2025:KER:54510

CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 25TH DAY OF JULY 2025 / 3RD SRAVANA, 1947

CRL.REV.PET NO. 408 OF 2024

AGAINST THE ORDER/JUDGMENT DATED 30.11.2023 IN Crl.A NO.59 OF 2019 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - III, PATHANAMTHITTA ARISING OUT OF THE ORDER/JUDGMENT DATED 21.06.2019 IN ST NO.387 OF 2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS - II, PATHANAMTHITTA

REVISION PETITIONER/APPELLANT/ACCUSED:

P.C. HARI
AGED 55 YEARS
S/O. LATE CHAKARAPANI, PALAMOOTTIL HOUSE, PRAKKANAM P.O., PATHANAMTHITTA, PIN - 689643

BY ADVS.
SRI.D.KISHORE
SMT.MEERA GOPINATH
SRI.R.MURALEEKRISHNAN (MALAKKARA)

RESPONDENT(S)/COMPLAINANT & STATE:

1 SHINE VARGHESE
KOIPURATHU VEEDU (PULINIKKUNNATHIL), AZHOOR MURI,

PATHANAMTHITTA, PIN - 689645

2 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA, PIN - 682031

BY ADVS.
SRI.MANU RAMACHANDRAN
SRI.M.KIRANLAL
SRI.T.S.SARATH
SRI.R.RAJESH (VARKALA)
SHRI.SAMEER M NAIR
SMT.SAILAKSHMI MENON
SMT.JOTHISHA K.A.
SMT.SHIFANA M.

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 07.07.2025, THE COURT ON 25.07.2025 DELIVERED THE FOLLOWING:

2025:KER:54510

CR

P.V.KUNHIKRISHNAN, J

Crl.Rev.Pet. No.408 of 2024

Dated this the 25th day of July, 2025

ORDER

When the Income-Tax Act, 1961 (for short "Act 1961") prohibit a person from taking or accepting from another person any loan or deposit or any specified sum above an amount of Rs. 20,000/-, otherwise than by an account payee cheque or account, or accepting payee bank draft or use of electronic clearing system through a bank account or such other electronic mode as may be prescribed; can a criminal court justify cash transaction above an amount of Rs.20,000/- treating it as a "legally enforceable debt" is the important question to be decided in this case. The Union Government is aiming for "Digital India", and the Hon'ble Prime Minister of India is leading the battle for complete digital transactions by every citizen of this country. Nowadays, we can see digital

transactions even in small tea shops, paan shops, etc. In Kerala, even coolie workers accept their wages through digital transactions of Unified Payments Interface(UPI) like Google Pay, PhonePe, Paytm etc. I am of the considered opinion that, when the government of India aims a goal of complete digital transactions by every citizen of this country instead of cash transactions, a court of law cannot turn its face and legalise cash transactions.

2. I will first consider the facts of this case. The revision petitioner was an accused in S.T. No.387/2013 on the file of the Judicial First Class Magistrate Court, Pathanamthitta. It was a prosecution initiated by the 1st respondent against the revision petitioner alleging offences punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short "NI Act"). (Hereinafter, the revision petitioner and the 1st respondent are mentioned as the accused and the complainant, respectively.)

3. According to the complainant, the accused owed an

amount of Rs.9,00,000/- (Rupees Nine lakhs only) to the complainant and for discharge of the said legally enforceable debt, the accused issued a cheque for Rs. 9,00,000/- drawn on his account maintained at the South Indian Bank Limited, Pathanamthitta Branch to the complainant. The accused made the complainant believe that he would keep sufficient funds in his account to honour the said cheque. The complainant presented the cheque for encashment through his account maintained at the Federal Bank, Pathanamthitta branch. The said cheque was dishonoured for the reason "funds insufficient". The said cheque was returned to the complainant on 04.01.2013. The complainant issued a lawyer notice on 09.01.2013, intimating the fact of dishonour of cheque and demanding Rs. 9,00,000/-, which is the amount covered under the cheque. The accused received the notice on 11.01.2013. It is the case of the complainant that the accused sent a reply notice to the complainant by setting up some false contentions. According to the complainant, the accused

refused to pay the amount even after getting the statutory notice. Hence, it is alleged that the accused committed the offences.

