

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 24 OF 2013

Mrs. Sulekhabai Yeshwantrao Chowghule,
w/o late Yeshwantrao Chowghule,
major of age, resident of Chowghule House,
Chicalim – Goa.
(since deceased represented by)

1(a). Mr. Jagdeep Yeshwant Chowgule,
aged 54, r/o House No. 272,
Chowgule House, Chicalim, Goa.

.... Appellant

Versus

1. Shaik Vahid Jahangir alias Shaik Vaid,
Major of age,
resident of Fatima Manzil,
Near First Water Tank,
New Vaddem, Vasco-da-Gama, Goa.
2. State of Goa,
Through the Public Prosecutor,
Panaji – Goa.
3. Mr. Daulatrao Yeshwantrao Chowghule,
aged 60 years, businessman,
r/o 60-61, Alto Mangor,
Vasco da Gama, Goa.
4. Mr. Jagdish Yeshwantrao Chowghule,
aged 54 years, businessman,
r/o H. No. 272, near Sateri Temple,
Chicalim, Goa.
5. Mr. Jaywant Yeshwantrao Chowghule,
aged 54 years, businessman,
r/o Chowghule House,
Chicalim, Goa.
6. Mrs. Sheela Chowghule,
aged 58 years, business,

r/o House No. 424,
Ward No. 12, St. Joaquim Road,
Borda, Margao, Goa.
Represented by her Legal Representative,
Mrs. Vidhya Vernekar.

7. Mrs. Vidhya Vernekar,
aged 40 years,
r/o House No. 424,
Ward No. 12, St. Joaquim Road,
Borda, Margao, Goa. Respondents

Shri Sudin Usgaonkar, Senior Advocate with Shri Kishan Padgaonkar, Advocate for the Appellant.

Shri Arun Bras De Sa with Shri Siddesh Shet, Advocates for the Respondent No. 1.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 29th JULY, 2015

PRONOUNCED ON:- 7th AUGUST, 2015

JUDGMENT :

By this appeal, the appellant is challenging the acquittal of the first respondent from an offence punishable under Section 138 of the Negotiable Instruments Act (the Act, for short).

2. The brief facts necessary for the disposal of the appeal may be stated thus:

That, the original complainant, Smt. Sulekhabai Chowghule (since deceased) had given a hand loan of Rs.30,00,000/- to the first respondent on 28.04.2009. The complainant is having an account with the Lokmanya Multipurpose Co-operative Credit Society Limited, Baina Branch (the Credit Society, for short). The complainant had requested the said Credit Society to issue a cheque to the first respondent, debiting her Savings Bank Account bearing Account No. 211. At her request, the said Credit Society issued a cheque No. 843394 dated 28.04.2009, drawn on the Oriental Bank of Commerce, in favour of the first respondent. At the request of the Manager of the Credit Society, the Oriental Bank of Commerce transferred a sum of Rs.30,00,000/- to the account of the first respondent with ICICI Bank Limited. The first respondent had executed a Loan Security Bond (Exhibit-17) and a Promissory Note (Exhibit-18), in the favour of the complainant. Further, according to the complainant, the loan amount was repayable on demand and if, no demand is made within a maximum period of one month i.e. on or before 28.05.2009. The first respondent had passed a post dated cheque in favour of the complainant for Rs.30,00,000/- on 28.05.2009, which was drawn on his

account with ICICI Bank Limited, Vasco Branch, with instructions to present the said cheque for realisation, in the event of failure of repayment. When the cheque was deposited for realisation with Bank of Baroda, Vasco Branch, on 31.10.2009, it was returned unpaid on account of insufficient funds, to the complainant, on 02.11.2009. The complainant thereafter issued a notice to the first respondent on 19.11.2009, to which a reply was sent by the first respondent on 05.12.2009. While denying the allegation that the first respondent had obtained a hand loan of Rs.30,00,000/-, it was claimed that the first respondent had approached for a loan to the said Credit Society at Baina, and the Manager, Shri Madhukar Khot had asked for a cheque, as a security for the loan. Thus, it was contended that the subject cheque was given as security for sanction of the loan, which never materialized. Thus, it was denied that the cheque was issued towards repayment of loan of Rs.30,00,000/- to the complainant. Thus, a complaint under Section 138 of the Act, came to be filed before the learned Judicial Magistrate First Class, Vasco-da-Gama.

