

Meena

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.25 OF 2017**

Mr. Tanveer Khatib,
Major of age,
R/o. 179/30, Alto Bella Vista,
Chogam Road,
Sangolda, Bardez- Goa.

...Appellant

Versus

1 Mr. Oscar Vaz,
Major, business,
r/o. 1st floor, Pooja Mahal,
Above Hotel Babaji,
Khorlim, Mapusa -Goa.

2 State, through PP

...Respondents

Ms. Barbara Andrade, Advocate for the Appellant.

Mr. Pravin Faldessai, Additional Public Prosecution for Respondent No.2.

Ms. C. Collasso, Advocate for Respondent No.1

CORAM: BHARAT P. DESHPANDE, J.

Reserved on: 11th November, 2022

Pronounced on: 22nd November, 2022.

JUDGMENT:

The appellant/original complainant is hereby challenging the judgment and order dated 16th December 2016 arising out of Private Criminal Complaint No.87/NIA/2011/B

whereby the learned Magistrate at Mapusa dismissed the complaint filed under Section 138 of Negotiable Instrument Act and acquitted the respondent.

2. Heard Ms. Barbara Andrade, learned Counsel for the appellant, Mr. Pravin Faldessai, learned Additional Public Prosecution for respondent No.2 and Ms. C. Collasso, learned Counsel for Respondent No.1.

3. With the assistance of the learned Counsel for the respective parties, I perused the entire records and proceedings of the trial Court as well as the paperbook.

4. In nutshell, it is the case put forth by the appellant/complainant that there was Memo of Understanding (MOU) dated 19th November 2009 executed between the appellant and respondent No.1 wherein the appellant agreed to buy property bearing Survey No.32/1 of village Colvale for a consideration of ₹7,50,000/- from the respondent. Since the respondent failed to perform his part, he issued a cheque for an amount of ₹15,00,000/- towards breach of contract and damages. On presentation of the said cheque with the bankers, it was returned with an endorsement "Opening balance insufficient". A demand notice dated 19th February 2021 was issued which was replied to by the respondent vide letter dated 7th March 2019 refuting the allegations in the notice. Complaint was filed under Section 138 of the Negotiable Instrument Act before the learned Magistrate at Mapusa. Process was issued

against the respondent who appear and contest the matter. The appellant examined himself. Respondent No.1 examined himself and one witness. The learned Magistrate vide impugned judgment and order dated 16th December 2016 dismissed the complaint and acquitted the respondent.

5. The learned Counsel for the appellant submitted that the impugned judgment is perverse and against the settled proposition of law as the learned Magistrate failed to draw presumption under Section 139 of Negotiable Instrument Act. The material brought on record by the respondent is not at all reliable to rebut such presumption. The appellant has produced receipt wherein respondent admitted that he is liable to pay ₹15,00,000/- towards non-performance of the contract and damages. Therefore, the impugned judgment needs to be quashed and set aside and the respondent be held guilty for the offence punishable under Section 138 of the Negotiable Instrument Act. Learned Counsel Ms.Barbara Andrade placed reliance on the following decisions:

1. Dr. Srishti Ashutosh Prabhu Dessai v/s. Mr. Dadamiyan M. Bagewadi and another¹
2. K.N. Beena v/s. Muniyappan and Another²
3. TarMahomed Haju Abdul Rehman v/s. Tyeb Ebrahim Bharamchari³

¹ Cria No.23 of 2015

² [(2001) 8 SCC 458]

³ O.C.J. Appeal No.58 of 1948

4. APS Forex Services Pvt. Ltd. v/s. Shakti International Fashion Linkers and others⁴
5. Bir Singh v/s. Mukesh Kumar⁵
6. Bharthi Bhanudas Gaonkar v/s. Suresh Vinayak Azgaonkar⁶

6. The learned Counsel for respondent No.1 supported the findings of the learned Magistrate and claimed that though presumption was drawn in view of the appellant, it stands rebutted by cogent and convincing evidence. Thereafter, the appellant failed to prove its case beyond all reasonable doubt and hence private complaint has been rightly dismissed. The learned Counsel for respondent No.1 then submits that the complaint filed under Section 138 of Negotiable Instrument Act was barred by limitation as it was filed beyond the period of limitation. She then claimed that there is no material on record to show as to how the figure of ₹15,00,000/- is arrived at towards damages and other expenses. She claimed that the receipt produced subsequently by the appellant is a fabricated document and the same is not reliable. She claimed that the cheque was issued somewhere in the year 2009 as security. However, the appellant failed to prove that the amount mentioned in the cheque was legally recoverable debt.

