

Meena

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.42 OF 2017**

Mr. Everisto Sequeira
s/o. Remedio Sequeira
Aged 47 yrs, Business,
R/o. D'costa Residency,
BSNL Tower, Curchorem, Goa. ...Appellant

Versus

Mrs. Shaik Hasina
Aged 41 yrs, R/o H. No.176,
Moraillem, near Church, Curchorem,
Savordem, Goa. ...Respondent.

Ms. A. Agni, Senior Advocate along with Ms. Jay Sawaikar,
Advocate for the Appellant.
Mr. Jatin Ramaiya, Advocate for the Respondent.

CORAM: BHARAT P. DESHPANDE, J.

RESERVED ON: 12th November, 2022

PRONOUNCED ON : 1st December, 2022

JUDGMENT:

Heard learned Senior Counsel Ms. A. Agni along with Ms. Jay Sawaikar, learned Advocate for the appellant and Mr. Jatin Ramaiya, learned Advocate for the respondent.

2. By this appeal the appellant/original complainant is challenging the impugned judgment and order passed by the learned Magistrate at Quepem whereby the complaint filed under Section 138 of the

Negotiable Instrument Act (N.I. Act, for short) was dismissed and the respondent was acquitted.

3. In nutshell, it is the contention of the appellant that the respondent issued promissory notes dated 18th April 2012 amounting to ₹3,00,000/- and ₹1,30,000/- each in favour of the appellant and towards repayment of such amount, issued two cheques dated 15th June, 2012 drawn on Saraswat Bank, Curchorem, Sanvordem, Goa for a sum of ₹3,00,000/- and ₹1,30,000/- each. On presentation of such cheques, the banker returned it vide memo dated 2nd July 2012 with remark “funds insufficient”. The appellant issued legal notice demanding the amount mentioned in the cheque through his Advocate vide notice dated 17th July 2012 thereby calling upon the respondent to pay the amount mentioned in the cheque within a period of 15 days from the date of receipt of said notice. Respondent received legal notice and replied vide her reply dated 27th July 2012 taking false defence. Accordingly, the appellant lodged complaint under Section 138 of the N.I. Act before the learned Magistrate who after taking cognizance, issued process against the respondent. After the trial concluded, the learned Magistrate dismissed the complaint and acquitted the respondent on the ground that the appellant failed

to prove that cheques were issued towards legally enforceable debt.

4. Parties are hereinafter called as a complainant and accused as arrayed before the Trial Court for the sake of brevity.

5. The learned Senior Counsel Ms. Agni, appearing on behalf of the complainant, submitted that both the cheques were issued towards legally enforceable debt and supported by promissory notes which the learned Magistrate has completely ignored. She submitted that observation of the learned Magistrate that promissory notes were not proved for not examining the notary, is unwarranted as the learned Magistrate has failed to take into consideration presumption under Section 118 of the N.I. Act in connection with promissory notes. She then submitted that the accused issued both the cheques towards the debt and one of such cheque is in connection with the debt of her husband and therefore, even though promissory note of ₹1,50,000/- is executed by her husband, the cheque issued by the accused being wife is clearly covered under Section 138 of N.I. Act.

6. The learned Senior Advocate Ms. Agni then submitted that the learned Magistrate had wrongly put burden on the complainant to prove that the cheques were issued towards legally enforceable debt by completely ignoring presumption under Section 139 of the N.I. Act.

