

IN THE HIGH COURT OF BOMBAY AT GOA***CRIMINAL APPEAL NO. 37 OF 2014***

Shri. Vikas Gopi Bhagat,
son of Gopi Bhagat,
33 years of age,
resident of H. No.151,
Bhagatwada, Canacona, Goa.

.... Appellant

V/s.

1. Shri. Shivdas Pednekar,
major of age,
resident of H. No.206,
Chandan Wadi,
near Holy Cross Primary School,
Bastora, Goa.

2. S T A T E
through the Public Prosecutor.
High Court, Panaji – Goa.

.... Respondents

Mr. A.D. Bhobe with Ms. A. Fernandes, Advocate for the Appellant.

Mr. Ryan Menezes with Mr. Nigel Fernandes, Advocate for the
Respondent no.1.

Coram : Prithviraj K. Chavan, J.

Reserved on : 25th June, 2019.

Pronounced on : 24th July, 2019.

JUDGMENT:

The appellant is the complainant who is aggrieved with the Judgment and Order of acquittal dated 28.5.2013 passed by the Judicial Magistrate, First Class, Canacona, Goa, in Criminal Case no.7/OA/NI/2012 by which the respondent/accused came to be acquitted for the offence punishable under Sec.138 of the Negotiable Instruments Act.

2. The facts in brief can be summarized as follows:

The appellant filed a complaint under Sec.138 of the Negotiable Instruments Act, against the respondent/accused. It is the case of the appellant/complainant that since the respondent/accused was in need of financial assistance to carry out repairs of his house, he approached the appellant/complainant in the first week of November 2010, and requested to lend an amount of ₹4,00,000/-. The respondent assured to repay the amount within a year. One Dinesh Sudhakar Komarpant introduced the respondent with the complainant for the first time in the month of August, 2010.

3. As the accused was in need of ₹4,00,000/- and had assured to repay the amount within one year, the complainant paid an amount of ₹4,00,000/- on 12.11.2010, which was duly acknowledged by the respondent in the presence of witnesses. The

respondent issued a cheque bearing no.3194 dated 7.1.2012 in the sum of ₹4,00,000/- drawn on the Mapusa Urban Co-operative Bank of Goa Limited, Mapusa Branch. When the complainant deposited the aforesaid cheque in his account at Syndicate Bank at Canacona Branch, under advance verbal intimation to the respondent/accused for the payment of the cheque amount, the said cheque came to be returned as dishonoured on 14.1.2012. There was an endorsement appearing on the Banker's Return Memo issued by the Banker as 'Not Arranged For". The complainant orally informed this fact to the respondent/accused, however the accused did not bother to repay the amount and has given false assurance.

4. A Legal Notice through Registered Post with acknowledgment due came to be issued to the respondent/accused on 18.1.2012 calling upon him to pay the amount of ₹4,00,000/- within fifteen days from the date of receipt of the Notice.

5. Despite due service of the Notice upon the accused on 19.1.2012, the respondent/accused neither paid the amount nor replied the said Notice. The complainant, therefore, filed a complaint under Sec.138 of the Negotiable Instruments Act.

6. The complainant filed an Affidavit in lieu of his evidence before the Judicial Magistrate First Class and has also examined

Dinesh Komarpant in support of his case.

7. The respondent/accused did not step into the witness box, however he examined one Ajit Pawaskar, who works as an Under Secretary (GAD-II) in the Secretariate, Porvorim, in order to prove that the respondent was in the Office on 12.11.2010 on the basis of a biometric device which recognizes thumb impression of the employees.

8. The defence of the respondent/accused in his statement under Sec.313 of Cr.P.C. is that the complainant had never advanced loan of ₹4,00,000/- and he had never visited Canacona Goa on 12.11.2010.

9. It is specifically contended that the complainant, Dinesh Komarpant and others had contacted him for securing the Government jobs. He had introduced them directly to one Mr. Janardhan Parsekar, Ex-Sarpanch of Bastora, who had some political contacts. The complainant alongwith others thereafter paid token amount to Mr. Janardhan Parsekar, Ex-Sarpanch of Bastora, for securing the Government jobs. Mr. Janardhan Parsekar, Ex-Sarpanch of Bastora, failed in his promise to secure the Government jobs to the complainant and others. The complainant and others therefore started harassing him by demanding the token amount. The

respondent refused to pay the amount since he had not accepted a single pie. It is also the contention of the respondent/accused that in the month of November 2011, the complainant along with Dinesh Komarpant and other persons claiming to be the persons of Ramesh Tawadakar, MLA of Canacona, visited his house at Bastora, Bardez, Goa, and threatened him that if he does not give any security for the token amount then they would kill him. It is further contended that all the above persons further demanded a blank signed cheque from him as a security towards the said loan amount.

