

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 46 of 2013**

Shri Datta S. Nadkarni,
Age - 60 years, Advocate,
Resident of House No.E-8,
Reliance Park,
Margao, Colva Road,
Per-Seraulim, Salcete, Goa.

.. Appellant/
Orig. Complainant

V/s

1. Mr. Salvador Fernandes
Major of age,
Resident of H.No. not known
Grande Vanelim,
Colva-Benaulim Road,
Colva, Salcete, Goa

.. Respondent/
Orig. Accused

2. State of Goa,
Through the P.P.
Panaji, Goa.

.. Respondents

Mr. Sudesh Usgaonkar and Ms. R. Pereira, Advocates for the appellant.

Mr. S. Redkar, Advocate for the respondent no. 1.

CORAM :- C. V. BHADANG, J.

Reserved on :- 8th July, 2015.

Pronounced on : 16th July, 2015.

JUDGMENT :

By this appeal, the appellant/ complainant is challenging the acquittal of the first respondent/ accused from an

offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (the Act, for short).

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

That the appellant and the respondent were good friends. The first respondent had approached the appellant on 03/11/2010, requesting for a financial accommodation of Rs.2 Lakhs, as he was in difficulty. Looking to their relationship, the appellant advanced a sum of Rs. 2 Lakhs to the first respondent "on loan basis". On the same day, the first respondent passed a cheque for Rs.2 Lakhs in favour of the appellant, which was drawn on the account of the first respondent with Bank of Baroda, Margao Branch. When the cheque was deposited by the appellant for encashment on 25/04/2011, the same was dishonoured, which was intimated to the appellant on 30/04/2011. Thereafter, the appellant issued a statutory notice on 14/05/2011, which was not claimed by the first respondent as per the endorsement dated 24/05/2011. The intimation about the refusal was left at the house of the appellant on 01/06/2011. However, the appellant was at Mumbai for a week and eventually, collected the envelope on 11/06/2011 and thereafter, filed the complaint under Section 138 of Act before the learned Magistrate on 13/07/2011.

3. At the trial, the appellant examined himself and produced documents, including the subject cheque, the notice and envelope, which was returned as not claimed. The first respondent did not lead any evidence in defence. The learned Magistrate, by the judgment and order dated 29/11/2012, dismissed the complaint, acquitting the first respondent. Feeling aggrieved, the complainant is before this Court.

4. I have heard Shri Usgaonkar, the learned Counsel for the appellant and Shri Redkar, the learned Counsel for the first respondent. With the assistance of the learned Counsel, I have perused the evidence and the impugned judgment.

5. It is submitted on behalf of the appellant that the learned Trial Court was in error in holding that the complaint is not filed within time. It is submitted that although the endorsement of refusal by the first respondent is dated 24/05/2011, the intimation about the same was left at the house of the appellant on 01/06/2011. It is submitted that the appellant can be attributed knowledge about the refusal only on 01/06/2011. It is submitted that the complaint would be within time if, the period is reckoned from 01/06/2011. The learned Counsel has placed reliance on the decision of the Kerala High Court in **K. G.**

Kailasanathan s/o. Gangadharan, Kalthilthodi Veedu Vs. Sajish Babu @ Kuttan and another, reported in **CRL. A.NO.1227/2005, dated 30/03/2012**, in order to submit that in a case of deemed service/ refusal, the period will have to be reckoned from the date on which the sender of the notice was notified about the refusal. He submitted that else the same would lead to unjust result. It is submitted that unless and until the intimation about refusal is received by the sender, the sender would not have any means to know that the notice has been so refused/ unclaimed. He submitted that the limitation in such a case would start from the date, on which the intimation about refusal is received/ served on the sender.

