**Present:**
Mr. Justice Md. Shohrowardi

Criminal Appeal No. 1144 of 2021
A.H. Ershadul Haque, Advocate
.....appellant
-Versus-
The State and another
...Respondents
Mr. Sudipta Arjun, Advocate with
Mr. Syed Fazla Elahi, Advocate
...For the appellant
Mr. Monirul Islam, D.A.G with
Ms. Anjuman Ara Begum, A.A.G with
Ms. Kazi Samsun Nahar, A.A.G with
Mr. Md. Shamim Khan, A.A.G
...For the State
Mr. S.M. Shahjahan, Senior Advocate with
Mr. Md. Jahangir Hossain, Advocate
...For respondent No. 2
Heard on 15.01.2023, 19.01.2023, 31.01.2023 and 02.02.2023
**Judgment delivered on 06.02.2023**

This appeal has been preferred under section 410 of the Code of Criminal Procedure, 1898 challenging the legality of the judgment and order of conviction and sentence dated 17.01.2021 passed by the Additional Metropolitan Sessions Judge, Sylhet in Sessions Case No. 2881 of 2013 arising out of C.R. Case No. 353 of 2010 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 1(one) year and also to pay a fine of Tk. 5,00.000.

Relevant facts for the disposal of the appeal are that the complainant filed the C.R. Case No. 353 of 2010 before the Chief Judicial Magistrate, First Court, Sylhet under Section 138 of the Negotiable Instruments Act, 1881 against the appellant alleging, inter alia, that the complainant deals with gold business at Sylhet and he is the proprietor of “Ruhi Jewellers”. The complainant and appellant had a good relationship and due to such relationship, he used to come to the shop of the complainant. All on a sudden, due to a personal problem he took Tk. 5,00,000/- (five lac) from the complainant on condition to

return the same within 1 month. After elapsing of time, the complainant went to the house of the appellant to get back the money and accordingly the petitioner issued a cheque bearing No. 10/Kha-1202194 in favour of the complainant on 11.03.2010. Thereafter the complainant deposited the cheque in the account of his business concern "Ruhi Jewellers" which was first dishonoured on 11.03.2010 due to insufficiency of the fund. Thereafter on request of the appellant, he deposited the cheque for encashment but on 15.03.2010 it was dishonoured for the same reason. Then the appellant again requested to place the cheque after 10 days and accordingly complainant on 25.03.2010 deposited the cheque for encashment and ultimately the cheque was dishonoured due to insufficient fund. Thereafter, the complainant on 01.04.2010 sent a legal notice to the appellant by registered post to pay the cheque amount within the statutory period which was received on 04.04.2010 but he did not pay the money. By such dishonour of cheque, the appellant has committed an offence under Section 138 of the Negotiable Instrument Act, 1881.

At the time of filing the complaint petition, the complainant was examined under Section 200 of the Code of Criminal Procedure, 1898 and the learned Magistrate was pleased to take cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881 and issued summons against the appellant. Thereafter, the appellant voluntarily surrendered before the Court below and the case was transferred to the Court of Metropolitan Sessions Judge, Sylhet for trial and the case was registered as Sessions Case No. 2881 of 2013. Subsequently, the case was sent to the Additional Metropolitan Sessions Judge, Sylhet for trial who framed the charge against the appellant under Section 138 of the Negotiable Instruments Act, 1881.

During the trial, the complainant examined himself as P.W. 1. After concluding the trial, the trial Court by judgment and order dated 22.01.2018 convicted the appellant and sentenced him to pay a fine of Tk. 5000 (five thousand) and that the complainant would get Tk.