10. It is further contended that in the month of March 2012, the complainant forced to accompany him in the Conference Hall of the Secretariate, at Porvorim, Goa, where the MLA of Canacona Mr. Ramesh Tawadakar and his Personal Assistant wrongfully restrained him from 4.30 p.m. to 11.00 p.m. and compelled him to write a note stating that he had received ₹4,00,000/- from the complainant. Due to the pressure and threat put on him and due to fear to his life, he wrote the said note. It is further contended that Mr. Ramesh Tawadakar threatened him that if he attends his duties at Secretariate Porvorim, without paying the amount to the complainant, then he would finish him. The respondent therefore did not attend his duties since April 2012, till date. Therefore, he lodged the complaints dated 18.7.2012 and 3.7.2012.

11. The Trial Court after recording the evidence of the complainant Pw1 Vikas Bhagat, Pw2 Dinesh Komarpant and defendants witness Ajit Pawaskar and after going through the record, by the impugned Judgment and Order acquitted the respondent.

12. The Learned Magistrate acquitted the respondent mainly on the following grounds:

- 1 That the complainant/appellant, has failed to discharge the burden of proof that it was a legally enforceable debt or liability.
- 2 The cash of ₹4,00,000/- was unaccounted, in the sense, no Income Tax Returns have been tendered by the complainant/appellant.
- 3 The execution of Exhibit 19 which is purported to be a receipt of the acknowledgement of money by the respondent/accused has not been established.
- 4 The Magistrate disbelieved that on 12.11.2010 between 3.30 p.m. to 4.30 p.m. the complainant/appellant had advanced the amount to the accused at Palolem Guest House, Canacona, as it was shown that the respondent/accused was in his Office at the Secretariate, Porvorim, on the basis of bio-metric device.

13. Shri. Bhobe, the Learned Counsel appearing for the appellant/complainant reiterated the facts by contending that there is no dispute as regards advancement of loan of ₹4,00,000/- to the respondent/accused on 12.11.2010 in the presence of Pw2 Dinesh. It is also not disputed that the respondent/accused had issued a cheque dated 7.1.2012 from his account with the Banker and his signature over it. It is contended by Mr. Bhobe that the complainant has duly proved the acknowledgement of Receipt Exhibit 19 and therefore it has been proved that the complainant had advanced a hand loan of ₹4,00,000/- to the respondent which he failed to repay despite receipt of legal Notice.

14. It is contended that it was quite possible to travel a distance of about 60 kms. from Porvorim to Canacona, and therefore, even if the defence witness has testified about bio-metric device and the presence of the person in the Secretariate would not *ipso facto* prove that he could not have left the Office during the Office hours. It is further contended by Mr. Bhobe that without there being any suggestions to the complainant in his cross-examination, the respondent/accused has for the first time raised various issues while answering question no.16 in his Statement under Sec.313 of Cr.P.C.

15. Mr. Bhobe assailed the impugned Judgment of the Learned

Trial Court by contending that on one hand the Learned Trial Court accepts the defence of the accused but ignores the evidence of the witnesses examined by the complainant on the aspect of acceptance of cash by the accused/respondent. There is no evidence adduced by the accused/respondent to show that his signature was forcibly obtained at Exhibit 19. He, therefore, strongly urged to quash the impugned Judgment and to convict the respondent.

16. Per contra, Shri. Ryan Menezes, the Learned Counsel for the respondent contends that the respondent was unaware of the relations between the complainant and Dinesh and therefore, the complainant could not have advanced such a huge sum to him. He also stressed on the aspect of unaccounted money of the complainant which is sans Income Tax Returns and, therefore, the presumption in favour of the complainant/appellant has been rebutted. The Learned Counsel took me through Exh.19 in order to buttress his contention as to how it is not a genuine document to prove the alleged transaction of money between the respondent/accused and the appellant/complainant. The Learned Counsel for the respondent has therefore placed reliance on few Judgments of this Court and the Hon'ble Supreme Court, which shall be referred to hereinafter. The Learned Counsel, has therefore supported the impugned Judgment.

17. At the outset, before analyzing the evidence of the

appellant and his witnesses vis-a-vis the evidence adduced on behalf of the respondent, it would be necessary to set down few facts which are no more in dispute:

- a. The Cheque (Exh.16) dated 7.1.2012 was issued from the account of the respondent/accused with his Banker.*
- b. The Cheque (Exh.16) bears the signature of the respondent.*
- c. The Cheque (Exh.16) was returned unpaid for the reason "Not Arranged For", vide Bank Memo (Exh.17).*
- d. Due service of statutory Notice dated 18.1.2012 upon the respondent on 19.1.2012 (Exh.18).*

18. In his Affidavit in lieu of examination-in-chief the appellant/complainant deposed that the respondent/accused was introduced to him by Pw2 Dinesh somewhere in the month of August, 2010. Since the respondent was in financial need to carry out repairs of his house, he approached the appellant/complainant somewhere in the first week of November, 2010, and requested him to lend an amount of ₹4,00,000/-. The respondent/accused assured the complainant/appellant that he will repay the amount within one year. The complainant/appellant, therefore, keeping trust on the

accused and the assurance given by him lent ₹4,00,000/- on 12.11.2010 in the presence of Pw2 Dinseh.