6. It is next submitted that the learned Trial Court was in error in holding that the cheque was not issued towards discharge of a legally enforceable debt. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in **Hiten P. Dalal Vs. Bratindranath Bangerjee**, reported in (2001)6 SCC 16, in order to submit that once the accused admits the signature on the cheque, a presumption arises, which is a statutory presumption, in favour of the complainant. It is submitted that it is for the first respondent/ accused to rebut this presumption on the basis of material, which would amount to proof and not by a

bare explanation, which is merely plausible. He submitted that the first respondent has not led any evidence to rebut the effect of such presumption. He submitted that the defence set up by the first respondent that he is in the business of developing property and had engaged the services of the appellant for the purpose of conveyancing work and the cheque was given as an advance for the work of conveyancing, which was never done, cannot be accepted. He submitted that the first respondent ought to have shown that indeed he owns property and he is in the business of developing the same. He submitted that the defence itself is improbable as a person in the business of developing property would not have approached, seeking financial assistance. It is submitted that the first respondent had even shown willingness to deposit Rs.2 Lakhs before the Magistrate vide an application dated 23/07/2012 which would show that the first respondent had admitted his liability. The learned Counsel has placed reliance on the decision in the case of **Rangappa Vs. Mohan**, reported in AIR 2010 SC 1898, **Krishna P. Morajkar Vs. Joe Domnic Ferrao Anr.** reported in 2014(2) Bom.C.R. (Cri.) 738 and **Krishna Janardan Bhat Vs. Dattatraya G. Hegde**, reported in AIR 2008 SC 1325, in support of his various submissions. It is submitted that the view taken by the learned Magistrate is clearly an impossible view, requiring interference.

7. On the contrary, it is submitted on behalf of the first respondent that the complaint was clearly barred by time. The learned Counsel has placed reliance on the decision of the Hon'ble Apex Court in the case of **Yogendra Pratap Singh Vs. Savitri Pandey**, reported in (2014)0 Supreme (SC)689 and **SIL Import, USA Vs. Exim Aides Silk Exporters, Bangalore**, reported in (1999)3 Crimes (C)21. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of **Subodh S. Salaskar Vs. Jayprakash M. Shah and others**, reported in AIR(SC) 3086. and **Tameshwar Vaishnav Vs. Ramvishal Gupta**, reported in 2010(1) Supreme 55, in order to submit that cognizance of the complaint beyond the period as prescribed in the proviso to Section 139 of the Act would be clearly illegal. Reliance is placed on the decision of Kerala High Court in **Vettan Sankaran Vs. N. S. Sastheendran**, reported in CRL.A.NO.171/2002 and the judgment of the Delhi High Court in the case of **Ashwani Kumar Zulka Vs. Lt. Col. Parthojit Coudhary (Retd).**, reported in 2007 CriLJ 1129. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of **John K. Abraham Vs. Simon C. Abraham**, reported in (2014)2 SCC 236 and the decision of this Court in **Sanjay Mishra Vs. Kanishka Kapoor @ Nikki**, reported in (2009)0 CrLJ 3777. It is submitted that the appellant

has failed to show that he had sufficient means to pay the amount. It is submitted that the learned Magistrate has rightly come to the conclusion that the cheque was not shown to be issued against the discharge of a legally enforceable debt or liability and that the complaint was barred by limitation. He submitted that the scope of interference in an appeal against acquittal is limited and in the absence of any illegality in the finding, recorded by the Magistrate, the appeal deserves to be dismissed.

8. In view of the rival circumstances and the submissions made, following points arise for determination in this case :

- (1) *Whether the complaint can be said to be filed within time ?*
- (2) *Whether the appellant proves that the cheque was issued towards discharge of a legally enforceable debt.*

9. Point No.1 - The issue of limitation goes to the root of the matter and has to be taken up first. In order to appreciate the controversy, it would be necessary to set out the relevant provisions, which govern the field namely, Section 138 and Section 142(b) which read as under :

“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 extend 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 or other liability” means a legally enforceable debt or other liability.*

“142(a).....

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c)”

10. It can, thus, be seen that under the proviso to Section 138 of the Act, following conditions should be satisfied :

- (i) That the cheque is presented for encashment within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.
- (ii) That the payee or the holder in due course 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 15 days of the "receipt of the information", by him from the Bank regarding the return of the cheque as unpaid and;

(iii) That the drawer of such a 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 15 days of the 'receipt of notice'.