She submitted that there is a clear nexus between the promissory notes and both the cheques. There is no allegation from the accused that such promissory notes were executed either by fraud or by putting pressure. Therefore, the learned Trial Court was completely wrong in accepting the so-called defence raised by the accused regarding issuing of cheques under threat and coercion. Even otherwise, the learned Senior Counsel submitted that such defence that the cheques were issued under threat is not even established on record except by producing some complaint to that effect which is clearly after thought. She then submitted that even if filing of such complaint is accepted, whether such fact would rebut presumption under Section 139 of N.I. Act when no FIR is registered on behalf of such a complainant and no action was taken by the police. According to her, filing of such a complaint is only a ploy to claim that such cheques were issued forcibly. She submitted that the timing of filing such a complaint needs to be taken into account which matches with the dates when both the cheques were dishonoured by the Bank of the accused. Thus, the delay in lodging such a complaint is not at all explained and therefore, it is clear that such a complaint is lodged only with ulterior motives and to create evidence. Finally, the learned Senior Advocate Ms. Agni claimed that findings of the learned trial

Court are perverse and against the settled proposition of law and therefore, needs to be quashed and set aside.

7. *Per contra*, the learned Counsel Shri J. Ramaiya appearing for the accused first of all claimed that power of this Court in an appeal against acquittal are limited and only if the Court comes to the conclusion that findings are perverse and against settled proposition of law, interference is warranted but not otherwise.

8. He then submitted that the complaint as well as legal notice did not disclose true facts and therefore, evidence brought on record is against the pleadings. He submitted that there is no mention of execution of promissory notes in the legal notice as well as in the affidavit filed by the complainant. He then submitted that one promissory note was admittedly executed by the husband of the accused and therefore, there is no presumption that the wife i.e. the accused is liable to repay such amount. There are no averments in the complaint that the accused undertook to repay the amount mentioned in the promissory note executed by her husband. He then submitted that the cheque which is in respect of the promissory note issued by the husband of the accused cannot be considered as issued towards legally enforceable debt and therefore, on that count the

learned trial Court was fully justified in rejecting contentions raised in the complaint as well as in the evidence.

9. Learned Advocate Shri Ramaiya then claimed that evidence suggests that these cheques were taken forcibly by the complainant and that an amount of ₹2,30,000/- was already paid and therefore the cheque of ₹3,00,000/- cannot be considered as legally enforceable debt. He supported reasons of the trial Court with regard to the promissory notes and also payment of the amount of ₹2,30,000/-. Finally, he claimed that the capacity of the complainant to give hand loan is also doubtful as he admitted that one cheque was issued by one Peter while giving loan to the accused. He therefore submit that over all material brought on record clearly support the defence which needs to be considered on preponderance of probabilities and it is settled that when two views are possible, the Appellate Court should not disturb the findings of the learned trial Court by setting aside acquittal which is otherwise based on proper analysis of the material.

10. The learned Senior Counsel for the appellant placed reliance on the following decisions:

1. ICDS Ltd. v/s. Beena Shabeer and Another¹

¹ (2002) 6 SCC 426

2. Angu Parameswari Textiles (P) Ltd. and others v/s. Sri Rajam and Co.²
3. M/s. The Jammy & Kashmir Bank v/s. Abhishek Mittal³

11. The learned Counsel for the respondent placed reliance on the following decisions:

1. Basalingappa v/s. Mudibasappa⁴
2. Varun Beverages Ltd. v/s. Abhay Shah and Ors.⁵
3. Chandrappa and Ors v/s. State of Karnataka⁶
4. Rangappa v/s. Mohan⁷

12. Points for determination

1. Whether impugned judgment Partly affirmative need interference?

13. The complaint is filed with regard to two cheques of the same date dated 15th June 2012 issued by the accused in favour of the complainant for an amount of ₹3,00,000/- and ₹1,30,000/-

2 2001 SCC OnLine Mad 922

3 CRL.A.No.294/2011 Dtd. 26th May 2011

4 AIR 2019 SC 1983

5 2015(3) Bom CR (Cri) 300

6 (2007) 4 SCC 415

7 AIR 2010 SC 1898

respectively. I would like to discuss firstly with regard to a cheque amounting to ₹3,00,000/- dated 15th June 2012 issued by the accused in favour of the complainant and which is connecting to the promissory note dated 18th April 2012 (Exh-24) signed by the accused in favour of the complainant. The second promissory note dated 16th March 2012 for ₹1,30,000/- produced at Exh.23 admittedly signed by the husband of the accused.