4. Before the trial court, the complainant himself was examined as PW1. PW2 was also examined on the side of the complainant. Exts.P1 to P8 were the exhibits marked on the side of the complainant. DW1 to DW3 were examined on the side of the defence. Exts.D1 and D2 were the defence exhibits. Exts.X1 to X15 were marked as court exhibits. After going through the evidence and the documents, the trial court found that the accused committed the offence under Section 138 of the NI Act and he was sentenced to undergo simple imprisonment for one year and to pay a compensation of Rs.9,00,000/- to the complainant under Section 357(3) of the Code Of Criminal Procedure, 1973 (for short 'Cr.P.C.'). In default of payment of compensation, the accused was directed to undergo simple imprisonment for a further period of one year.

5. Aggrieved by the conviction and sentence, the accused filed an appeal before the Sessions Court, Pathanamthitta. The appeal was heard by the III[rd] Additional District and Sessions Judge, Pathanamthitta. The appellate court, after going through the evidence and documents, confirmed the conviction and sentence, and accordingly dismissed the appeal. Aggrieved by the same, this Criminal Revision Petition is filed.

6. Heard Adv. D. Kishore, the learned counsel appearing for the accused and Adv. Manu Ramachandran, the learned counsel appearing for the complainant.

7. The main contention raised by Adv. D. Kishore, who appeared for the accused, is that the admitted transaction, according to the complainant, is by cash. The counsel relied on Section 269SS of the Act 1961 and submitted that any transaction above Rs. 20,000/- can only be made through an account transaction or by issuance of a cheque or a draft. The counsel submitted that, in this case, admittedly, Rs.

9,00,000/- is alleged to be paid by the complainant to the accused in cash. Therefore, the counsel submitted that the same violates Section 269SS of Act 1961, and consequently, a penalty is to be imposed as per Section 271D of Act 1961. The counsel submitted that, if this Court accept the contentions of the complainant, the accused is bound to pay a penalty under Section 271D of Act 1961. The accused completely denies the transaction. The counsel submitted that, even in the reply notice sent by the accused to the statutory notice, it is specifically stated that the accused has no source to advance an amount of Rs.9,00,000/-. The counsel submitted that the complainant deposed before the court that he had not paid any income tax for the amount. In such circumstances, the alleged transaction itself is illegal and therefore, a debt created by an illegal transaction cannot be treated as a legally enforceable debt. Adv. D. Kishore also relied on an article published in Kerala High Court cases by late Sri. Alex M. Scaria, along with his wife, Smt. Saritha Thomas.

8. Adv. Manu Ramachandran, who appeared for the complainant, opposed the contentions raised by Adv. D. Kishore. Adv. Manu Ramachandran submitted that, even if the case of the accused is accepted, only a penalty is possible under Section 271D of Act 1961. The counsel submitted that such a transaction in violation of Section 269SS of Act 1961 at the behest of the drawer of a cheque cannot be treated as null and void. The counsel also submitted that, even if the contentions of the accused are accepted, the penalty is to be paid by the accused who received the amount in cash. The counsel relied on the judgment of this Court in **Sugunan v. Thulaseedharan and Another** [2014 (4) KHC 848]. Adv. Manu Ramachandran also relied on the decision of the Bombay High Court in **Krishna P. Morajkar v. Joe Ferrao and Another** [Cr. Appeal No.6/2012] in which it is stated that infraction of provisions of the Income-Tax Act would be a matter between the revenue and defaulter, and advantage thereof cannot be taken by the borrower. It is also submitted

that there is a presumption in favour of the "legally enforceable debt". The accused has not rebutted the same is the contention.

9. This Court considered the contentions of the counsel for the accused and the complainant. The following important points arise for consideration in this case.

1. Whether the presumption under Section 139 of the NI Act cover the "legally enforceable debt"?
2. How can a presumption under Section 139 of the NI Act be rebutted by an accused?
3. Whether debt created by a cash transaction above Rs. 20,000/- in violation of the provisions of the Act 1961 can be treated as a "legally enforceable debt"?
4. Whether the presumption under Section 139 of the NI Act is rebutted in the facts and circumstances of the case, and whether the complainant established that there is any "legally enforceable debt"?

10. **Point No.1**

For a proper consideration of the above point, the relevant section of the NI Act is to be considered first. Section 138 of the NI Act reads like this:

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless—
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within 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 of other liability" means a legally enforceable debt or other liability. "

11. Explanation to Section 138 of the NI Act clearly states that for the purpose of that section, "debt of other liability" means a legally enforceable debt or other liability. Section 139 of the NI Act reads like this :

"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. "

12. From a reading of Section 139 of the NI Act, it is clear that 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. Therefore, the holder of the cheque is presumed that, he received the cheque in discharge, in whole or in part, of any debt or other liability and in the explanation to the section, it is stated that the debt or other liability is a legally enforceable debt. Therefore, there is no doubt to the fact that the presumption under Section 139 of the NI Act covers legally enforceable debt also. Therefore the holder of a cheque is presumed that, he received the cheque in whole or in part of any legally enforceable debt.