It can, thus, be seen that the offence contemplated under Section 138 of the Act is complete on the failure of the drawer to pay the amount within 15 days of the receipt of the said notice under proviso (c) to Section 138 of the Act. That affords a cause of action to the payee to file the complaint which under Section 142(b) of the Act has to be filed within a period of one month from the accrual of cause of action namely, the non-payment of the amount by the drawer within 15 days of the receipt of the notice. At this stage, it may be noted that a proviso was added to Section 142(b) by the Amendment Act No.55/2002 with effect from 06/02/2003, authorising the Magistrate to take cognizance of a complaint after the prescribed period of one month, if the complainant satisfies the Court that he had sufficient

cause for not making the complaint within such period. Thus, by the said amendment, there was a clause in the nature of a power for condonation of delay in filing the complaint, which was introduced in the Act. The question, which precisely falls for determination in this case is what is the date of 'receipt' of the said notice in a case where the notice has been refused /not claimed by the drawer. In a case, where the drawer has actually received the notice, there is no difficulty in reckoning the date. The question as is raised in the present case arises on account of the fact that the notice is unclaimed / refused by the drawer. Admittedly, the notice was sent on 14/05/2011 and the postal endorsement shows that the respondent/ accused had refused to claim the notice on 24/05/2011. The intimation of the refusal of the notice was left at the residence of the appellant on 01/06/2011. However, according to the appellant as he was out of station, he collected the envelope on 11/06/2011. It may be mentioned that the appellant is not relying on the date 11/06/2011. However, according to the appellant, the date of service of the notice (as unclaimed) will have to be reckoned as 01/06/2011 and not 24/05/2011. If we reckon the date of refusal as 01/06/2011, the complaint, which is filed on 13/07/2011 would be within time. However, if the date of service is taken as 24/05/2011, the complaint is barred by time. The learned Magistrate has found

that the date of actual refusal i.e. 24/05/2011 will have to be reckoned as the date of receipt of the notice and thus, found that the complaint is filed beyond time.

11. The Negotiable Instruments Act was amended by introduction of Chapter VII by Act No. 66 of 1988 with effect from 01/04/1989, whereby the dishonour of certain cheques for insufficient funds, was for the first time made an offence. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instruments and to instill confidence between the transacting parties in the field of business and commerce. The Hon'ble Apex Court in the case of **Krishna Janardan Bhat** (supra), has *inter alia*, held that the provisions under Section 139 of the Act have been inserted to regulate the growing business, trade, commerce and industrial activities in the country and strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque, which is essential to the economic life of a developing country like India. It has further been held that this, however, shall not mean that the Court shall put a blind eye to the ground realities. The Statute mandates raising of presumption, but it stops at that. It does not say how presumption drawn should be held to have been rebutted. Other

important principles of legal jurisprudence namely presumption of innocence as human rights and a doctrine of reverse burden, introduced by Section 139, should be delicately balanced. Such balancing act indisputably would largely depend upon the factual matrix of each case, materials brought on record and having regard to legal principles governing the same. It has further been held that the Courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Act, the same may not lead to injustice or a mistaken conviction.

12. In the case of ***Rahul Builders Vs. Arihant Fertilizers and Chemicals and another***, reported in 2008(2) SCC 321, the cheque was for Rs.1 Lakh which was dishonoured. The appellant sent a notice, asking to remit Rs.8,72,409 within 10 days. The High Court held that the notice was vague and was not in conformity with the statutory requirements of proviso (b) and (c) of Section 138 of the Act. While confirming the said finding, it was held by the Hon'ble Apex Court that the service of notice is imperative in character for maintaining the complaint. Same needs to be in conformity with proviso (b) to Section 138 of the Act. It was held that Section 138 of the Act being a penal provision, needs to be construed strictly, the condition precedent

wherefor is service of notice.

Although the factual matrix in **Rahul Builders** (supra) would be distinguishable, the fact remains that the service of the notice in terms of clause (b) of the proviso to Section 138 of the Act is imperative and the provisions being penal in nature, have to be strictly construed. Moreso, when the provisions also entail a reverse burden on account of the fact that the presumption is available in favour of the payee under Section 118 read with Section 139 of the Act.

13. Turning to the present case, the precise question is what should be the date of 'receipt of the notice' in a case where there is a deemed service, in which the drawer has either refused or the notice is returned as unclaimed. Whether it would be the actual date of the refusal or the date on which the drawer has unclaimed the envelope or it would be the date of intimation of such refusal to the payee.

