IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.322 OF 2017

Pushpa Sanchalal Kothari
Age: 53 years, Occu.: Business,
R/o. Parag Plaza, Ward No.4,
Shrirampur, Taluka Shrirampur,
District Ahmednagar **… Appellant**

Versus

Aarti Uttam Chavan
Age: 46 years, Occu.: Beauty Parlour,
R/o. Indiranagar, Shrirampur,
Taluka Shrirampur,
District Shrirampur **… Respondent**

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Mr. G. D. Jain, Advocate for appellant.
Mr. P. S. Dighe, Advocate for respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 28th October, 2020

PRONOUNCED ON : 25th November, 2020

JUDGMENT :

. Present appeal has been filed under Section 378(4) of the Code of Criminal Procedure by the original complainant challenging the acquittal of respondent – accused by learned Judicial Magistrate First Class, Court No.3, Shrirampur in Summary Criminal Case No.452 of 2013 on 17-09-2016, whereby the respondent came to be acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'N.I. Act').

2. By order dated 29-06-2017, this Court had granted leave to appeal.

3. Heard learned Advocate Mr. G. D. Jain for appellant and learned Advocate Mr. P. S. Dighe for respondent.

4. It has been vehemently submitted on behalf of the appellant that the complainant had come with the case that on the request of the accused, she had extended hand loan of Rs.80,000/- and in discharge of that legal debt or liability, the accused had issued cheque bearing No.741625 on 28-03-2013 drawn on her account maintained with Bank of Maharashtra branch at Shrirampur. It was assured that on the presentation of the said cheque, it would be honoured. Therefore, on the same day, the said cheque was presented by the complainant with her bank, namely, Nagar Urban Co-operative Bank, Branch at Shrirampur. However, the said cheque came to be dishonoured on 30-03-2013 on the ground "funds insufficient". Thereafter, the complainant had issued notice on 04-04-2013 through Advocate and demanded the amount under the cheque. In spite of receipt of the said statutory notice, accused did not give the amount, but gave a false reply and, therefore, the complaint was filed before the learned Judicial Magistrate First Class, Shrirampur. The complainant has examined herself and produced certain documents. The accused has also examined herself as well as a witness in defence. After hearing both sides, the learned Judicial

Magistrate First Class has acquitted the accused.

5. Learned Advocate for the appellant would submit that the learned Magistrate has not appreciated the evidence properly, so also has not considered the legal aspects involved in proper perspective. When the cheque was admittedly given by the accused, there was a presumption under Section 139 of the N.I. Act. The learned Magistrate, thereafter, ought not to have gone into the aspect regarding the source of income while lending the amount. Further, when the cheque was admittedly issued by the accused, then learned Magistrate ought not to have invoked his powers under Section 73 of the Indian Evidence Act and take it upon himself to have comparison with the alleged admitted signature. Further error has been committed that the said amount has not been shown in the income tax returns and, therefore, it has been taken as unaccounted cash. He failed to consider the legal position in ***Bipin Mathurdas Thakkar Vs. Samir alias Sameer Dessai and another (2015 (1) BOM. C.R. (Cri) 601),*** wherein the ratio in ***Sanjay Mishra Vs. Kanishka Kapoor, (2009 (3) Bom.C.R. (Cri) 157)*** was distinguished and held that it is not based on sound law. In ***Bipin Thakkar's*** case (Supra), it has been held that "every amount which is not shown in the income tax returns or the cash that has been given as hand loan will not amount to violation of the Income Tax Act and cannot be termed as unaccounted amount." Learned Judicial Magistrate First Class totally erred in holding that the presumption under Section 139 of the N.I. Act has been rebutted by the accused.