3. At the trial, the complainant, Smt. Sulekhabai Chowghule, examined herself (PW-1) alongwith Shri Madhukar Khot (PW-2), the Manager of the said Credit Society, Ms. Violet E. Das (PW-3), Manager of the Oriental Bank of Commerce and Ms. Saiprithi Shirodkar (PW-4), Branch Manager of the ICICI Bank, Vasco Branch and also Shri Anil Gaindhar (PW-5), the Chief Manager of Bank of Baroda. The complainant also produced certain documents, including the Statement of Account of the ICICI Bank of the first respondent, the subject cheque, the notice and her Statement of Account with Bank of Baroda, Vasco Branch.

4. The first respondent did not lead any defence evidence.

5. The learned Magistrate framed three points for determination, as under:-

(a) Whether it is proved that the cheque was issued towards a legally enforceable debt ?

(b) Whether it is proved that the cheque was returned dishonoured for insufficient funds ?

and

(c) Whether a demand in writing was made by the complainant to the accused ?

6. The learned Magistrate answered the points at (a) and (b) in the negative and point at (c) in the affirmative. In the face of the finding against point nos. (a) and (b), the first respondent came to be acquitted. That is challenged by the original complainant before this Court. Smt. Sulekhabai Chowghule, the original appellant died during the pendency of the appeal and the appeal is prosecuted by one of her heirs, Shri Jagdeep Chowghule. Respondent nos. 3 to 7 are the rest of the legal representatives of Smt. Sulekhabai Chowghule.

7. I have heard Shri Usgaonkar, the learned Senior Counsel for the appellant and Shri De Sa, the learned Counsel for the first respondent. None for the rest of the respondents. With the assistance of the learned Counsel, I have perused the entire evidence and the impugned judgment.

8. It is submitted by Shri Usgaonkar, the learned Senior Counsel for the appellant that the entire transaction was effected through RTGS and is reflected in the accounts,

both of the complainant and the first respondent. He submitted that the first respondent has also executed a Loan Security Bond (Exhibit-17) and a Promissory Note (Exhibit-18). It is submitted that the complainant had also examined the Branch Manager of the ICICI Bank, as also the Chief Manager of Bank of Baroda. It is submitted that thus, there is overwhelming evidence to show that the amount of Rs.30,00,000/- was transferred from the account of the complainant to the account of the first respondent. It is submitted that, in the face of such a evidence, the learned Magistrate was clearly in error in holding that the cheque was not issued towards a legally enforceable debt. It is submitted that the first respondent has not denied the receipt of the amount at any stage, including in the notice reply (Exhibit-15). It is submitted that the defence set up by the first respondent, that he had approached the Credit Society with a request for grant of loan and the cheque was given as security for such a loan being granted, which never materialized, is improbable. It is submitted that the first respondent has failed to show as to how, the amount of Rs.30,00,000/- was credited in his account. It is submitted that contrary to the defence, about PW-2, Shri Madhukar Khot obtaining the cheque as security for

a loan, to be granted, during the cross examination of PW-2, Shri Madhukar Khot, it was suggested that he is not the Branch Manager of the Credit Society. It is submitted that although, the learned Magistrate has noticed some discrepancy in the evidence of PW-1, Smt. Sulekhabai Chowghule, vis-a-vis the evidence of PW-2, Shri Madhukar Khot, the discrepancy cannot be said to be on material aspect. It is submitted that the reasoning by the learned Magistrate that Mohim, (who is the son of the Driver of the complainant and a friend of the first respondent) having not been examined, is also unsustainable. It is submitted that reliance placed by the learned Magistrate on Section 2(8) of the Bankers' Book Evidence Act, in refusing to place reliance on the Statement of Account (Exhibit-68) is improper, particularly when the first respondent has not denied the receipt of Rs.30,00,000/-, as having been transferred to his account and in the face of the evidence of the Branch Managers of Bank of Baroda and ICICI Bank.