5,00,000 (five lac) and the fine amount of Tk. 5000 (five thousand) will be deposited to the government treasury against which the appellant preferred Criminal Revision No. 960 of 2018 before the High Court Division and obtained Rule. After hearing, a Division Bench of this Division by judgment and order dated 31.10.2019 set aside the judgment and order of conviction passed by the trial Court and sent the case on remand with a direction in the following terms;

> "(1) This Criminal Revision is allowed. The judgment and order dated 22.01.2018 passed by the learned Metropolitan Additional Sessions Judge, Sylhet in Sessions Case No. 2881 of 2013 is hereby set aside and the case is sent back for re-trial
>
> (2) Upon receipt of the record, the trial court shall allow the prosecution side including the complainant, and also the accused person, reasonable opportunity to present their respective cases. If the accused (opposite party) appears, he may also be allowed an opportunity to cross examine the P.W.1 and to adduce defence evidence, if any.
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> (3) The trial Court shall, for the purpose of the re-trial, inform the learned Advocate earlier engaged by the accused opposite party, if he is in practice.
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> (4)The entire process of the retrial should be concluded expeditiously, preferably within 4(four) months from the date of receipt of the copy of this judgment."

Thereafter, the appellant surrendered before the trial Court and he was examined under Section 342 of the Code of Criminal Procedure, 1898 and the appellant examined himself as D.W. 1. After concluding the trial, the trial Court by impugned judgment and order convicted the appellant and sentenced him as stated above.

P.W. 1 Md. Manik Khan stated that he deals with the gold business and owner of the 'Ruhi Jewellers'. The appellant is previously

known to him and 1 year ago he took a loan of Tk. 5,00,000 from him. Subsequently, he issued a cheque on 11.03.2010 for payment of the loan of Tk. 5,00,000. He deposited the cheque on 15.03.2010 for encashment in the account of Ruhi Jewellers maintained with 'Uttara Bank Limited, Zindabazar Branch, Sylhet' which was dishonoured on 25.03.2010 for insufficient of fund. On 01.04.2010, the complainant served a legal notice upon the appellant to pay the cheque amount within 30 days which was received by the appellant on 04.04.2010 but he did not pay the cheque amount. Consequently, he filed a complaint petition on 13.05.2010 following the law. He proved the complaint petition as exhibit-1 and his signatures as exhibit-1 series. He proved the dishonoured cheque as exhibit 2 and the dishonoured slip as exhibit 3, the legal notice as exhibit 4 and the postal receipt as exhibit 5. During cross-examination, P.W. 1 affirmed that he is not dealing with any loan business and he also filed other cases for dishonouring cheques in different courts. He also stated that the appellant took a loan for the construction of his building which has not been mentioned in the complaint petition. In reply to a question during cross-examination P.W. 1 affirmed that he did not mention the date of disbursement of the loan in favour of the appellant and no written agreement was executed between the appellant and the complainant regarding the loan taken by the appellant. He denied the suggestion that there is no reason for taking a loan from him. He affirmed that Shaikh Ahmad of Jamalpur is known to him. He denied the suggestion that the said Saiek Ahmad is not his friend. He also affirmed that he does not know whether the said Saiek Ahmad is a friend of the appellant. He also denied the suggestion that he used to go along with Saiek Ahmad to the chamber of the appellant. He stated that he is not aware that Shaiek Ahmad is the clerk of the appellant. He denied the suggestion that in connivance with the clerk Saiek Ahmad, he fraudulently obtained the cheque from the Court chamber of the appellant. He denied the suggestion that in connivance with Shaiek Ahmed, he put the date, amount and name of the drawee in

the cheque. He denied the suggestion that the appellant did not take any loan from him.

D.W. 1 A H Ershadul Haque stated that he is a regular practitioner and he was also the AGP from 1996-2001 and he was GP from 2001 to 2009 of Sylhet Judge Court. The complainant is neither his friend nor his relation. He did not issue any cheque in favour of the complainant and except the signature of the cheque, he did not write anything on the cheque. He was also not a customer of the complainant. He constructed his house in Arambag after taking a loan from DBH. He is also conducting cases as an advocate of the Bank in Artha Rin Adalat. He used to withdraw money from the bank to purchase the court fees through the clerk and kept the signed cheque in his chamber and the clerk used to write the amount in the signed cheque. On 03.02.2010 he signed in the applications for addition of party in Title Suit No. 20 of 2007 in the Court of Subordinate Judge, Second Court, Sylhet and his clerk Shaiek Ahmed signed in the said application as an attorney. He also submitted the attested copy of vokalatnama and the application for the addition of a party. Shaik Ahmad along with the complainant used to come to his chamber and somehow the complainant managed the cheque through his clerk Sadhan and Shaiek Ahmed. He also filed a complaint against Sadhan on 18.10.2015 to the Bar Association, Sylhet. During cross-examination, D.W. 1 affirmed that he signed in the cheque but he denied the suggestion that he issued the cheque for payment of the debt.