⁴ (2020) 12 SCC 724

⁵ (2019) 4 SCC 197

⁶ 2011 SCC OnLine Bom 141

7. Rival contentions falls for the consideration of this Court as under:

i) Whether the respondent succeeded in rebutting presumption under Section 139 of the Negotiable Instrument Act?

ii) Whether complaint is within limitation?

8. In the complaint filed under Section 138 of the Negotiable Instrument Act, there are clear averments that the appellant and respondent were known to each other and that the respondent is in the business of selling properties in the State of Goa. The appellant was interested in purchasing some property whereas the respondent was holding Power of Attorney for Ms. Iris D'Souza and Mr. Walter Diniz Mendonca with respect to immovable property having a residential house bearing House No.15/3, together with larger property known as "Tolencho Sorvo" or "St. Roque Waddo" admeasuring 675sq.mtrs. bearing Survey No.32/1 of village Colvale, Bardez, Goa. The respondent offered the said property to the appellant for an amount of ₹7,50,000/-. The respondent also represented that the said property is having clear and marketable title and there is no dispute of any nature. Since the appellant liked the said property and on the basis of the representations made by the respondent, he agreed to purchase it for ₹7,50,000/-. Accordingly, a MOU dated 19th November 2009 was executed between the appellant and respondent who represented the owners of the said properties as their lawful attorney. The said MOU dated 19th November 2009 was registered before the Notary on the same

date.

9. The complaint further shows that the appellant noticed that some third party was trying to interfere with the said property and upon local inquiry he got the name of the said person as Paul Fernandes claiming to be caretaker of the said property. On inquiring with Mr. Paul Fernandes the appellant was informed that Ms. Iris D'Souza and Mr. Walter Diniz Mendonca are not the sole owners of the property. There was a notice board installed in the said property informing the general public that the said property is not for sale and the trespassers will be prosecuted. On seeking this information the appellant approached the respondent and requested him to restrain the said Paul Fernandes from interfering with the said property. However, the respondent started evading and giving flimsy reasons. The appellant made several attempts to obtain clear title of the said property by settling the issue with Paul Fernandes. Since there was no success, the appellant asked the respondent to return his amount with damages/loss. The respondent in due compliance and with mutual understanding issued a cheque of ₹15,00,000/- in favour of the appellant drawn on Bank of Baroda, Mapusa Branch towards the return of amount paid by the appellant to him as well as compensation/damages due to failure on the part of the respondent in conveying the said property.

10. The appellant then presented the said cheque with his bankers. However, it was returned unpaid for insufficient funds. Legal notice

was issued to the respondent demanding the amount mentioned in the cheque, however, the respondent flatly refused to pay and threatened the appellant to file a false complaint at the police station. The respondent replied to the legal notice by making false and frivolous allegations and thereby denying the liability to pay the said amount.

11. The appellant filed his affidavit-in-evidence and thereafter, he was cross-examined at length. Respondent No.1 then stepped into the witness box by filing affidavit-in-evidence and examined one witness by Rajesh Ranjan, the Chief Manager of Bank of Baroda through whom the statement of Account in the name of respondent No.1 is produced on record.

12. The learned Magistrate framed six points as observed in paragraph No.6 of the impugned judgment and order. All these six points are answered in negative.

13. At this stage, it is required to observe that Chapter XVII of Code of Criminal Procedure 1973 ('CrPC' for short) deals with the judgment. Section 354 of CrPC mandate that the judgment contained point or points for determination, decisions thereon and the reasons for such decision. The whole purpose of framing of points is to understand the case put forth, the law applicable to the fact and the decision against it.