19. Since the respondent/accused did not repay the amount despite demand, a Cheque dated 7.1.2012 (Exhibit 16) was issued by the respondent. The Affidavit further reveals that the cheque was dishonoured on its presentation to the Bank within a period of six months from the date of its issue. A statutory notice which was also duly served was neither replied nor complied with by the respondent/accused.

20. The appellant/complainant was extensively cross-examined by the Learned Counsel for the respondent/accused. During cross-examination of the complainant/appellant it has been reiterated that cash of ₹4,00,000/- was handed over to the accused in presence of Pw2 Dinesh on 12.11.2010 between 3.30 p.m. to 4.00 p.m. at Palolem Guest House at Canacona. The cross further reveals that the accused had handed over a cheque of ₹4,00,000/- on 5.1.2012 at Mapusa, in the presence of Pw2 Dinesh at about 6.00 p.m. It is further elicited in the cross that an amount of ₹4,00,000/- was arranged by the complainant from his business, which according to him is in the form of running a shack. He specifically testified that an amount of ₹4,00,000/- was not withdrawn from the Bank but it was lying in his hands in the form of cash. It is further substantiated

in the cross-examination that at the time of handing over ₹4,00,000/- to the respondent, a document in the form of Exhibit 19 came to be executed which was on a stamp paper purchased by Pw2 Dinesh in his name and it bears the signature of the respondent as well as Pw2 Dinesh.

21. The testimony of this witness corroborates materially by Pw2 Dinesh who works in the Office of New India Assurance Company. He testified that he introduced the accused with the complainant. The accused was introduced to him by his brother-in-law in the month of January, 2010. In his cross-examination, he testified that in the month of January 2010, accused/respondent had informed him that he is working as a Peon in the Secretariate. The accused/respondent was in need of financial assistance and therefore he approached this witness in the month of August 2010, at Canacona at the residence of his brother-in-law. Pw2 Dinesh could not lend the amount as he was drawing a salary of ₹10,000/- per month. Pw2 Dinesh, therefore, introduced the accused to the complainant/appellant. On the insistence of Pw2 Dinesh, the complainant had paid ₹4,00,000/-. Pw2 Dinesh took the guarantee of the repayment.

22. The cross-examination further reveals that an amount of ₹4,00,000/- was paid by the complainant/appellant to the

accused/respondent in the month of November, 2010, at Palolem Guest House. It further reveals that at the request of the complainant, Pw2 Dinesh bought a stamp paper and obtained a receipt from the respondent/accused.

23. From the evidence of these two witnesses, it is quite clear and has been proved that an amount of ₹4,00,000/- was lent/paid by the complainant/appellant to the accused/respondent in the presence of Pw2 Dinesh on 12.11.2010.

24. The Account Payee Cheque Exhibit 16 dated 7.1.2012 indicates the signature of the respondent which he admits. Exhibit 19 is also a document on record which is on a stamp paper of ₹100/- indicating that an amount of ₹4,00,000/- was received by the accused from the complainant for his house repairs.

25. From the oral evidence of the complainant and the documents on record it transpires that an amount of ₹4,00,000/- was paid by the complainant to the accused and it was duly acknowledged by the accused by executing Exhibit 19. From the evidence of the appellant/complainant and of Pw2 Dinesh it has been established that the Cheque Exhibit 16 was dishonoured for want of sufficient funds in the account of the respondent/accused as well as the fact of payment of a lump sum amount of ₹4,00,000/- to the

complainant.

26. This would lead to a presumption under Sec.139 of the Negotiable Instruments Act, in favour of the appellant/complainant. On the aspect of presumption under Section 139 of the Negotiable Instruments Act, and on the point of unaccounted money a Single Judge of this Court in case of ***Sanjay Mishra Vs. Kanishka Kapoor, 2009 (5) Bom.C.R. 464***, observed thus:

“7.It is true that merely because amount advanced is not shown in Income Tax Return, in every case, one cannot jump to the conclusion that the presumption under Section 139 of the said Act stands rebutted. There may be cases where a small amount less than a sum of ₹20,000/- is advanced in cash by way of loan which may be repayable within few days or within few months. A complainant may not show the said amount in the Income Tax Return as it is repayable within few days or few months in the same financial year. In such a case the failure to show the amount in the Income Tax Return may not by itself amount to rebuttal of presumption under Section 139 of the said Act. If in a given case the amount advanced by the complainant to the accused is a large amount is not repayable within few months, the failure to disclose the amount in Income-Tax return or Books of Accounts of the complainant may be sufficient to rebut the presumption under Section 139 of the said Act.

