

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO.38 OF 2013**

The Vaishya Urban Co-operative Credit
Society Ltd., Mapusa Goa.
Represented through its Assistant Manager
Mr. Kishorechandra R.Korgaonkar
Son of Raghunath Korgaonkar
age 55 years of age, married,
Resident of H. No.11/8/B,
Brimottem, Mapusa, Bardez Goa

... Petitioner**Versus**

- 1] Mrs. Alka Toraskar
Major of age, married,
Resident of FXX4,
Althino, Mapusa, Goa.
- 2] State of Goa
(Through Advocate General)
High Court of Bombay at Panaji,
Goa.

... Respondents

Mr. Gopal Kanekar along with Ms. Siddhi Naik, Advocate for
the petitioner.

Ms. Asha A. Desai, Advocate for the respondent No.1.

Coram : C. V. BHADANG, J.**Date : 1st July, 2015.****ORAL JUDGMENT :**

By this appeal the appellant – complainant is challenging
the acquittal of the respondent from the offence punishable under
Section 138 of the Negotiable Instruments Act (hereinafter referred as
to 'the Act').

2] Brief facts are that the appellant is a Urban Credit Co-operative Society. Sometime in the year 2003 the appellant had advanced a loan of Rs.2,50,000/- to the respondent. The said loan was repayable in monthly installments of Rs.4,200/- plus accrued interest. The loan was repayable in total sixty monthly installments. According to the appellant, the respondent defaulted in the matter of repayment of the loan and the account had become a non-performing asset. Further, according to the appellant, the respondent approached the appellant and had issued a cheque dated 13th January, 2007 for Rs.3,78,195/- towards repayment of the loan, which got dishonoured for want of sufficient funds. Hence, after issuance of the statutory notice, the appellant filed a complaint under Section 138 of the Act before the Judicial Magistrate, First Class, Mapusa.

3] It appears that on behalf of the appellant one Kishorechandra Korgaonkar its, Assistant Manager, was examined and the appellant produced certain documents including the subject cheque, memos and the copy of the notice etc. The appellant also produced an extract of the ledger of the loan account at Exh.15. There was no evidence led by the respondent. The learned Magistrate by a judgment and order dated 13th August, 2008 convicted the respondent for the offence under Section 138 of the said Act and sentenced him

to undergo simple imprisonment for one month and to pay the compensation of Rs.5,00,000/- and in default, to suffer further simple imprisonment for a period of two months. The respondent filed an appeal before the Additional Sessions Judge, Mapusa bearing Criminal Appeal No.73/2008, which was allowed on 12th July, 2012, thereby acquitting the respondent from the said offence. Feeling aggrieved, the appellant is before this Court.

4] I have heard Mr. G. Kanekar, the learned counsel for the appellant and Ms. Asha Desai for the respondent No.1. With the assistance of the learned counsel for the parties, I have perused the impugned judgment and record.

5] It is submitted by Mr. Kanekar, the learned counsel for the appellant that the statement of account Exh.15 was produced at the inception of the filing of the complaint. He submitted that the said document was exhibited during the evidence of Mr. Korgaonkar. It is submitted that at no point of time any objection was raised to exhibiting the said document. It is submitted that even during the cross-examination of Mr. Korgaonkar, there was no challenge raised to the admissibility or the genuineness of the said document. It is thus submitted that the learned Magistrate had rightly placed reliance on

the said document. It is submitted that the learned Sessions Judge has erroneously interfered with the finding of conviction, on the ground that the statement of account Exh.15 was not annexed with the certificate required under the Bankers Books Evidence Act. It is submitted that once the respondent had not objected to the said statement of account, it has to be taken as proved. Reliance is placed on a decision of this Court in ***Peacock Industries Ltd. & ors. Vs. M/s. Budhrani Finance Ltd. & Anr. reported in 2006 ALL MR (Cri) 2233*** in order to submit that in such a case the respondent ought to have raised an objection to admissibility of the statement.

6] It is next submitted that the respondent had made certain repayments, which would show that the respondent had admitted the correctness of the account. Reliance in this regard is placed on the decision of this Court in ***Krishi Vikas Kendra, Gondia Vs. Mukund s/o Shrikishan Funde & Anr. reported in 2006 ALL MR (Cri) 416.*** The learned counsel has also submitted that the respondent had agreed for an amicable settlement, which would also show that he had admitted the liability. It is thus submitted, that the acquittal of the respondent, on the ground that the appellant has failed to prove that the cheque was issued for a legally enforceable liability, cannot be sustained.