9. It is next submitted that reliance placed by the learned Magistrate on Section 2(l)(a) of the Goa Money Lenders' Act, 2001 (the Act of 2001, for short) and the

decision of this Court, in the case of **Kedar Ramakant Kakodkar Vs. Auduth Timblo**, in Civil Revision Application No. 17/2009 dated 05.02.2010, is also misplaced. The learned Senior Counsel has also placed reliance on the decision of this Court in **M/s Armstrong Builders and Developers Vs. Mr. Vishvanath Naik**, reported in **2007(1) ALL MR 167**, in order to submit that a solitary instance of giving a loan does not make a person a money lender. It is submitted that thus, the provisions of the Act of 2001, were not attracted. It is submitted that the finding of the learned Magistrate on point (b) is also not correct. The learned Senior Counsel has relied upon the decision of the Hon'ble Apex Court, in the case of **Rangappa Vs. Sri Mohan**, reported in **(2010) 11 SCC 441**, to submit that, once the signature on the cheque is admitted, a presumption arises in favour of the complainant, which can be displaced only by showing existence of some material to the contrary. It is submitted that the defence as set up by the first respondent, in the notice reply is improbable. It is submitted that the said defence also does not find place in statement under Section 313 of Cr.P.C. Thus, the presumption in favour of the complainant, cannot be said to be rebutted in this case. It is submitted that the view taken by the learned Magistrate is

an impossible view and needs interference.

10. On the contrary, it is submitted by Shri De Sa, the learned Counsel for the first respondent that the defence set up in the notice reply (Exhibit-15), about the first respondent approaching the said Credit Society for loan and the Manager, Shri Madhukar Khot having asked for a cheque, as security is probable, on the basis of the evidence led by the complainant. The learned Counsel has taken me through the evidence of PW-1, Smt. Sulekhabai Chowghule and PW-2, Shri Madhukar Khot, in order to show that PW-1, Smt. Sulekhabai Chowghule has admitted that the cheque was given by the first respondent as a security. The learned Counsel has referred to the cross examination of PW-1, Smt. Sulekhabai Chowghule, in which she has admitted that she had given the loan to one Mohim, who is the son of the driver of the complainant. It is submitted that in the face of such admission, non examination of Mohim, is material. The learned Counsel has referred to certain discrepancies between the evidence of PW-1, Smt. Sulekhabai Chowghule and PW-2, Shri Madhukar Khot, in order to submit that the evidence is not consistent to show that the complainant had advanced an amount of Rs.30,00,000/-, to

the first respondent as claimed. It is submitted that after PW-1, Smt. Sulekhabai Chowghule gave admission, about the loan being granted to Mohim and not the first respondent, there was no re-examination of PW-1, Smt. Sulekhabai Chowghule to clarify this aspect. The learned Counsel submitted that under Section 2(k)(x) of the Act of 2001, the transaction would be covered by the provisions of the said Act as a money lending transaction, which is prohibited in the absence of a license. It is submitted that thus, it has been rightly held that the complainant has failed to establish that the cheque was in discharge of a legally enforceable debt or liability. The learned Counsel would submit that the scope of an appeal against acquittal is essentially limited. This Court while examining acquittal cannot substitute its view, when two views are equally possible. It is submitted that the view taken by the learned Magistrate is a plausible view, which does not need interference.