8.In the present case, the amount was allegedly

advanced in September 2004. The amount is a large amount of ₹15 lacs. This is a case where not only that there is a failure to disclose the amount of loan in the Income Tax Return of the applicant till the year 2006 but there is a categorical admission on the part of the applicant that the amount was an “unaccounted” amount.

9. Before dealing with the aspect of rebuttal of presumption, it will be necessary to refer to the ingredients of Section 138 of the said Act. It will be necessary to refer to a recent decision of the Apex Court in the case of (Krishna Janardhan Bhat Vs. Dattatraya G. Hegde), 2008 (2) Bom. C.R. (Cri.) 505 (S.C.) : 2008 DGLS (soft)44 : 2008 DGLS (Cri.) soft 929 : (2008) 4 S.C.C. 54. The case before the Apex Court arose out of a complaint under Section 138 of the Act. The submission before the Apex Court was that the essential requirement of Section 138 was that there has to be a legally enforceable debt. The Apex Court referred to the provisions of Section 271-D of the Income Tax Act, 1961 which reads thus:

“271-D. Penalty for failure to comply with the provisions of section 269-SS.-(1) If a person takes or accepts any loan or deposit in contravention of the provisions of section 269-SS, 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.”

In paragraph 29 of the decision, the Apex Court referred to the ingredients of the offence under section 138. Paragraph 29 reads thus:

“29. Section 138 of the Act has three ingredients viz:

- (i) that there is a legally enforceable debt;*
- (ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and*
- (iii) that the cheque so issued had been returned due to insufficiency of funds.”*

In paragraphs 30 and 31 the Apex Court dealt with the presumption under section 139 of the said Act. Paragraphs 30 and 31 read thus:

“30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a Court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge liability of any debt or other liability.

31. The Courts below, as noticed hereinbefore, proceeded on the basis that section 139 raises a presumption in regard to existence of a debt also. The Courts below, in our opinion, committed a serious error in proceeding on the basis that for

proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the Courts, we feel, is not correct.” (Emphasis added)

10. Thus, what has been held by the Apex Court is that section 139 of the said Act merely raises a presumption in regard to the second aspect of the matter, namely, that the cheque was drawn in discharge of debt or other liability. The Apex Court specifically held that the existence of legally recoverable debt is not a matter of presumption under section 139 of the said Act. The Apex Court specifically held that section 139 merely raises a presumption in favour of holder of cheque that the same has been issued for discharge of any debt or liability. Thus, even if presumption is not rebutted, Act, in order to attract section 138 of the the debt has to be a "legally enforceable debt" as said is clear from the explanation to section 138 which provides that for the purposes of the said section the debt or other liability means a legally enforceable debt or other liability.

11. The Apex Court also reiterated well established legal position that for rebutting the presumption under section 139 of the said Act, it is not necessary in every case for the accused to step into the witness box. The Apex Court held that the standard of proof on the part of the accused and that of prosecution in a criminal case is different. The prosecution has to prove the guilt of an accused beyond reasonable doubt, but the standard of proof

so as to prove a defence is "preponderance of probability". Inference of preponderance of probabilities can be drawn even by reference to circumstances. In paragraph 44 the Apex Court observed thus:

"The presumption of innocence is a human right (See Narendra Singh v. State of M.P., Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Rajesh Ranjan Yadav v. CBI.) Rights Article 6(2) of the European Convention on Human provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction...."
(Emphasis added)

In paragraph 45 the Apex Court held thus:

"45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and

industrial activities of the country and the 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. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as human rights and the doctrine of reverse burden introduced by section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same." (Emphasis added)

The Apex Court held that presumption of innocence forms part of human rights and therefore the doctrine of reverse burden introduced by section 139 has to be delicately balanced.

12. Now turning back to the facts of the present case, assuming that the presumption under section 139 of the said Act regarding existence of debt or liability is not rebutted, in order to attract section 138, the debt or liability has to be a "legally recoverable" debt or liability. As held by the Apex Court in the case of Krishna Bhat (supra) there is

no presumption under section 139 of the said Act that the debt is a legally recoverable debt. In the case of Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza [(2004) 2 Supreme Court Cases 235] the Apex Court reiterated that a debt or liability subject matter of section 138 means a legally enforceable debt or liability.”

27. The complainant during cross-examination admits that he had not shown the present transaction of ₹4,00,000/- advanced to the accused in his Income Tax Returns. He further admits that he did not inform his Chartered Accountant about the present transaction. He even was unable to tell the exact amount of turnover for the year 2010. According to him, he will have to consult his Chartered Accountant namely Mr. Kamat. He states that since cash was lying in his hands, there was no need to withdraw any amount from the Bank. He admits that he had not shown the present transaction in his Income Tax Returns for the year 2010-2012.