7] On the contrary, it is submitted by Ms. Asha Desai, the learned counsel for the respondent No.1 that the learned Sessions Judge has rightly come to the conclusion that, the petitioner has failed to prove that the cheque was issued for a legally enforceable liability. It is submitted that the petitioner, which is a Urban Credit Co-operative Society has to maintain proper accounts in consonance with the accepted accounting practice. It cannot get away with a submission that because the account was a non-performing asset, interest was not applied. It is submitted that on its own saying, the petitioner had not applied the interest for the period from 1st January, 2004 to 31st December, 2006 i.e. for a period of three years and the interest cannot be applied by way of a footnote that too in lumpsum. It is submitted that the impugned judgment does not call for any interference.

8] On hearing the learned counsel for the parties and on perusal of the impugned judgment and the oral and documentary evidence produced, I do not find that any case for interference is made out, in the judgment of the acquittal, passed by the learned Sessions Judge.

9] At the outset, it may be mentioned that the respondent

has not disputed that she had obtained a loan of Rs.2,50,000/- from the appellant. From the reply Exh.14 issued by the respondent, it also cannot be said that the respondent has disputed the signature on the cheque. The only defence raised was that the appellant had obtained 2 to 3 blank cheques, as security for the loan. It appears to be the defence that the subject cheque was not issued by the respondent on 13th January, 2007, much less for an amount of Rs.3,78,195/-.

10] Before considering the controversy, further it would be necessary to state at this stage that, the learned Sessions Judge has placed reliance on the decision of the Hon'ble Apex Court in ***Krishi Vikas Kendra, Gondia*** (supra), in order to hold that admission as to the signature on the cheque and the consequent presumption under Section 138 of the Act, does not take into its ambit that the cheque was issued towards the satisfaction of a legally recoverable debt. The said decision came up for consideration before a three Judge Bench of the Hon'ble Supreme Court, in the case of ***Rangappa Vs. Sri Mohan reported in (2010) 11 Supreme Court Cases 441***, in which it has been held that, the presumption under Section 138 of the said Act extends and even covers the cheque being issued towards the discharge of legally recoverable debt or liability. To that extent the observations of the learned Sessions Judge in Para.16 of the impugned judgment

cannot be sustained. However, I find that, this may not have any bearing on the finding of acquittal as recorded by the learned Sessions Judge. A bare perusal of the statement Exh.15 shows that the amount outstanding as on 1st March, 2007 is shown to be Rs.2,53,089/-. There is an endorsement below the statement, which shows that the interest from 1st January, 2004 to 31st December, 2006 amounting to Rs.1,25,145/-, has not been posted. The original statement Exh.15 if seen, shows that there is some overwriting in respect of the date 1st January, 2004. To a query, why the interest was not debited, it was submitted on behalf of the appellant that the interest was not applied as the account had become a non-performing asset. Even if this is accepted for a moment, the appellant ought to have calculated the interest from time to time as per the monthly/quarterly rests, as per the agreement and that should have been shown separately. The interest could not have been applied by way of a simple note at the foot of the statement of the account. The sanctity and probity attached to such statement is on account of the fact that such accounts are regularly maintained, which excludes the possibility of any interpolation or manipulation of the account. I find that the statement Exh.15 as produced, does not inspire confidence. The amount of Rs.2,53,089/- and interest of Rs.1,25,145/- also does not exactly make out to Rs.3,78,195/-. Insofar as contention on behalf of the appellant

that there was no specific challenge to the statement Exh.15, I find that since inception i.e. issuance of the reply, the respondent had taken a defence that the cheque was passed as a blank cheque, which was obtained as a security. In a sense this would partake of the denial that a cheque has been issued on 13th January, 2007, for an outstanding loan of Rs.3,78,195/-. While the complainant is obliged to prove his case beyond reasonable doubt, the accused can rebut the presumption and establish his defence, on preponderance of probability.

11] The learned Sessions Judge, has found, and to my mind rightly so, that the amount of interest of Rs.1,25,145/-, is not reflected, as an entry in the statement of account Exh.15.

12] Insofar as the reliance placed on the decision of this Court in ***Peacock Industries Ltd.*** (supra) is concerned, in Para.45 of the judgment this Court had given certain general guidelines for conduct of the complaint under Section 138 of the Act including mode of proof of documents. Whether a particular document is proved or not, will always be a question confined to the facts and circumstances of each case and in such circumstances, I do not find that the case of ***Peacock Industries Ltd.*** (supra) can come to the aid

of the appellant, in this case. Even, as regards the submission that the respondent had made certain repayments, I find that the respondent had never denied the obtaining of the loan and in that view of the matter, mere repayments cannot take the case of the appellant any further. At the cost of repetition, it needs to be stated that the specific defence was that the said cheque was not passed on 13th January, 2007 for the amount of Rs.3,78,195/-. The appellant has failed to prove that the said amount was due and outstanding as on that date. The view taken by the learned Sessions Judge appears to be a probable view and does not call for interference in an appeal against acquittal.

13] In the result, the appeal is hereby dismissed.

C. V. BHADANG, J.

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