

*Esha*

**IN THE HIGH COURT OF BOMBAY AT GOA**

**CRIMINAL APPEAL NO. 27 OF 2015**

Mr. Shamsunder R. Paliyekar, Age: 58 years;  
Occu: Retired Bank Manager, R/o: House  
No. 149, Vancio Waddo, Guirim, Bardez,  
Goa. (since deceased through legal heirs)

1(a) Mrs. Shama S. Paliyekar (widow of  
deceased) aged 64 years, Indian National,

1(b) Mr. Vivek S. Paliyekar, (son of  
deceased) aged 29 years, Indian National,

1(c) Ms. Nivedita S. Paliyekar (daughter of  
deceased) aged 26 years, Indian National,

All residents of H. No. 29/1 (New),  
Vanacio wado, Girim, Bardez-Goa.

... APPELLANT

*Versus*

1. Jagannath Pandurang Chari, Age: 49  
years, R/o Cottarbhat Aldona, Bardez, Goa.

2. The State of Goa through the Public  
Prosecutor, High Court of Bombay at Goa.

... RESPONDENTS

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Mr. Nuno Noronha, Advocate *for the Appellant*.

Mr. Arjun Naik, Advocate *for Respondent No. 1*.

Mr. Mahesh Amonkar, Additional Public Prosecutor *for  
Respondent No. 2*.

**CORAM: MANISH PITALE, J.**

**RESERVED ON: 27<sup>th</sup> January 2022.**

**PRONOUNCED ON: 1<sup>st</sup> February 2022.**

**JUDGMENT:**

1. The appellant before this Court is the original complainant and he has challenged judgment and order dated 12.01.2015, passed by the Court of Additional Sessions Judge, North Goa, Panaji (hereinafter referred to as the Sessions Court), whereby Appeal filed by respondent no. 1 was allowed and the conviction and sentence imposed by the Court of Magistrate on the respondent no. 1 under the provisions of the Negotiable Instruments Act, 1881, was quashed and set aside.

2. The appellant filed complaint dated 15.10.2011, before the Court of Magistrate under Section 138 of the aforesaid Act, claiming that three cheques issued by the respondent no. 1 for total amount of ₹6 lakhs were dishonoured and that, therefore, the respondent no. 1 was liable to be punished for the offence under Section 138 of the aforesaid Act. It was stated in the complaint that the since the complainant was a friend of the respondent no. 1, he had faith and trust and as such, he advanced certain amounts on various dates, totaling ₹6 lakhs to the respondent no. 1. In order to repay the said amounts, which were said to have been advanced in the year 2009, the respondent no. 1 allegedly gave three cheques for amounts of ₹3,50,000/-, ₹50,000/- and ₹2,00,000/- in favour of the appellant, but, on

deposit of the said cheques, they were dishonoured. Despite notice issued to the respondent no. 1, he failed to make good the said amounts and therefore, the appellant was constrained to file the said complaint. It was stated that the respondent no. 1 did not give any reply to the notice issued by the appellant.

3. Upon summons having being issued to the respondent no. 1, he appeared before the Magistrate. The appellant filed his affidavit in evidence and relied upon various documents, including the subject cheques, the memorandum issued by the Bank stating that the cheques were dishonoured due to insufficiency of funds and the notice issued to the respondent no. 1.

4. The respondent no. 1 did not lead any evidence in his defence, although, in the cross examination of the appellant, the respondent no. 1 put questions to him as regards an earlier similar complaint filed by the appellant against the respondent no. 1 under Section 138 of the aforesaid Act and documents pertaining to the withdrawal of the said complaint. In the statement of the respondent no. 1 recorded under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.), he stated that a false case was filed against him and the appellant had misused the cheques, which were given long back when the respondent no. 1 had

obtained loan from the Goa State Co-operative Bank Limited. It was stated that the said cheques were never issued in favour of the appellant.

5. On 14.05.2014, the Magistrate passed judgment and order, holding that the appellant was able to prove his case against the respondent no. 1. It was held that presumption operated in favour of the appellant under Sections 118 and 139 of the aforesaid Act. It was held that the presumption was not rebutted by the respondent no. 1 by leading evidence and mere statement under Section 313 of the Cr.P.C. would not inure to the benefit of the respondent no. 1. On this basis, the Magistrate convicted the respondent no. 1 under Section 138 of the aforesaid Act, sentencing him to pay compensation of ₹6,05,000/- to the appellant under Section 357(3) of the Cr.P.C. and in default he was to undergo simple imprisonment for four months.

6. Aggrieved by the same, the respondent no. 1 filed Appeal before the Sessions Court. By the impugned judgment and order, the Appeal was allowed and the conviction and sentence imposed by the Magistrate was set aside.