14. In the matters arising out of Section 138 of the Negotiable

Instrument Act, framing of point while delivering judgment assumes much importance as first of all the Magistrate has to consider ingredients of Sections 138 r/w. 139 of the Negotiable Instrument Act. Similarly, the Magistrate has to keep it in mind provision of Section 140 of the Negotiable Instrument Act which says that it shall not be a defence in a prosecution for an offence under Section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

15. Thus, framing of points is a stage only when the judgment is dictated and not prior to it. At that stage, entire material is available with the Magistrate including the arguments of both sides. In the light of above facts, the duty of the Magistrate is to frame the correct point so as to arrive at a proper finding. If incorrect points are framed, a burden is unnecessarily shifting on either complainant or the accused and accordingly reasons are also affected.

16. The matter in hand is one such example wherein points have been framed without looking at the material placed before it. Admittedly, in the present matter the accused did not dispute his signature on the cheque. The only explanation that came forward from the defence is that such cheque was issued towards some security. Thus considering ingredients of Section 138 r/w. Section 139 of the Negotiable Instrument Act, it was incumbent upon the Magistrate to frame proper points. The first point ought to have

been as under:

1. Whether the accused succeed in rebutting presumption under section 139 of the Negotiable Instrument Act?

17. Instead of framing such a point, the learned Magistrate presumed that the accused succeeded in rebutting such presumption and framed point No.1 putting burden on the complainant to prove that such cheque was issued toward legally enforceable liability. By putting the unnecessary burden on the complainant by ignoring presumption of law under Section 139 of the Negotiable Instrument Act, the learned Magistrate mis-directed herself while forming the points and also discussing such points unnecessarily. Be that as it may, the fact remains that the entire case is based on MOU which is dated 19th November 2009 and the contents therein. Perusal of such MOU produced at Exh.8 before the Trial Court, it shows that Ms. Iris D'Souza and Mr. Walter Diniz Mendonca through their duly appointed and constituted attorney i.e. respondent No.1 represented to the appellant that there is a property bearing Survey No.32/1 together with house admeasuring 675sq.mts. for sale. The history as to how this property devolved upon the said vendors is disclosed. On page 5 before the start of terms and conditions it is mentioned in the MOU as under :

“AND WHEREAS the party No.1 through their duly appointed Attorney Mr. Oscar Vaz have represented to the Party No.2 that they have a sufficient, clear and marketable title to the said property and have agreed towards the sale of the said property which is clearly described in the

schedule below for Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand only)”

18. The MOU then proceeds further and record as under in paragraphs No.1 to 9.:

1. That Party No..1 has agreed to sell the said property to Party No.2 for fair market value price of Rs. 7,50,000/- (Seven Lakhs Fifty thousand only).

2. That the party No.2 has advanced to Party NO. 1 Rs. 5,00,000/(Rupees Five Lakhs) towards this agreement for sale. Out of which is Rs. 2,50,000/-(Rupees Two lakhs fifty thousand only) issued through ING VYSYA., PANJIM BRANCH, CHEQUE NO.349732, dated 9/05/08 and Rs. 2,50,000/- (Rupees Two Lakhs fifty thousand only) by way of cash which is duly acknowledged by Party No. 1 of sum of having received the said sum of Rupees 5,00,000(Rupees Five Lakhs only).

3. That the balance sum of Rs. 2,50,000/- (Rupees Two lakhs fifty thousand Only) will be paid at the time of execution of sale deed.

4. That the Party No.1 has represented to Party No 2 that they have no lien, and encumbrances or loans of whatsoever nature on the said property.

5. That the party No.1 have represented to party No.2 that they have not signed any agreement for sale /Agreements, mortgage deeds/Sale Deeds/towards the said property in favour of any party.

6. That the party No.1 states that the said property is not involved in any process of acquisition , by the Government or any local body or any authority and keeps the party No. 2 indemnified toward the same.

7. That the Party No.1 undertakes to provide Party No.2 a clean, clear and marketable title of the said property including vacant and peaceful possession of the said property.