The accused had come with the case that the complainant is indulged in a business of chit fund *(Bhishi)* and the accused was one of the member of the same. She had issued the cheque in favour of the complainant by way of security for the repayment of amount of the said chit fund. Accused has stated that the complainant has misused the said cheque and, therefore, in order to prove her defence, she had examined AW 1 Pratibha Patil, who claimed that she is also the member of chit fund. She has tried to say that lot of times she had gone to the house of the complainant in connection with the said chit fund, however, in her cross-examination, she has clearly stated that she has no documentary evidence to prove that she was the member of the chit fund run by complainant. In her testimony, the accused has stated that she was owing Rs.40,000/- to the complainant towards the sarees purchased by her from the complainant. It is her say that complainant had not given her amount of one *Bhishi* and it is her say that if any person failed to contribute to the *Bhishi*, then complainant used to recover it from the cheques, which she had taken as security. However, in her cross-examination, it can be seen that whatever she had stated in the examination-in-chief was never put by her in her reply to the statutory notice. That means, the stand taken by the accused was not firm and even by preponderance of probabilities, it could not have been concluded by the learned Magistrate that the accused has rebutted presumption under Section 139 of the N.I. Act. Learned Advocate for the complainant – appellant, therefore, requested to allow the appeal and convict the accused by holding that the complainant has proved that the accused has committed offence punishable under Section 138 of the N.I. Act beyond reasonable doubt.

6. Per contra, the learned Advocate for the respondent supported the reasons given by the learned Judge while acquitting the accused. He submitted that first of all the burden which was on the shoulders of the complainant to prove that she had extended the hand loan to the accused itself is false. Though it has come on record that the complainant is running a business in sarees, yet, she could not have given so much of cash in contravention of Section 269SS of the Income Tax Act. He submitted that the learned trial Judge has rightly relied on the decision of this Court in ***Sanjay Mishra Vs. Kanishka Kapoor @ Nikki and another (2009 (4) Mh.L.J. 155),*** wherein it has been held that, "when the applicant had not disclosed that he has advanced amount to the respondent to the Income Tax Department, then that amount would be an unaccounted amount and, therefore, it cannot be stated that there is a liability to pay such amount. The liability to pay unaccounted cash amount cannot be a legally enforceable debt within the meaning of explanation to Section 138 of the N.I. Act." It has been further submitted that the complainant should show or in other words should discharge the initial burden to prove that the disputed cheque has been issued towards legally enforceable debt or liability. Reliance has been placed on the decision in ***K Subramani Vs. K. Damodara Naidu, [(2015) 1 SCC 99),***

wherein it has been held that "when legally enforceable debt is not proved by the complainant by adducing proof regarding source of income from which alleged loan was given to the accused, then it will have to be held that the presumption in favour of holder of cheque has been rebutted." Further, reliance has been placed on the decision in ***Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, (2008(4) Mh.L.J. 354),*** wherein it has been held that "existence of legally recoverable debt is not a matter of presumption. It is raised in favour of a holder of the cheque that same has been issued for discharge of any debt or other liability." Further, in ***Krishna Bhat (Supra),*** it has been held that :-

> *"25. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies."*

7. When in this case the accused herself has entered into the witness box and had also examined witness to support her contention that the complainant was running a chit fund and she had taken certain cheques from the members of the chit fund, so also from the accused, then it was as a security and not towards the alleged legally enforceable debt or liability for extending hand loan of Rs.80,000/-. The learned Judicial Magistrate First Class was right in making comparison of the signature on the disputed cheque with the admitted

signature of the accused under Section 18 of the Indian Evidence Act. The acquittal of the respondent – accused was legal and correct, which requires no interference at the hands of this Court.

8. At the outset, it will have to be seen as to whether the complainant has discharged the initial burden to prove that she had advanced hand loan to accused. Complainant has deposed as per her complaint. In her cross-examination taken on behalf of accused, she was firm in saying that she had advanced the said amount on the request of accused. It has come on record that complainant runs a saree shop. She has produced Shop Act licence to support her said contention. In fact, if we peruse the testimony of accused along with this evidence, then we can get that accused is not disputing that complainant runs a saree shop. That means the complainant has source of income and she was in a position to extend hand loan. Another important point is that accused is not disputing issuance of cheque Exhibit-37. If we peruse the evidence in rebuttal, adduced by accused, then it can be seen that she has put forward two fold defence. One is that the said cheque was given by her as security for chit fund transaction. She says that it was blank cheque. This defence would infer that she is admitting her signature on the cheque Exhibit-37. As regards the rest of the contents on cheque Exhibit-37 is concerned, she does not say in specific words that those contents are not in her handwriting. When she has specifically admitted her signature on the cheque Exhibit-37, then learned Magistrate went

