IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL MISC. APPLICATION NO. 292 OF 2018

IN

STAM NUMBER MAIN NO.1888 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 212 OF 2018

IN

STAMP NUMBER MAIN NO. 1866 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 213 OF 2018

IN

STAMP NUMBER MAIN NO. 1894 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 214 OF 2018

IN

STAMP NUMBER MAIN NO. 1860 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 215 OF 2018

IN

STAMP NUMBER MAIN NO. 1893 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 216 OF 2018

IN

STAMP NUMBER MAIN NO. 1864 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 217 OF 2018

IN

STAMP NUMBER MAIN NO. 1868 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 218 OF 2018

IN

STAMP NUMBER MAIN NO. 1861 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 219 OF 2018

IN

STAMP NUMBER MAIN NO. 1882 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 220 OF 2018

IN

STAMP NUMBER MAIN NO. 1876 OF 2018.

WITH

CRIMINAL MISC. APPLICATION NO. 221 OF 2018

IN

STAMP NUMBER MAIN NO. 1870 OF 2018.

WITH

CRIMINAL MISC. APPLICATIONNO. 226 OF 2018

IN

STAM NUMBER MAIN NO.1891 OF 2018.

Mr. Carlos Tavora
Resident of Trionora Apts.,
Second Floor, Panaji-403 001. ....Applicant/Appellant.

V e r s u s

1. M/s Skyline Aquatech Exports Ltd.,
   No.80, III Cross, Lavelle Road,
   Bangalore-560 001, India.

2. Shri Fredrick D'Souza(Deceased)
   Authorised signatory,
   20, Vakratunda Co-op. Hsg. Soc.
   La Campala, Miramar, Panaji
   Goa 403001.

3. Shri Peter Prabhu
   Chairman and Managing Director
   No.78, Kalmane, Lavelle Road,
   Bangalore- 560 001.

4. Mrs. Carmel Prabhu
   Director,
   No.78, Kalmane, Lavelle Road,
   Bangalore-560 001,

5. Shri S. R. Singh
   Director, E-29, Jalavayu Vihar,
   Sector 21, Noida, Gaziabad,
   Uttar Pradesh 201 301.

6. Shri Ramasubramanium Ashok
   Director,
   562, Kamath Complex,
   Tonca, Caranzalem,
   Goa-403 002.

7. Mr. Kshounish C. Nag (Deceased)
   Director,
   77/5, Nandidurga Road,
   Bangalore, Karnataka-560 046.

8. Mr. J.C. Almeida(Discharged
   during trial)
   Director,
   13/376, La Campala Residential
   Colony, Miramar, Panaji Goa.

9. Mr. Selva Kumar
   Medreich Sterilab Ltd.,
   No.40, MEG Officers Colony,
   Banaswadi Road, Bangalore-560 033

10. Mr. Saju Kurien
    No.45, Lloyde Road,
    Cooks Town, Bangalore-560 005. … Respondents.

Shri V. Menezes and Shri A. Shirodkar,Advocates for the petitioner.
Shri M. Amonkar, Advocate for the respondent no.1.
Shri D. Dhond and Shri V. Amonkar, Advocates for the respondent nos. 3 and 4.
Shri A. Kantak and Shri R. Kantak, Advocates for the respondent no. 6.
Shri R. Chodankar and Shri V. Braganza, Advocates for the respondent no.9.
Shri P. Arolkar, Advocate for the respondent no.10.

Coram:- M. S. JAWALKAR, J.
Reserved on:- 22nd February, 2021.
Pronounced on:- 17th March, 2021.

JUDGMENT

There are 11 other connected matters wherein leave application to file appeal came up before this Court. By consent and at the request of the parties, leave applications as well appeals are taken together. As both of them are taken together leave is granted and appeals are treated as admitted. All the appeals are taken up together for decision to be decided by common judgment.

2. The present appeals are filed by the original complainant challenging the judgment of acquittal of the respondent/ original accused in complaint Other Act Case No.223/1998/C passed by the learned Judicial Magistrate First Class at Panaji under Section 138 of the Negotiable Instruments Act (for short “NI Act”) dated 13.3.2018.

3. The case of the complainant before the Magistrate as per the complaint is that the complainant is a businessman by profession and that the accused no.1 is a Public Limited Company registered under the Companies Act. It is further his case that the accused nos.2 and 9 are the directors/authroised signatories of the accused no.1's company with the accused no.3 being the Managing Director. Accused nos.2 to 10 are in charge of and responsible for the business of the company at the time when the loan was taken by accused no.1 from the complainant. It is further contention of the complainant that the accused nos.2 to 10 were in charge when the cheque for

consideration towards the repayment of a said loan was issued and was signed authorised signatories. Accused persons issued various cheques for consideration received by them towards loan. The details of the said cheques drawn on corporation bank which is subject matter in all twelve appeals are as under:-

Sr no.	***Case no.***	***Cheque no.***	***Amount***
1	STM NO.1888 OF 2018	946154	500000
2	STM NO.1866 OF 2018	054103	1,00,000
3	STM NO.1894 OF 2018	055826	2,00,000
4	STM NO.1860 OF 2018	054162	1,00,000
5	STM NO.1893 OF 2018	052323	3,00,000
6	STM NO. 1864 OF 2018	607058	1,00,000
7	STM NO.1868 OF 2018	945837	1,00,000
8	STM NO. 1861 OF 2018	055804	1,00,000
9	STM NO.1882 OF 2018	607093	1,00,000
10	STM NO.1876 OF 2018	913455	1,00,000
11	STM NO. 1870 OF 2018	945836	1,00,000
12	STM NO. 1891 OF 2018	917346	2,00,000