8. That the necessary stamp duty will be paid at the time of Executing the Sale deed in favour of party no 1

9. That this Agreement for Sale is signed as a stop gap arrangement between the parties and is enforceable in accordance to the provisions of Law applicable.”

19. From the reading of the above paragraphs and more specifically paragraph 2, it is clear that the appellant being party no.2 in the said MOU advanced to party No.1 i.e. the vendor through their attorney/respondent No.1 herein an amount of ₹5,00,000/- towards the agreement for sale. Out of said amount of ₹5,00,000/-, ₹2,50,000/- were paid through cheque dated 9th May 2008 issued through ING Vysya, Panaji Branch. Remaining amount of ₹2,50,000/- was paid by way of cheque which was duly acknowledged by respondent No.1. Thus, it is clear that before executing the MOU dated 19th November 2009, the amount of ₹2,50,000/- by cheque from ING Vysya Bank was paid in the month of May, 2008. There is no date with regard to the payment of ₹2,50,000/-. Be that as it may, the MOU shows that an amount of ₹5,00,000/- was paid by the appellant to the vendors through respondent No.1 intending to purchase the said property. Admittedly, the MOU is not the Agreement Of Sale. It is only an understanding that the appellant intends to purchase the said property. The appellant failed to produce on record the Agreement of Sale though

it was considered that the MOU is itself an Agreement to Sale the suit property.

20. The disputed cheque is dated 7th February 2011 for an amount of ₹15,00,000/- issued in favour of the appellant. It is the contention of the appellant that though he paid only ₹5,00,000/- intending to purchase the said property, respondent No.1 issued a cheque of ₹15,00,000/- which includes the costs and damages for non-performance of the said agreement. Thus, admittedly the amount which the appellant paid to respondent No.1 as per the MOU was ₹5,00,000/-. Therefore, it was for the appellant to establish as to how additional amount of ₹10,00,000/- is calculated towards the so called damages/compensation and whether the respondent no.1 acknowledged that he is liable to pay such amount which include the initial payment of ₹5,00,000/- together with additional amount of ₹10,00,000/- towards damages and compensation.

21. MOU produced at Exh-8 is totally silent about the eventuality of non-performance of the said agreement and what would be method of refund of the advance paid and whether the appellant would be entitled to claim damages/compensation. Returning back to the complaint filed under Section 138 of the Negotiable Instrument Act, there are no averments or calculations disclosed therein as to how the figure of ₹15,00,000/- was arrived at when amount paid by the appellant was only ₹5,00,000/-. Averment in

paragraph Nos.12 and 13 of the complaint show that the appellant directed the respondent to return the said amount along with damages/loss caused to him for non-performance of the said agreement. Accordingly, the respondent in due compliance of the said MOU issued a cheque for an amount of ₹15,00,000/-, towards the return of the amount advanced by the accused as well as compensation/damages for having failed to execute the Sale Deed. Thus, the complaint filed before the learned Magistrate is silent as to how the figure of ₹10,00,000/- is arrived at towards damages/compensation. Similar are the averment in the affidavit-in-verification at Exh-4 and also in affidavit-in-evidence at Exh-31 filed on behalf of the appellant before the learned Magistrate. Cross-examination of the appellant therefore assumes importance. It was suggested to the appellant that he obtained the said cheque as security from respondent No.1 which he had denied. Similarly, the appellant admitted on page 4 of the cross-examination that in the MOU an amount of ₹7,50,000/-was mentioned. He claimed that the said amount was received in the year 2008 but subsequently incidental costs such as surveyor fees, Form I and XIV taxes, to do succession deed, lawyer fees which were not accounted were included and that is how the accused issued a cheque of ₹15,00,000/-.

22. Further question put to the appellant asking whether such amount of ₹15,00,000/- is reflected in any document. He answered that there is one receipt to that effect. He claimed that such receipt

was given to him by respondent No.1 in the month of March 2010 along with the cheque. He admits that there is no date on the said receipt. He denied the suggestion that no such receipt was issued along with the cheque by respondent No.1. He also denied the suggestion that the contents of the said receipt including the amount is in his own handwriting.

