

## Surender Kumar vs Ms. Renu Bala on 21 August, 2019

IN THE COURT OF Dr. KAMINI LAU: ADDL. SESSIONS  
JUDGE-II (CENTRAL): TIS HAZARI COURTS: DELHI

Crl. Appeal No. 64/2019  
CNR No. DLCT01-012524/2018

Surender Kumar  
Son of Sh. Nathu Ram  
R/o H. No. 308-A, Gali No.5,  
Langde Khan, Kishan Ganj,  
Delhi - 110007

Versus

Ms. Renu Bala  
W/o Sh. Raj Kumar  
R/o H. No. 48/100, Basant Nagar,  
Kishan Ganj, Sarai Rohilla,  
Delhi - 110007

Date of Institution:	14.02.2019
Judgment Reserved on:	21.08.2019
Judgment Pronounced on:	21.08.2019

### JUDGMENT:

(Oral) (1) This Criminal Appeal impugns the judgment dated 22.12.2018 and order on sentence 15.01.2019 passed by the Ld. Metropolitan Magistrate, NI Act-138, Central District, Tis Hazari Court, Delhi in case bearing C.C. No. 523772/16 titled as "Renu Bala Vs. Surender Kumar" thereby holding the appellant Surender Kumar Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 1 of 16 guilty of the offence under Section 138 Negotiable Instrument Act and sentenced the appellant to undergo Simple Imprisonment for a period of One Year and to pay compensation to the tune of Rs.2,20,000/- to the complainant / respondent within 30 days and in default of payment of compensation, the convict / appellant was directed to undergo further Simple Imprisonment for a period of Six Months for the offence under Section 138 of Negotiable Instrument Act.

(2) The brief facts of the case are that a complaint under Section 138 of Negotiable Instrument Act was filed by the complainant/ respondent Ms. Renu Bala against the appellant Surender Kumar on the ground that a friendly loan to the tune of Rs.1,50,000/- was given to the appellant on the promise that he would repay the same before February 2013. However, the appellant did not repay the loan amount by the end of February 2013 despite repeated demands made by the respondents/ complainant and it was only in the month of July 2013 that the appellant issued a cheque bearing

No. 238903 dated 10.07.2013 drawn in Punjab National Bank, Kishan Ganj, Delhi for a sum of Rs.1,50,000/— against the liabilities of the loan taken. The complainant/ respondent presented the said cheque before her Banker i.e. Allahabad Bank, Kishan Ganj, Delhi on 19.08.2013 but the said cheque was dishonoured with the remark '88—Other Reasons' with the 'Return Memo Report' dated 20.08.2013. The appellant then instructed the respondent to again present the cheque pursuant to which the respondent presented the cheque on 19.09.2013 but the cheque again got dishonoured with the remark '88—Other Reasons' with the 'Return Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 2 of 16 Memo Report' dated 20.09.2013. The complainant/ respondent then issued a legal notice dated 27.09.2013 to the appellant through her Advocate through Registered Post and Speed Post and after the expiry of statutory period of 15 days of the legal notice, the complaint under Section 138 Negotiable Instrument Act was filed before the Ld. Trial Court.

(3) Notice of accusation was framed against the appellant by the Ld. Trial court on 21.01.2015 to which he pleaded not guilty and claimed trial. Further, in his defence the appellant stated that the cheque in question was issued by him to the complainant and the said cheque bears his signatures but none of the other particulars were filled by him. The appellant has also admitted having received the legal demand notice but did not reply to it. According to him, the cheque was given on the assurance of the complainant that she will advance him a loan of Rs.20,000/— but she did not give any amount and when he demanded the cheque back, the complainant stated that she had thrown away the cheque.

(4) In order to prove her case, the complainant / respondent Ms. Renu Bala has examined herself as CW1 and has placed her reliance upon the cheque bearing No. 238903 for Rs.1,50,000/— which is Ex.CW1/1; cheque return memo dated 20.09.2013 which is Ex.CW1/2; cheque return memo dated 20.08.2013 which is Ex.CW1/3; legal notice dated 27.09.2013 which is Ex.CW1/4 and the speed post receipts which are Ex.CW1/5 & 6.

Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 3 of 16 (5) Thereafter statement of the appellant was recorded under Section 313 Cr.P.C. wherein the appellant denied having taken any loan from the complainant. He stated that the cheque was taken by the complainant from his wife since the complainant was running a Committee and therefore the complainant had taken a cheque from his wife in relation to the said Committee. According to the appellant, he had already informed the complainant that he does not have any operational account and that the cheque cannot be honoured. He stated that the cheque was given as security for Committee. He has denied having received any legal demand notice but the address mentioned in the legal notice is partly correct since it is not Langde Khan but Khade Khan. In his defence the appellant has examined himself as DW1 and his wife Ms. Madhu as DW2.

(6) After considering the testimonies of the various witnesses and the material on record, the Ld. Trial Court vide judgment dated 22.12.2018 held the appellant Surender Kumar guilty of the offence under Section 138 of Negotiable Instruments Act and sentenced him vide order on sentence dated 15.01.2019. Being aggrieved by the same, the appellant has preferred the present appeal on the following grounds:— That the Ld. Trial Court has failed to appreciate that the respondent has not

given the loan to the appellant and she has not given any date on which she granted the alleged loan to the appellant nor filed any document to show that she had granted the alleged loan to the appellant.

Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 4 of 16 That the Ld. Trial Court has failed to appreciate that the respondent is a housewife and has no income and sufficient amount to grant such type of loan to the appellant or to anyone.

That the Ld. Trial Court has failed to appreciate that the cheque in question was not sent to the FSL for verification of its writing except for the signatures of the appellant over the same.

That the Ld. Trial court has failed to appreciate that the respondent has admitted her signatures on the receipt of Rs.45,000/□which is Ex.CW1/D□ in her cross□examination. That the Ld. Trial court has failed to appreciate that the respondent has herself admitted in her cross□examination that she did not see the factory of the appellant.

That the Ld. Trial Court has failed to appreciate that even the legal demand notice was not received by the appellant. It has been averred that the respondent had written her wrong address in the notice envelope and in the complaint under Section 138 of NI Act. It is further averred that the respondent did not know the address of the appellant and hence the question of loan given by her does not arise. That the Ld. Trial Court has failed to appreciate that the wife of the appellant who has been examined as DW2 has categorically stated that the cheque in question was given by her only for security purposes to the respondent and an Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 5 of 16 amount of Rs.45,000/□was paid to the respondent by her and only Rs.4,000/□remain to be paid to the respondent and in fact the respondent has admitted her signatures on the receipt of Rs.45,000/□

(7) Pursuant to the filing of the appeal, notice was issued to the respondent. The respondent has appeared before this court along with her counsel but not reply to the appeal has been filed. (8) Here, I may note that along with the appeal, an application under Section 389 Cr.P.C. was also filed by the appellant seeking suspension of sentence and grant of bail. Vide order dated 22.02.2019 the Ld. Predecessor of this Court directed suspension of sentence subject to the deposit of 50% of the total compensation i.e. Rs.1,10,000/□before the Ld. Trial Court with directions that the substantive sentence so imposed upon the appellant shall remain suspended upon such deposit. The appellant was admitted to bail on furnishing a personal bond for a sum of Rs.25,000/□with one surety of like amount before the Ld. Trial Court. However, the appellant had not deposited any amount and had surrendered before the Ld. Trial Court on 21.02.2019 and reported to be in Judicial Custody ever since. (9) Initially the appellant had engaged Sh. Yogesh Kashyap Advocate who had stopped appearing before the Court. The appellant then made a statement before this Court submitting that he is a poor person and requested for providing legal assistance at State Expenses pursuant to which Ms. Chitra Mal, Advocate was appointed as Amicus Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 6 of 16 Curiae for the appellant.

