* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 03.07.2017*
Judgment pronounced on: 04.09.2017

\+ CRL.A. 17/2017

BANSAL PLYWOOD ..... Petitioner
Through: Mr.Surender Gupta, Adv. with appellant in person.

versus

STATE (NCT OF DELHI) AND ORS. ..... Respondents
Through: Mr.Tarang Srivastava, APP for State.
Mr.Ahmad Waseem, Adv. with Mr.Muqeem Ahmed, Adv. for R-2 & 3.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. Challenge in this Criminal Appeal is to impugned judgment dated 28.10.2015 passed by the Trial Court whereby respondents 2 & 3 were acquitted for the offence punishable under section 138 of the Negotiable Instruments Act, 1881 (in short 'NI Act').

2. Brief facts leading to the present criminal appeal are that the appellant, a proprietary firm through sole proprietor Pawan Bansal is engaged in the business of supplying timber and plywood. The respondent no.3 is the proprietor of respondent no.2 firm M/s Bosecage. Respondent no.1 through its proprietor

used to purchase timber and plywood from the appellant. On 18.12.2010 the respondent no.2 & 3 had purchased goods worth Rs.1,72,522/- from the appellant and a bill no.254 (tax invoice) was raised against this transaction. Respondent no.3 issued a cheque no.222181 dated 18.12.2010 drawn on State Bank of India, branch Kalkaji, New Delhi in favour of the appellant against the said Bill. The said cheque was dishonoured for the reason "Payment Stopped by Drawer" vide memo dated 21.12.2010. The appellant got issued a legal notice dated 31.12.2010 by Regd. AD & UPC dated 04.01.2011 to the respondent no.2 through its proprietor respondent no.3 calling upon them to make the payment within 15 days of the receipt of the notice. Notice was duly served upon respondent no.2 & 3. Despite the service of notice, the respondents no.2 & 3 failed to make the payment within the stipulated period of 15 days and hence the complaint.

3. The Trial Court acquitted respondents 2 & 3 on two grounds (i) the bill/invoice no. 254 dated 18.12.2010 had cutting/ interpolation on the date mentioned on it and (ii) no other invoice was placed on record to show that the appellant and respondents no.2 & 3 had dealings up to December 2010.

4. The learned counsel for the appellant contended that the Trial Court erred in acquitting the respondent no.2 & 3. He submitted that the impugned judgment was not based on the

settled principles of law and the Trial Court did not correctly appreciate the facts and evidence on record.

5. He argued that under sections 118 and 139 of the NI Act, there is a presumption against the accused in a case under section 138 of the NI Act and the respondent no.2 & 3 were not able to rebut this presumption by cogent evidence. He relied upon the decision of the Hon'ble Supreme Court in ***Rangappa v Sri Mohan (2010) 11 SCC 441*** to further cement his arguments.

6. He further argued that the respondent admitted that a sum of Rs.9200/- was due and payable to the appellant in the month of October/November 2010 but did not pay it to the appellant. He contended that the malafide on the respondent's part is evident from her conduct of having submitted a false application to stop payment to her banker in advance on 01.12.2010 and then issued the cheque in question dated 18.12.2010 subsequently.

7. He urged that the Trial Court erred in not appreciating the fact that though there was overwriting on the date of the bill, month and year remain intact and the correction of date is signed by the appellant just above the same.

8. The learned counsel for the appellant had contended that the cheque in question admittedly was "signed" and "dated" by respondent no.3 herself.

9. He further urged that the Trial Court erred in overlooking the various inconsistencies and contradictions in the statements of respondent no.3. The learned counsel of the appellant contended

that respondent no.3 kept on changing her stand throughout before the filing of the complaint, after appearance before the learned MM and during the course of the trial. He argued that change of defence by itself makes the version of the respondent unreliable.

10. He contended that the legal notice dated 31.12.2010 issued to respondent no.2 & 3 was not replied to and an adverse inference can be drawn from this fact. He relies in ***Rangappa's case (supra) (para 29)*** to substantiate this point.

11. He further contended that there is no mention of stealing of cheque by appellant either in her letter for stop payment to her Banker on 01.12.2010 or in the complaint lodged with Chowki Incharge, P.S. Govindpuri on 23.12.2010.

12. He contended that there was a delay of 23 days in submitting the alleged complaint to the police by respondent no.3 in connection with the cheque no.222181 which is not explained by respondent no.3.