23. It is admitted fact that after the cheque was dishonoured, the appellant issued legal notice which is dated 19th February 2011 wherein the details of cheque issued in favour of the appellant which include advance amount together with compensation/damages for failure to execute Sale Deed is mentioned in paragraph No.1. Respondent no.1 responded to such legal notice by his reply notice dated 7th March 2011. In the said reply respondent no.1 clearly denied about his liability to pay the amount mentioned in the cheque. It is a specific case that such a cheque was issued as security at the time of executing MOU in the year 2009 and the same has been misused. Whereas specific statement that such cheque was never issued in discharge of any legally enforceable liability or debt. Thus respondent No.1 made his defence clear at the time of sending reply i.e. before filing the complaint under Section 138 of Negotiable Instrument Act. In such circumstances, it was incumbent upon the appellant to come up with the appropriate averments in the complaint by showing as to how the amount of ₹15,00,000/- is arrived at when the MOU only refers to payment of ₹5,00,000/- as advance. The only document which appellant subsequently relied

upon is the so called receipt, the contents of which reads thus :

“ Given to Mr. Tanveer Khatib, a sum of Rs.15,00,000/- by cheque No. 513842, drawn on Bank of Baroda, Mapusa Branch, towards security deposit against the Agreement for sale of the property (House plot) bearing Survey No.32, Sub-Division 1 of Colvale Village admeasuring about 700m2, situated at Colvale, Bardez, Goa. In the event that on the stipulated dated being 16-5-09 I am unable to deliver the above said house plot by completing the Deed of Sale, in that case you may deposit the given cheque for recovery of advance paid amount alongwith calculated damages.

Sd/-

24. On perusal of contents therein, though figure of ₹15,00,000/- is mentioned therein, it clearly shows that such cheque was handed over to the appellant towards security deposit against the agreement for sale of the property (house property) bearing Survey No.32 Sub division 1 of the Colvale village. It further refers that in the event that on the stipulated date being 16th May 2009, respondent No.1 is unable to deliver the above said house plot by completing the deed of sale, in that case the appellant may deposit the said given cheque for recovery of advance paid amount along with calculated damages. The stipulated date found referred in the above receipt is dated 16th May 2009, which is admittedly prior to MOU dated 19th November 2009. Thus, one thing is clear that even if such receipt is executed by respondent No.1 which bears no date, it was prepared and signed much prior to 16th May 2009. It further show that the cheque in question was given as security deposit against the agreement for

sale, much prior to the MOU. Thus, by executing MOU, the terms and conditions between the appellant and the respondent stands modified. This MOU executed on 19th November 2009 is conspicuously silent about in such receipt signed and executed by respondent No.1 in favour of the appellant and more so handing over of any cheque bearing No.513842 drawn on Bank of Baroda for an amount of ₹15,00,000/- as security deposit against the agreement of sale. There is absolutely no explanation coming forward from the appellant as to why the MOU is silent about execution of any receipt by respondent No.1 in favour of the appellant much prior to 16th May 2009. Thus, it clearly shows that the terms and conditions agreed between the parties were modified by the MOU dated 19th November 2009 which nowhere reflect or refer to any receipt executed much prior to 16th May 2009.

25. In the cross-examination of Dw1, he admits the signature on the said receipt at point “A”. However, he specifically claimed that such receipt was signed by him when he handed over the cheque to the appellant. Apart from this, there is absolutely no cross-examination of Dw1 on this receipt.

26. Thus, it is clear from the above observation that the so called receipt at Exhibit-9 is much prior to the MOU dated 19th November 2009 and, therefore, in absence of any reference of such receipt in the MOU, contents of such letter cannot be considered as terms and conditions executed between the parties specifically when such

terms and conditions, if any, were modified by the MOU dated 19th November 2009.