wrong in unnecessarily exercising his powers under Section 73 of Indian Evidence Act to compare the signature of the accused on Exhibit-37 with her admitted signature. No steps were taken by accused to send the disputed cheque for the opinion of handwriting expert. Learned Magistrate ought not to have shown such anxiety. Unnecessary or hyper activism on the part of learned Magistrate was uncalled for. When accused admits his/her signature on the disputed cheque, then the legal position on this point is also clear that the complainant would get an authority under Section 20 of N.I. Act to complete the incomplete cheque i.e. to write rest of the contents. The legal position on this point has been laid down in ***Bir Singh vs. Mukesh Kumar [CRIMINAL APPEAL NOS.230-231 OF 2019 (@ SLP(CRL) Nos. 9334-35 OF 2018 decided on 6 February, 2019),*** which is as follows :-

> *"37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.*
>
> *38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus*

would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

39. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

40. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt".

9. Thus, when in this case, as per the first defence, accused is admitting that she had given the cheque Exhibit-37, thereby admitting her signature on the cheque, then she had impliedly given authority to the complainant to complete the cheque and present it for encashment. The second defence appears to be halfhearted. Accused says that she was the member of chit fund run by complainant and she had not given her contribution in chit fund/ bhishi once and that amount was due. So also amount of Rs.40,000/- was due from her to the complainant towards purchase of sarees. She has not given specification of the same. When she had purchased those sarees and since when

the said amount on both count was due from her, accused says that the cheque has then been misused, which was given for security. Accused has examined AW 1 Pratibha, who claims that she is also member of the said chit fund and one blank cheque was given to complainant by accused on her behalf. She deposes that it was the practice of complainant to take blank cheques as security. However, if we see her cross-examination, then it is clear that she had no documentary evidence to support her statements in examination-in-chief. Accused also states that she had given two cheques to complainant. One was in respect of her contribution and another was for AW1 Pratibha. They both have not what was the duration of that fund and when it was suppose to end. Why accused should give a blank cheque for AW 1 Pratibha is also not known. They do not claim to be friends of each other. If that so called chit fund was illegal, then AW 1 and accused were the participants of such illegal transaction and would support each other in such situation. AW 1 Pratibha says that she had paid all the installments. If that is so, then why that cheque was not taken back is a question, which has not been answered by both of them. AW 1 Pratibha says that accused had not paid all the installments and amount which was due from her to complainant towards purchase of sarees. Even then that transaction could have been covered in one cheque. Why accused should allow complainant to retain both the cheques? If we peruse the notice reply Exhibit-47 given by accused, then it can be seen that there is no whisper about amount due towards purchase of sarees. Thus, it can be seen that the defence has been taken as per the convenience, without any base. Learned Trial Judge ought not to have relied on such kind of evidence which is not supported by any document. Notice reply Exhibit-47 also states that the said cheques were given prior to three years and she had stopped paying amount of chit fund about one year prior to that date. She had requested the complainant to return the cheques. If we see the contents, then it is clear that the relationship between accused and complainant was no longer cordial. In such situation, whether accused would have allowed complainant to retain two cheques? The cheque has been returned with remark 'Funds Insufficient' and not as 'stopped by drawer'. Accused had not taken any legal action to prevent alleged misuse of her cheque, which should have been her natural conduct. Hence, the defence taken by her is unbelievable.