4. The said cheque was issued on behalf of accused no.1(company) signed by accused nos. 2 and 9 who were directors and authorised signatories at Goa on intrusions of accused no.2 who was Managing Director. On 11.6.1998, the complainant presented the cheque and that the cheque was returned unpaid by the bankers informing that “Authority to

sign withdrawn". By notice dated 18.6.1998, the complainant called up the accused and requested to make payment within 15 days. Notices were served accused nos.1, 3, 4, 7 on 24.6.1998 and accused nos.2 and 6 on 20.6.1998, accused no.9 on 23.6.1998, accused no. 10 on 19.6.1998. As no payment was made even after the expiry of 15 days, the complaints filed by the present complainant under Section 138 read with Section 141 of NI Act. It is also the case of the complainant that accused no.1 paid monthly interest at the rate of 24% on the loan amount upto February, 1997 and thereafter no interest has been paid to the complainant. Upon losing confidence with the accused persons the complainant on consultation with his Chartered Accountant Raghu Pikale decided to withdraw the loan amount against the cheque issued by the accused and accordingly presented the same to the bank for the clearance. It is also his case that accused no.3 called the complainant and requested to come to Banglore alongwith his Chartered Accountant Mr. Raghu Pikale to see certain plots of land which the accused no.3 represented to the complainant as belonging to M/s. Skyline Constructions a sister concern of accused no.1. The said proposal is made on behalf of accused no.1 company by accused nos.2, 3 and 9 in order to compensate the complainant equivalent in value with the said loan amount.

However, the complainant rejected the said proposal. Proceedings against the accused no.2 and 7 are abated during the trial. Accused no.8 was discharged.

5. As accused persons after service of summons appeared and pleaded not guilty and claimed to be tried. Evidence came to be recorded. Statement under Section 313 of CRPC was recorded of accused nos. 3,4,6,9 and 10. Accused no.5 filed an application as he is not willing to answer the statement and accused no.10 stated that he is willing to lead evidence and examine himself. Accused no.3 filed written statement.

6. After recording of evidence and hearing the parties, the learned JMFC acquitted accused nos.3,4,5,6, 9 and 10. The said judgment and order is under challenge before this Court.

7. The appeals are filed mainly on the ground that the learned JMFC has failed to examine evidence on record on the basis of presumption of law contained under the provision of NI Act and arrived at erroneous conclusion that dishonoured cheque were not towards the discharge of a liability. The

learned trial Court erred in holding that loan transaction between the complainant and accused no.1 company was not proved. It further came to an erroneous conclusion that merely because a cheque was drawn as a "self cheque" and not on the name of the payee and further because such a cheque was deposited in the account of the complainant for realisaton and thereafter dishonoured, the same could not be considered towards discharge of an enforceable debt or liability. It is also alleged that learned Magistrate failed to apply legal provisions in law. The evidence on record clearly leads to the conclusion that though the endorsement on the cheque return memo states that the signatory to the account had changed, the real fact borne from the evidence is that concerned cheque was dishonoured as there were "no sufficient funds" in the account nor was any arrangement made to cover the said cheque.

8. The two contentions raised by the accused nos.1,3 and 4 that the cheque was invalid cheque as it was not signed by a person authorised to sign the same as the signatories had resigned from the company and for the reason that said cheque books which were issued by the concerned bank did not pertain to the period when the cheque were issud.. There is no evidence led by accused nos. 1, 3 and 4 to substantiate these

two contentions. It is further contentions that accused no.3 does not deny that he was Managing Director of the company. Under Section 138 of the NI Act, the Managing Director stands on a different footing from other directors and he deem to be responsible for the affairs of the company. He is responsible for all transactions entered into by other directors. The learned JMFC failed to appreciate this law position and rendered a judgment of acquittal.

9. The another ground to challenge the judgment of acquittal is that the learned Magistrate ought to presume consideration unless the contrary is proved. The conclusion of learned JMFC is on wrong legal foundation that since there is no documentary evidence on record of the loan transaction nor there is anything to prove that there was loan transaction between the complainant and the accused company. There is a letter dated 29.4.1997 written by the accused no.1 under the signature of the accused no.2, acknowledging issuance of cheque against loan. The signature on the said letter was not denied by accused no.2 The observation of the learned JMFC in that regard is contrary to the provisions of Evidence Act. It is observed that the accused no.2 was alive when the said document was produced in evidence and not denied his

signature, which proof of acknowledgment of the loan as the complainant has to corroborate the signature on the said letter by persons who were conversant with the same. The learned Magistrate has not considered the Power of Attorney executed by the accused no.3 in his personal capacity and as a managing director of the company. This fact was sufficient to demonstrate that accused no.2 was acting on behalf of company as its director and manager to sign the correspondence and, in view thereof, the letter ought to be held as proof of acknowledgment of the loan. The learned Trial Court has not referred the same. The rejection of consideration of the contents of letter dated 29.4.1997 are legally unsustainable grounds have resulted in gross miscarriage of justice. It is further contended that the learned Magistrate has failed to apply correct provisions of Section 141 of the NI Act and considered that directors of the accused company including accused no.3 are not responsible for the act of the company. Non-consideration of the evidence of the accused no.10 on the aspect of the role played by the directors has resulted in gross miscarriage of justice and acquittal of the accused. Accused no.3 being the Managing Director of the company was bound to lead positive evidence to rebut the presumption under Sections 139 and 141 of NI Act. The learned counsel for the appellant Shri V. Menezes, drawn my attention to the evidence and documents on record and submitted that Managing Director cannot escape the liability on the ground that he was not in charge, he is in charge by statute. The learned counsel for the complainant relied on:-

1. ***Goaplast Pvt. Ltd. Vs Chico Ursula D'Souza, AIR 2003 SC 2035.***
2. ***Rangappa Vs. Mohan ., AIR 2010 SC 1898.***
3. ***S.M.S. Pharmaceuticals Ltd Vs. Neeta Bhalla and another, AIR 2005 SC 3512***
4. ***Krishna P. Morajkar Vs Joe Domnic Ferrao and anr. 2014(2) Bom. C.R. (Cri.) 738.***
5. ***Pramod Building s and Developers Pvt. Ltd Vs. Shanta Chopra, (2011)4 SCC 741.***
6. ***Mr. Carlos Tavora Vs. M/s Skyline Aquatech Exports Ltd., in Criminal Case No. 223/OA/98/C.***
7. ***Goa plast Pvt. Ltd. Vs Chico Ursula D'Souza, (2004)2 SCC 235.***