27. Respondent No.1 stepped in the witness box and filed his affidavit-in-evidence in support of his defence. He has been examined at length. Testimony of respondent no.1 is not at all shaken in the cross-examination except the fact that he was unable to produce clear title to the property which he agreed to sell to the appellant. That apart, evidence of respondent No.1 clearly goes to show that he received only ₹5,00,000/- towards advance for sale of such property. In cross-examination of respondent No.1/Dw1, no suggestion was put to him that the cheque amount includes damages/compensation to the tune of ₹10,00,000/- over and above ₹5,00,000/-paid as advance. Even the receipt at Exh.-9 nowhere mentioned that the amount of ₹15,00,000/- is legally due to the appellant including damages. Neither the complainant nor any document justify quantifying such damages to the tune of Rs,10,00,000/-. No prudent man would agree to pay damages/compensation to an amount of ₹10,00,000/- for receipt of advance of ₹5,00,000/-. At the most such person may agree to return advance together with interest. Even calculating interest, it would not come to the figure of ₹10,00,000/-. No doubt it is not the case of complainant/appellant herein that additional amount of ₹10,00,000/- was toward the interest. Thus, from the material produced before the trial Court, it is clear that there is serious doubt in connection with the amount over and above ₹5,00,000/- as

received by respondent No.1 towards advance. This aspect has been brought on record from the cross-examination of the appellant and also from the evidence of respondent No.1 in clear terms. The preponderance of probability clearly shows that no prudent man would agree to pay compensation of ₹10,00,000/- in such circumstances. Thus, the amount mentioned in the cheque as ₹15,00,000/- cannot be considered as legally recoverable debt from respondent No.1. Accordingly, respondent No.1 succeeded on preponderance of probability in discharging the onus and dislodging presumption under Section 139 of Negotiable Instrument Act.

28. The learned Magistrate though in other words, found favour with the defence raised by respondent No.1 and accepted that the amount mentioned in the cheque cannot be considered as legally recoverable debt. In other words, the learned Magistrate observed that respondent No.1 succeeded in dislodging presumption under Section 139 of the Negotiable Instrument Act.

29. After holding that respondent No.1 dislodged presumption successfully, the onus then shift on the appellant and this time he has to prove that amount mentioned in the cheque is legally recoverable debt, beyond all reasonable doubt and without having in his favour any presumption under Section 139 of the Negotiable Instrument Act.

30. Evidence brought on record nowhere proves that respondent No.1 was liable to pay ₹15,00,000/- as debt to the appellant.

Thus,by considering above aspects, observations of the learned Magistrate cannot be faulted with.

31. In the case of **Dr. Srithi**(supra), this Court while relying upon case of **Rangappa**(supra) observed that presumption under Section 139 of the Negotiable Instrument Act could be rebutted by the cogent and convincing evidence though on preponderance of probabilities. Such observations are in fact support the arguments and contentions raised by respondent No.1 in the present matter.

32. In the case of **K.N. Beena**(supra), the Supreme Court relied upon the case of **Hitel Dalal v/s. Bratindranath Banerjee**⁷ and observed that presumption could be rebutted or discharged by proving contrary. Mere denial or rebuttal in reply to the legal notice is not enough. Applying the same principle to the matter in hand, respondent No.1 stepped into the witness box and led evidence which is sufficient enough to prove contrary and to rebut the presumption and this again support the case of respondent No.1.

33. In the case of **TarMohomad Haji Abdul Rehman, APS Forex Services Pvt. Ltd., Bir Singh and Bharthi Bhanudas Gaonkar**(supra), proposition is same that the presumption under Section 139 of the Negotiable Instrument Act is a rebuttable presumption and the accused is entitled to rebut it by showing preponderance of probability either through the material placed by the complainant and his cross-examination and/or by leading

⁷ (2001) 6 SCC 16

evidence to prove contrary. Thus, it is in fact support a case of respondent No.1 herein.

34. The decision cited by the learned Counsel Ms. Collasso as referred above are also on the same proposition of law which need not to be discussed again and again. Each case has to be considered on its own facts and circumstances and it is for the Magistrate to conclude as to whether presumption has been rebutted successfully.

35. Coming back to the matter in hand, above discussion found in the impugned judgment cannot be faulted with as the entire material has been considered and only thereafter the learned Magistrate observed that the presumption under Section 139 of the Negotiable Instrument Act stands rebutted.