28. As observed by this Court in case of **Sanjay Mishra** (supra) that merely because amount advanced is not shown in the Income Tax Returns, in every case, one cannot jump to the conclusion that the presumption under Sec.139 of the said Act, stands rebutted. Looking to the business of shack of the complainant it could not have been difficult for him to advance a cash of ₹4,00,000/-.

29. It is held by the Hon'ble Supreme Court in case of ***Krishna Janardhan Bhat Vs. Dattatraya G. Hegde***, that as per Section 271-D of the Income Tax Act, if a person takes or accepts any loan or deposit in contravention of provisions of Section 269-SS, he shall be liable to pay, by way of penalty, a sum equal to an amount of loan or deposit so taken or accepted. Thus, only on that basis it cannot be said that the presumption in favour of the appellant/complainant has been rebutted.

30. Turning to the document Exhibit 19 alleged to have been executed by the respondent/accused on 12.11.2010 at Palolem Guest House, it would be necessary to scrutinize the same. Surprisingly, it is the stamp paper of ₹100/- which was stated to have been purchased by Pw2 Dinesh. If the loan was advanced by the complainant, in normal course, the stamp paper should have been purchased in the name of either the complainant or the respondent. The second glaring aspect is though it is testified by the complainant and Pw2 Dinesh that it was signed by the respondent/accused, yet the respondent contends that his signature has been forged. The complainant could have examined an Expert in order to prove the signature over the said document. It is surprising to note as to how different inks have been used while purchasing the said stamp paper from the stamp vendor, in the sense that the serial number, place and date is in blue ink while only the name of the purchaser, i.e. Pw2

Dinesh Komarpant is in black ink and in different handwriting.

31. Recitals of Exhibit 19 reads as under:

I, Shri. Shivdas Pednekar, s/o. Vithu P. Pednekar, resident of H. No.89, Ward no.12, Amulim Wada, Khorlim, Mapusa, Goa.

That the above person has taken a loan of Rs.4 lakhs only (Four lakhs only) towards home repairs from Shri. Vikas Gopi Bhagat of Bhagat Wada, H. No.151, Bhagat Wada, Canacona, Goa.

Shivdas Vithu Pednekar Sd/-

Witnesses:

1. Shri. Dinesh Sudhakar Komarpant, Sd/-
2. Shri. Vikas gopi Bhagat, Sd/-

32. A bare look at the document indicates as if it is written by the respondent and thereafter in the next para the respondent refers himself as “the above person” which is something strange. Why the respondent should write about himself as “the above person”?

33. There is one more unusual thing which is noticeable is that the signatures are on the right side corner of the page which are normally, if written in the normal course, would have been below the writings. It appears that perhaps signatures were already obtained on a blank stamp papers and thereafter the matter has been written.

34. Exhibit19, therefore, does not appear to be a genuine and authentic document indicating a legally enforceable debt. The document is also silent as to where it was written.

35. Sec.139 merely raises a presumption in favour of the holder of the cheque that the same has been issued for discharge of any debt or other liability. Thus, even if the presumption is not rebutted, in order to attract Sec.138 of the said Act, the debt has to be a “legally enforceable debt” as is clear from the explanation to Sec.138, which provides that for the purposes of the said Section the debt or other liability means a legally enforceable debt or other liability.

36. In the cross-examination, it has been brought on record that the respondent was introduced with the complainant in the month of August 2010, and within a span of three months the complainant lent ₹4,00,000/- to the accused which is something quite strange and unbelievable that a person without having much acquaintance would lent such a huge sum to a person about whom he does not have any information except his acquaintance with Pw2 Dinesh Komarpant. From the cross-examination of the complainant it further reveals that he did not inquire about the survey number of the property or the house number of the respondent. He even did not ask the respondent as to what kind of house repairs he intended to

carry out. This is also not a normal conduct of a prudent man, that too, a business man like the complainant. The explanation which the complainant gives is that he did not ask the details of the house property because he has friendly relations. Within three months the complainant was so friendly with the respondent that he lent him a huge amount of ₹4,00,000/- in cash. This is incredible.

37. Pw2 Dinesh who had introduced the respondent with the complainant in his cross-examination admits that he also did not inquire about the repayment capacity of the accused because the accused is a Government servant. It is pertinent to note that Pw2 admits that in the month of January 2010, the accused had informed him that he was working as a Peon in the Secretariate. Despite knowing this fact Pw2 Dinesh insisted the complainant to lend ₹4,00,000/- to the accused for the so called repairs of the house knowing fully well that the accused was not capable of repaying the said amount. This definitely creates a suspicion about the nature of transaction to be legal.