14. None of the parties have brought to my notice any decision of this Court or of the Hon'ble Apex Court, governing the said question. On behalf of the appellant, reliance is placed on the decision of the Kerala High Court in the case of **K. G. Kailasanathan** (supra), in which it was held that the presumption

of 'deemed service', should be drawn, reckoning the date on which the sender of the notice was notified that the notice has not been served and hence, the limitation for filing the complaint should commence from the date when the complainant received the returned postal cover or was so informed by the Postal Authority, in case the postal cover was lost. While holding so, the Kerala High Court has placed reliance on its earlier decision in the case of **Chacko Vs. Joseph**, reported in 2003(2) KLT 1, in which it was held as under :

“Normally the presumption of deemed service can and need be drawn only when the notice sent by the complainant is received back by him without service. Of course there may be exceptional cases where the complainant sleeps over his rights and does not make enquiries about the notice sent by him. If within a reasonable time the notice is not returned, the complainant is certainly expected to make enquiries. If he does not draw the presumption of due service at the appropriate time by being indifferent to his own rights, such a complainant may not be justified in insisting that the presumption of due service can be drawn only if and when he gets the notice sent by him returned to him unserved. But in all other cases where the notice sent is returned to the sender within a reasonable time, such sender will be obliged to invoke the presumption of due service only on the

date on which the sender receives back the returned notice.”

It can, thus, be seen that even in the case of **Chacko** (supra), the Court did not lay down as a universal proposition that in every case, the complainant/ payee would be entitled to claim that it is the date of intimation of the refusal, that would lead to presumption of deemed service. That has been found to be dependent on the payee acting diligently and only where within a reasonable time the notice is not returned, the complainant would be entitled to claim that the date of deemed service would be the date when the payee is so intimated. Although it is not clear, in all probability, the decision in the case of **Chacko** (supra) arose out of a complaint prior to the amendment by Act No.55/2002, whereby the provisions in the nature of condonation of delay were introduced in the Act. Yet another Single Judge of the Kerala High Court in the case of **Vettan Sankaran** (supra), had taken a contrary view. After considering the decision of Delhi High Court in the case of **Ashwani Kumar Zulka** (supra), it has been held that it would be the date of refusal or the date on which the envelope is not claimed would have to be considered and not its intimation to the payee. The Delhi High Court on the facts of that case had held that although the complaint was barred by one or two days, the only result was that the action initiated was beyond

the period prescribed and the complaint was dismissed. In the said case, the registered envelope was lastly taken by the postman at the residential address of the drawer on 28/11/1996 and to the business address on 29/11/1996. Thus, the limitation if counted from 28/11/1996/ 29/11/1996, the complaint ought to have been filed by 13th or 14th January, 1997. The complaint, which was filed on 16/01/1997, was found to be beyond the period of limitation although by two days only. The Court also noticed that at the relevant time, there was no provision for condonation of delay and as such, the complaint was dismissed as time barred. The Delhi High Court in the said case, had placed reliance on the decision of the Hon'ble Supreme Court in the case of **SIL Import, USA** (supra) and **K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Anr.**, reported in (1999)7 SCC 510 and held in paragraph 13 as under :

“13. It is clear from the above that 15 days' period is to be reckoned from the date when a notice is returned by the sender as unclaimed. A conjoint reading of the two judgments of the Supreme Court in SIL Import USA (supra) and K. Bhaskaran (supra) would clearly establish that 15 days' period is to be counted from the date when the notice is received by the drawer of the cheque and not when intimation of receipt of this notice is received by the sender of the notice. In case the notice is actually received by the

addressee (drawer of the cheque) 15 days' period would be reckoned from that date. In those cases, where it is a case of deemed service, namely, where the notice is dispatched at correct address but returned by the addressee and not accepted, it would be from the date when the addressee returned the notice as unclaimed....."

15. In the case of **SIL Import, USA** (supra), the notice was sent by fax as well as by Registered Post. It was held that the date when the notice was sent by fax would be sufficient compliance with the legal requirement and the complaint filed beyond 45 days of the fax notice, was rightly dismissed.

16. At this stage, it would be useful to refer to Section 27 of the General Clauses Act, 1897, which reads as under :

"27. Meaning of service by post. *Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is*

proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

17. It can, thus, be seen that in the case of a service by post, the same shall be deemed to be effected by properly addressing, pre-paying and posting by registered post a letter containing the document and unless the contrary is proved, it will be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

18. On consideration of the relevant provisions, I find that it would be the date on which the drawer has actually refused or has unclaimed the envelope, which will have to be reckoned as the date of deemed service and not the date on which the intimation of refusal is received by the payee. As noticed earlier, even in the case of **Chacko** (supra), a learned Single Judge of Kerala High Court has not held as a rule that in all the cases, it would be the date of service of the intimation of the refusal, which would be reckoned as the date of deemed service. That is made dependent on the condition that the drawer acts with due diligence and is not indifferent to his own rights and waits indefinitely for receipt of either the acknowledgment or the envelope back as refused or an intimation of refusal.