13. It is true that in **Krishna Janardhan Bhat v. Dattatraya G. Hegde** [2008 (4) SCC 54], the Apex Court observed that there is no presumption as far as legally enforceable debt under Section 139 of the NI Act is concerned. The said principle is laid down by the Apex Court in **Krishna Janardhan Bhat**'s case (supra) in paragraph Nos. 20, 21 and 22. But the said principle is overruled by a three judge bench decision of the Apex Court in **Rangappa v. Sri Mohan** [2010 KHC 4325].

14. In the light of the above authoritative judgment and also in the light of the clear wording in Section 139 of the NI Act, it is clear that there is a presumption under Section 139 of the NI Act as far as legally enforceable debt is concerned. The first point is answered accordingly.

15. **Point No.2**

The presumption under Section 139 of the NI Act can be rebutted by an accused by raising a probable defence which creates doubts about the existence of a legally enforceable debt or liability. In **Rangappa**'s case (supra) itself, this point is considered by the Apex Court about the manner in which an accused can rebut the presumption under Section 139. Therefore, it is clear that the accused can rebut a presumption under Section 139 of the NI Act by a probable defence by preponderance of probability as stated in **Rangappa**'s case (supra). It will be beneficial to extract paragraph No.18 of **Rangappa**'s case (supra):

> "18. In light of these extracts, we are in agreement with the respondent - claimant that the presumption

mandated by S.139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) 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. S.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 S.138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under S.139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by S.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 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 accused / defendant cannot be expected to discharge an unduly high standard or proof. 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 S.139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his / her own." (underline supplied)

16. Therefore, the accused can rebut the presumption under Section 139 of the NI Act by the standard of proof of a probable defence through preponderance of probabilities, which creates doubts about the existence of a legally enforceable debt. The second point is also answered accordingly.

17. **Point No.3**

The next point to be decided is whether a debt created by a cash transaction in violation of the Act 1961 can be treated

as a legally enforceable debt. For deciding that, Section 269SS of Act 1961 is to be considered. Section 269SS is extracted hereunder:

> "**269SS.** Mode of taking or accepting certain loans, deposits and specified sum.—
>
> No person shall take or accept from any other person (herein referred to as the depositor), any loan or deposit or any specified sum, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account, if,—
>
> (a) the amount of such loan or deposit or specified sum or the aggregate amount of such loan, deposit and specified sum; or
>
> (b) on the date of taking or accepting such loan or deposit or specified sum, any loan or deposit or specified sum taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or
>
> (c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b),
>
> is twenty thousand rupees or more:
>
> Provided that the provisions of this section shall not apply to any loan or deposit or specified sum taken or accepted from, or any loan or deposit or specified sum taken or accepted by,—

(a) the Government;

(b) any banking company, post office savings bank or co-operative bank;

(c) any corporation established by a Central, State or Provincial Act;

(d) any Government company as defined in clause (45) of section 2 of the Companies Act, 2013 (18 of 2013);

(e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:

Provided further that the provisions of this section shall not apply to any loan or deposit or specified sum, where the person from whom the loan or deposit or specified sum is taken or accepted and the person by whom the loan or deposit or specified sum is taken or accepted, are both having agricultural income and neither of them has any income chargeable to tax under this Act. Explanation.—For the purposes of this section,—

(i) "banking company" means a company to which the provisions of the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act;

(ii) "co-operative bank" shall have the same meaning as assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949);

(iii) "loan or deposit" means loan or deposit of money;

(iv) "specified sum" means any sum of money

receivable, whether as advance or otherwise, in relation to transfer of an immovable property, whether or not the transfer takes place."

18. From the above, it is clear that, no person shall take or accept from any other person, any loan or deposit or any specified sum, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, if the amount is above Rs.20,000/-, provided that such transactions will not come within the purview of the exemptions mentioned in the section. Similarly, Section 269ST also prohibit that no person shall receive an amount of two lakh rupees or more in aggregate from a person in a day; or in respect of a single transaction; or in respect of transactions relating to one event or occasion from a person otherwise than by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed. Section 271D of Act 1961 says that if a person

takes or accepts any loan or deposit or specified sum in contravention of the provisions of Section-269SS, shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit or specified sum so taken or accepted. Of course, Section 273B deals with situations in which 'penalty not to be imposed in certain cases'. It will be better to extract Section 273B of Act 1961:

> "273B. Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of section 271, section 271A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FAA, section 271FAB, section 271FB, section 271G, section 271GA, section 271GB, section 271GC, section 271H, section 271-I, section 271J, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or sub-section (1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure."