14. The first aspect which has been raised by the learned Counsel Shri J. Ramaiya regarding powers of this Court and to interfere with the judgment, it is necessary to refer to the judgment of the Supreme Court in the case of ***Gamini Bala Koteswara Rao and others v/s. State of Andra Pradesh through Secretary***⁸ and more specifically paragraph No. 14 which reads thus:

“14. In the case of Chandrappa and Ors V/s. State of Karnataka (2007)4 SCC 415, the Supreme Court has held in paragraph No.30 thus:

“1. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

⁸ (2009) 10 SCC 636

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

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

15. It is now a well settled proposition of law that the Appellate Court should not replace its finding with that of the trial Court only when another view is possible. Interference is permitted only when findings of the trial Court are perverse or against a settled proposition of law. Keeping in mind the above settled proposition for the purpose of deciding present appeal. Re-appreciation of evidence so as to

consider whether findings of the trial Court are in fact perverse and if so whether interference is warranted, needs to be looked into.

16. Looking to the impugned judgment and more specifically points for determination as framed in paragraph 8, one thing needs to be emphasized that the learned Magistrate failed to consider the presumption under Section 118 and 139 of N.I. Act while framing the points for determination. Point No.1 reads thus:

“Whether the complainant proved that the cheques were issued for a legally enforceable debt?”

17. In the entire evidence brought on record, the accused did not dispute issuance of such cheques including her signature on it. However, only defence raised with regard to such cheques is that same were obtained by force and coercion as well as threats. Thus, when the signatures on the cheques are not disputed as that of the accused, the provisions of Section 139 of N.I. Act stands attracted immediately. Magistrate is duty bound to draw a presumption under Section 139 of N.I. Act in favour of the complainant and there is no other option available otherwise.

18. In the case of Basalingappa(supra) and on considering the case

of Rangappa(supra), the Supreme Court in paragraph 23 has observed thus:

“23. We having noticed the ratio laid down by this Court in the above cases on Section 118(a) and 139, we now summarise the principles enumerated by this Court in the following manner:

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

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

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

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

v. It is not necessary for the accused to come in the witness

box to support his defence."

19. Thus one thing is clear that while framing point No.1, the learned trial Magistrate failed to consider provision of Section 139 of N.I. Act and that too in favour of the complainant and thereby putting onus/burden on the complainant to prove that cheques were issued for legally enforceable debt. By putting such burden on the complainant in point No.1, the learned trial Court committed error in the eyes of law by not advertng to the presumption which is mandatorily required to be drawn in favour of the complainant once the accused admit signing of the cheques though the circumstances under which such cheques were signed being a part of defence. Thus, the entire reasoning in the impugned order is only putting burden on the complainant to prove that cheques were issued for legally enforceable debt and not on the accused to disprove or dislodge this presumption.

20. The finding of the learned trial Court is therefore necessarily be considered as perverse. The law mandates drawing of presumption in favour of the complainant once the accused admits issuing of cheque and accordingly, it is for the accused to satisfy the Court though on preponderance of probability that such cheques were not drawn for

legally enforceable debt. Only after such material brought on behalf of the accused to dislodge presumption, onus shift on the complainant to prove beyond all reasonable doubt that such cheques were issued for legally enforceable debt.

21. Learned Senior Advocate Ms. Agni was fully justified in submitting that the learned Magistrate completely lost the site to draw a presumption under Section 118 of N.I. Act qua promissory notes and simply rejected to accept such promissory notes on the reason that there is no mention of such promissory note in the legal notice and that execution of such promissory notes were not proved as a Notary before whom promissory notes were executed was not examined.

22. Chapter XIII of N.I. Act deals with Special Rules of Evidence. Section 118 of the N.I. Act reads thus:

“118 Presumptions as to negotiable instruments. —Until the contrary is proved, the following presumptions shall be made:—

(a) of consideration —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or

transferred for consideration;

(b) as to date —that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance —that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer —that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements —that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps —that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course —that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.”