11. I have given my anxious consideration to the rival circumstances and the submissions made. The following points arise from my determination in this case:

<u>POINT</u>	<u>FINDING</u>
(i) Whether the subject cheque was issued towards a legally enforceable debt ?	In the Affirmative
(ii) Whether the cheque was returned dishonoured on account of insufficient funds ?	In the Affirmative
(iii) Whether the impugned judgment needs interference ?	In the Affirmative
(iv) What order ?	As per final order

12. Point No. (i): At the outset, it may be mentioned that the first respondent has not denied his signature on the subject cheque. The first respondent has also not denied that an amount of Rs.30,00,000/- was transferred from the account of the complainant to the account of the first respondent with ICICI Bank at Vasco. During the course of argument at Bar, in reply to specific query, the learned Counsel for the first respondent did not dispute the signature/execution of the Loan Security Bond (Exhibit-17) and a Promissory Note (Exhibit-18), by the first respondent. The learned Magistrate in paragraph 18 of the judgment has held that the presumption under Section 118(a) and Section 139 of the Act can be drawn in

favour of the complainant. The learned Magistrate has also noticed the decision of the Hon'ble Supreme Court, in the case of **Rangappa** (supra), holding that the presumption mandated by Section 139 of the Act includes a presumption of the existence of a legally enforceable debt or liability, The learned Magistrate has also noticed that the first respondent has not even suggested that the signature on the cheque was not his or that it was not put by him. Thus, it can safely be said that a presumption under Section 118(a) and Section 139 of the Act arises in this case in favour of the complainant. It is true that such a presumption is a rebuttable one. It is not necessary for the first respondent/accused to lead any defence evidence in order to rebut the presumption. The accused can do so on the basis of the evidence led on behalf of the complainant. In doing so, it has to be shown that the defence raised by the first respondent/accused is probable. Before advertng to the defence, it would be necessary to look into the evidence of PW-3, Ms. Violet E Das and PW-4, Smt. Saiprithi Shirodkar.

13. PW-3, Ms. Violet E Das is the Manager of Oriental Bank of Commerce. She has stated that the letter (Exhibit-20)

was issued at the request of the said Credit Society. She has stated that the RTGS entry was effected on instructions given by authorised person.

PW-4, Smt. Saiprithi Shirodkar is the Branch Manager of the ICICI Bank at Vasco. She has stated that the first respondent is having an account with the said Bank. She states that the amount of Rs.30,00,000/- was credited to the said account on 28.04.2009 by RTGS from Oriental Bank of Commerce from the account of the Credit Society. She has produced the Statement of Account (Exhibit-68), which reflects the deposit of Rs.30,00,000/- in the account of the first respondent on 28.04.2009.

Thus, from the evidence of PW-3, Ms. Violet E Das, and PW-4, Smt. Saiprithi Shirodkar and the Statement of Accounts (Exhibits-20 and 68), it is clear that an amount of Rs.30,00,000/- has been credited to the account of the first respondent.

14. The perusal of the impugned judgment would show that the learned Magistrate has considered the evidence of PW-1, Smt. Sulekhabai Chowghule and PW-2, Shri Madhukar Khot, from paragraph 19 onwards. The learned Magistrate has

noticed certain discrepancies in their evidence inter se. It has been found from the cross examination of PW-1, Smt. Sulekhabai Chowghule that the first respondent had not requested personally, for the loan. She admitted that she was not present when the loan was given to the first respondent. She has stated that Shri Madhukar Khot (PW-2) and one Mohim, the son of her driver had requested to give the loan to the first respondent. She also stated that she had given the loan to Mohim. On the basis of this admission, the learned Magistrate has found that the case of the complainant of having given hand loan to the first respondent is falsified. The learned Magistrate has then noticed, the evidence of PW-2, Shri Madhukar Khot, in which the witness has stated that the first respondent was introduced to him by one Mohim Khawja. PW-2, Shri Madhukar Khot did not have any family or business relations with the first respondent. He did not know why the loan was given by the complainant. He did not request the complainant to give the loan and the loan was not given on his request. This part was found to be discrepant with the evidence of PW-1, Smt. Sulekhabai Chowghule. The learned Magistrate has then found that in such circumstances, Mohim was "extremely material witness" and in the absence of his

examination, the role of Mohim in the entire transaction has “remained unknown”.