19. As per Section 273B, if the person proves that there was a reasonable cause for the failure of the mandate in Section 269SS, no penalty can be imposed under Section 271B of the Act 1961.

20. Admittedly, the Apex Court in **Krishna Janardhan Bhat**'s case (supra) was considering a case in which the accused was convicted and sentenced by the trial court. While discussing the facts, the apex court also considered the impact of Section 269SS. Paragraph 19 of the above judgment is extracted hereunder:

> "19. The Courts below failed to notice that ordinarily in terms of S.269SS of the Income Tax Act, any advance taken by way of any loan of more than Rs.20,000/- was to be made by way of an account payee cheque only. S.271D of the Income Tax Act reads as under:
>
> "271D. Penalty for failure to comply with the provisions of S.269SS.-- (1) If a person takes or accepts any loan or deposit in contravention of the provisions of S.269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.
>
> (2) Any penalty imposable under sub-section (1) shall

be imposed by the Joint Commissioner."

21. The three-member bench decision in **Rangappa**'s case (supra) overruled only the declaration regarding the non-availability of presumption under Section 139 of the NI Act for legally enforceable debt in **Krishna Janardhan Bhat**'s case, and all other points in it were confirmed. This is clear from paragraph 15 of Rangappa's decision, which is extracted in paragraph 15 of this judgment, while considering point number two. Therefore, the judgment of the **Krishna Janardhan Bhat**'s case (supra) is in effect confirmed in **Rangappa**'s case (supra), except regarding the declaration regarding non availability of the presumption under Section 139 of the NI Act.

22. The Bombay High Court in **Sanjay Mishra v. Kanishka Kapoor @ Nikki and Another** [2009 (2) KLD 825] considered the impact of Section 269SS of the Act 1961. It will be better to extract the relevant portion of the above judgment:

> "13. In the present case, there is a categorical admission that the amount allegedly advanced by the applicant was entirely a cash amount and that the amount was 'unaccounted'. He admitted not only that the same was not disclosed in the Income Tax Return at the relevant time but till recording of evidence in the year 2006 it was not disclosed in the Income Tax Return. By no stretch of imagination it can be stated that liability to repay unaccounted cash amount is a legally enforceable liability within the meaning of explanation to S.138 of the said Act. The alleged debt cannot be said to be a legally recoverable debt. "

23. It is true that the Bombay High Court relied on the judgment of **Krishna Janardhan Bhat**'s case (supra) to conclude that there is no presumption as far as legally enforceable debt is concerned. That is already overruled in **Rangappa**'s case (supra). But the dictum laid down in **Sanjay Mishra**'s case (supra) is relevant here also. The Bombay High Court observed that by no stretch of imagination, it can be stated that liability to repay unaccounted cash amount is a legally enforceable debt within the meaning of the explanation to Section 139 of the said Act. I am in perfect agreement with

the above dictum laid down by the Bombay High Court. It is true that the above judgment was referred by another learned Single Judge of the Bombay High Court and the matter reached before the Division Bench of the Bombay High Court Nagpore Bench. The Division Bench of the Bombay High Court in **Prakash Madhukarrao Desai v. Dattatraya Sheshrao Desai** [2023 SCC OnLine Bom 1708] observed like this :

> "17. It can thus be said that the validity of section 269SS of the Act of 1961 having been upheld in Assistant Director of Inspection (Investigation) v. Kum. A. B. Shanthi (supra), breach thereof being subjected to penalty under section 271D with a further provision for waiving the penalty under section 273B of the Act of 1961, it will have to be held that such transaction in violation of section 269SS of the Act of 1961 at the behest of the drawer of a cheque cannot be treated as null and void. Similar is the case when there is an omission of any entry relevant for computation of total income of such person to evade tax liability under section 271AAD of the Act of 1961. Such person, assuming him to be the payee/holder in due course, is liable to be visited by penalty as prescribed. Such act is not treated to be statutorily void. We may in this context refer to paragraph 4 of the decision in Gujarat Travancore Agency, Cochin (supra) wherein reference has

been made to the following statement in Corpus Juris Secundum, Volume 85 page 580, paragraph 1023: "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal penal laws." Further, in Atul Mohan Bindal (supra), the penalty referred to in section 271(1)(c) of the Act of 1961 has been referred to as a civil liability and not one which is criminal or quasi-criminal in nature. Thus, in the light of statutory presumption under sections 118 and 139 of the Act of 1881, it would be for the accused to rebut such presumption in the light of what has been held in Rangappa (supra).