10. Shri Dhond, the learned counsel alongwith Shri V. Amonkar counsel for the respondent nos.3 and 4 submitted that the applicant has been unable to fulfill the mandatory ingredients and requirements of Section 138 of the NI Act. The applicant has miserably failed to produce any material to

establish that he had advanced a loan amount to the tune of Rs.20 lakhs or any part thereof to the respondent no.1's company. Secondly the applicant has not produced a single document in respect of the alleged loan transaction of the said amount, neither the said amount is reflecting in the income tax returns nor in the books of accounts. There is nothing mentioned as to whom the amount of Rs.20 lakhs has been paid or on which date the said amount paid or received. As per the complainant, the alleged recipient of the said amount is a company. However, there is nothing on record to suggest whether the company has resolved to accept the said amount of Rs.20 lakhs. The company having the nominee director from the Govt. of Karnataka, it is difficult to believe that such company would receive such a huge loan and make payment of interest without any document. Hence the requirement that the cheques have to be issued towards an enforceable debt has not been satisfied.

11. The cheques were returned as "Authority to sign withdrawn" and not for insufficient funds. As such, the ingredients which are condition precedent to invoke the provision under Section 138 of the NI Act not satisfied.

12. It is further categorically submitted by PW2 Mr. Bernard Pereira(Bank Personnel) in his deposition that even if there was no balance in the account of accused no.1 if the signatures were correct as per the resolution the bank would transfer the amount from PCL account to the account of accused no.1 to honour the cheques. It is further submitted that there is no evidentary value to the letter dated 29.4.1997 as the author of the said letter has not been examined nor any witnesses who were conversant with the signature of the author of the said letter has been examined.

13. It is further submitted that it is settled position when the complainant have failed to establish and prove the basic ingredients required under Section 138 of NI Act, the accused need not adduce evidence and can rely on the material submitted by the complainant in order to raise the defence. It is also contended that though Raghu Pikale is alleged to be a common Chartered Accountant of the company and the complainant and at whose instance complainant alleged that he had paid huge amount of Rs.20 lakhs in cash was not examined by the complainant.

14. The learned Advocate Shri Dhond also submitted that company wound up by order dated 31.7.2003, in company petition no. 269/2002, the High Court of Karnataka appointed official liquidator. As per Section 446 the Company Act then existing when a winding up order has been made or the official liquidator has been appointed, no suit or other legal proceedings shall be commenced, or if pending shall be proceeded with against the company, except by the leave of the Tribunal and subject to terms as Tribunal may impose. On this count also appeal is liable to be dismissed.

15. Shri D. Dhond, the learned counsel for the respondent nos. 3 and 4 relied on following judgments.

1. ***Sanjay Mishra Vs Ms. Kanishka Kapoor @Nikki and anr., 2009 Cri. L. J. 3777***
2. ***Vassudeo Ramchand Ahuja Vs. Vilas Shripad Kamble and anr., 2006 ALL Mr(Cri) 3203***
3. ***Kishor L. Purohit Vs. Prem Saxena and anr., 2017 ALL MR(Cri) 148***
4. ***Shri Datta S. Nadkarni, Vs. Mr. Salvador Fernandes and anr., Criminal Appeal No. 46 of 2013.***

5. ***K. Subramani VS K. Damodara Naidu, 2015 ALL Mr.(Cri) 789(S.C.)***
6. ***Shri Vikas Gopi Bhagat, Vs. Shri Shivdas Pednekar and anr. Criminal Appeal No. 37 of 2014.***
7. ***Shri Rajendra Pangam, Vs. Shri Paresh B. Naik and anr., Criminal Appeal No. 13 of 2013.***
8. ***Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, 2008 ALL MR (Cri) 1164 (S.C.)***
9. ***Smt. Kiran Yugalkishore Bhattad VS Suhila Ramcharan Kattamwar, 2010 ALL Mr (Cri) 1147.***
10. ***Nitin s/o Bapurao Mankar Vs. Shri Vyankatesh Housing Agency and anr. 2010 ALL MR (Cri) 1441.***
11. ***M/s Kalpana Mines and Minerals Vs. M/s. Muneer Enterprises, 2016 ALL Mr(Cri.)5316***
12. ***Ashish Parikh Vs. State of Maharashtra, Criminal Application No. 1883 of 2007.***
13. ***Mitthulal and anr. Vs. State of Madhya Pradesh, 1975 Cr. L. J. 236.***

14. ***John K. Abraham Vs. Simon C. Abraham and anr., 2014 Cri. L. J. 2304.***
15. ***N. K. Wahi Vs. Shekhar Singh & Ors., AIR 2007 SC 1454.***
16. ***Mr. Narendra Urangi & Ors. Vs. M/s Greenmint India Agritech Pvt. Ltd. & Anr., 2016 ALL MR (Cri) Journal 449.***
17. ***Smt Nanda Dharam Nandanwar Vs. Nandkishor Talakram Thaokar, 2010 ALL MR. (Cri) 733.***
18. ***Mulchand Ramji Saiya Vs. Mr. Premji Ratanshi Gangar and anr. 2011 ALL MR(Cri) 3568.***
19. ***Anil Baburao Kataria Vs Purshottam Prabhakar, 2010(2) Bankmann 90(Bom).***

16. Shri Kantak, the learned counsel for the respondent no. 6 pointed out that the accused no.6 was not the signatory of the cheque. He further argued that in view of the complainant's deposition that he has not come across any resolution or document to say that the accused no. 6 was involved in decision making or to issue the cheques or that he was part of any financial decision pertaining to the accused no.1 and that if he attended any board meeting in respect of accused no.1/company. There are no specific averments to disclose that

the accused/directors were in charge and responsible for the affairs of the company. Complainant's case is that on the basis of information given by the Chartered Accountant Shri Raghu Pikale, he filed a complaint and he himself has not made any efforts to verify whether the accused persons are the directors of accused no.1 company, nor examined the Raghu Pikale.