38. Pw2 Dinesh admits that even the complainant did not make any inquiry with the accused about his capacity to repay the amount. If the accused promised to repay the loan amount within a period of one year from 12.11.2010, why there is no mention of the said fact in Exhibit19? This also creates a shadow of doubt about the

nature of transaction between the complainant/appellant and the respondent.

39. The defence of the accused that the complainant, Pw2 Dinesh and others had contacted him for securing a Government job and that he introduced them to one Janardhan Parsekar, Ex-Sarpanch of Bastora, who had some political contacts and that some amount was paid to the said Janardhan Parsekar by the complainant, Dinesh and others appears to be probable in the light of the fact that one Ramesh Tawadkar, who was a MLA of Canacona, Goa, stated to have threatened and pressurized the respondent to repay the amount to the complainant.

40. In the cross-examination of the complainant, it has come on record that the local MLA Ramesh Tawadkar and one Umesh Abhigiri, who was the PA of the said MLA had asked the accused to return the amount to the complainant. The complainant had approached the said MLA with a request to put some pressure on the accused for returning the said amount. It reveals from the cross-examination that the said Minister/MLA called the accused in the Secretariate at Porvorim and requested him to return the amount. The accused was asked to give an undertaking in writing which is at Exhibit 23. The recitals of this document are self explanatory:

From:
Shivdas V. Pednekar,
Amuli Wada,
Khorlim, Mapusa,
Bardez – Goa.
Date : 26/03/2012

To,
The Ramesh Tawadkar,
MLA, Canacona – Goa.

“That I undersigned Mr. Shivdas Vithu Pednekar, r/o. Amuli Wada, Mapusa – Goa, that I received 4 lakhs (Four Lakhs) 4,00,000 from Vikas Bhagat on 16/11/2010, now that same amount I will pay on 25/04/2012 in front of Canacona MLA.

If I will fail to pay same amount on that particular date you are free to take any action on me.

Thanking you,

Sd/-
(Umesh Abbegiri)

Yours faithfully,
Sd/-
(Shivdas V. Pednekar)

41. A bare look at the recitals would indicate that the accused was pressurized and forced to give such an unlawful undertaking. The complainant admits that there is no mention of Cheque in question at Exhibit 23. He also admits that he did not inform the MLA about the cheque and also about pendency of a criminal case against the

accused. It is written in two different inks or pen. How the date of 16.11.10 appears here which, according to the complaint was 12.11.10?

42. It reveals that the accused had thereafter lodged a Report against the complainant and MLA Tadwadkar in the Office of Superintendent of Police about the alleged threats.

43. In his additional statement under Sec.313 of Cr.P.C. about which I have already stated herein above, the accused states that in the month of March 2012, he was forcefully taken to the Conference Hall of Secretariate Porvorim, Goa, where MLA Ramesh Tawadkar and his PA wrongfully restrained him from 4.30 p.m. to 11.00 p.m. and they compelled him to write a Note which is at Exhibit 23. He states that due to the pressure and threats to his life and limb, he wrote the said Note. It is stated by the respondent that MLA Ramesh Tawadkar threatened him that if he attends duty in the Secretariate without paying money to the complainant then the MLA would finish him. The respondent, therefore, lodged complaints dated 18.7.2012 and 3.7.2012 against the complainant and MLA.

44. It is quite interesting to note that Pw2 Dinesh in his cross-examination admits that the details of the cheque were written

by him at the request of the accused which no sane man will believe. If the accused had really borrowed ₹4,00,000/- from the complainant, then he would have happily written the cheque in his own handwriting without asking the Pw2 Dinesh to write the same.

45. The only inference which would flow from the evidence of this witness and from the other attending circumstances is that the signature of the respondent must have been obtained by force or under pressure.

46. Pw2 Dinesh admits that he had applied for Government service on many occasions. This fact probablises the contention of the respondent that he had introduced the complainant, Pw2, Dinesh and others to one Mr. Janardhan Parsekar, who had some political contacts and some amount was paid to him by these persons for securing Government jobs.

47. The Supreme Court in the case of **Basalingappa Vs. Mudibasappa, 2019 SCC OnLine SC 491**, summarized the principles as regards Sec.118 (a) and 139 of the Negotiable Instruments Act. Para 23 reads thus:

“23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139,

we now summarize the principles enumerated by this Court in following manner:

(i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support his defence.

48. As such, the respondent has succeeded in rebutting the presumption by discharging the onus in the form of raising probable defences. Even on the aspect of preponderance of probabilities, the

defences raised by the respondent are quite believable and acceptable.

49. From the cross-examination of the aforesaid witnesses itself it is sufficient to raise doubt about the nature of this transaction which cannot be said to be a legal one. It was not necessary for the respondent to enter into the witness box in view of the aforesaid discussions.

50. Having applied the aforesaid principles of law to the facts of the case in hand, it is crystal clear that though there was a transaction of ₹4,00,000/- between the complainant and the accused and the cheque was issued in discharge of a debt, the complainant has failed to substantiate that it was a legally enforceable debt or a transaction.