19. A conjoint reading of the provisos (a) to (c) to Section 138 of the Act would show that there are obligations which alternate between the payee and the drawer, which ultimately lead to the offence being complete, enabling the Magistrate to take cognizance of the offence. Thus, while under proviso (a), the drawer is obliged to present the cheque within a period of six months or within the validity, whichever is earlier and then to issue the notice within 15 days of the receipt of the information of the dishonour, the obligation then shifts to the drawer to make the payment within 15 days of the 'receipt of the notice'. If that is not done, the cause of action accrues to the payee to file the complaint within a period of one month. The final obligation rests on the drawer to pay the amount within fifteen days of the receipt of the notice. Obviously, for this, it is the date of knowledge of the drawer which would be relevant for the purpose and not that of the payee.

20. The matter can also be looked at from another angle. Let us take a case where the notice is accepted and personally served on the drawer and the postal authorities take some time for delivering the acknowledgment to the payee. The question is whether in that case also, it can be claimed that the date of

service would be the date of receipt of the acknowledgment by the payee. If not, we would be creating two clauses of cases, namely, a case, where the notice is accepted and served on the drawer, in which case, it would be that date, which would be relevant and another eventuality, where the notice is refused/ not claimed, thereby raising a presumption of deemed served in which case, the relevant date would be the date of receipt of the intimation of refusal. Such an interpretation is neither conceivable nor appropriate. As noticed earlier, the obligations between the payee and the drawer alternate as provided for in clauses (a) and (b) to Section 138 of the Act. Under clause (a) of the proviso, it is for the payee to issue the notice within 15 days and, therefore, it is the date of the receipt of the intimation of dishonour, which is relevant. Obligation of the drawer is to pay within 15 days of the receipt of the notice and thus, it would logically follow that it is the date of receipt or refusal by the drawer, which would be relevant. There is one more reason why the submission on behalf of the appellant cannot be accepted. If we were to take the date of receipt of the intimation of refusal by the payee as a relevant date, it would have the effect of putting the period of limitation for filing the complaint at the mercy of the postal authorities and the time taken for service of the intimation of refusal. Such a view cannot obviously be countenanced.

21. It was argued on behalf of the appellant that if the date of actual refusal and not the date of delivery of intimation is taken, it will cause serious prejudice to the complainant and would lead to anomalous and unjust result. It was argued that without the receipt of the intimation of the refusal, the complainant would not be in a position to know as to from where the period of 15 days, which is allowed to the drawer/accused for payment of amount starts, which consequently has a bearing on accrual of cause of action to file the complaint. It is submitted that such a view, which will lead to anomalous or unjust result, cannot be preferred. I do not find that the submission can be accepted, for more reasons than one. As noticed earlier, if the submission is accepted, it would apply with equal force to a situation where the accused accepts the notice and some unusual time is taken by the postal authority for delivery of the acknowledgment to the complainant. Secondly, the possible prejudice which may occasion in a given case to the complainant, (albeit who does not wait indefinitely for the acknowledgment or the intimation of refusal to be received,) can now be taken care of by virtue of the introduction of the amendment, which permits condonation of delay in filing the complaint.

22. In the result, I find that the provisions contained under Section 138 of the Act being penal in nature and moreso providing for a reverse onus, have to be strictly complied and when the Legislature has purposely used the term "from receipt of the notice", it would not be possible to read into it the date of receipt of the intimation of the refusal, as the relevant date (in a case of deemed service/ refusal of the notice by the accused). That, in my humble view, would be, doing violence to the language, which is otherwise plain and explicit. I also find that the possible prejudice, if any or the disadvantage caused to the complainant on account of the delayed receipt of an intimation of refusal can be adequately taken care of by the provisions permitting condonation of delay in filing the complaint. This is not to suggest that in every case this would be a sufficient ground for condonation of delay. The question would always be one of the fact as obtaining in each case. It can only be said that where the complainant is not found to have slept over his rights and had acted diligently in not waiting too long for such an intimation being received, can, in appropriate case, set this as a ground along with other attending circumstances. I, therefore, find that the learned Magistrate has rightly come to conclusion that the complaint was not filed within time as the date of refusal has to be reckoned as 24/05/2011 and the complaint is filed on 13/07/2011. The learned Magistrate has

also noticed that there was no prayer for condonation of delay. Even in the appeal or arguments advanced at the bar, it was not urged that the delay, if any, may be condoned. The appellant all along claimed that the complaint is filed within time. Be that as it may, in the result, the point no.1 is answered in the negative.