The learned Advocate Mr Sudipta Arjun appearing on behalf of the appellant submits that the complainant failed to prove that the appellant issued the cheque for payment of the consideration and no statement has been made in the complaint petition as regards the date of payment of the loan by the appellant and during trial of the case, the complainant failed to adduce any evidence to prove that the appellant issued the cheque in favour of the complainant to pay the debt and failed to make out a case under Section 138 of the Negotiable Instruments Act, 1881 and therefore, he prayed for acquittal of the appellant from the

charge levelled against him by setting aside the impugned judgment and order passed by the trial Court. He also relied on the decision made in the case of Kamalas vs Vidyadharan MJ reported in 5 SCC 264 and Md. Abul Kaher Shahin vs Emran Rashid reported in 25 BLC (AD) 115.

The learned Senior Advocate Mr S.M. Shahjahan appearing along with learned Advocate Mr Md. Jahangir Hossain on behalf of respondent No. 2 submits that there is a presumption under Section 118(a) of the Negotiable Instruments Act, 1881 that drawer of the cheque issued the cheque in favour of the complainant for consideration and admittedly the appellant signed the cheque which proved that the appellant issued the cheque in favour of the complainant for payment of the debt. Therefore, he committed an offence under Section 138 of the Negotiable Instruments Act, 1881 and the appeal is liable to be dismissed. He also cited a decision made in the case of Syed Anowar Towhid vs Tayobbi vs Syed Zahid Ali and another reported in 13 BLC(2008) 428.

The issue involves in the instant appeal whether the complainant proved ingredients of Section 138 of the Negotiable Instruments Act, 1881 and whether the appellant rebutted the presumption under Section 118(a) of the Negotiable Instruments Act, 1881.

In the instant case, there is no denial of the fact that the appellant is a practicing Advocate and former GP of the Sylhet District. The appellant did not deny the fact that he signed the cheque. No argument has been made on behalf of the appellant as regards the legal procedure to be followed before filing the case under Section 138 of the Negotiable Instruments Act, 1881.

In the Roman law, the sixth-century Digest of Justinian provides, as a general rule of evidence that: “Ei incumbit probatio qui dicit non que negat.” which means that "proof lies on him who asserts, not on him who denies" It is there attributed to the second and third-century jurist Julius Paulus Prudentissimus. It was introduced in Roman Criminal law by Emperor Antoninus Pius.

The presumption of innocence was subsequently expressed by the French cardinal and canonical jurist Jean Lemoine, the first canon lawyer, to formulate the legal principle of the presumption of innocence in the phrase "item quilbet presumitur innocens nisi probetur nocens (a person is presumed innocent until proven guilty)", based on the legal inference that most people are not criminals. It requires that the trier of fact, be it a juror or judge, begin with the presumption that the state is unable to support its assertion.[Words and phrases, 1914, P.1168]. “To ensure this legal protection is maintained, a set of three related rules govern the procedure of criminal trials. The presumption means:

> “1. With respect to the critical facts of the case-whether the crime charged was committed and whether the defendant was the person who committed the crime-the state has the entire burden of proof.
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> 2. With respect to the critical facts of the case, the defendant does not have any burden of proof whatsoever. The defendant does not have to testify, call witnesses or present any other evidence, and if the defendant elects not to testify or present evidence, this decision cannot be used against them.
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> 3. The jury or judge is not to draw any negative inferences from the fact the defendant has been charged with a crime and is present in court and represented by an attorney. They must decide the case solely on the evidence presented during the trial.[Mueller, Christopher B, Laird C. Kirkpatrick(2009) Evidence. 4th ed. Aspen (Wolters Kluwer) ISBN978-0-7355-7968-2.P.P.133-34]”