51. The respondent has examined one Ajit Pawaskar, an Under Secretary (GAD II) in the Secretariate at Porvorim. He had supplied an information under RTI, which is at Exhibit 32.

52. His evidence is restricted to the fact that he had produced the data indicating an information which came to be generated automatically through bio-metric machine indicating the presence of the accused in the Office on 12.11.2010 when, according to the complainant an amount of ₹4,00,000/- was lent to the accused at

Palolem Guest House and Exhibit 19 came to be executed by him. The role of this witness is restricted only to the aspect of supplying of information asked for under the Right to Information Act.

53. He admits that in addition to bio-metric device, the Office also maintains the Muster Roll. The thumb impression scan is taken when an employee joins in the morning and then it is again obtained at the time of leaving the Office in the evening. Between the said duration an employee has a liberty to leave the Office for official purpose. A Movement Register is kept in which the employee leaving the Office has to make an entry.

54. This bio-metric device as per the testimony of this witness indicates the presence of the respondent in the Office for the whole day on 12.11.2010. No attempt has been made by the complainant to bring-forth the Movement Register in order to show that on 12.11.2010 the respondent had left the Office and visited Palolem Guest House where he had accepted cash of ₹4,00,000/- from the complainant and executed Exhibit 19 between 3.30 to 4.00 p.m.

55. Annexure I to the Exhibit 32 obtained under Right to Information Act, indicates that the respondent was present in the Office from 9.26 hours to 18.08 hours. There is no rebuttal evidence tendered by the complainant.

56. Though, it is contended by the Learned Counsel for the complainant that it was quite possible to travel a distance of around 60 kms. from Porvorim to Canacona, the Learned Counsel for the respondent, on the other hand contends that the distance is about 69 kms. which requires at least two hours driving and therefore it was improbable for the respondent to travel the said distance. As stated above, the public document tendered by Dw1 proves that the respondent was in the Office from 9.26 to 18.08 on 12.11.2010.

57. The Learned Counsel for the complainant, Mr. Bhobe drew my attention to paras 10, 15 and 18 of a Judgment of the Supreme Court in case of **Rohitbhai Jivanlal Patel Vs. State of Gujarat and another**, 2019 SCC OnLine SC 389.

“10.The High Court observed that if the transaction in question was not reflected in the accounts and income-tax returns, that would at best hold the assessee or lender liable for action under the income-tax laws but, if the complainant succeeds in showing the lending of amount, the existence of legally enforceable debt cannot be denied. The High Court also observed that the issue regarding washing away of the cheques in rain water was of no significance when the accused had accepted his liability in clear terms. The High Court found that the defence plea of the accused that the money was given as hand loan by his friend Shri Jagdishbhai got falsified by the version of the said Shri Jagdishbhai,

who was examined as a witness on behalf of the complainant. The High Court, therefore, set aside the impugned orders and, while convicting the accused-appellant for the offence under Section 138 of the NI Act, sentenced him in the manner noticed hereinbefore. The High Court, inter alia, observed and held as under:

“24.It is necessary at this stage also to refer to the emphasis laid by the learned counsel appearing for the respondent No. 2 on the source of the fund which has been lent by the appellant. It has emerged from the detailed examination of the record, as also detailed examination-in-chief as well as cross-examination, that the complainant runs the business. He also maintains the books of account and he has his own factory in the name and style of ‘Ashirwad Enterprise’ and manufactures plastic. The said factory is situated at Jambusar. Ordinarily, any prudent business person would prefer to transact by cheque while lending money, but it is quite often noticed that the cash transactions in the business would allow huge sum of money as cash, which sometimes are shown in the books of account as cash on hands or otherwise as amount available on books. Assuming that cheque transaction of lending of amount is absent and income-tax returns also do not reflect such amount, that at the best would hold the assessee or lender liable for action under the Income-tax laws. However, otherwise, if he succeeds in showing lending of such amount, both by oral evidence of himself and his friend, on whom even respondent No. 2 relies upon and from the writing of the respondent No. 2 given separately along with seven cheques signed by him, what possible reasons could

weigh with the Court to deny the existence of legally enforceable debt in such glaring circumstances.

25. Considering the fact that the complainant maintains his books of account, coupled with the fact that the respondent No. 2 had merely refuted on flimsy ground of his having transacted with witness Jagdishbhai and not with the complainant, has failed to discharge the burden which had shifted upon him. It is to be noted that the respondent No. 2 has admitted his signature on the impugned cheque. At no point of time, the cheque has been disputed..... Once this fact is acknowledged that the signature on the cheque is that of the respondent No. 2-accused, section 139 of the Negotiable Instruments Act would mandate the presumption that the cheque concerns a legally enforceable debt or liability. Of course, this presumption is in the nature of rebuttal and onus is on the accused thereafter to raise a probable defence.