(10) While the case was being dealt with, the Court has observed that one counsel Sh. R.P. Vijay Advocate was closely watching the proceedings in the Court. On query from the Court, initially he was hesitant but thereafter he informed that he had been asked by the employer of the appellant to watch the proceedings. He has further informed that the appellant Surender Kumar was under employment as a guard with the person who had asked him to watch the proceedings. He did not disclose anything further. Sh. R.P. Vijay Advocate was granted an opportunity to file the written synopsis of arguments on behalf of the appellant by 4:00 PM, which has not been done. (11) I have considered the oral submissions made by Ms. Chitra Mal Advocate/ Amicus Curiae for the appellant. I have gone through the Trial Court Record and also considered the grounds raised in the appeal. At the very Outset I may observe that the complainant/ respondent Renu Bala has examined herself as her sole witness as CW1 before the Ld. Trial Court wherein she has proved the cheque bearing No. 238903 for Rs.1,50,000/ which is Ex.CW1/1; cheque return memo dated 20.09.2013 which is Ex.CW1/2; cheque return memo dated 20.08.2013 which is Ex.CW1/3; legal notice dated 27.09.2013 which is Ex.CW1/4 and the speed post receipts which are Ex.CW1/5 & 6. (12) Secondly, I may observe that time of framing of notice and recording the statement under Section 313 Cr.P.C. before the Ld. Trial Court, the appellant has admitted having issued the cheque in question and also admitted his signatures on the same. This being the Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 7 of 16 background, the issuance of cheque in question by the appellant is not disputed. In this regard, I may observe that in the Negotiable Instruments Act, there is a presumption in favour of holder. The provisions of Section 139 of N. I. Act, are as under: "..... 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....."

(13) Further, the provisions of Section 118 (a) of The Negotiable Instruments Act, 1881 provides as under:

Section 118. Presumption as to negotiable instruments. "Until the contrary is proved, the following presumption 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, endorsed, negotiated or transferred, was accepted, was endorsed, negotiated or transferred for consideration.

(14) In the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde reported in (2008) 4 SCC 54, the Hon'ble Supreme Court of India has observed and I quote as under:

".....32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different....."

Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 8 of 16

34. Furthermore, whereas prosecution must prove the guilty of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is 'preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies....."

(15) Also, in the case of Mallavarapu Kasivisweswara Rao Vs. Thadikonda Ramulu Firm reported in (2008) 7 SCC 655, the Hon'ble Supreme Court of India has 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....."

(16) Again, in the case of Bharat Barrel & Drum Mfg. Co. V. Amin Chand Payrelal reported in (1999) 3 SCC 35, it was observed by the Hon'ble Supreme Court had observed and I quote: "..... 12. Upon consideration of various judgments as noted herein above, 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.

Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 9 of 16 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 the 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 Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 10 of 16 case, shall act upon the plea that it did not exist....."

(17) Also, in the case of Rangappa Vs. Sri Mohan reported in (2010) 11 SCC 441 the Hon'ble Supreme Court while discussing above said provisions, judgments and other case law on the point, observed and I quote as under:

"..... 26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To the extent, the impugned observations in Krishna Janardhan Bhat may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 11 of 16 confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof.

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 doubt 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....."

(18) Hence, it is writ large that there is initial presumption of legally enforceable debt or liability against the appellant, but the same is rebuttable. The standard of proof for rebuttal is preponderance of probabilities. Accused can lead evidence in defence, even can rely on materials submitted by complainant and can rely upon circumstances also to show non-existence of consideration or it being improbable and need not adduce evidence of his/her/its own for the same. Therefore, in the light of the above, a valid presumption has been raised against the appellant which cannot be faulted. The appellant Surender Kumar has Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 12 of 16 not denied his signatures on the cheque Ex.CW1/1 and hence, there is a presumption under Section 118 and 139 of Negotiable Instruments Act in favour of the complainant/ respondent. Therefore, I hold that the cheque was issued towards legally enforceable liability. (19) Thirdly, the aspect of dishonour of cheque also stands established from the Return Memo Reports which are Ex.CW1/2 and Ex.CW1/3.

