IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.48758 of 2016

CNR No. BRHC010866402016

Arising Out of PS. Case No.-1538 Year-2016 Thana- PATNA COMPLAINT CASE District- Patna

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Smt. Sanghmitra Singh, W/o Shri Rajiv Ranjan Kumar Singh, resident of Shivduti, Purendu Nagar (Mitra Mandal Colony), P.S.- Anisabad, Phulwarisharif, District- Patna (Bihar).

... ... Petitioner/s

Versus

1. The State of Bihar
2. Parwez Alam, S/o Vikku Malik, resident of Village- Bijaura, P.S.- Bhagwanganj, District- Patna.

... ... Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. Dhananjay Kumar, Advocate
For the O.P. No. 2	:	Mr. Uday Prasad, Advocate Dr. Sushil Kumar, Advocate
For the State	:	Mr. Sanjay Kumar Pandey, APP

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CORAM: HONOURABLE MR. JUSTICE RANA VIKRAM SINGH
C.A.V. JUDGMENT
Date : 27-10-2026

The present application has been filed under Section 482 of the Code of Criminal Procedure, 1973 (*in short* ***Cr.P.C.***), for quashing the order dated 04.07.2016 passed by the learned Judicial Magistrate, 1st Class, Patna, in Complaint Case No. 1538(C) of 2016, whereby cognizance has been taken against the petitioner for the offences punishable under Section 406 of the Indian Penal Code (*in short* ***I.P.C.***) and Section 138

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of the Negotiable Instruments Act, 1881 (*in short* ***N.I. Act***).

2. The prosecution case, as set out in the complaint petition, is that the complainant/opposite party No. 2 and the petitioner were acquainted with each other. So the petitioner had taken a loan of Rs. 35,00,000/- from the complainant/opposite party No. 2 and, in connection with the said transaction, had executed a bond/agreement undertaking to repay the amount. It has further alleged that the petitioner issued a cheque in favour of the complainant/opposite party No. 2 towards repayment of the aforesaid loan amount.

3. It is averred by the complainant/opposite party no. 2 that when the cheque was presented for encashment, it was returned unpaid by the bank with the note "*Kindly Contact Drawer/Drawee Bank & Present Again*". The complainant alleges that, despite the demand for repayment, the petitioner failed to discharge the alleged liability. Consequently, the complainant/opposite party No. 2 initiated proceedings against the petitioner, alleging commission of offences punishable under Section 406 of the I.P.C. and Section 138 of the N. I. Act.

4. On the basis of the complaint filed on 12.05.2016, the learned Judicial Magistrate, 1st Class, Patna, having recorded solemn affirmation of the complainant and

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statement of inquiry witnesses, passed the order dated 04.07.2016 in Complaint Case No. 1538(C) of 2016, taking cognizance of the offences under Section 406 of the I.P.C. and Section 138 of the N.I. Act, against the petitioner. Aggrieved by the said order, the petitioner approached this Court by filing the present application under Section 482 of the Cr.P.C., seeking quashing of the order taking cognizance.

5. Mr. Dhananjay Kumar, learned counsel appearing on behalf of the petitioner, submits that the impugned order is unsustainable in the eyes of law and that the complaint has been instituted on false and fabricated allegations. It is contended that the petitioner never borrowed the alleged amount from the complainant/opposite party No. 2 and that the bond/agreement relied upon in the complaint does not represent a genuine transaction between the parties.

6. It is vehemently argued that the petitioner disputes the genuineness of the signatures appearing on the disputed documents and the cheque in question. The petitioner has also raised objections regarding the alleged transaction, the presentation of the cheque and the subsequent proceedings initiated by the complainant/opposite party No. 2. According to the petitioner, the allegations made in the complaint do not

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disclose the essential ingredients of the offences alleged against her.

