interest and secondly such money was paid or taken without any documentation. No copy of paper was also produced before the Court which suggests that no transaction took place between the complainant and the accused. So far as the law is concerned the learned Appellant Court held that although there is a presumption under Section 139 of the N.I. Act in favour of the drawee, but the said presumption is rebuttable presumption. The debt referred to in the provision is a legally enforceable debt of law and therefore it is open to the accused to raise a defence regarding legality of any debt or liability. Additionally the appellate Court assigned the reasons that the complainant is required to prove independently that the cheque in question was issued by the accused in discharge of liability or a legally recoverable debt. The complainant in the present case has failed to discharge such liability as he has not been able to prove that any dates also in respect of which money was advanced or given as loan to the accused. It has been observed by the learned Appellate Court that the cheque in question was signed by the complainant with a different ink and the particulars regarding the date, name and the amount which has been filled up was with different ink, no chit of paper has been produced by the complainant in support of such transaction, the infirmities according to the

appellate Court are sufficient for drawing inference in favour of the accused that the cheque was never issued in discharge of liability. With the aforesaid observation the learned Appellate Court decided to set aside the order of conviction and sentence so passed by the learned Trial Court on 07.01.17.

Mr. Niladri Sekhar Ghosh, learned Advocate appearing for the appellant submitted that the cheque in question was admitted in evidence without any objection and the learned appellate Court on its own stressed in the difference in ink with regard to the signature of the accused on the cheque and the body of the cheque. There was no material in evidence whereby the defence has challenged the signature or taken a plea of a lost cheque. The nature of cross-examination itself would reflect that the same was a case of mere denial and finding out certain minor inconsistencies in the prosecution case. No evidence was led by the accused to dislodge as to how the cheque came in possession of the complainant rather emphasis was made in cross-examination wherefrom complainant obtained the money to give loan to the accused. The appellate Court according to the learned Advocate ignored the provisions of Section 139 and Section 118 of the N.I. Act and arrived at its finding of acquittal based on standard of proof beyond reasonable doubt as in Indian Penal Code offences which by no stretch of imagination can be an accepted proposition in cases under the provisions of Negotiable Instruments Act. Lastly prayer was advanced by the appellant for setting aside the order of acquittal and confirming the order of conviction and sentence passed by the Learned Trial Court.

Mr. Debasis Kar, learned Advocate appearing for the respondent/accused supported the judgment of the appellate Court and argued that a complainant in a case under the provisions of the N.I. Act cannot claim as of right the amount covered by the dishonoured cheque until and unless he substantiates his case that the cheque was issued in discharge of legally enforceable debt or liability. To that aspect learned Advocate drew the attention of the Court to relevant part of the cross-examination as also the findings of the appellate Court to the effect that there was no agreement between the parties, no trade license was produced, no money receipt was brought in evidence to show as to wherefrom the money was borrowed by the complainant, neither the persons whose names were disclosed in evidence (as those who gave money to the complainant) were examined in support of the prosecution case. Further the observation of the appellate Court with regard to the difference in ink do support the defence case that the cheque was not issued in discharge of liability and as such the appeal should be dismissed.

Before appreciating the evidence and the arguments addressed by both the parties as also the reasons cited by the appellate Court and the trial Court in their judgment, some precedents of the Hon'ble Supreme Court are required to be considered. In Oriental Bank of Commerce –Vs. – Prabodh Kumar Tewari reported in 2022 SCC OnLine SC 1089 the relevant paragraphs are set as follows:

> ***"4.*** *The respondent admits that he signed and handed over a cheque to the appellant. According to the respondent a signed blank*

cheque was handed over by him. The question which arises in the appeal is whether the High Court was correct in permitting the respondent to engage a hand-writing expert to determine whether the details that were filled in the cheque were in the hand of the respondent. For the reasons set out below, we have allowed this appeal against the order of the High Court for the reason that Section 139 of the NI Act raises a presumption that a drawer handing over a cheque signed by him is liable unless it is proved by adducing evidence at the trial that the cheque was not in discharge of a debt or liability. The evidence of a hand-writing expert on whether the respondent had filled in the details in the cheque would be immaterial to determining the purpose for which the cheque was handed over. Therefore, no purpose is served by allowing the application for adducing the evidence of the hand-writing expert.

14. *In Bir Singh v. Mukesh Kumar,*[3] *after discussing the settled line of precedent of this Court on this issue, a two-Judge Bench held:*

33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply 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 provisions of Section 138 would be attracted.*

34. 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 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.