10. At the cost of repetition it can be said that accused is admitting issuance of disputed cheque Exhibit-37 and, therefore, reliance can be placed on the decision in ***M/S. Shree Daneshwari Traders vs. Sanjay Jain [CRIMINAL APPEAL NOS.61-62 OF 2011 decided on 21 August, 2019]*** wherein it has been held that, "Under Section 138 of the Negotiable Instruments Act, once the cheque is issued by the drawer, a presumption under Section 139 of the Negotiable Instruments Act in favour of the holder would be attracted. Section 139 creates a statutory presumption that a cheque received in the nature

referred to under Section 138 of the Negotiable Instruments Act is for the discharge in whole or in part of any debt or other liability. The initial burden lies upon the complainant to prove the circumstances under which the cheque was issued in his favour and that the same was issued in discharge of a legally enforceable debt".

11. Learned Advocate for the respondent has relied on the decision in ***Krishna Bhat*** *(supra)*. However, we should take into consideration the legal position laid down in ***Rangappa vs. Sri Mohan, [2010 (4) Bom. C. R. 652 (SC): (2010) 11 SCC 441]***, which is three Judge Bench decision as well as ***M/S. Shree Daneshwari Traders*** *(supra).* Even otherwise also complainant has discharged the initial burden in this case by showing that she had the source of income. It is not the case of accused that complainant had no capacity to extend hand loan.

12. Now it has been harped upon by the accused that the said transaction has not been accounted for. In other words, complainant has not shown the said transaction in her Income-Tax returns. Learned Advocate for the respondent as well as learned Trial Court have heavily relied on the decision in ***Sanjay Mishra*** *(supra).* However, it appears that the legal position that had developed thereafter was not pointed out to learned Trial Judge. In ***Bipin Thakkar*** *(supra)* entire legal position on this point has been discussed. In fact, ***Bipin Thakkar*** *(supra)* reiterates the law discussed on the point in ***Krishna P.***

Morajkar vs. Joe Ferrao and another [2013 ALL MR (Cri) 4129 : (2013) 5 AIR Bom R 294]. It is necessary to reproduce those observations from ***Krishna's*** case, which reads thus :-

> *"Further, it has been observed that there is no provision in Income-Tax Act, which makes an amount not shown in the income-tax returns unrecoverable. If some amounts are not accounted for, the person would be visited with the penalty or at times even prosecution under Income-Tax Act, but it does not mean that the borrower can refuse to pay the amount which he has borrowed simply, because there is some infraction of the provisions of the Income-Tax Act."*

13. Thus, when in a subsequent pronouncements this Court has clarified the legal position that too, after taking note of subsequent pronouncement by Hon'ble Supreme Court, then the later decision would prevail. It has been then observed in ***Bipin Thakkars'*** case that, "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 said Act stands rebutted". We can consider the decision in the case of ***Assistant Director of Inspection vs. A. B. Shanthi, (2002) 6 SCC 259,*** wherein it has been held :-

> *"The object of introducing S. 269 is to ensure that a tax payer is not allowed to give false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving false explanation for the same. During search and seizure unaccounted money is unearthed and the tax payer would usually give the explanation that he had borrowed or received deposits from*

his relatives or friends sand it is easy for the so-called lender also to manipulate his records later to suit the plea of the tax-payer. The main object of S. 269-SS was to curb this menace."

14. In the light of the observations of the Apex Court, it cannot but be said that Section 269-SS of the Income Tax Act only provided for the mode of acceptance of payment or repayment in certain cases so as to counteract evasion of tax. Section 269-SS does not declare all transactions of loan, by cash in excess of Rs.20,000/- as invalid, illegal or null and void, while as observed by the Apex Court, the main object of introducing the provision was to curb and unearth black money. To construe Section 269-SS of the Income Tax Act as a competent enactment declaring as illegal and unenforceable all transactions of loan, by cash, beyond Rs. 20,000/-, in my opinion, cannot be countenanced.

15. Yet, another reason for this opinion is Section 271-D of the Income Tax Act, 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."

16. In that if a person takes or accepts any loan or deposit in

contravention of Section 269-SS is liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted, as may be imposed by the Joint Commissioner.