7. By way of a supplementary affidavit, the petitioner has brought on record a handwriting and fingerprint expert's report dated 19.12.2016, contending that the said report is relevant to the dispute concerning the signatures on the documents relied upon by the complainant/opposite party No. 2. On these grounds, it is prayed that the impugned order taking cognizance be set aside and the criminal proceeding be quashed.

8. Mr Uday Prasad, learned counsel appearing on behalf of opposite party No. 2, submits that the present application is devoid of merit and that the learned Court below has rightly taken cognizance of the offences alleged against the petitioner on the basis of the materials available on record. It is contended that the allegations made in the complaint disclose a *prima facie* case against the petitioner and that the correctness or otherwise of the allegations cannot be examined in detail at this stage since the petitioner has sought to challenge the criminal proceeding by raising disputed questions of fact relating to the alleged transaction and the documents in question. Such disputed issues require proper consideration by the competent Court and cannot be conclusively determined in

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proceedings under Section 482 of the Cr.P.C. Learned counsel accordingly submits that no exceptional circumstance has been made out warranting interference with the impugned order and prays that the present application be dismissed.

9. Mr. Sanjay Kumar Pandey, learned Additional Public Prosecutor for the State, submits that the impugned order has been passed by the learned Trial Court upon consideration of the materials available on record. It is contended that the allegations made in the complaint relate to an alleged loan transaction, execution of a bond/agreement and dishonour of a cheque, and that the veracity of the allegations and the defence raised by the petitioner involve disputed questions of fact which cannot be conclusively determined at this stage and as such the inherent jurisdiction of this Court under Section 482 of the Cr.P.C. is to be exercised sparingly and only where interference is necessary to prevent abuse of the process of the Court or to secure the ends of justice. He, therefore, submits that the matter may be considered in accordance with law and that appropriate orders may be passed after examining the allegations and the materials available on record.

10. Heard rival submissions advanced on behalf of the respective parties and perused the documents placed on

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record.

11. The issues which crop up for consideration are :

(i) Whether the cheque in question has been duly presented as required under Section 72 of the N.I. Act ?

(ii) Whether all the ingredients of the offence under Section 138 of the N. I. Act are made out or not ?

(iii) Whether the cheque in question was issued for valuable consideration, which is a *sine qua non,* for the offences under Section 138 of the N. I. Act ?

12. The issues framed hereinabove assume significance in view of the facts of the case and these are germane to the issues raised in the application in order to properly adjudicate the issue raised therein.

13. Section 138 of the N.I. Act stipulates that :-

> *"**138. Dishonour of cheque for insufficiency, etc., of funds in the account-** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended or two years], or with fine which may extend to twice the amount of the cheque, or with both:*

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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 (reduced to three months w.e.f. 01.04.2012 by RBI notification) 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, make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; 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."

14. In the case of ***Gimpex Private Limited Vs. Manoj Goel***, reported in ***(2022) 11 SCC 705,*** the Hon'ble Supreme Court has laid down the ingredients of the offence under Section 138 of the N. I. Act as follows:-

"A. Drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account.

B. The cheque being drawn for discharge in whole/part any debt or other liability;

C. The cheque has been presented to the bank within a period of six months (now three months) from the date on

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which it is drawn or within the period of its validity whichever is earlier;

D. Returning of the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque;

E. Giving of notice in writing to the drawer of the cheque within 30 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount;

F. Failure of the drawer to make payment to the payee or the holder in due course of the cheque of the amount covered by the cheque within 15 days of the receipt of the notice."

All these factors cumulatively constitute an offence under Section 138 of the N.I. Act. Thus, the burden of proof is upon the complainant to prove all the above ingredients against the accused beyond reasonable doubt to prove the charges against him.

15. Section 139 of the N.I. Act stipulates that:-

*"**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."*

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It is amply clear from the above provisions that the presumption under Section 139 of the N.I. Act is a rebuttable presumption and the accused issuing the cheque is at liberty to prove to the contrary.