18. In view of the aforesaid discussion, it is held that a transaction not reflected in the books of account and/or Income-tax returns of the holder of the cheque in due course can be permitted to be enforced by instituting proceedings under section 138 of the Act of 1881 in view of the presumption under section 139 of the Act of 1881 that such cheque was issued by the drawer for the discharge of any debt or other liability, execution of the cheque being admitted. Violation of section 269SS and/or section 271AAD of the Act of 1961 would not render the transaction unenforceable under section 138 of the Act of 1881. The decisions in Krishna P. Morajkar, Bipin Mathurdas Thakkar and Pushpa Sanchalal Kothari (supra) lay down the correct position and are thus affirmed. The decision in

Sanjay Mishra (supra) with utmost respect stands overruled. ”

24. The Hon'ble Division Bench of the Bombay High Court observed that the penalty referred to in Section 271 of Act 1961 is a civil liability and not one which is criminal or quasi criminal in nature. In effect, the Bombay High Court observed that transaction not reflected in the books of account/ income tax returns of the holder of the cheque in due course can be permitted to be enforced by instituting proceedings under Section 138 of the NI Act in view of the presumption under Section 139 of the NI Act that such cheque was issued by the drawer for the discharge of any debt or other liability, execution of the cheque being admitted. It is also observed by the Division Bench of the Bombay High Court that, violation of Section 269SS would not render the transaction unenforceable under Section 138 of the NI Act because such a person, assuming him to be the payee/holder in due course, is liable to be visited by penalty as prescribed.

Such an act is not treated to be statutorily void is the findings. The Bombay High Court also relied, Corpus Juris Secundum, Volume 85 page 580, paragraph 1023: wherein it is stated that, "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal penal laws." With great respect, I cannot agree with the above finding of the Division Bench of the Bombay High Court. A penalty is imposed for discouraging individuals from violating laws or regulations. It is not to enrich the revenue. If the criminal court legalises such violations relying on Section 139 NI Act presumptions, stating that the revenue will get the penalty amount, revenue will be treated like a "shylock" who is a Shakespeare's character. Penalty is imposed on a citizen for the violation of a provision and to prevent him from repeating the same in future, and it is not a mechanism to get money to the revenue. In other words, if the criminal court indirectly

legalises such illegal transactions in violation of Act 1961, the same will be against the aim of our country to discourage cash transactions above twenty thousand rupees, which is also a part of the "digital India" dream of our country, which is propounded by our Prime Minister to save our economy and to curb a parallel economy in our country. The matter reached the Division Bench of the Bombay High Court based on a reference by another learned Single Judge of the Bombay High Court in **Prakash Madhukarrao Desai v Dattatraya Sheshrao Desai** (2023 KHC Online 3165). It will be beneficial to extract the relevant portion of the above reference order:

> **"**8. The provisions of S.139 of the IT Act enjoins upon every person to furnish a return of his income during the previous year before the due date, failure to do so entails the imposition of penalty and also imprisonment as provided in S.276 CC of the IT Act. Thus, a person is under statutory obligation, under the pain of penalty or imprisonment to furnish a return of his income for the previous year before the due date. The term 'legal' would mean what is permissible by a statute and the term 'illegal', would mean what is prohibited by a statute or something done contrary to the manner as postulated by

the provisions of a statute. Thus, when S.139 of the IT Act casts a burden upon a person to file a return, not doing so, or filing a return, not showing an entry of a transaction, would mean that the statutory requirement, in that regard stands violated, thereby making such person liable for penalty and / or imprisonment, thereby making such act as illegal i.e. not legal. In this sense of the view, in case a complainant (under S.138 of NI Act), has not filed a return, or has filed a return in which the entry in respect of which the complaint is not reflected, the transaction, would be of unaccounted cash and therefore would be illegal i.e. not legal.