23. Perusal of above provision makes it clear that there is

presumption as to the negotiable instruments which include consideration, date, time of acceptance, time of transfer, order of endorsement, as to stamp and that holder is a holder in due course.

24. Section 13 of the N.I. Act defines “Negotiable Instrument” and reads thus:-

“13. “Negotiable instrument”.—[(1) A “negotiable instrument” means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation (i).—A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii).—A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank.

Explanation (iii).—Where a promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.]

[(2) A negotiable instrument may be made payable to two

or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.]”

25. Thus, a promissory note is admittedly a negotiable instrument and therefore presumption under Section 118 of the said Act needs to be drawn in favour of the holder in due course of such promissory note, until the contrary is proved. The presumption includes clauses (a) to (g) as found mentioned in Section 118 of the said Act and more specifically that every Negotiable Instrument was made or drawn for consideration. It is for the other side/accused to prove contrary by showing that there was no consideration for drawing such negotiable instrument/promissory note.

26. Both promissory notes were produced by the complainant during the trial and were duly exhibited as Exhibit 23 and 24 respectively. The observation of the learned Magistrate in paragraph 12 of the impugned judgment that execution of the promissory note is not proved by the complainant although the promissory note is executed before the Notary and that the said Notary is not examined by the complainant, is completely against the settled proposition of law. First of all there is no dispute or denial on the part of the accused that such promissory notes were not even executed by her along with

her husband. The only defence is with regard to the cheques in question. Therefore, if it is not a case of the accused that promissory notes are not executed by them, inference drawn by the trial Court for not examining the Notary before whom such promissory notes were executed needs to be considered as unwarranted and without any sufficient material on record. Similarly, the observations of the learned trial Court in paragraph 12 itself show that both promissory notes were forwarded to the expert i.e. CFSL, Hyderabad and the report is received by the Court which is at Exhibit D-87 wherein it has been opined that the person who had signed the cheque have also written on the questioned document i.e. promissory note i.e. Exh C-24. Such report of CFSL in connection with Exh C-24 which is admittedly executed by the accused in favour of the complainant for an amount of ₹3,00,000/-, is admissible in evidence under Section 293 of CrPC. Thus, promissory notes at Exh.24 are proved to have been executed by the accused in favour of the complainant for an amount of ₹3,00,000/- on 18th April 2012. In such circumstances, the learned Magistrate was duty bound to draw a presumption under Section 118 of N.I. Act in favour of the complainant and thereby putting onus on the accused to prove contrary so as to dislodge such presumption.

27. The entire material placed by the parties before the trial Court in connection with Exh.24 i.e. promissory note dated 18th April, 2012 nowhere remotely suggests that the accused succeeded in proving contrary thereby dislodging presumption under Section 118 of the N.I. Act.

28. A cheque which is a subject matter of this proceedings and produced at Exh-21 dated 15th June 2012 for ₹3,00,000/- is clearly related to the promissory note at Exh-24 dated 18/04/2012.

29. The promissory note at Exh-24 reads thus:

“PROMISSORY NOTE

Dated 18/04/2012

ON DEMAND, i Mrs. Shaikh Hasina, wife of Shaikh Mohammad Rafik, aged 36 years, business r/o. H.No.176, Morailem, Near Church, Curchorem, Sanvordem - Goa, do hereby promise of order to pay to Mr. Evaristo Sequeira, son of Remedios SEqueira, aged 42 years, business r/o. D'costa RESidency, BSNL tower, Curchorem- Goa, a sum of Rs.3,00,000/- (Rupees three lakhs only) which has deemed to begin from 16th Oct 2011 to 15th June 2012 from the date herein mentioned for value received.

Curchorem - Goa.