16. Under Section 139 of the N. I. Act, there is legal presumption that the cheque was issued for discharging an antecedent liability and that presumption can be rebutted only by the person who drew the cheque. The presumption is obviously in favour of the holder of the cheque and is only for casting the burden of proof as to who should advance evidence in a case. It is open to any of the accused to adduce evidence to rebut the said presumption. So the burden of proof to rebut the presumption is on the accused and the evidence available on record will have to be appreciated by bearing in mind this fact regarding burden of proof.

17. Section 139 of the N. I. Act does not draw a distinction regarding the stage at which the presumption has to be drawn. It simply states that unless the contrary is proved, it shall be presumed that the holder of the cheque received the same for discharge of a debt or other legal liability.

18. The Hon'ble Apex Court in catena of judgments including ***Kumar Exports Vs. Sharma Carpets***, reported in

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(2009) 2 SCC 513; ***Rangappa Vs. Sri Mohan***, reported in ***(2010) 11 SCC 441***; and ***Basalingappa Vs. Mudibasappa***, reported in, ***(2019) 5 SCC 418***, has expounded the scope of Section 139 read with Section 138 of the N. I. Act.

19. From an understanding of principles laid down in the aforesaid judgments, it is borne out that once the complainant proves that the cheque was drawn/issued by the accused, the mandatory rebuttable presumption under Section 139 of the N.I. Act gets activated. As soon as the presumption is raised, the onus shifts upon the accused to rebut the presumption on the standard of preponderance of probabilities. The accused can discharge his/her onus by raising a probable defence where the existence of debt/liability can be contested. This can be done either by leading defence evidence or by specifying lacunae in the complainant's case. It may comprise of direct or circumstantial evidence.

20. Once the accused discharges the onus of rebutting the presumption under Section 139 of the N. I. Act, it is incumbent upon the complainant/opposite party No. 2 to prove the existence of debt/ other liability as a matter of fact without the support of the presumptive device under Section 139 of the N. I. Act. Thus, the complainant has to discharge the

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burden of proving its case beyond reasonable doubts with or without the aid of section 139, as the case may be.

21. Then, Section 118 of the N. I. Act also gains importance at this stage which needs consideration:-

> *"**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;*
>
> *(b) **as to date.**- that every negotiable instrument bearing a date was made or drawn on such date;*
>
> *(c) **as to time of acceptance.**- that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;*
>
> *(d) **as to time of transfer.**- that every transfer of a negotiable instrument was made before its maturity;*
>
> *(e) **as to order of indorsements.**- that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;*
>
> *(f) **as to stamp.**- that a lost promissory note, bill of exchange or cheque was duly stamped;*
>
> *(g) **that holder is a holder in due course.**- that the holder of a negotiable instrument is a holder in due course:*
>
> *Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."*

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22. In ***Bharat Barrel and Drum Mfg. Co. Vs. Aminchand Pyarelal***, reported in ***(1999) 3 SCC 35***, while interpreting Section 118(a) of the N. I. Act, the Hon'ble Apex Court opined upon consideration of various judgments as noted herein above, the position of law which emerges is that once execution of a promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is a rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defense.

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 either be 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.

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In case, where the defendant fails to discharge the initial onus to prove 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 the 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.

23. In the case of ***K. Prakashan Vs. P. K. Surenderan***, reported in ***(2008) 1 SCC 258***, the Hon'ble Apex court observed that :-

> *"The Act raises two presumptions:*
>
> *firstly, in regard to the passing of consideration as contained in Section 118(a) and secondly, a presumption that the holder of cheque receiving the same of the nature (referred to Section 139 discharged in whole on in part in any debt or any liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature. Having regard to the definition of terms proved and disproved as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-a-vis and accused, it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.*
>
> *It is further more not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is the only mere preponderance of probabilities."*

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24. Thus, it is a settled law that presumptions under Section 118 (a) and Section 139 of of the N. I. Act are rebuttable presumption. The burden of lies on the accused. The standard of proof required for rebutting the presumption is not as strict as is required to establish a criminal liability and would get discharged on the basis of preponderance of probabilities.