8.1. Then the provision of S.269 SS of the Income - tax Act prohibits the acceptance or taking of loans / deposits exceeding an amount of Rs.20,000/- by cash. The provisions of S.271 D of the IT Act makes an action in contravention to the provisions of S.269 SS liable for penalty equivalent to the amount of loan or deposit taken or accepted by cash. Though the provisions of S.273 B of the IT Act mandates, that in case the assessee or the recipient proves that there was a reasonable cause for acceptance of the amount in cash in excess of the sum prohibited by S.269 SS of the IT Act the penalty may not be imposed, the fact remains that the acceptance of an amount in cash in excess of Rs.20,000/- would carry penalty as contemplated by S.271 D of the IT Act and therefore would be an act, which is not permissible in law. Though S.269 SS of the IT Act imposes a prohibition upon

the recipient, the prohibition in fact touches the transaction itself. In Assistant Director of Inspection Investigation v. A.B. Shanthi (2002) 6 SCC 259 : (AIR 2002 SC 2188), the Hon'ble Apex Court while considering the legality of S.269 SS of the IT Act has held that the object of introducing S.269 SS was to ensure that the taxpayer should not be allowed to give false explanation for his unaccounted money or if he has given some false entries in his accounts, he should not escape by giving false explanation for the same and the main object of the provision was to curb this menace. The constitutional validity of the said provision was thus upheld. Thus, the very purpose, of introducing S.269 SS of the IT Act was to curb the parallel economy which was rampant on account of cash transactions which were unaccounted for. Thus, what has been prohibited by S.269 SS of the IT Act and violation of the same and has been made liable for a penalty, could it be said that an action done contrary thereto, would be legal, within the expression "legally enforceable debt or other liability", as occurring in the explanation to S.138 of the NI Act. Holding that infraction of provisions of the Income - tax Act would be a matter between revenue and the defaulter and the advantage cannot be taken by the borrower [as held in Bipin Madhurdas Thakkar and Krishna Morajkar, 2015 (3) ABR (Cri) 463 (supra)], in my considered opinion, would tend to defeat the very purpose of the Income - tax Act and would bolster the parallel economy of transactions in cash. ”

25. I agree with the observations of the learned Single Judge in the above reference order, which leads to the Division Bench judgment.

26. Another contention raised by the complainant is that, even if it is stated that there is a violation of Section 269SS of Act 1961, the penalty is only to be paid by the person who received the amount in cash. Here, the accused received the amount in cash. No penalty is to be paid by the complainant because he paid the amount in cash to the accused, and only the accused is liable to pay a penalty because he received the amount in cash. But the question to be decided in a proceedings under Section 138 of the NI Act is whether there is any legally enforceable debt. Debt is not defined in the NI Act. Therefore, the ordinary meaning of debt is to be considered. A debt is generally understood as a sum of money owed by one party to another, often arising from a contract or agreement. If the debt arises through an illegal transaction, that debt cannot be treated as a legally

enforceable debt. If the court regularises such transactions, that will encourage illegal transactions by the citizens. Even black money will be converted into white money through the criminal courts. Therefore, I am not impressed by the argument of the complainant that only the receiver of the cash above Rs.20,000/- is liable to pay penalty, and therefore, if the complainant pays the amount as cash which is even above Rs.20,000/- it will come within the purview of a legally enforceable debt. In **Dalmia Cement (Bharat) Limited v. Galaxy Traders & Agencies Limited and Others** [2001 (6) SCC 463], the Apex Court referred to the object of Section 138 of the NI Act. Paragraph No.3 of the above judgment is extracted hereunder:

> "3. The Act was enacted and S.138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instrument is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instrument of credit which could be deemed to be

convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discovered, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country."

27. The Apex Court held that the laws relating to the said Act are required to be interpreted in the light of the object

intended to be achieved by it, despite there being a deviation from the general rule. The Apex Court expressed that the object of Section 138 of the NI Act is to ensure that commercial and mercantile activities are conducted in smooth and healthy manner. In **Sanjay Mishra**'s case (supra), the Bombay High Court extracted the above judgment of the Apex Court in **Dalmia Cement**'s case (supra) and observed that the alleged liability to repay an unaccounted cash amount, admittedly not disclosed in the income-tax return, cannot be a legally recoverable liability. I perfectly agree with the above observation of the learned Judge of the Bombay High Court. Accordingly, it is declared that debt created by a cash transaction above Rs.20,000/- in violation of the provisions of Act 1961 is not a "legally enforceable debt" unless there is a valid explanation for the same. But the accused should challenge such transactions in evidence, and he has to rebut the presumption under section 139 of NI Act, of course, through preponderance of probability. If there is no challenge, it is presumed, in the light of Section 139 of the NI Act that, there is a valid explanation to the complainant under Section 273B of the Act 1961. Hereafter, if anybody

pays an amount in excess of 20,000/ to another person by cash in violation of Act 1961, and thereafter receives a cheque for that debt, he should take responsibility to get back the amount, unless there is a valid explanation for such cash transactions. If there is no valid explanation in tune with Section 273B of the Act 1961, the doors of the criminal court will be closed for such illegal transactions.