17. Shri Kantak, the learned counsel for the respondent no.6 relied on following Judgments:-

1. ***Saroj Kumar Poddar Vs. State (NCT of Delhi) and anr.(2007) 3 SCC 693.***
2. ***K. Shrikanth Singh Vs. North East Securities Ltd. And anr., (2007) 12 SCC 788.***

18. The learned counsel Shri R. Chodankar for the respondent no.9 submitted that he was never a Director of a company but he is an employee of the company and one of the signatory of cheque issued. His authority to sign the cheque was withdrawn on 16.5.1997. The cheques are dated subsequent to that date that is 26.12.1997 onwards. He also further submitted that he resigned on 23.1.1998 from the company much before the presentation of the cheques i.e 8.6.1998 onwards. He has duly replied legal notice and

informed that he has no concern with the company as he had resigned. When the offence committed he was not the employee also.

19. The complainant admitted that accused no.9 was not the director. Even though he had signed six cheques, he was arrayed as an accused in all the complaints in respect of 12 cheques. Complainant was not having any registration under the Money Lenders Act nor intimated about the loan transactions as per the provisions of Money Lenders Act. He submitted that the appeal is liable to be dismissed.

20. Shri R. Chodankar, the learned counsel for respondent no. 9 relied on following judgments:-

1. ***Harshendra Kumar D. Vs. Rebatilata Koley etc, AIR 2011 SC 1090***
2. ***DCM Financial Services Ltd. Vs. J. N. Sareen and anr. 2008 ALL MR (Cri) 2272 (S.C.***
3. ***Ashok Mal Bafina Vs. M/s Upper India Steel Mfg. & Engg. Co. Ltd., 2017 ALL SCR (Cri) 1358.***

4. ***Baba Chandrashekhar Radhakrishnan and ors. Vs The State of Maharashtra and anr. 2018 ALL MR (Cri.) 4533.***
5. ***Mrs. Anita Malhotra Vs. Apparel Export Promotion Council and anr. AIR 2012 SC 31.***
6. ***Mr. Shehzad Valimohammad Merchant Vs Mr. Saiyed Ghulam Abbas Zaidi and anr. 2019 ALL MR(Cri) 5001.***
7. ***M/s SIL Import, USA Vs. M/s Exim Aides Silk Exporters, Bangalore, 1999 ALL MR (Cri) 826.***
8. ***Girdhari Parmanand Motiani Vs Vinayak Bagwant Khavnekar and ors, 2016 ALL MR(Cri) 1909.***

21. The learned Counsel Shri P. Arolkar, for the respondent no.10 has submitted that he came to be appointed on 18.3.1995 resigned on 8.4.1997 and relieved on 30.4.1997. The cheques are dated 26.12.1997 onwards i.e much later from his leaving the company. He was not even the employee at the relevant time. He also submitted that he signed only six blank cheques however, he was arrayed in all the 12 matters.

22. The learned Counsel Shri Menezes, for the applicant in rejoinder submitted that there is no question of application of Money Lenders Act as it is nobodies case that the complainant was a money lender. Burden to prove that the complainant is money lender is on the accused. The presumption that cheque is issued on behalf of the company can be rebutted only by the Managing Director by leading evidence. The documents produced by PW2 Bank person are not proved.

23. I have heard the learned counsel for all the parties at length. Now rival contention fall for my consideration.

24. The main questions involved in this application/appeal are:-

i. Whether the Judgment passed by the learned JMFC contrary to law and resulted in gross miscarriage of justice by acquitting the respondents/accused?

ii. Whether the required ingredients to attract section 138 of NI Act were in existence?

iii. Whether appellant proved that the said cheque was issued towards discharge of legally enforceable debt for attracting presumption in its favour?

iv. Whether the appellant has proved that the person committing the offence under Section 138 of NI Act is a company and every person at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company to make them liable to be proceeded against and punished accordingly.

v. Whether the Money Lenders Act is applicable in the present circumstances?

25. For the sake of convenience, I am summarising the required ingredients to attract Section 138 of NI Act as under:-

(i) A person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) That cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier,

(iv) That cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) The payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) The drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

26. It appears that the cheque bears a word “Self” in place of payee's name. The learned trial Judge held that even self cheque would come within the ambit of Section 138 of the NI Act and held that the complainant is the holder in due course.

27. The next question is whether the cheques have been issued for the discharge in whole or in part of any debt or other liability. It is also necessary, to avail presumption under Section 139 of NI Act to establish that the cheques have been issued for the discharge of debt or liability. As per the contention of the complainant the said cheques were issued towards the repayment of the loan borrowed by the company accused no.1.

28. The accused persons disputed the same and have stated that there was no liability to discharge by the accused persons. It is also contention of the accused that the cheques were invalid cheques, as the authority to sign was withdrawn.

29. Now the complainant first to prove that there was a loan transaction between the complainant and the accused no.1. The complainant to establish his case has produced the cheques, dated 26.12.1997, memo of the bank dated 11.6.1998,

notice to the accused dated 18.6.1998, acknowledgment receipt at Exh. PW1/D, reply dated 2.7.1998, reply dated 24.6.1998, reply of accused no.5 at Exh. PW1/G, reply of accuse no.6 dated 27.6.1998, reply of accused no.8 at Exh. PW1/I, reply dated 17.7.1998, power of attorney dated 28.5.1995, Written Statement of accused no.2, 3 in Special Civil Suit No.110/99, letter dated 29.4.1997 at Exh. C/70 and copy of deposition of Peter Prabhu in Special Civil Suit No. 69/99.