It may be mentioned that although at one stage, the complainant had stated that she had given a loan to Mohim, in the further cross examination she has specifically stated that the amount was given to the first respondent, although, she admits that there was no commercial transaction between the complainant and the first respondent. It is trite that the evidence of any witness has to be read as a whole and it is not possible to pick and choose certain part of evidence.

The learned Magistrate has then went upon examining the evidence of PW-1, Smt. Sulekhabai Chowghule and PW-2, Shri Madhukar Khot, in order to find that the case of the complainant, is falsified. It has also been held that the complainant is a housewife and as such, there was a doubt whether the complainant had at all met the first respondent and this according to the learned Magistrate “gives probability to the stand taken by the accused in his reply”. The learned Magistrate has noticed that the complainant had stated that she inquired with the ICICI Bank if, the first respondent was having any account with it, prior to giving loan to him. The learned Magistrate has observed that it is unlikely as under the

Rules as to secrecy, the Bank would not divest any such information of its constituents. It has been found that the "safeguard allegedly taken by the complainant, prior to giving the loan to the accused stands disproved". It has also been found that the complainant had admitted that the first respondent is not having friendly relations or business relations with her. Therefore, "a doubt arises that such a huge sum would be advanced to an unknown person". The learned Magistrate has noticed some other aspect in the evidence, about absence of any written instructions, to debit the amount, which in the opinion of the Magistrate would have been a link to connect the amount debited from the account of the complainant and the amount credited in the account of the first respondent by the Credit Society. The learned Magistrate has then relied upon Section 2(8) of the Banker's Book Evidence Act, to discard the Statement of Account (Exhibit-68), for want of certificate as contemplated under the said Act. The learned Magistrate has then found that PW-1, Smt. Sulekhabai Chowghule has admitted that she was not present, when the transaction was entered into and has therefore, found that PW-2, Shri Madhukar Khot had exceeded his role as a Manager in getting the documents executed. In the opinion

of the Magistrate, a question also arises "as to why the complainant would have asked the Manager that the amount advanced by her to the accused was not paid, if Shri Madhukar Khot was only acting as a Manager to the Bank". This according to the learned Magistrate probalises the stand taken by the first respondent that the cheque was issued, towards security for a loan, which the first respondent had sought from the Credit Society.

15. I have carefully gone through the reasoning articulated by the learned Magistrate. It is true that there is no clear evidence to show that the first respondent was so well acquainted to the complainant, except the claim that he was the friend of one Mohim, who is son of the driver of the complainant. It can also be seen that there are certain contradictions in the evidence of PW-1, Smt. Sulekhabai Chowghule vis-a-vis the evidence of PW-2, Shri Madhukar Khot. However, all these aspects would fall into insignificance in the face of clear documentary evidence to show that the amount of Rs.30,00,000/- was transferred from the account of the complainant, to the account of the first respondent. In addition to this, there are also documents in the nature of

Loan Security Bond (Exhibit-17) and a Promissory Note (Exhibit-18), which are also not disputed by the first respondent. The effect of all this evidence, coupled with the absence of denial, would clearly fortify the statutory presumption available to the complainant as the signature on the cheque is not disputed.