The rebuttle does not have to be conclusively established rather such evidence in support of evidence needs to be adduced before the Court that the Court either believes the defence to exists or considers its existence to be reasonably probable.

The presumption can also be rebutted without support of any direct evidence from the accused but from the case set out by the complainant, *i.e.*, from the averments made in the complaint, the case set out in the statutory notice and the evidence adduced by the complainant during trial.

25. Section 72 of the N.I. Act, at this juncture also assures significance and as such, is quoted hereinbelow:-

> *"**72. Presentment of cheque to charge drawer.**- [Subject to the provisions of section 84,] a cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer."*

26. Section 72 of the N. I. Act provides that a

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cheque must, in order to charge the drawer (accused herein), be presented at the bank upon which it is drawn (Bank of accused) before the relation between the drawer and his banker has been altered to the prejudice to the drawer. Accordingly, by virtue of this provision, in order to bind the drawer, the cheque must be presented to the banker of the drawer within the prescribed time.

27. Now coming to the case at hand, where perusal of the complaint petition as well as documents placed on record, allows certain vital facts comes to the fore, which requires consideration:-

(i) The petitioner (accused) took Rs. 35,00,000/- friendly loan from the complainant/opposite party No. 2 for which a bond was duly executed on a stamp paper on 18.11.2008.

(ii) This bond paper was in the name of petitioner (accused) wherein the petitioner as well as the complainant/opposite party No. 2 and his witnesses have also duly signed and given their thumb impressions.

(iii) This bond executed between the parties besides averments made in the complaint application shows friendly loan of Rs. 35,00,000/- extended to the petitioner by the complainant/opposite party No. 2 in between 20.01.2008 to 18.11.2008.

(iv) While executing bond paper, the petitioner (accused) undertook to repay the loan amount within a

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period of six years.

(v) On 31.03.2016, the petitioner issued a Cheque bearing No. 103947 for a sum of Rs. 35,00,000/- in favour of the complainant/opposite party No. 2, drawn on Central Bank of India, Chitkohra Branch, Patna.

(vi) Which was presented by the complainant on 31.03.2016 with his banker I.C.I.C.I Bank, Patna.

(vii) on 05.04.2016, the complainant/opposite party no. 2 received a memo from the bank that the cheque has been been returned with a note "*Kindly Contact Drawer/Drawee Bank & Present Again*".

(viii) Thereafter again on 16.04.2016, the complainant/opposite party No. 2 presented the cheque, which again returned with the bank memo dated 19.04.2016 with a note "*Kindly Contact Drawer/Drawee Bank & Present Again*".

(ix) This information was given to him by the Bank on 21.04.2016, whereafter by issuing a legal-cum-demand notice dated 23.04.2016, the complainant asked the petitioner (accused) to repay the amount of the cheque which could not be honoured by the Bank.

28. These aforesaid facts are discernible from perusal of the averments made in the complaint case, the cheque dated 31.03.2016, the Bank memos dated 06.04.2016 & 19.04.2016 and the legal notice dated 23.04.2016, besides the bond dated 18.11.2008 executed between the parties.

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29. In her defence, the petitioner (accused) has brought on record vide Annexure – 2, an information given to the S.H.O. of Beur Police Station, Patna on 09.09.2010 of missing of some leaves of cheque bearing Nos. 502, 471 and 478 of Canara Bank and cheque No. 1271473196 of Central Bank.

30. On behalf of the petitioner, it has vehemently been urged that no cheque was ever issued rather it was a misplaced cheque which has been used by the complainant/opposite party No. 2 to implicate her. It has further been strongly pressed that she had never issued any cheque nor is there her sign on the cheque so presented by the complainant before the Bank and at last it has been argued that the cheque has been returned with a note " *Kindly Contact Drawer/Drawee Bank & Present Again",* which does not attract ingredients of Section 138 of the N.I. Act because it does not fall within the two categories of Section 138 *(supra)* .