23. Point No.2 - In the face of the finding on point no.1, the issue whether the cheque was passed in discharge of a legally enforceable debt or liability, would fall into insignificance as the finding on the point no.2 one way or other would not change the ultimate result of dismissal of the complaint. However, this being an appeal and as the parties have addressed the Court on these aspects also, I propose to briefly deal with the same.

24. In a case, where the accused admits the signature on the cheque, a presumption arises under Section 139 of the Act in favour of the complainant. It is now well settled that while the prosecution is obliged to prove its case beyond reasonable doubt, the accused can prove his defence or rebut the presumption as is available to the complainant under Section 139 of the Act, on mere preponderance of probability.

25. The question as to quantum of evidence required for

rebuttal, fell for the consideration of a three Judge bench of the Hon'ble Supreme Court in the case of **Hiten P. Dalal** (supra). The Hon'ble Apex Court in paragraph 24 held thus :

“Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram vs. Custodian, Evacuee Property, Bombay AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in Dhanvantrai Balwantrai Desai vs. State of Maharashtra, AIR 1964 SC 575, where this Court reiterated the principle enunciated in State of Madras vs Vaidyanath Iyer (Supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption

"the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence

Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....." (AIR p.580, para 12)

(See also V. D. Jhingan V. State of U.P., AIR 1966 SC 1762; Sailendranath Bose V. Stte of Bihar, AIR 1968 SC 1292 and Ram Krishna Bedu Rane Vs. State of Maharashtra, (1973)1 SCC 366).

26. The presumption under Section 139 of the Act is a statutory presumption, which is evident from employment of the word 'shall'. Thus, the Court is obliged to raise such a presumption once the facts necessary for raising of such presumption are established. It is further well settled that for rebuttal of such presumption, it is not necessary as a rule that the

accused shall enter into the witness box or should lead independent evidence. (See the case of **Krishna Janardan Bhat** (supra)). The accused can do so on the basis of cross-examination of the complainant and his witnesses and the material on record.

27. Turning to the present case, the appellant is an Advocate and a Notary. According to him, the accused had approached him for a financial accommodation in the sum of Rs.2 Lakhs and the amount was advanced "on loan basis" (That is what is stated in the complaint). This was on 03/11/2010. Towards the repayment of the amount, the respondent passed a cheque of Rs.2 lakhs on the same day, which was presented on 25/04/2011, when it got dishonoured. On the contrary, it is the defence of the first respondent that he is in the business of development of property and had engaged the services of the appellant to look after conveyancing and the cheque was passed towards the fees for giving the professional services. However, the appellant failed to give the service. In the cross-examination, PW1, the appellant has stated that the amount is reflected in the Income Tax returns and he could produce the same. He denied the suggestion that the amount is not reflected in the Income Tax Returns or his account books. Although the appellant stated that he can produce the Income Tax Returns, the same are not produced. He also admitted

that he has no document to show that he has lent the money to the respondent. According to him, the payment was made in the presence of one Raju Painguinkar, who is not examined. Thus, there were certain aspects about the envelope exhibit PW1/20 put to the witness, in which he has admitted that the word 'refused' on the envelope is cancelled and there is some scribbling there. He does not know as to who has done the said scribbling. He also admitted that the envelope was in torn condition. It was suggested to him that he has refused the legal notice, which was denied. He stated that he is not aware if the respondent is in the business of developing plots. On consideration of the evidence, I find that non-production of the Income Tax Returns, particularly in the wake of the fact that the appellant had admitted that the amount is reflected in the same, would be sufficient to raise an adverse inference. On overall consideration of the evidence, I do find that the presumption stood rebutted. For these reasons, Point No.2 is also answered in the negative.

28. In the result, there is no merit in the appeal. Consequently, the same is dismissed.

C. V. BHADANG, J.

SMA