13. Per contra, learned counsel for the respondents No.2 and 3 had contended that the judgment of the Trial Court was based on correct appreciation of facts and law and therefore requires no interference.

14. He argued that respondent no.3 used to keep blank "signed" cheques with "dates" mentioned thereon at her residential office in order to make payment to various contractors and suppliers and cheque no.222181 was also kept at her office-cum-

residence. He submitted that the respondent used to go out in the field due to business related work and cheques used to be delivered by her family members to contractors and suppliers in her absence. He argued that there was no business dealing by the respondent No.3 with the appellant after 2009 whereas the bill is dated 18.12.2010. He submitted that the proprietor of the appellant company i.e. Pawan Bansal used to visit frequently at the residential office because of good business relations between respondent no.3 and Pawan Bansal. Learned counsel contended that the said cheque was stolen by Pawan Bansal, on one of such visits in December, 2010 to the house cum office of respondent no.3. He urged that Pawan Bansal forged the bill/invoice dated 18.12.2010 which is clear from the interpolation on the same in order to defraud respondents no. 2 & 3.

15. I have heard the learned counsel for the parties.

16. Before proceeding further I deem it appropriate to advert to Sections 138, 139 and 118(a) of the NI Act:

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account.**
>
> Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid. either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be

paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless- (a)the cheque has been, presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b)the payee or the holder in due course. of the cheque as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
(c)the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

139. 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.

118. 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. ....."

17. While explaining the scope of Section 139 of the NI Act, the Hon'ble Supreme Court in ***Laxmi Dyechem v. State of Gujarat,*** **(2012) 13 SCC 375** held as under:

> "25. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. **If however, the accused/drawer of a cheque in question neither raises a probable defence nor is able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant**. (Emphasis supplied)"

18. While explaining the nature of presumption given under section 118(a) of the NI Act, the Hon'ble Supreme Court in ***Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal,*** **(1999) 3 SCC 35** held as under: -

> "12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is

supported by a consideration. Such a presumption is rebuttable. **The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing** that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument**. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies**. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. **In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour**. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. **The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act.; upon the plea that it did not exist.**" (Emphasis supplied)

19. In ***Rangappa's case (supra)***, a three Judge Bench of the Hon'ble Supreme Court observed that if the accused in a complaint under Section 138 of the NI Act admits his signatures on the cheque, presumption that the cheque pertains to a legally enforceable debt or liability arises under Section 139 of the NI Act. Such presumption is rebuttable in nature and the onus is on the accused to raise a probable defence.

20. Even if 'Stop Payment' instructions are given to the banker, the drawer/accused cannot avoid his liability and the burden to prove that there was no legally existing debt or liability on the accused. This position was reiterated by the Hon'ble Supreme Court in ***M.M.T.C. Ltd. v. Medchl Chemicals and Pharma (P) Ltd.,* (2002) 1 SCC 234**. Para 19 details the mode of rebuttal of presumption under Section 139 of the NI Act as under: -

> *"19. Just such a contention has been negatived by this Court in the case of Modi Cements Ltd. v. Kuchil Kumar Nandi [(1998) 3 SCC 249] . It has been held that even though the cheque is dishonoured by reason of "stop-payment" instruction an offence under Section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also.* ***The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the "stop-payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the***

amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground*"* (emphasis supplied)

21. The Hon'ble Supreme Court in ***Hiten P. Dalal v. Bratindranath Banerjee*****, (2001) 6 SCC 16** while explaining the presumption under Section 139 of the NI Act held as under:

> "22. Because both **Sections 138 and 139 require that the court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras v. A. Vaidyanatha Iyer [AIR 1958 SC 61 : 1958 Cri LJ 232]** it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." (Ibid. at p. 65, para 14.) Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged 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 or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact**"

22. The Hon'ble Supreme in ***Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm*, (2008) 7 SCC 655** emphasized that the initial burden to prove that non-existence of consideration is on the accused. The Hon'ble Supreme Court held as under:

> "17. **Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal**. In this connection, reference may be made to a decision of this Court in Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal [(1999) 3 SCC 35] . In para 12 of the said decision, this Court observed as under: (SCC pp. 50-51)
>
> > "12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the

basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. **The bare denial of the passing of the consideration apparently does not appear to be any defence**. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist."