In the Blacktone’s ratio [known as Black stone’s formulation] it has been stated that it is better that “ten guilty persons escape than that one innocent suffer.” Subsequently, Benjamin Franklin stated that “It is better 100 guilty persons should escape than that one innocent Person should suffer.” Defending British soldiers charged with murder for their

role in the Boston Massacre, John Adams also expanded upon the rationale behind Blackstone's Ratio when he stated that:

> "We find, in the rules laid down by the greatest English Judges, who have been the brightest of mankind: We are to look upon it as more beneficial, that many guilty persons should escape unpunished than one innocent person should suffer. 'The reason is, because it's of more importance to the community, that innocence should be protected, than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security. And if such a sentiment as this, should take place in the mind of the subject, there would be an end to all security whatsoever. [ Adams Argument for the Defense; 3-4 December 1770]

Although the Constitution of the United States of America does not cite it explicitly, the presumption of innocence is widely held to be followed from the Fifth, Sixth, and Fourteenth Amendments. Coffin v. United States, 156 U.S. 432 (1895) was an appeal case before the Supreme Court of the United States in 1895 which added the principle that the accused is presumed to be innocent until his guilt is proved beyond a reasonable doubt. In the referred case, The Supreme Court of America has held that

> "Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favour of one accused, whereby his innocence is established until sufficient evidence is

> introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn. The fact that the presumption of innocence is recognized as a presumption of law and is characterized by civilians as a presumptio juris, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy."

The duty on the prosecution was famously referred to as the "golden thread" in the criminal law by Lord Sankey LC in the Woolmington v DPP judgment dated 23.05.1935. House of Lords opined that;

> "Throughout the web of English criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.."No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Negotiable Instruments Act.1881 is a special law. An offence under Section 138 is not compoundable and before filing a case the drawer and the drawee of the cheque are at liberty to make a compromise between them. Since an offence under Section 138 of the Negotiable Instruments Act, 1881 is not compoundable, after filing the complaint petition, there is no scope to settle the dispute out of Court. An offence under section 138 of the Negotiable Instrument Act, 1881 is a pure and simple criminal offence. Therefore, the age-old principle that the accused is presumed to be innocent until proven guilty beyond all reasonable doubt is required to be proved by the complainant based on clear, cogent,

credible or unimpeachable evidence. The presumption of innocence is a fundamental right of the accused. An accused has a constitutional right to remain silent. The presumption of innocence itself is evidence in favour of an accused.

In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, at page 3697, the term 'presumption' has been defined as under:

> "A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known.
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> A presumption is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof.
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> A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof. It follows, therefore that a presumption of any fact is an inference of that fact from others that are known". (per ABBOTT, C.J., R. v. Burdett, 4 B. & Ald, 161). The word 'Presumption' inherently imports an act of reasoning- a conclusion of the judgment; and it is applied to denote such facts or moral phenomena, as from experience we know to be invariably, or commonly, connected with some other related facts. (Wills on Circumstantial Evidence).
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> A presumption is a probable inference which common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking. results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made."

By Act No. XVII of 2000 the legislature repealed section 139 and amended Section 138 of the Negotiable Instruments Act, 1881 by

repealing the words and commas i.e. “for the discharge in whole or in part, of any debt or other liability” without making any amendment in Section 43 of the said Act wherein it has been stated that a negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. Therefore, because of the provision of Section 43 of the said Act a person who issued a cheque without consideration has no obligation to pay the cheque amount. The presumption under section 118 (a) of the said Act is not conclusive proof of the fact that the drawer issued a cheque in favour of the drawee for payment of the consideration. When the accused cross-examined P.Ws. and examined himself as D.W. denying the issuance of the cheque in favour of the complainant and make out a probable deference case, heavy-duty lies on the complainant to prove the consideration for which the cheque was issued in favour of the drawee. In the complaint petition, it has been stated that the complainant paid Tk. 500000 to the appellant in cash as a loan but no date of payment of loan has been mentioned in the complaint petition. It is further stated that after due date, the complainant went to t he house of appellant to get back the money without mentioning any date, but no evidence has been adduced to that effect. The burden of proof that a cheque had not been issued for consideration is on the accused. If the accused failed to discharge the onus lies on him it is to be presumed that he issued the cheque for consideration. However, the Court will not insist upon the accused to disprove the existence of consideration by adducing direct evidence.