16. The learned Counsel for the first respondent has stated that the genesis of the entire transaction in this case is shrouded in mystery. That coupled with the discrepancies in the evidence of PW-1, Smt. Sulekhabai Chowghule and PW-2, Shri Madhukar Khot, would probablise the defence set up by the first respondent. I would tend to disagree. It is true that evidence of PW-1, Smt. Sulekhabai Chowghule would show that PW-2, Shri Madhukar Khot had taken active part in transfer of the amount to the account of the first respondent, as also execution of the documents namely, Loan Security Bond (Exhibit-17) and a Promissory Note (Exhibit-18). However, that by itself would be insufficient to say that the defence is probablised. It may not be out of place to mention that, the defence that, Shri Madhukar Khot had insisted for a cheque, when the first respondent had approached the Credit

Society for loan, is not even put to PW-2, Shri Madhukar Khot. That also does not find place in the statement of the first respondent under Section 313 of Cr.P.C., The first respondent only states that the case is filed at the instance of Shri Madhukar Khot, the Branch Manager of the Credit Society. Thus, in my considered view, the discrepancies found in the evidence of PW-1, Smt. Sulekhabai Chowghule and PW-2, Shri Madhukar Khot cannot over ride the evidence of PW-3, Ms. Violet E Das, PW-4, Smt. Saiprithi Shirodkar. The Statement of Account (Exhibit 68), which clearly show that the amount of Rs.30,00,000/- was transferred to the account of the first respondent. It is clearly established that the amount of Rs.30,00,000/- was transferred to the account of the first respondent, from the account of the complainant.

17. Reliance placed by the learned Magistrate on Section 2(8) of the Bankers' Book Evidence Act is also misplaced. The said Section defines certified copy, while envisages a certificate in the prescribed format being appended. Section 2A provides for conditions in the printout. The learned Magistrate has found that in the absence of the certificate, the Statement of Account (Exhibit-68) cannot

be relied upon. We have on record the Statement of Account No. 211, of the complainant with the Credit Society (Exhibit-16) and a Certificate dated 28.04.2009 (Exhibit-19), issued by the Branch Manager of the Credit Society certifying that Rs.30,00,000/- has been transferred in favour of the first respondent, by debiting the amount to the Saving Bank Account No. 211. In my considered view, this evidence cannot be brushed aside merely, for the absence of the certificate as contemplated in the Bankers' Book Evidence Act. (See **AIR 1994 SC 1644**, in the case of **State Bank of India Vs. Yumnam Gouramani Singh**).

18. This takes me to the provisions of the Goa Money Lenders Act, 2001. Section 2(k)(x) of the said Act of 2001 reads thus:

"2(k) - "loan" means an advance at interest, whether of money or in kind, but does not include —

(x) an advance of any sum exceeding rupees three thousand made on the basis of a Negotiable Instrument as defined in the Negotiable Instruments Act, 1881 (Central Act 26 of 1881), other than a promissory note."

19. Section 2(l)(a), which defines a “money lender” reads thus:

“2(l) “money-lender” means,—
(i) an individual; or
(ii) an undivided Hindu Family; or
(iii) a company; or
(iv) an unincorporated body of
individuals, who or which—
(a) carries on business of money-lending in
the State; or does any activity of lending of
any finance.”

20. It cannot be disputed that the evidence of PW-2, Shri Madhukar Khot, as also the Loan Security Bond (Exhibit-17) and a Promissory Note (Exhibit-18), would show that the amount was to carry interest at the rate of 18% per annum. The question is whether such a transaction would come within the mischief of Act of 2001. In other words, can it be said that in the absence of a license, the transaction would cease to be a legally enforceable debt or liability.

21. The question precisely turns upon the interpretation of Section 2(l)(a) of the Act of 2001. The learned Magistrate

has relied upon the decision of this Court in the case of **Kedar Ramakant Kakodkar** (supra), in order to hold that the words in Section 2(l)(a) has widened the scope of activity of lending of finance, so as to include within its sweep each and every activity of such lending. Section 14 of the Act of 2001 lays down that no decree shall be passed in any suit under the Act, unless, the Court is satisfied that at the time, when the loan or any part thereof, to which the suit relates was advanced, the money lender held a valid license and if, the Court is satisfied that the money lender did not hold a valid license, it shall dismiss the suit. In the case of **Kedar Ramakant Kakodkar** (supra), the order challenged was the one of rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure. The suit was filed for recovery of the sum advanced to the defendant under a loan agreement. The Civil Court in that case had concluded that the averments in the plaint do not bring out the fact that the plaintiff was a money lender, within the meaning of Section 2(l) of the Money Lenders' Act. This Court after examining the provisions of a cognate legislation, namely, the Bombay Money Lenders' Act 1946 held thus in paragraph 16:-