31. Thus since it does not satisfy the ingredients of Section 138 of the N.I. Act, the Court could not take cognizance of the offence as mandated under Section 142 of the N.I. Act along with this, it has also been strongly urged that the mandatory compliance of Section 142 of the N.I. Act with

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respect to limitation of time has not been complied with in the case it hand. Hence, the order taking cognizance is bad and the entire prosecution arising therefrom is equally bad in law.

32. In this backdrop, the judgment of the Hon'ble Supreme Court delivered in the case of ***Laxmi Dyechem Vs. State of Gujarat and Anr.***, reported in ***(2012) 13 SCC 375***, assumes significance, where it has been held :-

> *"16. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in Magma case that the expression "amount of money... is insufficient" appearing in Section 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act:"*

33. In ***Modi Cements Ltd. Vs. Kuchi Kumar Nandi***, reported in ***(1998) 3 SCC 249***, a similar question has arisen for consideration of the Hon'ble Supreme Court. The question was whether dishonour of a cheque on the ground that Drawer had stopped payment was a dishonour punishable under

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Section 138 of the N. I. Act. Over ruling the earlier two decisions of the Hon'ble Supreme Court rendered in the case of ***Electronics Trade & Technology Development Corporation Ltd. Vs. Indian Technologists and Engineers (Electronics) (P) Ltd.,*** reported in ***(1996) 2 SCC 739*** and ***K. K. Sidharthan Vs. T.P. Praveena Chandran***, reported in ***(1996) 6 SCC 369 ,*** the Hon'ble Supreme Court has held in para 18 and 20 as follows:-

> *"18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in Electronics Trade & Technology Development Corpn. Ltd.*
>
> *'Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly, in our opinion, do not also lay down the law correctly.*
>
> *20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to*

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share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above.

(emphasis in original)"

34. In the case of ***Goaplast (P) Ltd. Vs. Chico Ursula D'Souza***, reported in ***(2003) 3 SCC 232***, where the Hon'ble Supreme Court has held that "stop-payment instructions" and consequent dishonour of a post-dated cheque attracts the provision of Section 138 of the N.I. Act. The Hon'ble Supreme Court observed that:

"Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. The said provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque.

In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person a who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the

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> *Act leads to the conclusion that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations be undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong."*

35. A three-Judge Bench of the Hon'ble Supreme Court in ***Rangappa Vs. Sri Mohan***, reported in ***(2010) 11 SCC 441***, has approved the above decision and held that failure of the drawer of the cheque to put up a probable defence for rebutting the presumption that arises under Section 139 of the N.I. Act would justify conviction even when the appellant drawer may have alleged that the cheque in question had been lost and was being misused by the complainant.

36. Thus examining and analysing the case at hand, in the backdrop of the authoritative judicial pronouncement, it can safely be said that in terms of Section 72 of the N.I. Act, cheque has been presented twice before the Bank in order to charge the drawer (petitioner-accused), be presented at the Bank upon which it was drawn. Accordingly, by virtue of this provision (*supra*) in order to bind the drawer, the cheque must be presented to the banker of the drawer within the prescribed time. Here in the present case, the cheque has duly been

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presented within the stipulated time as mandated under Section 72 of the N.I. Act.

37. The Bank memo dated 19.04.2016 was received by the complainant/opposite party No. 2 on 21.04.2016. Thereafter, on 23.04.2016 a legal-cum-demand notice was sent to the petitioner and a complaint case was subsequently filed on 12.05.2016.