30. He examined himself and deposed as per the complaint. In cross examination, he has admitted that(1) he does not have any document to show that he paid an amount. The payment is made on 17.9.1996 in cash. (2) He deposed that the accused was introduced to him by his Chartered Accountant and he advised that there was no need for him taking any acknowledgment in writing. (3) He does not have any document to show that the accused paid him an interest at the rate of 24% per annum, till February 1997 nor the interest paid reflected in his books of account. (4) The cheques were taken as self cheques as it was suggested by his Chartered Accountant Raghu Pikale (who allegedly happens to be Chartered Accountant of accused no.1 company) (5) Though it is the case of the complainant that Bank had informed him

orally that there is no sufficient balance in the account of the accused no. 1, he admitted that he did not make any efforts to get an letter from the bank of the accused that there was no sufficient funds in the account of accused no.1. He has also admitted that he has not confirmed by going to the bank whose authorisation withdrawn and at what point of time even after he received reply to his legal notice informing withdrawal of the authority by the concerned accused.

31. For the sake of convenience a chart showing cheque number, amount date on cheque, date of presentation, signatories to the cheque and cheque book date. So also the date of resolution by which signing authorities of the company's cheque were declared.

SR NO	CHEQUE NO.	AMOUNT RS.	DATED	PRESENTED ON	CHEQUE SIGNATURES	CHEQUE BOOK DATE
1	607093	1,00,000	26/12/1997	8/6/1998	FREDRICK & S.KUMAR	17/08/1995
2	946154	5,00,000	26/12/1997	11/6/1998	FREDRICK & S.KUMAR	14/2/1996
3	052323	3,00,000	26/12/1997	11/6/1998	FREDRICK & KURIEN	5/6/1996
4	055826	2,00,000	26/12/1997	11/6/1998	FREDRICK & KURIEN	24/9/1996
5	917346	2,00,000	26/12/1997	11/6/1998	FREDRICK & KURIEN	13/2/1996
6	945836	1,00,000	26/12/1997	11/6/1998	FREDRICK & S.KUMAR	23/1/1996

SR NO	CHEQUE NO.	AMOUNT RS.	DATED	PRESENTED ON	CHEQUE SIGNATURES	CHEQUE BOOK DATE
7	945837	1,00,000	26/12/1997	11/6/98	FREDRICK & S.KUMAR	23/1/1996
8	607058	1,00,000	26/12/1997	11/6/1998	FREDRICK & S.KUMAR	17/8/1995
9	055804	1,00,000	26/12/1997	11/6/1998	FREDRICK & KURIEN	24/9/1996
10	054162	1,00,000	1/1/1998	16/6/1998	FREDRICK & KURIEN	22/8/1996
11	913455	1,00,000	1/1/1998	12/6/1998	FREDRICK & S.KUMAR	10/5/1996
12	054103	1,00,000	1/1/1998	15/6/1998	FREDRICK & KURIEN	22/8/1996

I) Resolution dated 8.3.1995 till 16.5.97

Accused no.10 Saju Kurien or Accused no. 2 Fedrick D'Suza could sign alongwith Accused no. 9 Salva Kumar.

II) Resolution datd 16.5.1997 till 23.3.98

Accused no. 2 Fredrick D'souza Could sign alonwith Vasudev Byndoor.

III) Resolution dated 23.3.1998

Vasudev Byndoor could singally sign all cheques.

32. The learned counsel Shri V. Menezes, placed his reliance on ***Krishna Morajkar*** (supra) in support of his contention that to rebut the presumption under Section 118(b) of the NI Act, which provides that only when a contrary is

proved, a Negotiable Instruments is presumed to have been made on the date shown on the instrument. The same presumption can be rebutted only by a person denying it by entering into a witness box. The learned counsel also relied on the same judgment in support of his contention that it is the accused to prove that he was not managing the affairs of the company.

33. The learned counsel for the respondent nos. 3 and 4 Shri Dhond pointed out from the same judgment and submitted that the presumption are rebuttable and the accused is not required to tender evidence or bear burden of proof of the same magnitude as the prosecution. The standard of proof is preponderance of probabilities and inference of preponderance of probabilities can be drawn while rebutting the presumption not only from the material on record, but also by reference to the circumstances upon which the accused relies.

34. The learned Counsel Shri Menezes for the appellant also relied on ***S. M. S. Pharmaceuticals Ltd*** (supra) in support of his contentions, that Managing director or joint managing director admittedly in charge of company and responsible to the company for the conduct of its business.

When that is so, holders of such positions in a company becomes liable under Section 141 of the Act. By virtue of the office they hold as a managing director or joint managing director, these persons are in charge of and responsible for the conduct of the company and, therefore, they get covered under Section 141 of NI Act. In fact in my considered opinion this citation is supporting the accused persons. To make responsible the managing director it is necessary to specifically aver in the complaint under Section 141 of the NI Act that at the time the offence was committed, the person accused was in charge of and responsible for the conduct of the business of the company. This averment is an essential requirement of Section 141 and has to be made in the complaint. Merely being a director of a company is not sufficient to make a person liable under Section 141 of the Act. The director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of the business. The requirement of section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

35. The learned counsel for the appellant also relied on ***Goa Plasts (P) Ltd*** (supra) in support of his contention that the presumption in favour of holder of cheque can be rebutted by accused by entering into witness box. In the said matter the cheque was dishonoured due to stop payment instructions. Neither the said letter shifting the liability on a third person nor its contents were proved. The accused was MD of complainant's company not stepped into the witness box. On fact, it is held that Courts below erred in treating the said letter as proof sufficient to rebut the presumption under Section 139 of the NI Act. It is the duty of the Courts below to see whether the company had sufficient funds in its account on the date of signing of the cheques, presentation of the cheque and the date on which stop payment instructions were issued.

36. The learned counsel further submitted that the expression 'other legal proceedings' appearing in Section 446(1) of the Companies Act does not include complaint under section 138 of the N.I.Act. In other words, the leave of the Tribunal as provided in Section 446(1) of the Companies Act is not required to be obtained by the complainant to continue with the present proceeding.