"16. Consequently, the plaint which refers not to a single act of giving a loan, but several such acts in absence of any specific pleadings regarding the nature or object of the business carried on by the plaintiff purports to clothe the plaintiff with an occupation or pursuit of lending finances, an activity in which he purports to be active."

It can thus be seen that in the case of **Kedar Ramakant Kakodkar** (supra), the Court was concerned with a matter, where there were multiple transactions.

22. In the case of **M/s Armstrong Builders and Developers** (supra), this Court was considering an appeal against acquittal, under Section 138 of the N.I. Act, as in the present case. In that case also, there was a solitary transaction. This Court specifically interpreted, the term "activity", as appearing in Section 2(l)(a) of the Act of 2001 and held thus in paragraph 8 of the judgment:

"8. The complainant was also cross examined on the aspect of money lending. In fact in the cross examination of the complainant it was impliedly admitted that the amount which was advanced to the

accused was not connected with the business of the accused, the complainant's business being that of a builder and developer. The complainant had categorically stated that he was not a money lender nor did he have license to lend money. Picking up the expression from para 3 of the complaint, that the complainant had given a loan to the accused, learned Counsel on behalf of the accused, submits that such a loan was not recoverable in the light of the provisions of the Goa Money Lenders Act, 2001. The learned Counsel on behalf of the accused has particularly referred to the expression activity in sub-clause (a) of Clause (I) of Section 2 of the said Act and has submitted that even a single loan would come within the purview of the expression "activity" appearing in the said sub-clause(a) of Clause (I) of Section 2 of the Act. Apart from the denial by the complainant that he is the money lender, the accused produced no evidence to bring on record to show that the complainant was carrying on business of money lending or any activity of lending of any finance. The expression "activity" is not defined under the said Act and the ordinary dictionary meaning as per Black's Law Dictionary activity is an occupation or

*pursuit in which a person is active, and, as per Oxford English Dictionary, it is the condition in which things are happening or being done. In other words, the very subject of activity suggests continuity and therefore a single act of giving a loan would not come within the definition of sub clause(a) of clause(l) of Section 2 of the said Act. In this context, reference to the case of **Rotakonda Raghu Naidu Vs. Kolla S. Prasad** (2004 (4) Crimes 295) could be made. The learned Single Judge of the Andhra Pradesh High Court referring to another decision of the Division Bench of that Court observed that "money lender" envisages only those persons whose regular business is to advance monies and not those who advance monies casually. A solitary instance of giving a loan does not make a person a money lender. That being the position, the provisions of the Goa Money Lenders Act, 2001 would be of no assistance to the case of the accused."*

23. It can thus, be seen, that this Court after consideration of the import of the expression "activity" has held that a solitary instance of giving a loan does not make a

person "Money Lender". It was held that provisions of the Goa Money Lenders' Act of 2001 would be of no assistance to the case of the accused. The facts in the present case are similar/identical to the case of **M/s Armstrong Builders and Developers** (supra). I am in respectful agreement that the view expressed by a learned Single Judge of this Court in the case of **M/s Armstrong Builders and Developers** (supra) that a solitary instance of giving a loan would not make a person a "Money Lender". Thus, the provisions of Section 14 of the Act of 2001, cannot come to the aid of the first respondent in this case. For these reasons, I hold that the finding recorded by the learned Magistrate in this regard is clearly not sustainable. The point is accordingly answered in the affirmative.