38. In view of the presumption under Section 139 of the N.I. Act, which is obviously in favour of the holder of the cheque is only for the purposes of imposing the burden of proof. However, this presumption is rebuttable and it is open to the petitioner (accused herein) to produce evidence to rebut the said presumption. Moreover, presumption under Section 118 of the N.I. Act is also rebuttable presumption as once execution of a promissory note is admitted, the presumption under Section 118 of the N.I. Act would arises that it is supported by a consideration. However, the petitioner (accused) can prove the non-existence of consideration by raising the probable defence and if the accused is proved to have discharge the initial onus of proof that the existence of consideration was doubtful or the same was illegal then in that case onus would get shifted to the complainant who will have to now prove his case of *bona fide*

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claim on the basis Negotiable Instruments Act.

39. It is settled proposition of law that the presumption under both Sections 118 and 139 of the N.I. Act are rebuttable and onus of rebutting lies on the accused. But in the case at hand, the petitioner-accused has miserably failed to rebut the above presumption as raised in terms of the provision contained in Sections 118(a) and 139 of the N.I. Act.

40. The defence of the petitioner claimed on the strength of Annexure – 2 is not of any help to her on account of the fact that in the aforesaid information given to the police, the cheque number of the cheque presented by the complainant/opposite party No. 2 is not mentioned. This very fact also renders the defence of the petitioner very weak one which appears to be untenable even on facts of the case.

41. In view of the binding judicial precedent laid down by the Hon'ble Supreme Court in the case of ***Laxmi Dyechem*** (*supra*) that Section 138 of the N.I. Act describes two contingencies and those contingencies describe therein is *genus* out of which various species with respect to dishonour for reasons such as account closed, payment stop, referred to the drawer, signature does not matched, image not found, account becoming dormant, etc. etc. are only various sorts of species

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springing out from the *genus* which is in the form of two contingencies as enumerated in Section 138 of the N.I. Act.

42. In the case at hand, cheques were presented twice and those returned with the bank memo that "*Kindly Contact Drawer/Drawee Bank & Present Again*" it may be for the reasons that: account may have been closed, account may have been inoperative, account may have been become dormant etc. and all these fall within the categories of species of the *genus* as mentioned under Section 138 of the N. I. Act.

43. The petitioner has also failed to discharge her onus in rebutting the presumption drawn against her in view of the provision of Section 118 of the N.I. Act by issuing the cheque in question in favour of the complainant/opposite party No. 2.

The above finding of this Court get buttressed and substantiated from the letter dated 18.06.2016 issued by the Central Bank of India to the learned Judicial Magistrate, 1st Class, Patna, which was called for in course of inquiry under Section 202 of the Cr.P.C. In para 2 of this letter, it has categorically been stated that Account No. 1271473196 of Smt. Sanghmitra Singh is inoperative and balance in the account was Rs. 8,905/- (Eight thousand nine hundred & five only). This

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also shows that on account of insufficiency of fund, in other way, the cheque has been dishonoured since the account was inoperative and in dormant state, the cheque was returned to the complainant with the note that "*Kindly Contact Drawer/Drawee Bank & Present Again*". Had the account of the petitioner (accused herein) been active, then the aforesaid cheque could have definitely been dishonoured on account of insufficiency of fund.

44. Though the petitioner has come up with the defence by filing supplementary affidavit bringing on record a report of a private handwriting expert for disputing the signature on bond paper executed between the parties and on the cheque, but this report of the private handwriting expert is of no consequence because it has been obtained by the petitioner in her support without there being any direction from the Court to get it matched.

45. In the conspectus of factual and legal background, it can safely be concluded that the cheque in question was returned dishonoured on the ground of "*Kindly Contact Drawer/Drawee Bank & Present Again*" as such it does attract a penal liability under Section 138 of the N. I. Act.

46. With respect to the defence of the petitioner that

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no offence under Section 406 of the I.P.C. is made out, it needs to be examined in the factual profile discussed hereinabove.