In view of provision of section 138(1)(a) of the said Act, a cheque is required to be 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. Be that as it may, there is no scope to issue a undated cheque. If the payee or holder in due course is allowed to present the undated cheque, the purpose of Section 138 (1)(a) will be frustrated. The presentation of the cheque within 06(six) months to the

bank is not without any purpose. It is not practically possible for the drawer of the cheque to keep the money in the account for a indefinite period. Therefore, a cheque issued without mentioning the name of the payee or date does not come within the purview of section 138 of the said Act. Although there is no bar in issuing a antedated or post dated cheque in view of the provision of section 21C of the said Act. Nothing has been stated in the said Act as regards issuance of undated cheque.

In section 138 of the Negotiable Instruments Act, 1881, the legislature used the word "another person" meaning thereby that the drawer issued the cheque in favour of a 'particular and specified person'. On a bare reading of section 138 and 43 of the said Act in a juxtaposition it reveals that there is no scope to issue any blank cheque without writing the name of the payee in the cheque. A person cannot be convicted for any act unless he violates any penal provision of law. No duty has been attributed in the said Act to the drawer of a cheque to pay the undated and blank cheque inasmuch as Sub-section 2 of Section 16 of the said Act stats that the provision of this Act relating to a payee shall apply with the necessary modifications to an indorse as defined in Section 16(1) of the said Act. Therefore, a cheque issued without writing the name of payee in the cheque is not a cheque in the eye of law and the drawer of a blank cheque has no obligation to pay the cheque amount.

In the case of Md. Idris Chowkder @ Idris Vs. The State and another, reported in 3 LM (AD) (2017) (2) 560 judgment dated 03.07.2014 our Apex Court has held that:

> "An offence under section 138 of the Negotiable Instruments Act is not compoundable, it being a special law. However, in view of the submissions made by the learned Advocates on Record, we are of the opinion that the ends of Justice will be sufficiently met if the sentence of the petitioner is reduced to imprisonment for the period already undergone by him in prison, and the sentence of

> fine is set aside. We note that the complainant appeared before us to say that he has received his money in full satisfaction."

In the case of Syed Anowar Towhid (Tayeb) vs Syed Zahed Ali and another reported in 13 BLC 428 it has been observed that-

> Sections 138-141 of the Negotiable Instruments Act, 1881 has been amended with an aim to punish the delinquent drawer of cheque who knowing full well that his bank account does not contain sufficient funds, issues cheque in order to deceive his creditor. Therefore, the proceeding under section 138 of the Negotiable Instruments Act, 1881 is only related to the dishonour of a negotiable instrument which may proceed independent of any other claim to be decided through civil proceedings. No question of defective title arises in the instant case since the complainant-opposite party categorically stated in the petition that the cheque was dated one and, as such, the factual aspect as to whether the cheque was dated one or not cannot be decided by this Court which is a matter for evidence in the trial Court and therefore, the question relating to such fact cannot be considered at this stage.

On a bare reading of section 138 of the Negotiable Instruments Act, 1881 it reveals that the legislature empowered the Court to convict and sentence the accused to suffer imprisonment for a term which may extend to one year or with a fine which may extend to [thrice) the amount of the cheque or with both if the charge is proved against the accused beyond all reasonable doubt. No doubt the penal provision of section 138 of the said Act is harsh. Therefore, the age-old principle that the accused is innocent until proven guilty beyond all reasonable doubt is

required to be followed strictly in a case under Section 138 of the Negotiable Instruments Act, 1881.

In Section 4 of the Evidence Act, 1872 three classes of presumption have been mentioned namely (i) may presume (refutable), (ii) shall presume (also refutable) and conclusive presumption (irrefutable). To refute the statutory presumption under Section 118(a) of the Negotiable Instruments Act, 1881 an accused is not required to prove his defence case beyond all reasonable doubt as required by the complainant in a criminal case. An accused may either adduce direct evidence to show that the cheque is not supported by consideration as required under Section 43 of the said Act or by cross-examining the witness/witnesses he is entitled to show that the cheque was issued without consideration. The accused may also rely on circumstantial evidence or Section 114 of the Evidence Act, 1872.