7. Mr. Nuno Noronha, learned Counsel appearing for the appellant submitted that the Sessions Court erred in reversing the conviction and sentence imposed upon the respondent no. 1.

According to the learned Counsel for the appellant, the Sessions Court erred in holding that the presumption available under the provisions of the said Act did not operate in favour of respondent no. 1. It was submitted that despite the respondent no. 1 having failed to place on record any positive defence, the Sessions Court reversed the findings given by the learned Magistrate. The learned Counsel emphasized on the fact that the signature on the cheques and the fact that they were handed over to the appellant were not denied by the respondent no. 1 and therefore, the presumption under Sections 118 and 139 of the said Act operated in full force, which the Sessions Court failed to appreciate. It was submitted that the contents of the cheques could be said to have been entered later on and that by itself would be of no assistance to the respondent no.1. Reliance was placed on the judgments of the Hon'ble Supreme Court in **T. Vasanthakumar Vs. Vijayakumari**, (2015) 8 SCC 378, **Bir Singh Vs. Mukesh Kumar**, (2019) 4 SCC 197 and the judgment of this Court in **Krishna P. Morajkar Vs. Joe Ferrao & Others**, 2013 ALL MR (Cri) 4129.

8. On the other hand, Mr. Arjun Naik, learned Counsel appearing for the respondent no. 1 submitted that no interference was warranted in the well reasoned judgment and order, passed by the Sessions Court. It was submitted that the material on record

was appreciated in the correct perspective to hold that the presumption operating against the respondent no. 1 stood rebutted. The necessary foundational facts for operation of the presumption in favour of the appellant were absent in the present case and therefore, the conviction and sentence was correctly set aside. Reliance was placed on the judgment of the Supreme Court in the case of **Basalingappa Vs. Mudibasappa, (2019) 5 SCC 418** and the judgment of this Court in the case of **Ravindra Vassant Kenkre Vs. Mrs. Nutan Damodar Prabhu & Another** (order dated 28.06.2012, passed in Criminal Miscellaneous Civil Application No. 233/2011 in Stamp Number Main No. 2828/2011) and in the case of **Patricio D'Souza Vs. Mr. Oscar D'Souza & Another, 2008 ALL MR (Cri) 3321**.

9. Mr. Mahesh Amonkar, learned Additional Public Prosecutor appeared on behalf of the formal respondent i.e. respondent no. 2, the State of Goa.

10. In the present case, the appellant has assailed the findings rendered by the Sessions Court, whereby the conviction and sentence imposed upon the respondent no. 1 has been quashed and set aside and it is declared that the respondent no. 1 is acquitted of the offence under Section 138 of the said Act. Since, the impugned judgment and order is of reversal of conviction,

this Court has considered the rival submissions and documents in detail.

**11.** The material available on record shows that the case of the appellant before the Magistrate was that since he was having friendly relations with the respondent no. 1, he had advanced certain amounts to the said respondent on different dates, totaling to an amount of ₹6 lakhs. It was claimed that the respondent no. 1 failed to repay the said amounts, despite several visits and eventually, the subject cheques were issued in favour of the appellant. There is no dispute of the fact that the cheques were dishonoured due to insufficiency of funds and notice was issued to the respondent no. 1, to which he failed to respond, impelling the appellant to file the complaint before the Magistrate. In the affidavit in evidence, the appellant made statements consistent with the contents of his complaint. There is no dispute of the fact that the respondent no. 1 did not lead any evidence in his defence.

**12.** The statutory scheme of the aforesaid Act is that presumption operates in favour of the complainant under Sections 118 and 139 of the said Act. As long as the signature on the cheque is not denied, it is presumed that the cheque has been issued in discharge of legal debt or liability and the onus is on the

accused to demonstrate why the presumption ought not to operate against him. There cannot be any doubt about the proposition that the presumption can be rebutted by the accused. It can be rebutted by the accused by leading defence evidence or by discrediting the claims made by the complainant by effective cross examination or confronting the complainant with certain documents.

**13.** In the present case, the version of the appellant (original complainant) was put to test by cross examination on behalf of the respondent no. 1 and the appellant was also confronted with documents pertaining to an earlier similar complaint filed on behalf of the appellant for dishonour of cheque for an amount of ₹2 lakhs.