47. The offence of criminal breach of trust as defined under Section 405 of the I.P.C. lays down the following ingredients:

> *"i. The accused was entrusted with property, or entrusted with dominion over property;*
>
> *ii. The accused had dishonestly misappropriated or converted to their own use that property, or dishonestly used or disposed of that property or wilfully suffers any other person to do so; and*
>
> *iii. Such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract."*

48. As can be inferred, entrustment constitutes the foundational ingredient of the offence of criminal breach of trust. The Hon'ble Supreme Court in ***State of Gujarat Vs. Jaswantlal Nathalal***, reported in ***1967 SCC OnLine SC 58*** discussed the meaning of the term entrustment. It was as follows:

> *"8.... The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an*

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entrustment…..”

49. What emerges from the aforesaid exposition is that the ownership in the property continues to remain vested in the person entrusting it. It is the possession alone which is parted with for a specific purpose. The person receiving such property is expected to deal with it in the manner directed by the entrustor and not otherwise. A transaction of sale, on the other hand, stands on an entirely different footing, inasmuch as the ownership in the goods itself stands transferred from the seller to the purchaser.

50. In the present case, the allegation made in the complaint indisputably indicates that money was given in cash as a loan for which bond was executed with the accused-petitioner, wherein the accused has promised to repay the same within a period of six years thereafter the accused-petitioner failed to repay the loan amount. In the entire complaint petition no averments has been made with respect to any kind of “*entrustment*” with respect to any of the property either movable and immovable or in cash. On the contrary, it has been stated categorically that on account of having friendly relation with the accused, the complainant/opposite party No. 2 has loaned the aforesaid amount of Rs. 35,00,000/- in order to enable the petitioner to run and develop her business.

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51. From the very averments made in the complaint petition as well as in the notice and the bond duly executed between the parties, it becomes clear that it was a kind of friendly loan given to the accused-petitioner for running, developing and expanding her business with an undertaking that the accused would refund or repay the loan amount within a period of six years. Further, with respect to the aforesaid repayment of the aforesaid loan amount, a cheque was issued which was dishonoured and for which prosecution has been initiated under Section 138 of the N.I. Act, which is a specific crime, though pre-supposes civil dispute but it is, in fact, a criminal liability entailing criminal prosecution.

52. In the absence of any kind of "*entrustment*" of the aforesaid amount for which specific case under Section 138 of the N.I. Act has already been initiated, it can never be said that any ingredient of the offence as stipulated under Section 406 of the I.P.C. is made out in the case at hand.

53. In view of the factual and legal discussion and having appreciated the same, juxtaposing the facts of the present case with the legal and factual background of the case at hand, this Court comes to a conclusive finding that the order dated 04.07.2016 passed by the learned Judicial Magistrate, 1st Class,

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Patna, taking cognizance of offence under Section 138 of the N.I. Act is strictly in consonance with the legal provision and settled judicial pronouncement in this regard and as such it does not need any kind of interference and hence, it is affirmed. But the order dated 04.07.2016, taking cognizance with respect to the offence under Section 406 of the I.P.C. being untenable in the eyes of law, is set aside.

54. Thus, the application is allowed in part so far as it relates to the quashing of the order dated 04.07.2016, taking cognizance of the offence under Section 406 of the I.P.C., passed by the learned Judicial Magistrate, 1st Class, Patna in Complaint Case No. 1538 (C) of 2016, but with respect to the order dated 04.07.2016, taking cognizance of the offence under Section 138 of the N.I. Act, no interference is warranted and it is, accordingly, affirmed with a direction to the learned Trial Court to proceed with the trial within a time frame as mandated by Section 143 of the Act (*supra*) and the judicial direction of the Hon'ble Supreme Court passed in the case of ***Indian Bank Association and Others Vs. Union of India and Others***, reported in ***(2014) 5 SCC 590.***

55. Accordingly, this application is partly allowed.

56. There shall be no order as to cost.

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57. All interlocutory application(s), if any, shall also stand disposed of.

(Rana Vikram Singh, J)

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