17. The contravention of Section 269-SS of the Income Tax Act though visited with a stiff penalty on the person taking the loan or deposit, nevertheless, the rigor of Section 271-D of the Income Tax Act is whittled down by Section 273-B of the Income Tax Act, on proof of bonafides. It cannot, therefore, be said that the transaction of the nature brought before this court could be declared illegal, void, and unenforceable.

18. Though the facts and issue involved in above case was different, but the purpose and scope of those sections under Income-Tax Act as explained by Hon'ble Supreme Court would support the decision in ***Krishna Morajkar*** (supra).

19. Therefore, in this case also, accused cannot take benefit of such infraction by complainant to show the transaction in Income-Tax returns. Complainant in this case had the capacity to advance the said amount to accused. Thus, from the complaint and the deposition of the complainant/ appellant the factum of giving of loan stands established. Complainant had proved beyond reasonable doubt that the disputed cheque Exhibit-37 was issued by the accused towards the "legally enforceable debt or liability". Presumption under Section 139 of N.I. Act was in favour of complainant. Though accused has

adduced evidence in rebuttal, however, she has failed to discharge the said presumption.

20. Complainant had issued statutory notice within statutory period. It was replied by accused but not complied with within the statutory period and, therefore, this Court holds the accused guilty for committing offence punishable under Section 138 of N.I. Act. The view taken by the learned Magistrate thereby acquitting the accused is erroneous and not based on sound legal principles. Hence, interference is required at the hands of this Court. Though the legal principle is that merely because two views are possible, the appellate Court should not take contrary view; but as aforesaid the learned Magistrate had not scanned the evidence properly with sound legal principles and, therefore, interference is required. In other words, this Court is well aware that accused was acquitted by the learned Trial Judge; and ordinarily the appellate Court would cautious while setting aside the said acquittal. In this connection reliance can be placed on the law explained by Hon'ble Supreme Court in ***Govindaraju alias Govinda vs. State by Sriramapuram P. S. & Anr. [(2012) 4 SCC 722]*** as follows :-

> *"A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefits of such presumption which could be interfered with by the courts only for compelling reasons and not merely because another view was possible on appreciation of evidence. The element of perversity*

should be traceable in the findings recorded by the Court, either of law or of appreciation of evidence. The Legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 Cr.P.C. This is an indication that appeal from acquittal is placed at a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 Cr.P.C. has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate Court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 Cr.P.C. clearly provides that no appeal to the High Court under sub-sections (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the Courts. Under the scheme of the Code of Criminal Procedure, acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the Appellate Court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law. In the case of State of Rajasthan v/s. Shera Ram alias Vishnu Dutta [(2012) 1 SCC 602], a Bench of this Court, of which one of us (Swatanter Kumar, J.) was a member, took the view that there may be no grave distinction between an appeal against acquittal and an appeal against conviction but the Court has to keep in mind the value of the presumption of innocence in favour of the accused duly endorsed by order of the Court, while the Court exercises its appellate jurisdiction. In this very case, the Court also examined various judgments of this Court dealing *with the principles which may guide the exercise of jurisdiction by the Appellate Court in an appeal against a judgment of acquittal. We may usefully refer to the following paragraphs of that judgment:*

> *"8. The penal laws in India are primarily based upon certain fundamental procedural values, which are right to fair trial and presumption of innocence. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever there is perversity of facts and/or law appearing in the judgment, the appellate court would be within its jurisdiction to interfere with the judgment of acquittal, but otherwise such interference is not called for".*

21. It has been further observed that :-

"When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the court can interfere in the judgment of acquittal

to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves".

22. Further while taking note of powers of the appellate Court are concerned, it has been observed that :-

"The law is well-settled that an appeal against an order of acquittal is also an appeal under the Code of Criminal Procedure, 1973 and an appellate Court has every power to re-appreciate, review and reconsider the evidence before it, as a whole. It is no doubt true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the trial Court. But that is the end of the matter. It is for the Appellate Court to keep in view the relevant principles of law to re-appreciate and reweigh the evidence as a whole and to come to its own conclusion on such evidence, in consonance with the principles of criminal jurisprudence".