28. **Point No.4**

Coming back to the facts of this case, the question to be decided is whether the accused rebutted the presumption. Admittedly, an amount of Rs.9,00,000/-was paid in cash. PW1 who is the complainant gave evidence before the trial court regarding the income-tax payment. It will be better to extract the same:

> "ഞാൻ ഇൻകം ടാക്സ് അടച്ചിട്ടില്ല . ഇൻകം ടാക്സ് സ്റ്റേറ്റ്മെൻറ് നൽകിയിട്ടില്ല. ഇൻകം ടാക്സ് അയക്കണമെന്നും Return നൽകണമെന്നും ഉള്ള വിവരം എനിക്ക് അറിയില്ല. ഞാൻ പത്താം ക്ലാസ് വരെ പഠിച്ചിട്ടുണ്ട്. പത്താംക്ലാസിൽ ജയിച്ചിട്ടില്ല ."

29. From the above, it is clear that the complainant has not paid any income-tax for the amount paid to the accused in cash. He has no explanation for the payment of the amount in cash to the accused. It is a settled position that the ignorance of the law is not an excuse. The accused specifically cross-examined about the same when PW1 was in the box, as far as the legally enforceable debt is concerned. He has absolutely no explanation regarding the payment of the amount above Rs.20,000/- by cash. In such circumstances, in the light of the principle laid down by the Apex Court in **Rangappa**'s case (supra), the accused rebutted the presumption. The debt alleged to be due to the complainant cannot be treated as a legally enforceable debt.

30. It is true that, this Court in **Sugunan**'s case (supra) considered this point. The relevant portion of the above judgment is extracted hereunder:

> "11. It is true that in the decision reported in 2009 (2) KLT 897, 2009 (2) KHC 1021 : 2009 (2) KLD 9 : 2009 (2) KLJ 473 : ILR 2009 (3) Ker. 371 : 2009 (3) KLT 580 : AIR

2010 NOC Ker. 877 Bhaskaran Nair v. Mohanan, a reference has been made regarding the provisions of the Income Tax Act and it is observed that, a loan transaction beyond a sum of Rs.20,000/- otherwise than by cheque or draft, it has to be noted, is interdicted under S.269(SS) of Income Tax Act, which came into force from 01/04/1984 and any infraction there of liable to be punished under S.217(d) of the above Act. It cannot be treated as a proposition, that any transaction in violation of that provision, will make the transaction itself unenforcible through Court of law. It was only observed in that decision that, that has to be taken into consideration while considering the facts of that case to arrive at a conclusion, as to whether the transaction alleged by the complainant is believable or not. It was a case where the complainant was a partner of a money lending firm having money lending licence and doing business in money lending, who is expected to do transaction in accordance with law. Further the evidence of the complainant in that case was that, this amount was not shown in the account of the firm and it was not mentioned in the Income Tax return of the firm and he had only informed about the same to his son alone, coupled with the fact that, such a huge amount was paid by cash / by a partner of the firm, when a loan was taken was viewed by this Court, as a suspicious one to disbelieve the case of the complainant. So that cannot be taken as a proposition laid down that, any transaction by a hand loan given by ordinary persons, will make it an unenforcible one and any cheque given in discharge of such

liability cannot be treated as a cheque issued in discharge of a legally enforcible debt, so as to maintain an action under S.138 of the Act. Further any violation of a particular Act, which may lead to a penal offence in that Act, will not affect the transaction as such illegal, though it may give a cause of action for that department, to initiate action, against the person, who violated the provisions of that Act.

12. Further in the decision reported in 1999 (2) KLT 634, 1999 KHC 394 Abdul Gafoor v. Abdurahiman, it has been held that, merely because the complainant / partnership is not registered one, that will not prevent the complainant firm by filing a complaint under S.138 of the Negotiable Instruments Act, in respect of a cheque given by the accused, in discharge of a liability for the amount due to the complainant firm, as it will not affect the criminality of the transaction, that has been committed by the accused and the effect of non - registration of the partnership of a firm under S.69 of the Partnership Act has no application to criminal cases. Further in the decision reported in 1999 (2) KLT 512, 1999 KHC 366 : 1999 (1) KLJ 660 : ILR 1999 (2) Ker. 607 : 1999 CriLJ 2472 Nadarajan v. Nadarajan, this Court has held that merely because the chitty was conducted in violation of S.3(1) of the Chitties Act, 1975, it will not make the transaction void and it only peanalise the foreman for violation and it does not declare the transaction as illegal or unlawful and the cheque issued in discharge of such liability will fall under the category issued in discharge of legally enforcible debt as contemplated under S.138 of