24. Point No. (ii): The learned Magistrate has considered the written advise/memo dated 31.10.2009 (Exhibit-12) and a letter dated 02.11.2009 of Bank of Baroda (Exhibit-13). It has been found that the advise (Exhibit-12) did not indicate as to which Bank had issued or who had signed the same. It is found that PW-3, Ms. Violet E Das has not identified the written advise (Exhibit-12) and she has not

deposed that the cheque was returned for insufficient funds. The learned Magistrate has then referred to the evidence of PW-5, Shri Anil Gaindhar, the Chief Manager of Bank of Baroda, where the complainant is having an account. This witness has stated on the basis of Statement of Account (Exhibit-102), that the cheque was presented for payment on 31.10.2009 and was returned dishonoured for insufficient funds on 02.11.2009 and this was so intimated to the complainant on the same day. PW-5, Shri Anil Gaindhar has stated that Exhibit-13, which is a letter from the Bank intimating the complainant about dishonor of the cheque is signed by Shri Kedar, the Chief Manager of the Bank. The learned Magistrate has thereafter found that both the Statements of Account (Exhibit-102) indicates that the cheque bearing no. 510087 was returned dishonoured for insufficient funds. However, it is held that the statement does not bear a certificate as required under the Bankers' Book Evidence Act and thus, cannot be read into evidence.

25. In my considered opinion, this is taking too technical view of the matter. When the Chief Manager has deposed that the cheque was dishonoured for insufficient funds

and it was so intimated to the complainant, it is difficult not to believe the said witness for the reasons as stated by the learned Magistrate. PW-4, Smt. Saiprithi Shirodkar has also stated in categorical terms that the cheque was returned dishonoured for insufficient funds. It is not possible to accept that PW-4, Smt. Saiprithi Shirodkar and PW-5, Shri Anil Gaindhar would fabricate a false Statement of Account, only to help the complainant. Thus, it has to be held that the cheque was dishonoured on account of insufficient funds. The point is accordingly answered in the affirmative.

26. Point No. (iii): The scope and ambit of an appeal against acquittal is no longer *res intriga*. It is not well settled that although, in an appeal against acquittal, the Appellate Court cannot justifiably substitute its view, in the place by the one taken by the lower Court, when two views are equally possible. However, this would apply only where two views are equally and reasonably possible, on the basis of the evidence led. If, the view recorded by the learned Magistrate is found to be perverse or in the nature of impossible view, the Appellate Court would not only be justified, but duty bound to step in. As noticed earlier, the finding recorded by the learned

Magistrate in holding that the subject cheque was not issued towards discharge of a legally enforceable debt or liability is clearly against the weight of the evidence in the form of transfer of an amount of Rs.30,00,000/-. The reliance placed on the provision of Section 2(8) of the Bankers' Book Evidence Act and on the provisions of the Act of 2001, is also misplaced. Thus, I find that the impugned judgment needs interference. The point is accordingly answered in the affirmative.

27. I have heard, the first respondent and Shri De Sa, the learned Counsel appearing for the first respondent, as also Shri Usgaonkar, the learned Senior Counsel for the appellant on the point of sentence.

28. It is submitted by Shri De Sa, the learned Counsel for the first respondent that the first respondent is the sole earning member in the family and therefore, leniency may be shown while awarding the sentence. It is submitted that some time may be granted to surrender.

29. Having regard to the above circumstances, and having heard the learned Counsel for the parties, the following

order is passed:

(i) The appeal accordingly succeeds and is allowed. The impugned judgment of acquittal is hereby set aside. The first respondent is hereby convicted for the offence punishable under Section 138 of the Negotiable Instruments Act.

(ii) The first respondent is sentenced to suffer simple imprisonment for a period of three months and to pay compensation of Rs.30,00,000/- and in default to suffer further simple imprisonment, for a period of three months.

(iii) The first respondent is granted one week's time to surrender before the learned Magistrate. In the event of failure, the learned Magistrate shall take steps for getting the first respondent apprehended, for serving the sentence.

(iv) The appeal is disposed of, in the aforesaid terms.

C. V. BHADANG,J.