From the above decision of this Court, it is pellucid that if the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who would be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument.

> **It is also discernible from the above decision that if the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour.**" (emphasis supplied)

23. The Hon'ble Supreme Court in ***Rangappa's case (supra)*** re-iterated the view taken in ***Mallavarapu's case (supra)*** and held as 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."

24. Record reveal that on 01.12.2010, **the respondent no.3 submitted** a letter Ex.DW-3/1 **to the Branch Manager, State Bank of India**, Kalkaji, New Delhi, to the effect that she was having a current account no.3037498968 with their bank in the name of "BOSCAGE". **She had lost her one PDC Cheque no.222181 "dated 18.12.2010" in Kotla Market where she had gone to purchase some material**. She also mentioned that

it was a **"blank cheque"** but it was **"signed"** one. She requested to stop payment against cheque.

25. After a long gap of 22 days, on 23.12.2010 **the respondent no.3 submitted an application to the Chowki Incharge, Police Station Govind Puri**, to the effect that name of her company is BOSCAGE and is having current account with State Bank of India, Kalkaji, New Delhi. **Her one cheque no.222181 "dated 18.12.2010" bearing her signatures was lost** and she wanted to inform so that no one could misuse it. She also mentioned that she had given stop payment instructions to the bank.

26. At the time of framing of notice under section 251 of the Code, on 11.10.2012, the respondent no.2 answered to the learned MM about her defence as under:

> "Q3. What is your defence, specify?
> Ans. I do not have any liability towards the complainant. **The cheque has been stolen by the complainant.** I have made a complaint to the police on 23.12.2010 and the payment was also stopped on my instructions given on 01.12.2010. The cheque has been misused by the complainant."

27. The respondent no.3 filed an application under section 145(2) of NI Act before the learned MM on 29.02.2012 wherein she pleaded that the complainant used to come to her office for business purposes and **in December, 2010, in her absence** the **complainant came to her office** and **embezzled cheque no.222181 from there**. She further mentioned that when she

came back she was under the impression that the said cheque was misplaced somewhere in the market and immediately requested the bank to stop payment and later on reported the matter in the Govind Puri Police Station. She **admitted in the application that the cheque was blank but signed** and **dated** by her.

28. At the time of cross-examination of the appellant on 08.01.2013, the respondent no.3 initially asked the appellant as to whether he knew about the complaint made to Police Station Govind Puri regarding the loss of the cheque in question, evidently to suggest that cheque was lost in the market as per her stand taken in application to SBI for stop payment instructions and complaint dated 23.12.2010 given to Chowki Incharge PS Govind Puri. However, on 7.7.2014, the respondent no.3 again changed her stand and suggested in the further cross-examination of the appellant that the cheque in question was stolen by him from her residence-cum-office during his visit there. In her explanation under section 313 read with section 281 of the Code recorded on 4.2.2015 the respondent no.3 explained that the cheque was never issued in favour of the complainant (appellant) and was stolen from her office-cum-residence as the complainant had been visiting her office as they had good business terms.

29. The defence taken by the respondent no.3 at the time of framing of the notice under section 251 of the Code or the stand taken

by her in her application under section 145(2) of NI Act or her explanation under section 313 read with section 281 of the Code recorded on 4.02.2015 is not "evidence" within the meaning of section 3 of the Indian Evidence Act, 1872 which reads as under:

> "3. **Interpretation clause**. —In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—
>
> **…… …… …… …… …… ……..**
> **……..**
>
> **"Evidence"** .— " Evidence" means and includes—
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
>
> (2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

30. When person appears in the Court as a witness, he is required to state facts on oath under Section 4 of Oaths Act, 1969 and his examination in chief is tested on touchstone of cross-examination by the other party. This is actually the evidence. Therefore the plea taken in application under Section 145(2) of NI Act or defence taken at the time of framing notice under Section 251 of Code or explanation under Section 313 read with Section 281 of the Code by any stretch of imagination cannot be treated as "evidence". This is only a defence which should have

been proved by her by cogent evidence to rebut the presumption under Section 139 and Section 118 of the NI Act.