25.1 As can be noted from the chronology of events and the material that has been placed before this Court that the defence raised by the accused is not at all probable. The respondent No. 2-accused states that the money was given as a hand loan by his friend Jagdishbhai and not the appellant, also gets falsified completely by the version of Jagdishbhai. It appears that in case of all the seven cheques when notices were given prior to the filing of the complaint, he has chosen not to reply to four of the notices. Either on account of insufficiency of the funds or because he has closed account that the cheques could not be realized. All these circumstances cumulatively lead this Court to

conclude that the appellant succeeded in proving the legally enforceable debt and no probable defence for rebutting the statutory presumption is raised by the respondent No. 2.

25.2 Initial presumption as contemplated under section 139 of the Negotiable Instruments Act, when the proof of lending of the money and acceptance of the signatures on the cheques, shall need to be raised by the Court in favour of the appellant.

28. Reasonably, when the appellant had proved the legally enforceable debt, not only through his own evidence, but also through the evidence of his friend Jagdishbhai and also other contemporaneous record, more particularly, the document at Exhibit 24, which is a writing by which the respondent No. 2 clearly indicates and accepts his liability to the tune of Rs. 22.50 lakh. Thus, the burden had shifted upon the respondent No. 2. The presumption which was needed to be drawn by the Court under section 118 of the Negotiable Instruments Act would oblige the Court to presume that the cheque had been issued for consideration and until contrary is proved, such presumption would hold the ground. Except the bare denial, nothing has been found to come on record to dislodge the positive proof that has been adduced by the appellant.

30. The trial Court has committed a serious error by not discharging its obligation of recognizing the evidentiary value and not appreciating the positive evidence which led to the reasonable proof of

legally enforceable debt existing on the side of the original complainant.”

15. The principles aforesaid are not of much debate. In other words, ordinarily, the Appellate Court will not be upsetting the judgment of acquittal, if the view taken by Trial Court is one of the possible views of matter and unless the Appellate Court arrives at a clear finding that the judgment of the Trial Court is perverse, i.e., not supported by evidence on record or contrary to what is regarded as normal or reasonable; or is wholly unsustainable in law. Such general restrictions are essentially to remind the Appellate Court that an accused is presumed to be innocent unless proved guilty beyond reasonable doubt and a judgment of acquittal further strengthens such presumption in favour of the accused. However, such restrictions need to be visualised in the context of the particular matter before the Appellate Court and the nature of inquiry therein. The same rule with same rigour cannot be applied in a matter relating to the offence under Section 138 of the NI Act, particularly where a presumption is drawn that the holder has received the cheque for the discharge, wholly or in part, of any debt or liability. Of course, the accused is entitled to bring on record the relevant material to rebut such presumption and to show that preponderance of probabilities are in favour of his defence but while examining if the accused has brought about a probable defence so as to rebut the presumption, the Appellate Court is certainly entitled to examine the evidence on record in order to find if preponderance indeed leans in favour of the accused.

18. So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 the NI Act is concerned, apparent it is that the accused-appellant could not deny his signature on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs. 3 lakhs each. The said cheques were presented to the Bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The Trial Court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the accused-appellant to establish a probable defence so as to rebut such a presumption.

58. In view of the discussion herein above, the ratio laid down would be applicable to the present set of facts, so as to say the respondent has rebutted the presumption by raising probable defences.

59. The law is well settled that if two views are possible, the Appellate Court should not reverse a Judgment of acquittal only

because another view is possible to be taken. The Appellate Court's jurisdiction to interfere is limited, wherein it is held that the Appellate Court's are required to be slow in setting aside the Judgment of acquittal, particularly in a case where two views are possible.

60. There is nothing in the Judgment of the Learned Trial Court which can be said to be perverse or wholly unsustainable in law.

61. Though it is observed in para 15 that the same rule with the same rigor cannot be applied in a matter relating to the offences under Sec.138 of the Negotiable Instruments Act, particularly where a presumption is drawn that the holder has received a cheque for the discharge, wholly or in part, of any debt or liability. However, it is further observed that the accused is entitled to bring on record the relevant material to rebut the presumption and to show that preponderance of probabilities are in favour of his defence then the Appellate Court is certainly entitled to examine the evidence in order to find out if preponderance indeed leans in favour of the accused.

62. In the case at hand, the respondent/accused has succeeded in bringing on record probable defences and has rebutted the presumption; the complainant has not further discharged his

burden to indicate that the transaction in question was a legally enforceable debt. It is therefore, needless to take any different view other than the one taken by the Learned J.M.F.C., in the impugned Judgment while acquitting the respondent/accused.

63. Consequently, I do not find any substance in the appeal which deserves to be dismissed and as such stands dismissed.

(Prithviraj K. Chavan, J.)

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