37. The learned counsel placed reliance on ***Rangappa*** (supra) in support of his contention that once the accused has admitted that the signature on the impugned cheque was indeed his own Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of rebuttal nature and the onus is then shifts on the accused to raise a probable defence.

38. The learned counsel Shri Dhond for the respondent nos.3 and 4 submitted that in the same judgment in para 10 the Division Bench of this Court relying on ***Krishna Janaradhan Bhat Vs Dattatraya G. Hegde, (2008) 4 SCC 54*** observed at paragraphs 30, 34 and 45 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 of any debt or other liability.*
>
> *34. Further more, 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 the accused is '*preponderance of probabilities*' *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 he relies.*"

(Emphasis supplied)

Specifically in relation to the nature of the presumption contemplated by Section 139 of the Act, it was observed;

"*45…..........*

Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have been rebutted. Other important principles of legal jurisprudence namely, presumption of innocence as a human right 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 supplied)

39. The learned counsel Shri Dhond submitted that the presumption will come into play when the complainant will demonstrate that the amount he has advanced was available

with him. There are documents, accounts to that effect should be available with the complainant. The evidence shows otherwise. He claimed that he had advanced 20 lakhs in cash to the company without there being any acknowledgment from the company. The said amount is neither reflected in the account of complainant nor in the account of the company. There is no resolution of the company to the effect that company is in need of loan. In such circumstances, advancement of the huge amount in cash itself is in doubt. The case in which private person is involved in as an accused, stand on different footing than where there is an offence against the company. The learned counsel in support his proposition that "failure by the complainant to disclose the amount in the income tax returns or books of account is sufficient to rebut the presumption specifically when the amount is huge and paid in cash. It cannot be said to be a legally enforceable debt." The learned counsel relied on ***Vasudeo Ramchand Ahuja*** (supra), wherein the complainant alleging that the accused had taken friendly loan of Rs.5 lakhs from him. Cheque issued in repayment was dishnoured. As the complainant was unable to produce the document to show that there was enforceable debt against accused. The said amount admittedly was not shown in income tax returns and also did not reflect in the books of accounts.

The Hon'ble High Court upheld the trial's Court verdict that the defence of the accused that there was no legally enforceable debt on the date of presentation of the cheque and dismissed the complaint.

40. Similarly the learned counsel relied on ***Kishor L. Purohit*** (supra), wherein the Hon'ble Bombay High Court held that the "complainant's case that the accused had issued cheque towards part payment of friendly loan. However, it is unbelievable that a businessman like the complainant would advance a loan of Rs.3.40 lakhs to a stranger like respondent that too without receiving any acknowledgment. The plea of complainant that receipt was obtained, however, it was handed over back to the respondent, not inspiring confidence of Court. This Court held that legally enforceable liability, not proved beyond reasonable doubt and acquittal was proper."

41. The learned counsel further relied on judgment on ***Shri Datta S. Nadkarni*** (supra) in which it is held at paras 24 and 26 thus:-

> 24. .... It is now settled that while the prosecution is obliged to prove its case beyond reasonable doubt, the accused can prove his

defence or rebut the presumption as is available to the complainant under Section 139 of the Act, on mere preponderance of probabilities.

26. .... The presumption under Section 139 of the Act is a statutory presumption, which is evident from employment of the word 'shall'. Thus, the Court is obliged to raise such a presumption once the facts necessary for raising of such presumption are established. It is further well settled that for rebuttal of such presumption, it is not necessary as a rule that the accused shall enter into the witness box or should lead independent evidence. (See the case of Krishna Janardhan Bhat (supra). The accused can do so on the basis of cross examination of the complainant and his witnesses and the material on record.

42. The learned counsel for the respondent Shri Dhond submitted that in the matter before this Court the complainant though stated that he can produce the income tax returns and his accounts book, the same were not produced. Similarly he

has admitted that there is no document to show that he has lent the money to the respondent. The person in whose presence he alleged to have made the payment is not examined. This would be sufficient to raise an adverse inference and this Court held that presumption stood rebutted.

43. The learned counsel relied on ***K. Subramani*** (supra), wherein Hon'ble Apex Court considering the fact that alleged loan of Rs. 14 lakhs without producing bank statements to substantiate his claim and upheld the order of the acquittal of the trial Court.

44. The learned counsel also relied on ***Shri Vikas Gopi Bhagat*** (supra) wherein this Court relying on the ratio laid down in ***Basalingappa Vs. Mudibasappa, 2019 SCC On line SC 491*** held that respondent have rebutted the presumption by raising probable defences. In the said Basalingappa's (supra) case, the Hon'ble Apex Court summarised the principles as regards to section 118 sub clause (a) and 139 of the NI Act. So also in the same judgment reliance is placed on judgment of Hon'ble Apex Court in case of ***Rohitbhai Jivanlal Patel Vs. State of Gujarat and another 2019 SCC Online SC 389*** wherein Hon'ble Apex Court held that ordinarily the Appellate

Court will not be upsetting the judgment of the acquittal if the view taken by trial court is one of the possible view of the matter and unless the Appellate Court arrives at a clear finding that the judgment of the trial court is perverse that is not supported by the evidence on record or contrary to what is regarded as normal or reasonable or is wholly unsustainable in law. However, such restrictions needs to be visualised in the context of the particular matter before the Apex Court and the nature of the 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.

45. On similar proposition he relied on ***Rajendra Pangam*** (supra). In this matter also though it was possible to examine the Chartered Accountant or atleast produced the accounts maintained in order to establish that amount of Rs.75000/- was advanced was not produced by the complainant and, therefore, the appeal of the complainant was dismissed.

46. The learned counsel also relied on ***Krishna Janaradhan Bhat*** (supra) in support of his similar contentions that Section 139 merely raises a presumption in

favour of holder of the cheque that the same has been issued for discharge of any debt or other liability. Section 138 proviso ordinance compliance with legal requirement before complaint petition can be acted upon and also relied on in support of his contention that for proving defence accused is not required to step into the witness box. He can rely upon the material already on record and the standard of proof to prove defence is "preponderance of probabilities."