(20) Fourthly, in so far as the legal notice dated 27.09.2013 Ex.CW1/4 is concerned, at the time of framing of notice before the Ld. Trial Court, the appellant has admitted having received the legal demand notice but at the time of recording his statement under Section 313 Cr.P.C. he denied the same. The defence of the appellant is that he did not receive the legal demand notice and address mentioned in the said notice is partly incorrect since it is not Langde Khan but Khade Khan. In this regard, I may note that the Hon'ble Supreme Court in the case of C.C. Alavi Haji Vs. Palapetty Muhammad & Anr. reported in 2007 (6) SCC 555 the Hon'ble Apex Court has observed that in case, drawer of the cheque raises an objection that he never received the legal notice under Section 138 of NI Act, he can within 15 days of the receipt of summons make payment of the cheque amount and in case, he does not do so, he cannot complaint that there was no proper service of Legal Notice under Section 138 of NI Act. This being the background, the findings of the Ld. Trial Court cannot be faulted to the effect that the presumption of service of legal notice has arisen, if not Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 13 of 16 through the legal notice Ex.CW1/4 sent vide registered post, then through the issuance of summons by the Court.

(21) Fifthly, according to the appellant he had only signed the cheque and did not fill up the details on the same. In this regard, I may observe that mere allegation of issuance of Incomplete Negotiable Instrument does not create absolute defence in favour of the accused unless corroborative evidence exists to show that by threat or fraud, a cheque was taken. There is no law that a person drawing the cheque has to necessarily fill it up in his own handwriting. The appellant has not denied his signatures on the cheque and hence, he cannot escape his liability on the ground that the details on the same have not been filled in by him. The Ld. Trial Court has rightly held that when a blank cheque is signed and handed over, it means that the person signing it has given implied authority to the holder of the cheque, to fill up the blank which he has left and a person issuing a blank cheque is supposed to understand the consequences of doing so.

(22) Lastly, I note that the grounds raised in the present appeal, have also been raised before the Ld. Trial Court and the Ld. Trial Court has dealt with all the defences raised by the appellant. I may observe that the appellant has taken different defence at different stages. At the time of framing of notice, the appellant claimed that the cheque in question was issued to the complainant for taking

loan of Rs.20,000/□whereas at the time of recording his statement under Section 313 Cr.P.C. he claimed that the cheque was issued for committee. In so far as the document Mark CW1/D□ is concerned, the Ld. Trial Court has Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 14 of 16 rightly observed that it is only a copy of certain calculations and merely since the complainant has admitted her signatures on the same, it does not mean that the said documents has been proved. On the one hand the appellant claimed that he did not receive any amount from the respondents, whereas on the other hand his wife i.e. Ms. Madhu (DW2) claimed that she has already paid Rs.40,000/□to the complainant for the committee and only Rs.4,000/□remains to be paid. Contrary stands have been taken by the appellant Surender Kumar and the findings of the Ld. Trial Court to this effect cannot be faulted. (23) This being the background, I find no illegality in the impugned judgment dated 22.12.2018 which is hereby upheld. (24) In so far as the impugned order on sentence dated 15.01.2019 is concerned, I may observe that the Ld. Trial Court has already taken a lenient view against the appellant and sentenced him to undergo Simple Imprisonment for a period of One Year and to pay compensation to the tune of Rs.2,20,000/□to the complainant / respondent within 30 days and in default of payment of compensation, the convict / appellant was directed to undergo further Simple Imprisonment for a period of Six Months for the offence under Section 138 of Negotiable Instrument Act.

(25) I may note that till date no amount has been deposited by the appellant which is despite the indulgence granted by the Ld. Predecessor of this Court while suspending the sentence. This being the background, I hold that there is no illegality in the order on sentence dated 15.01.2019 which calls for no intervention.

Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 15 of 16 (26) The appeal is hereby Dismissed. Trial Court Record be sent back along with the copy of this judgment.

(27) The appellant is directed to undergo the remaining sentence as imposed by the Ld. Trial Court. One copy of the judgment is directed to be sent to the appellant Surender Kumar through the Superintendent Jail concerned. Digitally signed by (28) Appeal file be consigned to Record Room. KAMINI KAMINI LAU LAU Date:

2019.08.21 18:09:52 +0530 Announced in the open Court (Dr. KAMINI LAU) Dated: 21.08.2019 Addl. Sessions Judge - II (Central), Tis Hazari Courts, Delhi Surender Kumar Vs. Renu Bala, (Crl. Appeal No.64/2019), Judgment dated 21.08.2019 Page No. 16 of 16