[…]

36. 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 Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

(emphasis supplied)

15. *The above view was recently reiterated by a three-Judge Bench of this Court in Kalamani Tex v. P. Balasubramanian.*[4]

17. *In AnssRajashekar v. Augustus Jeba Ananth,*[5] *a two Judge Bench of this Court, of which one of us (D.Y. Chandrachud J.) was a part, reiterated the decision of the three-Judge Bench of this Court in Rangappa v. Sri Mohan*[6] *on the presumption under Section 139 of the NI Act. The court held:*

12. Section 139 of the 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 Act is rebuttable. Terming this as an example of a "reverse onus clause" the three-Judge Bench of this Court in Rangappa held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the

presumption under Section 139 of the Act is guided by a preponderance of probabilities. This Court held thus:

"28. 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.""*

In P. Rasiya –Vs. – Abdul Nazer reported in 2022 SCC OnLine SC 1131, the Hon'ble Supreme Court has dealt with the issue relating to nature of transactions and source of funds of the complainant in the backdrop of the provisions of Section 138 of the N.I. Act and in the following paragraphs has been pleased to observe as follows:

"7. *Feeling aggrieved and dissatisfied with the judgment and orders passed by the Appellate Court affirming the conviction of the accused under Section 138 of the N.I. Act, the accused preferred three different Revision Applications before the High Court. By the impugned common judgment and order, the High Court has reversed the concurrent findings recorded by both the courts below and has acquitted the accused on the ground that, in the complaint, the Complainant has not specifically stated the nature of transactions and the source of fund. However, the High Court has failed to note*

the presumption under Section 139 of the N.I. Act. As per Section 139 of the N.I. Act, 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 discharge, in whole or in part, of any debt or other liability. Therefore, once the initial burden is discharged by the Complainant that the cheque was issued by the accused and the signature and the issuance of the cheque is not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. The presumption under Section 139 of the N.I. Act is a statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the Complainant/holder of the cheque, in that case, it is for the accused to prove the contrary. The aforesaid has not been dealt with and considered by the High Court. The High Court has also failed to appreciate that the High Court was exercising the revisional jurisdiction and there were concurrent findings of fact recorded by the courts below.

8. *In view of the above and for the reasons stated above, the impugned common judgment and order passed by the High Court is not sustainable and the same deserves to be quashed and set aside.*

9. *Under the circumstances, the impugned judgment and order passed by the High Court acquitting the accused for the offence punishable under Section 138 of the N.I. Act is hereby quashed and set aside and the order passed by the learned trial Court convicting the accused for the offence punishable under Section 138 of the N.I. Act confirmed/modified by the learned Sessions Court is hereby restored. Now, the accused be dealt with as per the order passed by the first Appellate Court/Sessions Court.***"**

In Tedhi Singh –Vs. – Narayan DassMahant reported in (2022) 6 SCC 735 the Hon'ble Supreme Court was pleased to deal with the manner in which complainant is expected to lead evidence in a proceeding under the provisions of Section 138 of N.I. Act. It has been held that unless the accused in reply notice to the statutory notice sent is able to set up a case regarding the capacity of the complainant there is no requirement of the complainant to lead such evidence. In case the accused intends to demonstrate he has to examine his witness and place documentary materials to rebut the prosecution or the complainant's case. The following paragraphs of the cited judgment require consideration and are set out as follows:

> ***"8.*** *It is true that this is a case under Section 138 of the Negotiable Instruments Act. Section 139 of the NI Act provides that court shall presume 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. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the accused to establish that there is no consideration received. It is in the context of this provision that the theory of "probable defence" has grown. In an earlier judgment, in fact, which has also been adverted to in Basalingappa [Basalingappa v. Mudibasappa, (2019) 5 SCC 418 : (2019) 2 SCC (Cri) 571] , this Court notes that Section 139 of the NI Act is an example of reverse onus (see Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184]). It is also true that this Court has found that the accused is not expected to discharge an unduly high standard of proof. It is accordingly that the principle*

has developed that all which the accused needs to establish is a probable defence. As to whether a probable defence has been established is a matter to be decided on the facts of each case on the conspectus of evidence and circumstances that exist.