47. Similar is the view taken by this Court in ***Smt. Kiran Yugalkishore Bhattad, Nitin Bapurao Mankar and M/s Kalpana Mines and Minerals*** (supra).

48. From above all citations relied on by the learned counsel Shri Dhond for respondent nos. 3 and 4, it is now well settled that the complainant is required to establish the case beyond reasonable doubt whereas the accused can discharge the burden on preponderance of probabilities. This can be done on the basis of cross examination of the witnesses of the complainant and any other material available on the record and it is not necessary for this purpose the accused should enter into the witness box.

49. The question really is about the extent to which such presumption can operate and can the benefit of such presumption be availed then the case set up by the complainant is found to be not substantiated.

50. The learned counsel for respondent Shri Dhond further relied on judgment in the case of ***Ashish Parikh*** (supra) in support of his contention that to attract Section 138 of the NI Act the cheque is to be dishonoured for “want of sufficient funds”. To attract Section 138 of NI Act, the cheque must have been returned unpaid by the drawee's bank either because amount of money standing to the credit of the account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with that bank. It is submitted that in the present matter the cheques were returned dishonoured on the count that “authority withdrawn” and it is not established that there were no sufficient funds to clear the cheques. There was no direction for stop payment or there is no case of closure of account. In such circumstances, there is no liability of the company nor any of the accused.

51. The learned counsel relied on ***John K. Abraham*** (supra) herein it is held by the Hon'ble Apex Court that conviction of the accused not proper. The Hon'ble Apex Court held that for drawing presumption under Section 118 read with Section 139 of NI Act burden is heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing. The complainant not sure as to who wrote cheques nor aware as to where and when existing transaction took place for which cheque were issued by the accused. Thus defect in the evidence of the complainant as noted by the trial Court was proper.

Specific averments about directors in charge

52. In ***N. K. Wahi*** (supra), wherein Hon'ble Supreme Court held that it is necessary to specifically aver in a complainant under Section 141 that at the time when the offence was committed the person accused was in charge of and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in the complaint. Without that it cannot be said that the requirement of this section came to be satisfied.

53. It would not suffice to state that all the accused are the directors and responsible officers of the company.

54. The learned counsel for respondent Shri Dhond relied on ***Mr. Narendra Urangi and ors***. (supra) of the Hon'ble Andhra Pradesh High Court in support of his contention that when offence alleged to have been committed by the company the complaint against non signatory director is not maintainable. Bald statement that the accused-directors are also liable for the day to day business of the company alongwith managing director without there been any material averments in the complaint as to how they are liable does not make them liable.

Application of Money Lenders Act.

55. The learned counsel for the respondent Shri Dhond submitted that alleged advance of loan is against Money Lenders Act. In support of this contention he relied on Smt. ***Nanda Dharam Nandanwar***(supra). The said business is invalid without a licence, in view of Section 23 of the Contract Act any agreement or consideration the object of which is unlawful within the meaning of Section 23 are not enforceable.

56. Similarly relied on ***Mulchand Ramji Saiya*** (supra). Huge amount was given in cash and promissory note stipulating interest. Complainant engaged in money lending business without valid licence. Held trial Court was justified in holding that the debt was not legally enforceable debt.

57. In ***Anil Baburao Kataria*** (supra),wherein Hon'ble Bombay High Court upheld the acquittal order passed by the learned JMFC as loan advanced by the money lender without licence is not a debt or other liability and it was held that provisions of Section 138 will not apply to such transaction.

58. The learned counsel for the respondent no.6, Shri A. R. Kantak, submitted that accused no. 6 is not the signatory of the cheque. He relied on ***Saroj Kumar Poddar*** (supra) in support of his contention that as there was no averment in the complaint as to how and in what manner the appellant was responsible for the conduct of business of company, moreover he having not issued any cheque, his responsibility for dishonour of cheque ought to have stated specifically. The allegation thus, did not satisfy the requirement of Section 141 which was obligatory. In the matter before the Hon'ble Apex

Court in the similar set of facts it was held that proceedings against the appellant liable to be quashed. It is further held that a person would vicariously liable for commission of an offence on the part of the company only in the event the conditions precedent laid down therefor in Section 141 of the Act stands satisfied.

59. The learned counsel on relied on ***K. Shrikanth Singh*** (supra), wherein the Hon'ble Apex Court held that to attract vicarious liability of a director of a company under Section 141 it must be pleaded and shown that the director was responsible for the conduct of business of the company at the time of commission of the offence. Only being a director not enough to cast a criminal liability. Vicarious liability must be pleaded and proved and cannot be merely inferred.

60. The learned counsel for the respondent no.9, Shri R. Chodankar, relied on ***Harshendra Kumar D.*** (supra), wherein Hon'ble Apex Court held that a director whose resignation has been accepted by the company and that has been duly notified to the Registrar of the company cannot be made accountable and fasten with liability for anything done by the company after the acceptance of his resignation. The word "Every person,

who at the time the offence was committed" occurring in Section 141 sub clause 1 of the NI Act are not without significance and this words indicate that criminal liability of a director must be determined on the date the offence is alleged to have been committed.

61. The learned counsel for the respondent no.9 further relied on ***DCM Financial Services Ltd***. (Supra). In the matter before the Hon'ble Apex Court the cheque in question was admittedly a post dated one. It was signed on 3.4.1995 and presented on June 1998. In the meantime the respondent no.1 had resigned from the directorship of the company. Complaint was filed on 20.8.1998. Intimation about his resignation was given to the complainant in writing by the first respondent on several occasions. Appellant was, therefore aware thereof. Despite having the knowledge the first respondent was impleaded one of the accused in the complaint as a director in charge of the affairs of the company on the date of the commission of the offence, which he was not. it was held that the persons who had resigned with the knowledge of the complainant in 1996 could not be a person in charge of the company in 1998 when the cheque was dishonoured. He had no

say in the matter of saying that the cheque is honoured. and therefore he cannot be made responsible for the payment.