**14.** In the cross examination, specific questions were put to the appellant as to the details regarding the amounts that were allegedly advanced to the respondent no. 1. The appellant could not give any such details. Although, the appellant is justified in contending that he could not have been expected to remember the exact date, time and denomination of currency notes of the amounts advanced to the respondent no. 1, it was expected that the appellant could have given some details about the time period when the said amounts were advanced. Even such information

was not forthcoming from the appellant. It is further found in the cross examination that the appellant conceded to the fact that he had not mentioned about the advancement of such amounts to the respondent no. 1 in his Income Tax Returns. Nothing was stated even in the complaint or in the affidavit in evidence tendered on behalf of the appellant as to the source of such cash amounts allegedly advanced to the respondent no. 1. There was no the Bank Account statement showing withdrawals of such amounts advanced to the respondent no. 1.

**15.** The respondent no. 1 confronted the appellant during the cross examination with the documents pertaining to the earlier similar complaint filed under Section 138 of the Act in the year 2008, pertaining to dishonour of cheque of ₹2 lakhs. The said complaint was admittedly withdrawn by the said appellant on the ground that the matter was settled between the parties. A suggestion was given in cross examination that the appellant had withdrawn the earlier complaint because the respondent no. 1 had told the appellant that he would be submitting a complaint to the Bank that the cheques given to the Bank in the context of a loan advanced to the respondent no. 1 were misused by the appellant, who was admittedly working as Branch Manager of the Bank. It was conceded in the cross examination by the appellant that in the application for withdrawing the earlier complaint, it

was not stated that the respondent no. 1 had paid the amount of the cheques and therefore, the complaint was withdrawn. It is also surprising that despite the earlier complaint filed by the appellant in the year 2008 for dishonor of earlier cheque, he claims to have advanced further amounts to the respondent no.1 in the year 2009.

**16.** The statement made by the respondent no. 1 under Section 313 of Cr.P.C. needs to be read in the context of such admissions given by the appellant under the strain of cross examination. In the statement made under Section 313 of Cr.P.C. by the respondent no. 1, it was specifically stated that he had given the cheques to the Goa State Co-operative Bank Limited while obtaining loan and the same were misused by the appellant, thereupon claiming that the case lodged against him was false. It is an admitted position that the appellant was the Branch Manager of the said Bank.

**17.** In this backdrop, it needs to be examined whether, the appellant was justified in claiming that the order of conviction and sentence imposed by the Magistrate could not have been reversed for the reason that the presumption under Sections 118 and 139 of Cr.P.C. operated in his favour, due to the reason that the signatures on the cheques were not denied by the respondent

no. 1. Even if it is to be accepted that the presumption operated in his favour, in the present case, this Court is of the opinion that the presumption stood rebutted in view of the admissions given by the appellant under the strain of cross examination. It is a settled position of law that the accused is required to rebut the presumption on the touchstone of preponderance of probabilities and not on the test of proving the same beyond reasonable doubt. Considering the said position of law, it is found that the respondent no. 1 successfully rebutted the presumption. This is supported by the law laid down by the Supreme Court in **M.S. Narayana Menon alias Mani Vs. State of Kerala & Another, (2006) 6 SCC 39**, which is relied upon by this Court in the case of **Krishna P. Morajkar** (supra).

18. Apart from this, another aspect of the matter is that the presumption would operate when foundational facts are established by the complainant. One of the relevant facts in this regard is the material, which is required to be placed on record by the complainant as regards the details of when and the manner in which the amounts were advanced to the accused and the source of such amounts supported by cogent material on record. The failure of the appellant in showing the said amounts in the Income Tax Returns is also a relevant factor, which the Sessions Court took into consideration while reversing the conviction and

sentence. Therefore, reliance placed by the learned Counsel for the appellant on the judgments of the Supreme Court in the case of **T. Vasanthakumar** (supra) and **Bir Singh** (supra) can be of no avail because in the said judgments, it has been laid down that once the presumption operates, the onus would be on the accused to rebut such a presumption. There can be no quarrel with the said proposition, but, at the same time, the facts of each case would have to be analyzed before applying the ratio of the said judgments.

**19.** A perusal of the judgment upon which the respondent no. 1 has placed reliance shows that in the case of **Basalingappa** (supra), the Supreme Court has laid down that presumption in such cases is rebuttable when a probable defence is raised. The judgment of this Court in the case of **Ravindra Kenkre** (supra) and **Patricio D'Souza** (supra) also supports the case of the respondent no. 1 for the reason that, in those cases also, it was found that the accused had successfully rebutted the presumption by effective cross examination of the complainant.

**20.** In the light of the above, it is found that the Magistrate had erred in proceeding to convict and sentence the respondent no. 1 under Section 138 of the aforesaid Act and that the Sessions Court was justified in interfering with the same.

**21.** In view of the above, it is found that there is no merit in the present Appeal and accordingly, it is dismissed.

**MANISH PITALE, J.**