36. The impugned judgment up to paragraph 12 shows discussion with regard to point No.1. However, what is disturbing is the remaining portion of a judgment starting from paragraph No.13 onward wherein the points framed in paragraph No.6 and more specifically points No.2 to 6 were taken together. While adverting to such points and giving findings on it, the learned Magistrate in paragraph No.17 of the impugned judgment decided points No.2 to 5 in negative only on the ground that point No.1 was answered in negative.

37. Respondent No.1 raised a specific plea that the complaint filed under Section 138 of the Negotiable Instrument Act was beyond

limitation and point No.6 in paragraph No.6 of the judgment was framed with that effect. However, there is absolutely no discussion on the aspect of limitation though finally it was answered in negative.

38. Surprisingly, point No.2 which reads thus:

“Whether the complainant proves that the cheque was present within its validity period?”

Record goes to show that the cheque is dated 07th February 2011 drawn on Bank of Baroda in the name of the appellant/complainant. It was presented for encashment with Canara Bank, Vasco on the same date i.e. on 7th February 2011 and it was returned unpaid by Bank of Baroda vide its memo dated 8th February 2011 which is at Exh-6. Thus, it clearly shows that the cheque dated 7th February 2011 was presented on the same day and it was returned unpaid on the next date.

39. Thus, cheque was presented within its valid period. The normal validity of an negotiable instrument/cheque is three months from the date of issue of such cheque. Therefore, answering the point No.2 in negative is clearly required to be considered as perverse as evidence suggest otherwise.

40. The point No.3 which reads thus:

“Whether the complainant proves that such cheque was dishonest (to be read as dishonoured) for the reason

“opening balance sufficient”?

Interestingly the learned Magistrate answered this point also in negative though the memo of return of cheque produced at Exh-6 by the appellant from Bank of Baroda, Panaji, shows reason of return of cheque as “opening balance insufficient”. Thus, answering this point No.3 in negative is against evidence on record and therefore needs to be considered as perverse.

41. Point No.4 reads thus:

“Whether the complaint proves that the demand notice was sent within the prescribed period?”

Surprisingly, this point is also answered in negative. The record shows that the appellant issued legal notice dated 19th February 2011 addressed to respondent No.1 which is produced at Exhibit-7 (Colly). This notice was sent to two different addresses of the respondent. The acknowledgment card produced at Exhibit-7 (Colly) shows that such notice was received by respondent No.1 on 21st February 2011. Section 138 of the Negotiable Instrument Act and more specifically clause (b) reads thus:

“138 (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid.”

42. Thus reading of above provision show that the drawer of

cheque or the holder in due course must issue notice in writing demanding the amount mentioned in the cheque to the payee within a period of 30 days from the date of intimation from the bank regarding return of cheque. In this matter as discussed earlier, the Bank of Baroda intimated the appellant vide memo dated 8th February 2011 at Exhibit-6 that the cheque is returned for the reasons “opening balance insufficient”. The legal notice demanding the amount mentioned in the cheque was issued on 19th February 2011 and it was received by respondent No.1 on 21st February 2011. Thus, the appellant/complainant proved that demand notice was seen within the prescribed period and hence point No.4 ought to have been answered in affirmative and not in negative.

43. The learned Magistrate was therefore misdirected herself in answering these points even though evidence suggests otherwise.

44. Coming to the last point No.6 which reads thus :

“Whether the complainant proves that the complaint is filed within the limitation period?”

45. No doubt this point is answered in negative which means that the complaint is not filed within limitation. However, there is absolutely no discussion in the reasoning part of the judgment as to on what ground complaint was not filed within limitation. The casual approach in answering points is writ large.

46. The written submissions filed on behalf of respondent No.1

before the learned Magistrate are on record wherein specific arguments were advanced that the complaint was time barred. Such written arguments are found at Exhibit-99 in the record of the trial Court. The first statement in the written argument is that the complaint is time barred and specific dates are mentioned therein.