62. He also relied on ***Ashok Mal Bafina, Baba Chandrashekhar Radhakrishnan and ors., Mrs. Anita Malhotra, Mr. Shehzad Valimohammad Merchant and Girdhari Parmanand Motiani*** (supra) in support of his above contention.

63. After considering the above referred citations a common proposition emerges that when offence under section 138 is in respect of a company section 141 comes into play. It is a penal provision creating vicarious liability and must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in the complaint that the director (arrayed as an accused)in charge of and responsible to the company for the conduct of the business of the company. The complaint should spell out as to how and in what manner the accused was in charge of or was responsible to the company for the conduct of its business.

64. Thus to make accused liable under Section 138 read with Section 141 of NI Act, it is necessary that the complainant

should establish that he is a holder of a cheque and the said cheque has been issued for the discharge in whole or in part of any debt or other liability. As it is an offence against the company, it is also require to be established that the accused is the person responsible for affairs of the company he was in charge and having the control over the company's affiars at the time of commission of the offence. A person who has already resigned or whose authority is withdrawn at the time of commission of the offence can not be made accountable and fasten with liability for anything done by company after acceptance of his resignation or after withdrawal his authority to sign the cheque. In the present matter as discussed earlier though the complainant is having cheques in his possession it doesn’t bare the name of the payee. Even if it is considered as a held by the learned JMFC that the cheque is though a “self” cheque the word "or bearer" is not cancelled. It can be assumed that the complainant is the holder in due course, however he will not be exempted from discharging his other burden.

65. To establish that there was a loan transaction it is necessary for the complainant to establish that he was having capacity to pay that much amount. There has to be some document to show that there is capacity to pay and actually

payment is made. In the present matter the complainant himself admitted that he does not have any document to show that he paid an amount though he deposed that the payment is made in cash. It is difficult to believe that the person will pay amount of Rs. 20 lakhs(the full amount of all the cheques) in cash. Though he further alleged that the said transaction is carried out as per the advise of his Chartered Accountant Shri Raghu Pikale who allegedly happened to be Chartered Accountant of the complainant as well as of the company. As per his advice he did not secure any acknowledgment in writing. It is matter of record that the complainant has not examined the said Chartered Accountant Raghu Pikale. There are no income tax returns or books of accounts nor any pass book extracts produced on record. So far as contention that he received 24% interest per annum there is nothing in support of this contention. Now the question is whether the accused is required to enter into a witness box to rebut the presumption. On the first place it is not established at all that cheques were issued in discharge any liability enforceable by law. the cheques were not dishonoured due to "insufficient funds" but "authorisation is withdrawn" of the person who signed the cheques.

66. The complainant is harping on the letter dated 29.4.1997 Exh.70. The said letter allegedly written by accused no.2. The said accused has expired. Although the said letter is exhibited through the complainant the contents thereof ought to have been proved by examining other witness who are conversant with the signature of the accused no.2. It is the contention of the appellant that when the letter was produced accused no. 2 who was very much alive but he had not disputed the same. On this count one cannot say that the contents therein are proved.

67. It is matter of record that on all the 12 cheques the signatories are not the same. On six cheques as shown in the chart are issued under the signature of Fredrick and S. Kumar and six under the signature of Fredrick and Kurien. However, in all the 12 complaints all the three persons were made as respondents/accused. Apart from this there is no specific averments who is the director responsible for the affairs of the accused no.1 company. Thus it transpires that complainant himself is not sure as to who were the directors and responsible person. As per his deposition he incurred information in respect of directors of a company from the chartered Accountant Shri Raghu Pikale. however, the said Raghu Pikale was not

examined. Failure to establish this fact that he was having capacity to pay the amount of 20 lakhs cash as a loan or failure to show that he has received 24% interest per annum from the company the complainant failed to established that cheques were issued in discharge of any legal liability or part thereof. The accused respondents have established their defence on the basis of preponderance of probabilities that neither any such amount is paid to the company nor it is reflecting in the any account of the complainant nor the complainant is able to establish his capacity. As such, the acquittals of the respondents herein is perfectly justified. It reveals from the record that accused nos.3, 4,5 and 6 are not the signatories to the cheques in dispute. There are no specific averments against these accused that they are connected or responsible to the affairs of the company. The signatories were already resigned and or authority thereof is withdrawn by the company which is made clear giving reply to the notice inspite of that all the nine respondents are arrayed as accused.

68. So far as application of money-lending Act is concerned, in view of Section 6 of the Goa Money-Lenders Act, 2001, every person who is engaged in business of money lending, should apply for licence to the Registrar of money-

lending before the prescribed date and in prescribed form annually. Section 15 of the Goa Money-Lenders Act, 2001 reads as under:

> "Every person who has advanced a sum of money or is otherwise covered by the provisions of this Act shall register all such past transactions of money-lending with the Registrar within 15 days of the coming into force of this Act under an intimation thereof."

69. It appears that it is the claim of the complainant that he has paid amounts on various occasion. As such, there are various transactions of the loan as per the complainant's contention itself. If that would be the case, for his past transactions of money lending, he ought to have after coming into force of the said Act of money lending, registered with the Registrar of money-lending within 15 days. Such transactions cannot be termed as hand loan. He is also claiming that he has received 24% interest. As such, without registration or intimation to the Registrar as per the Goa Money-Lenders Act, the amount so advanced, cannot be termed as legally enforceable debt.

70. In my considered opinion after going to the principles laid down in above citations and after going through the evidence on record for the reasons stated in foregoing paras, I do not find any reason to interfere with the judgment and order passed by the learned JMFC acquitting the accused person.

71. Accordingly, I proceed to pass the following order:-

ORDER

i. All the Criminal Misc. Applications are allowed.

ii. All the appeals stand dismissed with this common judgment.

In facts and circumstances no order as to costs.

M. S. JAWALKAR, J.

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