23. In one of the recent pronouncement in ***Anwar Ali and others Vs. The State of Himachal Pradesh [Criminal Appeal No. 1121 of 2016] decided on 25-09-2020;*** the Three Judges Bench of Hon'ble Supreme Court has reiterated the same principles. Note of catena of earlier pronouncements was taken and the relevant extract is reproduced here:-

"5.2 Before considering the appeal on merits, the law on the appeal against acquittal and the scope and ambit of Section 378 Cr.P.C. and the interference by the High Court in an appeal against acquittal is required to be considered.

5.2.1 In the case of Babu (supra), this Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 Cr.P.C. In paragraphs 12 to 19, it is observed and held as under :-

> *12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P (1975) 3 SCC 219, Shambhoo Missir v. State of Bihar (1990) 4 SCC 17, Shailendra Pratap v. State of U. P. (2003) 1 SCC 761, Narendra Singh v. State of M. P. (2004) 10 SCC 699, Budh Singh v. State of U. P. (2006) 9 SCC 731, State of U.P. v. Ram Veer Singh (2007) 13 SCC 102, S. Rama Krishna v. S. Rami Reddy (2008) 5 SCC 535, Arulvelu v. State (2009) 10 SCC 206, Perla Somasekhara Reddy v. State of A.P. (2009) 16 SCC 98 and Ram Singh v. State of H.P. (2010) 2 SCC 445)*
>
> *13. …..*
>
> *14. …..*

15. In Chandrappa v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under: (SCC p. 432, para 42)

> *"(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.*
>
> *(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
>
> *(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances','distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*
>
> *(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of Law. Secondly, the accused having*

secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. In Ghurey Lal v. State of U.P (2008) 10 SCC 450, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that:

> *"20. ... an order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."*

18. In State of U.P. v. Banne (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include:

"(i) The High Court's decision is based on totally

erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal."A similar view has been reiterated by this Court in Dhanapal v. State (2009) 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."(emphasis supplied)

24. Therefore, after taking note of the said ratio laid down in those catena of judgments, this Court has every power to re-appreciate, review and reconsider the evidence. After re-appreciating the evidence as above, the conclusion has been drawn that the judgment of acquittal rendered by the learned Trial Court is perverse. Now, when this Court has respondent/accused guilty of committing offence punishable under Section 138 of N.I. Act, the further act would ensue regarding imposition of quantum of punishment. It is clear from the aims and object for the enactment of Negotiable Instruments Act, that the penal provision was introduced to enhance the acceptability of cheque in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer. Honest drawers' interest who issue cheques is safeguarded in the Act itself.

25. In ***Dalmia Cement (Bharat) Ltd vs. Galaxy Traders & Agencies Ltd., [(2001) 6 SCC 463]***, the Hon'ble Supreme Court has explained the scope of offence under Section 138 of the Act as under :-

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

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

4. Section 138 of the Act makes a civil transaction to be an offence by fiction of law. Whereby 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 is returned by the bank unpaid either because of the amount or money standing to the credit of that person being insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account, such person, subject to the other conditions, shall be deemed to have committed an offence under the Section and be punished for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with *both. To make the dishonor of the cheque as an offence, the aggrieved party is required to present the cheque 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 and the payee or the holder in due course of the cheque makes a demand for payment of the cheque amount by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and drawer of such cheque fails to make the payment of the amount within 15 days of the receipt of the said notice. Section 139 refers to presumption that unless the contrary is proved, the holder received the cheque of the nature referred to under Section 138 for the discharge in whole or in part or of any debt or other liability. Section 140 restricts the defence in any prosecution under Section 138 of the Act and Section 141 refers to such offence committed by the companies. Section 142 provides that, notwithstanding anything contained in the code of Criminal Procedure, no court shall take cognizance of an offence under the section except upon a complaint in writing made by the payee or, as the case may be, the holder of the cheque and that such complaint is made within one month of the date on which the cause of action arose under clause (c) of proviso to Section 138 of the Act."*