10. *The trial court and the first appellate court have noted that in the case under Section 138 of the NI Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the NI Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent, the courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross-examination of the witnesses of the complainant. Ultimately, it becomes the duty of the courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence."*

In the present case the only relevant answers in cross-examination were a mode of denial wherein PW1 answered in respect of a question of the accused

that *"Not a fact that, the accused persons never issued cheque of the amount Rs.9,70,000/-".*

A series of question were asked in reply to which the following answers were given by the PW1 in cross-examination which are set as follows:

"Not a fact that, I did not give any money to the opposite party for which I am (read 'have') demanded my dues from him. Not a fact that, I cannot claim any dues (read 'dues') from him. Not a fact that, I have filed a false and fabricated case. Not a fact that, I have not filed any bank related document. Not a fact that, I have deposed falsely before this court."

In this case the accused did not adduce any evidence nor did she rely upon any documentary materials to rebut the prosecution or the complainant's case. As such the aforesaid three judgments of the Hon'ble Supreme Court assumes importance in view of the fact that all the questions which were confronted relate to source of funds of the complainant and the capacity of the complainant to give such money to the accused neither any document has been relied upon by the defence to show that there cannot be such due nor the signature in the cheque has been disputed. Thus, it would be very difficult for a Court to accept rebuttal of the statutory presumption available under the provisions of the Negotiable Instruments Act. The issues which weighed with the Appellate Court in acquitting the accused that the complainant has not been able to prove that the cheque was issued by the convict/appellants in discharge of his liability or any legal enforceable debt; the reasons for coming

to such a conclusion is because of the complainant in cross-examination has neither given the date, month or the year when the loan was given nor had be obtained any receipt from the accused; the amount of loan has neither been reflected in the income tax return of the complainant nor has it been in the books of account; on the contrary the cheque in question was signed by the accused with the different ink and the particulars regarding the date, name and money it has been filled up in the cheque which has been in different ink, no chit of paper has been produced by the complainant in support of the transaction of a huge sum of Rs.9,70,000/-. Such infirmities according to the appellate Court are sufficient to draw inference regarding the probability of defence of the accused that he has not issued the cheque for discharging the liability and the Magistrate Court erroneously banking upon Section 139 of the N.I. Act to arrive at its finding of guile.

The aforesaid observations of the appellate Court are beyond the scope of appreciating evidence in respect of provisions relating to adjudication of offence under Section 138 of the N.I. Act. Section 139 of the N.I. Act is a statutory presumption which carries with it an expression “unless the contrary is proved”. The test of proportionality in such cases must guide the determination of the issue of rebuttal. As such what is required for the accused to do in such case is to raise a probable defence. It cannot be a probable defence that the complainant has no capacity to pay the money until and unless an initial defence is set up by a reply notice or the accused examines his witnesses and relies upon documentary evidence. In this case the signature in the cheque

also has not been challenged, no evidence to that effect is reflected in the cross-examination of PW1 (the sole witness in this case). Further, no materials have been produced to show as to how the cheque was in possession of the complainant as there are no allegations of lost cheque or the signature in the cheque being forged. Although it is permitted in a case of such nature to raise a probable defence from the available materials in the cross-examination of the prosecution witness only, but the nature of the cross-examination and the probable defence raised by the accused do not qualify as a rebuttal to the provisions under Section 139 of the N.I. Act and the learned Appellate Court unnecessarily resorted to the issue of difference in ink as no case has been made out by the accused for the cheque having been lost or the same was obtained by coercion.

Having regard to the factual circumstances presented by the prosecution/complainant in this case in its evidence and the accused having failed to create or raise any defence to rebut the statutory presumption and having regard to the aforesaid three cited judgments of the Hon'ble Supreme Court the order of the Appellate Court calls for interference. Accordingly, the judgment and order of acquittal dated 5th September, 2018 passed by the learned Additional Sessions Judge, FTC-3rd Court, Barrackpore, in Criminal Appeal No. 06/17 is hereby set aside and the judgment and order dated 07.01.17 passed by the learned Judicial Magistrate, 5th Court, Barrackpore in C-Case No. 466/09 (TR Case No. 324/09) is hereby confirmed.

The respondent/accused is directed to comply with the order of the learned Judicial Magistrate 5th Court, Barrackpore, within a period of four weeks i.e. by 7th December, 2022, in the alternative the learned Judicial Magistrate, 5th Court, Barrackpore would exercise his powers under Section 421 of the Code of Criminal Procedure for executing the sentence.

Thus, CRA 685 of 2018 is allowed.

Pending Applications, if any, are consequently disposed of.

Department is directed to send back the Lower Court Records to the learned Appellate Court as well as the Learned Trial Court within 15th of November, 2022, so that effective steps are taken by the learned trial Court.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)