Sd/-

DEPONENT

30. Much arguments were advanced on behalf of the accused that promissory note discloses that such amount was due beginning from 16th October 2011 to 15th June 2012 whereas the date of promissory note is 18th April 2012. Similarly, it is the contention on behalf of the accused that it is found in the reply notice dated 27th July 2012, produced at Exh-26 that the complainant and the accused are engaged in the business of online survey of the consumer product and the accused borrowed an amount of ₹3,00,000/- from the complainant vide promissory note dated 23rd April 2011 duly executed before the Notary and that the accused paid such borrowed amount of ₹3,00,000/- in installments which can be seen clearly from the passbook of Saraswat Bank, Curchorem-Goa. Even the copy of the passbook of Saraswat Co-operative Bank in the name of the accused and her husband is produced at Exh-31 to show that the payment was made with regard to such a promissory note.

31. However, one thing is clear that reply notice at Exh-26 shows that whatever payment is made as claimed therein, is in connection with another promissory note dated 23rd April 2011. Perusal of the passbook produced at Exh-31 and as pointed above by the learned Counsel for the accused show that there is entry on 17th May 2011

regarding payment by cash to the complainant for ₹30,000/-. Similarly there is an entry dated 26th May 2011 regarding payment of cash to the complainant to the tune of ₹50,000/-. Another entry is dated 14th June 2011 towards payment of cash to the complainant to the tune of ₹30,000/-. There is entry on 18th July 2011 regarding transfer to the complainant to the tune of ₹30,000/- . Then there is entry on 16th August 2011 towards cash payment to the complainant to the tune of ₹30,000/-. On 16th September 2011 there was an entry of transfer of ₹30,000/- by cheque in favour of the complainant. Again on 14th October 2011 there was a transfer of ₹30,000/- in favour of the complainant by cheque. Lastly, there is entry on 8th November 2011 by way of NEFT transfer of deposit of ₹1,00,000/- from the complainant, in the account of the accused. All these entries are admittedly prior to the promissory note dated 18th April 2012 and more particularly before 16th October 2011 to 15th June 2012.

32. The entry dated 8th November 2011 in the saving Bank Account statement produced at Exh-31 of the accused shows that an amount of ₹1,00,000/- was transferred by way of NEFT by the complainant in the account of the accused. Thus coupled with the reply notice at

Exh.26 and specifically the saving bank account entries produced at Exh.31 clearly shows that there were business transactions and exchange of money between the complainant and the accused. In fact, on 8th November 2011 the transfer by NEFT ₹1,00,000/- in the account of the accused by the complainant and this amount was withdrawn by the accused on the next day i.e. on 9th November 2011 shows separate transaction between them and not in connection to earlier promissory note dated 23rd April 2022. In such circumstances, the attempt on behalf of the accused to show that out of ₹3,00,000/- as mentioned in the cheque dated 15th June 2012, an amount of ₹2,30,000/- has been paid, is only to create a confusion and nothing more for the simple reason that the accused admitted in the reply notice at Exh-26 that there were business transactions between them and there was earlier promissory note of ₹3,00,000/- on 23rd April 2011 which accused executed in favour of the complainant.

33. The learned Magistrate completely lost the sight of the dates of so called payment and the stand taken in the reply notice at Exh-26 and arrived at incorrect conclusion that part payment was made by the accused and that the promissory note at Exh-24 nowhere explain the period mentioned in the promissory note thereby creating a

doubt.

34. Paragraph 24 of the impugned judgment therefore needs to be considered as incorrect observations. First of all the learned trial Court's observation that promissory note beginning from 16th October 2011 to 15th June 2012, if calculated it is seen that during this period the accused was already repaying an amount of ₹3,00,000/- which was taken by her by executing the promissory note dated 23rd April 2011, are clearly by misunderstanding the facts and failing to appreciate evidence on record.