31. The respondent no.3 had decided to come in the witness box by moving an application under section 315 of Cr.P.C. which was allowed by the learned MM on 3.6.2015. She appeared as DW-3. In her deposition she testified that the cheque in question including other cheques used to be at her office-cum-residence with her signatures and date, for making payment to the contractors and suppliers by her family members as she used to be in the field on most occasions due to nature of her work. She further testified that on 1.12.2010 when she went to Kotla Mubarakpur Market for purchasing some material for her firm, she noticed that the cheque in question bearing no.222181 was missing from her purse.

32. In her deposition as DW-3, the respondent no.3 had nowhere deposed that the cheque in question was stolen by complainant/appellant from her residential office as claimed by her at the time when she moved her application dated 29.02.2012 under section 145 (2) of NI Act or at the time of framing of the notice under section 251 of the Code on 11.10.2012 or in her explanation tendered under section 313 read with section 281 of the Code that the cheque was stolen by the appellant/complainant. Knowing fully well consequences of perjury and false deposition, respondent no.3 in her deposition could not dare to testify that the cheque was stolen by the

appellant. Therefore the respondent has miserably failed to prove her defence that the cheque in question was stolen by the complainant in December 2010 from her residential office. Further the respondent no. 3 had not proved her alleged visit to market by producing any Bill/invoice for purchase of material which she claimed to have purchased from Kotla Market on 01.12.2010 when she found cheque was missing from her purse. She had not explained as to why she kept that single cheque in question in her purse and why she had put a date as 18.12.2010 and signed it when it was blank.

33. Respondent no.3 in her testimony as DW-3 admitted that there was a running account with the complainant company and as on October/November, 2010, a payment of Rs.9,200/- was due to the complainant company. She testified that she did not make payment of due amount of Rs.9,200/- to the complainant. She stated that she closed her business with the complainant after end of year 2009 and did not purchase any material after 2009. She admitted that the cheque in question was already signed by her. She also admitted that she had put the date on the said cheque.

34. The respondent had taken contradictory and inconsistent plea in her deposition. On one hand respondent no.3 took the plea that there was a running account with the complainant and in the month of October/November 2010, there was outstanding balance amount of Rs.9200/-. On the other hand, she pleaded

that she closed her business with the complainant after end of 2009.

35. If she had no business terms with the appellant after 2009, she could have produced her books of accounts, bank statement and financial statements consisting of profit and loss account and Balance Sheet for the financial year 2009-10 & 2010-11 to prove that she had no such transactions with the complainant during the year 2010 and there was no existing liability to pay to the complainant as held in ***M.M.T.C. Ltd. v. Medchl Chemicals and Pharma (P) Ltd. (supra)***. Her testimony that her family members used to deliver the "signed" and "dated" cheques to suppliers/contractors from her residential office in her absence as she used to be in the field, shows that she might be having one or two employees with her. She had neither disclosed names of her employees nor examined any of them to prove that the said invoice was not bearing the signatures of any of her employees.

36. She had claimed that the invoice dated 18.12.2010 Ex.CW-1/E was forged. She took the plea that there was cutting on the date. Cutting of date does not make it to be forged when cutting of date was "signed" by the executant of invoice i.e. the complainant and particularly when month and year remain intact. This appears to be human error and cannot be interpreted as interpolation or forgery.

37. If the contention of the respondent no.3 that the cheque was lost in Kotla Market is to be believed, it is highly improbable that the said cheque would have landed up in the hands of the appellant if the same was lost in a crowded market like Kotla Mubarakpur.

38. Earlier on 23.02.2012 the respondent no.3 had taken the stand in her application under section 145(2) of NI Act that the complainant used to come at her office for business purposes and in December, 2010 he had visited the applicant's office. On one hand, she had taken the stand that she did not purchase any material after 2009 from the complainant but on the other hand, she had claimed that the complainant had visited her office as usual in December, 2010 for business purposes. This makes her defence completely false. If her deposition/evidence as DW-3 is ignored, and instead her defence that cheque was stolen by appellant, is considered, it certainly gives rise to an opinion as to why she did not examine any of his family members to prove the visit of complainant in December 2010 for business purpose. She claimed in her application under Section 145(2) of the NI Act that appellant visited her office in December 2010 and had stolen the cheque. She did not specify the alleged date of visit to her residential office by the complainant. She gave stop payment instructions to her banker on 01.12.2010. On one hand she took the stand that the cheque was misplaced in market on 01.12.2010 and on the other hand she took the

defence that it was stolen by respondent in December, 2010. Therefore respondent No.3 has no leg to stand either way. The bare statement of the respondent is not at all sufficient to rebut the presumption under Section 139 and 118 of NI Act as held by **Hon'ble Supreme Court** in ***Bharat Barrel's case (supra)*** **and** ***Mallavarapu Kasivisweswara Rao (supra)***. She neither produced books of accounts and financial statements for the years 2009-10 and 2010-11 nor examined any alleged supplier/contractor if any amount was outstanding or payable to them by her at the relevant period as claimed by her to prove that she used to leave "blank signed and dated" cheques in her residential office for handing over to them by her family members.