In Section 118(a) of the Negotiable Instruments Act, 1881, the legislature used the words “until the contrary is proved”. A bare reading of Section 118(a) of the said Act makes it clear that presumptions to be raised under the said section is discretionary and refutable. The accused has to make out a probable case that the cheque has been issued without consideration or for a consideration which fails. The complainant is bound to prove all relevant facts stated in the complainant petition. In the complainant petition, it has been stated that he paid Tk. 500000 to the accused as a loan. No evidence has been adduced to prove said loan or consideration as required under Section 43 of the Negotiable Instrument Act, 1881.

It is found that the appellant issued a blank cheque without mentioning the name of “another person” i.e payee as required under section 138 of the said Act and no date was written in the said cheque to present the cheque within six months from date on which it was drawn or within the period of its validity, whichever is earlier as required under section 138 (1)(a) of the said Act. The accused has given a satisfactory explanation while he was examined as D.W. 1 as to how the signed

undated and blank cheque came into possession of the complainant. On the contrary, the complainant did not adduce any evidence to the effect that he disbursed a loan of Tk. 500000 to the accused. The evidence of D.W. 1 as regards the issuance of the blank cheque has not been denied by the complainant by giving any suggestion to D.W. 1. In the given fact, the duty lies on the complainant to prove that the cheque has been issued in the name of the complainant.

In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice Where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment. Presumption of Innocence and Reverse Burdens: A Balancing Duty, by David Khamer published in [2007] C.L.J. (March Part) 142

The presumption is a rule of evidence and does not conflict with the innocence of the accused. The presumption of innocence of accused is a legal presumption. The duty of the prosecution may be discharged with the help of the presumption of law or fact or with both unless the accused adduces evidence to show the reasonable possibility of the non-existence of the presumption. A fact is said to be proved, when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

It is noted that by Act No. XVII of 2000, Section 139 of the Negotiable Instruments Act, 1881 has been repealed, but section 139 of the said Act in India remains the same.

In the case of Bharat Barrel & Drum Manufacturing Company vs Amin Chand Payrelal (1999) 3 SCC 35 interpreting Section 118(a) of the Negotiable Instruments Act the Supreme Court of India has opined that

> 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 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 nature and extent of presumption came up for consideration before the Supreme of India Court in M.S. Narayana Menon v. State of Kerala' Judgment dated 4.7.2006, Criminal Appeal No. 1012 of 1999 para 30 wherein it has been held that;

> “Applying the said definitions of 'proved' or 'disproved' to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

In Krishna Janardhan Bhal vs Dattatraya G, judgment dated 11.1.2008 considering the case of M.S. Narayana Menon Alias Mani vs State of Kerala and another reported in [(2006) SCC 39], K. Prakashan vs P.K Surenderan [2007(12) SCALE 96, Johnk. John vs Tom Varghese & another reported in [JT 2007(13) SC 222, Hiten P Dalal vs Bratingdranath Banerjee reported in [(2001) 6 SCC 16], K.N Beena vs Muniyappan and another (2001) 8 SCC 458, Narender Singh and another vs State of M.P (2004) 10 SCC 699, Ranjitsing Brahmajeetsing Sharma vs State of Maharashtra and another reported in (2005) SCC 294 and Rajesh Ranjan Yadav @ Pappu Yadav V. CBI (2007) 1 SCC 70, K. Bhaskaran vs Sankaran Vaidhyah Balan and others reported in AIR 1999 SC 3762, S.R Muralidar vs Ashok G.Y [ILR 2001 Karnataka 4127], M/S. Devi Tyres vs Nawab Jan reported in [AIR 2001 Karnataka HCR 2054], Bharat Barrel & Drum Manufacturing Company vs Amin Chand Payrelal reported in (1999) 3 SCC 35 it has held that

> “A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not,

> must, therefore, be determined keeping in view the other evidences on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration. 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 a 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."

A similar issue has been dealt with by the Supreme Court of India in the case of Kamalas Vs. Vidhyadharan M.J. and another, reported in 5 Supreme Court Cases 264 (2007) and after elaborate discussion, the Apex Court of India has held that:

> "The Act contains provisions raising presumption as regards the negotiable instruments under Section 118(a) of the Act as also under Section 139 thereof. The said presumptions are rebuttable ones. Whether the presumption stood rebutted or not would depend upon the facts and circumstances of each case."