35. The promissory note dated 23rd April 2011 referred by the accused in her reply is clearly a different promissory note from Exh-24 and the cheque which is the subject matter of the present proceedings. The learned Magistrate seems to be confused with two promissory notes, one executed on 23rd April 2011 and another executed on 18th April 2012. As earlier observed, the passbook entries produced at Exh-31 clearly show that there were business transactions between the complainant and the accused and accepting such payments made in the years 2011 in connection with promissory note executed in the year 2012 is certainly not permissible and out of context.

36. Thus the promissory note at Exh-24 dated 18th April 2012 executed by the accused for ₹3,000,000/- in favour of the complainant stands proved in evidence and attracts presumption under Section 118 of N.I. Act that it was executed for consideration, by date and time mentioned therein. No evidence has been brought on record by the accused to dislodge such presumption.

37. The entire case of the complainant is based on a cheque dated 15th June 2012 for ₹3,00,000/- issued by the accused towards discharge of the amount mentioned in the promissory note at Exh-24. Therefore, apart from the presumption under Section 118 of the N.I. Act, the complainant is also having the support of presumption under Section 139 of the N.I. Act.

38. Perusal of complaint and more specifically paragraph no.1 clearly show that the complaint averred that the accused took hand loan of ₹3,00,000/- from him and executed promissory note dated 18th April 2012 before a Notary at Curchorem. In discharge of such loan, the accused issued cheque dated 15th June 2012 for an amount of ₹3,00,000/-.

39. The learned Counsel Shri Ramaiya appearing for the accused strongly contended that the notice issued on 17th July 2012 at Exh.25

on behalf of the complainant to the accused nowhere refers to the execution of the promissory notes and therefore, the complainant came up totally with a different case while filing of the complaint. The learned Senior Counsel Ms. Agni rightly pointed out that there is no need to mention in the legal notice about the execution of promissory notes as in discharge of such promissory note, cheques were issued by the accused which were dishonoured on presentation and according to provisions of Section 138 of the N.I. Act, demand has to be made only with regard to amount mentioned in the cheque and not otherwise. Such submissions are having sufficient force. Admittedly, there is no need to mention in the demand notice about execution of the promissory notes as demand notice is only with regard to the cheque in question and the amount mentioned therein so as to give opportunity to the accused to make arrangement of such amount within the stipulated period or to raise his legitimate defence. Therefore, such contentions raised on behalf of the accused are of no substance.

40. The learned Counsel Shri Ramaiya appearing for the accused then submitted that the evidence of the complainant clearly shows that she was not having capacity to disburse loan of ₹3,00,000/- to

the accused and therefore, accused succeeded in rebutting the presumption that the cheque was issued for legally enforceable debt. However, perusal of cross examination of Pw1 at page 5 clearly support the contention of the complainant and it reads thus:

“I had given an amount of Rs.3,00,000/- to the accused on 18.04.2012, given in three cheques of Rs.1,00,000/- each. Out of these three cheques one cheque was to be drawn on Central Bank of India, Curchorem branch, another SBI Curchorem and Saraswat Bank Curchorem branch.”

41. After few lines, Pw1 then stated as under:

“The cheques of Saraswat Bank and State Bank were from my account and the cheque from Central Bank was in the account of Peter alias and handed over to Shaikh Hasina.”

42. It is necessary to see that during further cross-examination of Pw1, there is no other material with regard to the above aspect except denial. Such statement of the complainant supports the execution of promissory note at Exh-24 by the accused in favour of the complainant. Further issuing cheque of ₹3,00,000/- by the accused in favour of the complainant vide Exh-21 again support the contentions brought on record in the evidence of Pw1. Even otherwise Accused in her reply to the legal notice admitted that she took hand loan of

₹3,00,000/- from complainant as business transaction. This shows that capacity of complainant to lend money to accused.