> the Act. These two dictums were not considered by the learned Single Judge while deciding the case in Bhaskaran Nairs case (supra). So merely because the amount was given in cash though it was more than Rs.20,000/-, which was expected to be given by cheque or demand draft by the provisions of the Income Tax Act by itself will not make the transaction an illegal one, though it may give a cause of action for the Income Tax Authorities to prosecute the person, who violated that provision. Further it will be seen from the evidence as well as the submission made by the counsel for the revision petitioner that, both the revision petitioner and the complainant were coming from village area, not conversant with these aspects fully as well. So under the circumstances, the dictum laid down in the decision in Bhaskaran Nairs case (supra) is not as such applicable to the facts of this case, to dis - believe the case of the complainant, so as to give the benefit of acquittal to the revision petitioner as claimed by the counsel for the revision petitioner. ”
>
> [underline supplied]

31. I am of the considered opinion that the above judgment of this Court is without adverting the decisions of the Apex Court in **Rangappa**'s case (supra) and **Krishna Janardhan Bhat**'s case (supra). Therefore, the dictum laid down by this Court in the above judgment is *per incuriam*.

32. Counsel for the petitioner relied on an article of late Adv. Sri. Alex M. Scaria. Adv. Alex M. Scaria was a lawyer with innovative thinking on all legal issues. I heard him arguing several complicated legal issues with an 'Alex touch'. The present article is also like that. We, the legal fraternity, miss such a great lawyer in his early age. Adv. Alex considered a point, "whether presumption under Section 118 or Section 139 of NI Act would be born, if the disputed transaction is not in tune with Section 269SS of the Income Tax Act, 1961?." Adv. Alex concluded the article with the following observations:

> "i. It is impossible to presume consideration under Section 118(a) or Section 139, when the disputed transaction is not in line with Section 269SS of the Income Tax Act, 1961.
> ii. Any evidence to such a consideration, even in the form of such a presumption, is hit by Section 91 of the Indian Evidence Act, 1872."

33. I agree with the conclusion of the above article that the debt arising through an illegal transaction cannot be treated as a legally enforceable debt. But I am not in a

position to accept the above conclusion in the article of our friend lawyer, Alex, about the non-applicability of presumption under Section 139 of the NI Act for legally enforceable debt because of the dictum laid down by the Apex Court in **Rangappa**'s case (supra).

34. Before concluding, I also clarify that the dictum laid down in this judgment is applicable only in cases in which this question is specifically raised and there is no explanation to the complainant in tune with Section 273B of Act 1961. In other words, in cases in which the trial is already concluded and the matter is pending before the appellate court, unless the above point is specifically raised, the appellate court need not consider this and need not remand the case for giving any opportunity to adduce further evidence. In other words, I make it clear that the dictum is applicable only prospectively, and in a concluded trial in which no such point is raised need not be reopened based on the decision in this case.

35. As a last submission, the counsel for the complainant also submitted that the case may be remanded to

the trial court for giving an explanation for the payment of cash. As I observed earlier, the explanation can be given for the payment of cash amount above Rs.20,000/- by the person who received the amount in the light of Section 271D of Act 1961. Here is a case where the complainant admits that he is not a tax payee. He paid Rs.9,00,000/- by cash to the accused. The accused has a case that the complainant has no source to pay an amount Rs.9,00,000/-. The accused has got such a case from the stage of the reply notice itself. In Ext.P7 reply notice, the accused clearly stated that the complainant has no source to raise an amount of Rs.9,00,000/-. Even though some evidence is adduced by the complainant to show that he withdrew some amount from some other account, since the complainant admits that he is not a taxpayer, it cannot be said that the amount is a legally enforceable debt. Therefore, I am of the considered opinion that this is a case in which the complainant fails to prove that there is legally enforceable debt. The accused rebutted the presumption

under Section 139 of NI Act. Consequently, the conviction and sentence imposed on the accused are to be set aside.

Therefore, this Criminal Revision Petition is allowed. The conviction and sentence imposed on the revision petitioner/accused as per the judgment dated 21.06.2019 in S.T. No.387/2013 on the file of the Judicial First Class Magistrate Court-II, Pathanamthitta and the judgment dated 30.11.2023 in Crl.Appeal No.59/2019 on the file of the Additional District & Sessions Court-III, Pathanamthitta is set aside, and the revision petitioner is acquitted. The bail bond, if any, executed by him is cancelled. If any amount is paid by the accused as per the orders of the appellate court or this Court, the same should be disbursed to the revision petitioner/accused forthwith.

Sd/-

P.V.KUNHIKRISHNAN, JUDGE

DM