In the case of Md. Abul Kaher Shahin Vs. Emran Rashid reported in 25 BLC (AD) 115 our Apex Court adopted the view of the Supreme Court of India made in the case of Kamalas (Supra) wherein our Apex Court relying on the decision made in the case of Alauddin vs State reported in 24 BLC (AD) 139, Shahidul Islam vs Bangladesh and others, reported in 2 SCOB (2015) HCD 1, Dalmia Cement (Bharat) Ltd. vs Galaxy Traders and Agencies Ltd, reported in AIR 2001 SC 676), Bharat Barrel and Drum Manufacturer Co. vs Amin Chand Payrelal reported in

AIR 1999 (SC) 1008, Rameshwar Singh vs Bajit Lal, reported in AIR 1929 PC 95, and Hiralal vs Badkulal reported in AIR 1953 SC 225 has held that:

> "When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the cheque in question was not supported by consideration. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of consideration apparently would not serve the purpose of the accused. Something, which is probable has to be brought on record for getting the burden of proof shifted to the complainant. The burden of proof of the accused to disprove the presumption under sections 118 and 138 of the Act is not so heavy. The preponderance of probability through direct or substantial evidence is sufficient enough to shift the onus to the complainant. Inference of preponderance of probabilities can be drawn from the materials on record and also by reference to the circumstances upon which the party relies."

The presumption under Section 118(a) of the Negotiable Instruments Act, 1881 is always rebutable and the standard of proof of doing so is that of the preponderance of probabilities. The accused either adducing evidence or by cross-examining the PWs are entitled to rebut the said presumption. The accused is not bound to prove his innocence

by adducing evidence. A negative fact cannot be proved by adducing positive evidence. The issue as to whether the presumption stood rebutted or not must be determined based on the evidence adduced by the parties. In a case under Section 138, the false implication cannot be ruled out. Therefore, the Court shall not put on a blind eye to the ground realities. In that case, the background of the case and the conduct of the parties are required to be taken into consideration. No explanation has been given by the complainant as to why no instrument was executed between the parties although handsome money was claimed to have been paid to the appellant.

Although there is a presumption under section 118(a) of the said Act as regards the payment of consideration in favour of the payee but section 118(a) of the said Act does not absolve the complainant to prove other requirements of the law. D.W. 1 in the examination of chief stated that "নালিশকারী বা তার প্রতিষ্ঠান□ আমি কোন চেক দেয়নি। চে□র স্বাক্ষর ব্যতীত অন্যান্য লেখা আমার হা□র নয়।" The above statement of D.W. 1 has not been denied by the complainant during cross-examination. When a cheque is issued by any person in favour of any other private individual without mentioning the name of the payee and date of issuance of the cheque, a doubt creates as regards the actual payee of the cheque, if there is no debt or any liability to be discharged by the accused. Admittedly the appellant did not mention the name of the payee and the date in the cheque. During cross-examination no suggestion was given to D.W. 1 that he has written the name of the complainant as a payee in the cheque. Therefore, it is to be presumed that the complainant himself or somebody on his behalf has written the name of the complainant as a payee in the cheque.

It is found that the complainant is neither friend nor he had any business transaction with the appellant. The complainant has failed to prove that the appellant has taken a loan from him. On consideration of the evidence of both parties in a juxtaposition, I am of the view that the appellant has rebutted the presumption under sections 118(a) of the

Negotiable Instruments Act, 188. Therefore, there was no reason for the issuance of cheque by the appellant in favour of the complainant.

Because of the above facts and circumstances of the case, evidence and the proposition, I am of the view that the complainant has failed to prove the charge under section 138 of the Negotiable Instruments Act, 1881 against the appellant by adducing legal evidence beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial Court are hereby set aside.

The appellant is entitled to get back Tk. 2,50,000 paid before filing the appeal. The trial Court is directed to allow the appellant to withdraw Tk. 2,50,000.

Send down the lower Court’s records at once.