47. Since the entire material is on record and there are no disputes with regard to the dates, it is necessary to look into such argument which was also canvassed by the learned Counsel Ms. Collasso while arguing the present appeal. Relevant dates are necessary to find out whether the complaint under Section 138 of the Negotiable Instrument Act was filed within limitation. The dates which are relevant are as under:

1. Cheque is dated 7th February 2011.
2. Cheque was returned by Bank of Baroda on 8th February 2011
3. Demand notice was issued on 19th February 2011
4. Demand notice was received by respondent No.1 on 21st February 2011
5. The period of 15 days from the date of receipt of demand notice expired on 7th March 2011.
6. The period of one month for filing a complaint expired on

6th April 2011.

7. The complaint was filed before the learned Magistrate on 8th April 2011.

48. Section 142 of the Negotiable Instrument Act reads thus :

142. Cognizance of offences

[(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

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

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

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.

[(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]

49. Above provision starts with a non-obstante clause and, therefore, the period of limitation mentioned to entertain the complaint excludes all other provisions mentioned in Criminal Procedure Code. It further says that no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint in writing made by a payee or as the case may be the holder in due course of the cheque and as such complaint is made within one month of the date on which cause of action arise under clause ‘c’ of proviso to Section 138.

50. Thus clause ‘c’ of Section 138 needs to be considered which says thus:

“(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.”

51. The words “within 15 days of the receipt of the said notice” assumes importance. In the present matter, admittedly respondent

No.1 received demand notice on 21st February 2011. Thus, he was supposed to make payment of the amount mentioned in the cheque within 15 days of the receipt of the said notice. Such period expired on 7th March 2011.

52. The complaint is required to be filed in writing within one month of the date on which cause of action arises. Thus, the cause of action accrued to the appellant on expiry of 15 days from the date of receipt of notice i.e. on 7th March 2011. Thus, he was required to file the complaint in writing “within one month from 7th March 2011”. Admittedly, the complaint was filed on 8th April 2011 i.e. beyond the period of one month from the date of cause of action. Perusal of record and proceedings show that the complaint was presented on 8th March 2011 and it was registered on the same day. Neither the Registry at the office of learned Magistrate nor the learned Magistrate noticed the above aspect and did not raise any objection at that time. Similarly, the appellant stepped into the witness box by filing an affidavit in verification at exhibit-4 and producing necessary documents. However, the complaint as well as the affidavit-in-verification show that cause of action to file complaint arised on 9th February 2011 as no payment was effected by 8th March 2011.

53. The dates mentioned above clearly show that respondent No.1 received notice on 21st February 2011 and from that date he was supposed to make payment within 15 days. Thus considering 8days

of February and 7 days of the month of March 2011 which comes to total of 15 days, the said period of 15 days expired on 7th March 2011. Thus cause of action arose on expiry of 15 days i.e. on 8th March 2011 as mentioned in Section 138(c) of Negotiable Instrument Act. However, Section 142(c) specifically provides that the complaint in writing shall be filed within a period of one month. Therefore, the word within is significant and not to be construed otherwise. The complaint must be filed within a period of one month. Thus, if cause of action arose on 8th March 211, the complaint ought to have been filed within one month i.e. on or before 7th April 2011 as it has to be within a period of one month from the accrual of cause of action. The complaint was admittedly filed on 8th April 2011 and there is no application for condonation of delay. Though the learned Magistrate answered point No.6 in negative holding that the complaint was beyond the period of limitation, there was no proper discussion while answering such point.

54. Having said so, it is clear that the appellant has miserably failed to prove his case beyond all reasonable doubts as respondent No.1 succeeded in rebutting presumption under Section 139 of the Negotiable Instrument Act. Secondly, the complaint is found to be time barred and thus appeal must fail.

55. As observed earlier, it is high time for the Magistrate specially dealing with the matters under Section 138 of the Negotiable

Instrument Act to properly frame points so as to answer it independently or if taken jointly with reasoning on all points. The impugned judgment though gives separate reasons while answering point No.1, such findings are recorded in view of incorrect framing of points. Be that as it may, from the material placed on record, the appeal deserves to be rejected for the reasons recorded above.

O R D E R

- 1.** Appeal stands rejected.
- 2.** Parties shall bear their own costs.

BHARAT P. DESHPANDE, J.

MEENA
VISHAL BHOIR

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