43. The accused stepped in the witness box and stated that she and the complainant knew each other and were members of Speak Asia Company. She admits taking a loan of ₹3,00,000/- from the complainant and a promissory note dated 23rd April 2011 was executed by her in favour of the complainant before the Notary. She then claimed that she paid the entire amount through the Saraswat Bank, Curchorem branch. As earlier discussed the promissory note dated 23rd April 2011 is clearly a separate transaction between the accused and the complainant. Therefore, even if some amount out of that earlier promissory note is paid, such payment cannot be adjusted to the present promissory note executed on 18th April 2012 and more specifically the cheque dated 15th June 2012. The accused placed on record promissory note dated 23rd April 2011 which is at Exh-30 for ₹3,00,000/-. The passbook entries in Exh-31 up to 14th October 2011 are clearly with regard to earlier promissory note dated 23rd April 2011 and promissory note dated 18th April 2012 produced at Exh-24 which refers to the period beginning from 16th October 2011 to 15th June 2012. Thus, the entry in the passbook produced by the accused

at Exh.31 dated 8th November 2011 clearly show that the complainant transferred an amount of ₹1,00,000/- by NEFT in the account of the accused i.e. after 16th October 2011 as mentioned in the promissory note dated 18th April, 2012 at Exh-24. Therefore the said promissory note at Exh-24 is separate and distinct from the earlier promissory note dated 23rd April 2011 produced at Exh-30. Learned Magistrate has totally confused and failed to culled out the dates mentioned therein so as to arrive at proper conclusion.

44. The contention raised by the learned Counsel Shri Ramaiya that the complainant was not having any source to give hand loan of ₹3,00,000/-, is therefore unacceptable for the reasons that first of all reply at Exh.26 from the accused clearly admit that both are engaged in business of online survey of the consumer product and on earlier occasion accused borrowed an amount of ₹3,00,000/- from the complainant. Secondly, the entries of passbook produced at Exh.31 show that there are various transactions between the accused and the complainant. Thus only by putting same questions to the complainant, it cannot be expected that she had no capacity to give loan of ₹3,00,000/-. Thirdly, the accused executed a promissory note at Exh.24 dated 18th April 2022 which presume the consideration.

Similarly, an earlier promissory note produced at Exh-30 dated 23rd April 2011 again proved that the complainant was having sufficient means to give ₹3,00,000/- to the accused as loan, which has been clearly admitted in the reply notice at Exh.26. Thus, the submissions of the learned Counsel Shri J. Ramaiya on this aspect is clearly unacceptable.

45. As far as the cheque of ₹3,00,000/- signed by the accused qua the complaint dated 15th June 2012 produced at Exh-21 is concerned, except creating some confusion, presumption under Section 139 of N.I. Act has not been rebutted.

46. The learned Magistrate accepted that filing of complaint with the police dated 2nd July 2012 by the accused, as sufficient to rebut presumption under Section 139 of N.I. Act. First of all it is clear from the record that said cheque was signed and issued on 15th July 2012. Complainant presented the said cheque for encashment, within its validity time. However, Saraswat Co-Operative Bank Ltd. i.e. the banker of the accused returned the said cheque vide memo dated 2nd July 2012 for the reason “funds insufficient”. It is interesting to note that as legal notice was issued by the complainant on 17th July 2012 demanding the amount mentioned in the cheque which was duly

received by the accused. She replied to the legal notice vide her reply dated 27th July 2012 and claimed as under:

“My clients states that under the threats and coercion of your client, my client handed over cheque bearing No.513124 dated 15/06/2012 drawn on Saraswat Bank Curchorem-Goa for an amount of Rs.3,00,000/- (Rupees Three Lakhs only) and cheque bearing No.513125 dated 15/06/2012 drawn on Saraswat Bank, Curchorem- Goa, for an amount of Rs.1,30,000/- (Rupees One Lakh Thirty Thousand Only) to your client which can be clearly seen from the complaint dated 02/07/2012 addressed to the Police Inspector, Curchorem Police Station, which copy of complaint dated 02/07/2012 forms part of the present reply.”