39. It comes out from the above discussion that the respondent no.3 had been taking different stands at different stages of the proceedings and as such her deposition as DW3 is not at all worth inspiring confidence. The respondent No.3 having adduced no other evidence is not able to rebut the presumption under Section 139 and Section 118 of the NI Act. She has not brought forward evidence which would have made a reasonable and prudent person believe that the explanation put forward by her was the most probable outcome.

40. It is clear as crystal from the ratio laid down in ***Bharat Barrel's case (supra)*** **and** ***Mallavarapu Kasivisweswara Rao (supra)*** that the initial burden of proving that a legally enforceable debt

did not exist against the accused lies on the accused himself which has to be discharged by bringing on record some cogent evidence to make the Court believe that the existence of such liability was not probable. The Trial Court has erred in not appreciating the provisions of section 139 and 118 of the NI Act and in not applying the law laid down by the Hon'ble Supreme Court, and appears to be obsessed with idea that initial burden is on the complainant instead of the accused. The complainant was only required to prove that the cheque issued by the respondent No.3 was dishonoured, and the statement of complainant that it was issued by respondent against her liability/debt is sufficient proof of debt or liability thus shifting the onus to the respondent to rebut by way of cogent evidence and not by bare statement. The learned Trial Court has erred in rejecting the complaint on the ground that no other invoice has been placed on record by the appellant to show that there had been dealing between the appellant and respondent no.3 upto December, 2010 and by dismissing the complaint on this score, the Trial Court has erred in putting the initial burden on the complainant/appellant without realising that initial burden was on the accused/respondents no.2 and 3. It was for the respondent no.3 to adduce cogent evidence and certainly not bare statement that there were no business dealings with the appellant after 2009 or that the goods in question were not purchased by her from the appellant. This is particularly so

when respondent no. 3 admitted in her deposition that there was running account with the complainant and in the month of October/November, 2010, there was an outstanding balance of Rs.9,200/-.

41. The complainant while appearing as CW-1 in his examination in chief testified that he got issued one legal notice dated 31.12.2010 to the accused by registered AD & UPC dated 4.1.2011 which was duly served and despite service of notice the accused did not discharge the liability nor took any steps for repayment of the amount. The copy of the legal notice was exhibited as Ex.CW-1/C and postal receipts as Ex.CW-1/D (Colly.). In his cross-examination, the respondent/ accused had not disputed receipt of notice. She has failed to reply said notice which attracts the applicability of principles of Non-Traverse. It has been held by the Supreme Court in ***Rangappa's case (supra)*** that the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to an inference that there was merit in the complainant's version.

42. If the bare statement of the accused stating that the cheque in question bearing his signatures and date was misplaced by him in the market is taken as gospel truth, then all accused persons under section 138 of the NI Act can easily get away from their legally enforceable liability by taking such sham and false defence.

43. On reading and evaluation of the entire evidence on record, this Court finds that the impugned judgment is erroneous and perverse and is not sustainable both on facts and in law. In the result, the criminal appeal is allowed and the judgment dated 28.10.2015 of Ld.MM-02, South District, Saket, New Delhi in CC No.985/2014 is set aside and the accused/respondent No.3 is convicted for the offence under section 138 of NI Act.

44. In the facts and circumstances of the case, it would secure ends of justice if the respondent No.3 is directed to pay twice the amount of cheque in question as fine. As such the respondent is sentenced to fine of Rs.3,45,044/- with directions to deposit the same with the trial court within 30 days from today failing which she shall undergo simple imprisonment for a period of one year. The amount of fine upon being realized shall be released to the appellant/complainant as compensation by the Trial Court.

45. Registry is directed to circulate the copy of this judgment to all Judicial Officers for their guidance.

VINOD GOEL, J.

SEPTEMBER 04, 2017
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