26. Further in ***Kaushalya Devi Massand vs. Roopkishore Khore,*** [***(2011) 3 SCR 879]*** Hon'ble Supreme Court while dealing with a matter regarding quantum of sentence for the offence under Section 138 of the N.I. Act, observed as under :-

"9. Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Indian

Penal Code or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones. The learned Magistrate, in his wisdom was of the view that imposition of a fine payable as compensation to the Appellant was sufficient to meet the ends of justice in the instant case. Except having regard to the submission made that the Appellant/complainant, is a widowed lady of advanced age, there is no other special circumstance which calls for interference with the order of the learned Magistrate, as confirmed by the High Court, with an increased fine."

27. In ***R Vijayan vs. Baby and another, [(2012) 1 SCC 260]*** Hon'ble Supreme Court held that while awarding compensation in matters under Section 138 of the N.I. Act, interest can be awarded @ 9% per annum.

28. Taking into consideration the above legal position, awarding jail sentence to the respondent/accused may not be in the interest of justice. Here, the appellant would also be interested in getting her amount back. Therefore, payment of compensation under Section 357 of the Code of Criminal Procedure to the complainant would be in the interest of justice. The punishment that can be awarded for an offence under Section 138 of N.I. Act is " imprisonment for a term which may extend to two years, <u>or with fine which may extend to twice the amount of the cheque,</u> or both" (stress supplied by me). The next step would be what could be the amount of fine. Here the cheque Exhibit-37 was drawn for Rs.80,000/-. The complaint was filed in the year 2013 after the statutory notice. The amount became due to complainant from the date of notice. Accused has

utilized the said amount till today. Therefore, some amount needs to be given to her above the cheque amount towards interest. The rate of interest in Banks has gone down now a days, therefore, the said rate cannot be equal to the rate granted in ***R. Vijayans'*** case (Supra). Hence, after taking into consideration all the above pronouncements, it would be in the interest of both the parties to impose fine of Rs.1,10,000/- and to direct that amount of Rs.1,00,000/- be paid to complainant as compensation under Section 357(1) of the Code of Criminal Procedure. Time will have to be granted to the accused to deposit the said amount; however, with a rider that the said time will not be extended. Learned Magistrate who would be responsible for the execution of sentence that would be imposed by this Court will not have any authority to extend the said period.

29. For the aforesaid reasons, as the learned Magistrate has erred in acquitting the respondent/accused; the impugned judgment needs to set aside. Appeal deserves to be allowed. Hence following order :-

ORDER

1. Appeal stands allowed.

2. The judgment and order passed in Summary Criminal Case No.452 of 2013 by learned Judicial Magistrate First Class, Court No. 3, Shrirampur, Dist. Ahmednagar on 17-09-2016; acquitting the respondent/ accused Aarti Uttam Chavan is hereby set aside.

3. Respondent/accused Aarti Uttam Chavan is hereby convicted for the offence punishable under Section 138 of Negotiable Instruments Act.

4. Respondent/accused is hereby sentenced to pay fine of Rs.1,10,000/- (Rupees One Lakh Ten Thousand) only. The said amount be deposited by respondent before learned Trial Court on or before 1st of January 2021. In case of failure on the part of the accused to deposit the said amount within the aforesaid period, she should undergo simple imprisonment of three months.

5. It is clarified that the said period for deposit of time will not be extended on any ground. Learned Magistrate has no authority to extend the said period for deposit of fine amount.

6. After the amount of fine is deposited in the Trial Court, amount of Rs.1,00,000/- (Rupees One Lakh Only) be given to complainant Pushpa Sanchalal Kothari under Section 357 (1) of Code of Criminal Procedure.

7. Rest of the amount be credited to Government.

8. Respondent to surrender bail bounds on above condition to deposit the amount of fine within period given.

[SMT. VIBHA KANKANWADI, J.]

scm