47. The complaint dated 2nd July 2012 from the accused and her husband addressed to Police Inspector Curchorem Police Station against the complainant is produced at Exh-29. Admittedly, the husband of the accused did not sign any cheque in favour of the complainant however his name appears with the accused as applicants in the said complaint. Be that as it may, such complaints show that the present complainant came to their residence on 15th June 2012 at around 2.45 p.m. and demanded an amount of Rs.4,30,000/-. Paragraph 2 of the said complaint show thus:

“2. The Complainants state that the Opponent threatened the complainants that if the amount of Rs.4,30,000/- (Rupees Four Lakhs Thirty Thousand Only) is not handed to the Opponent today than he will lodge a Police Complaint and will see that the complainants are put behind bars as the Opponent is a influential person and has good political contracts.”

48. The complaint dated 2nd July 2012 at Exh-29 in paragraph 3 however states that the accused and her husband were scared of the behaviour of the Opponent and under threat and coercion she handed over two cheques dated 15th June 2012 for Rs.3,00,000/- and Rs.1,30,000/- each to the complainant. Paragraph 4 of the said complaint further reads that the accused apprehended on that in order to harass them, the complainant inspite of knowing the fact that there are no sufficient funds in the account of the accused may deposit such cheques for realisation and on being bounced, could lodge false criminal cases under N.I. Act.

49. First of all the date of such complaint lodged with Curchorem Police is 2nd July 2012 i.e. on the date when the cheques were already bounced/dishonoured. The alleged incident of threatening is dated 15th July 2012 and that too in the residence of the accused which is in Curchorem itself. There is no explanation from the accused as to why

she failed to lodge the complaint on the same day or at the most on the next day of the alleged incident. Admittedly, no action was taken by the police. Purpose of lodging such a complaint is obvious. It was lodged only on getting knowledge from her own bank that the cheques were presented and dishonoured. Similarly, the accused by mentioning in paragraph 4 of the said complaint dated 2nd July 2012 admits that there is no sufficient balance in her account though she issued cheques in favour of the complainant. Surprisingly, no letter was addressed to the complainant not to present such cheques. No instructions were given to the bank to stop payment of such cheques as such cheques were issued under threat or coercion. Therefore, only because the complaint is lodged with the police station on 2nd July 2012 i.e. on the date when such cheques were already dishonoured, no interference could have been drawn by the learned Court in favour of the accused so as to dislodge presumption under Section 139 of the N.I. Act. Only lodging such a complaint of taking such cheque by force or threat is not sufficient enough to rebut presumption under Section 139 of N.I. Act specifically when the accused admits her signature on the cheque.

50. Even otherwise, paragraph 2 of the said complaint dated 2nd

July 2012 as quoted earlier, nowhere amounts to giving threats as it is clear from the material brought on record that the accused executed promissory note in favour of the complainant on 18th April 2012 thereby promising to repay ₹3,00,000/-. Hence, the so called complaint dated 2nd July 2012 is only trying to create some evidence on the part of the accused. Filing of such a complaint is only an after thought and could not have been considered as evidence to rebut presumption under Section 139 of the N.I. Act though on preponderance of probability.

51. Having said so, the observations of the learned trial Court that the accused succeeded in rebutting presumption under Section 139 of the N.I. Act qua the the cheque dated 15th June 2012 for ₹3,00,000/- at Exh-21, are clearly unacceptable and not supporting to the material placed on record and therefore needs to be considered as against the weight of evidence. In other words, such findings are clearly perverse in terms of law as understood.

52. Once it is considered that the accused failed to rebut presumption under Section 139 of the N.I. Act qua the cheque dated 15th June 2012 for ₹3,00,000/- vide Exh-21, the accused ought to have been considered as guilty for the offence punishable under

Section 138 of N.I. Act. Thus such findings are clearly unacceptable and therefore so far as the first cheque of ₹3,00,000/- is concerned dated 15th June 2012, the accused is found guilty for the offence under Section 138 of the N.I. Act.

53. Now coming to the second cheque for ₹1,30,000/- issued on 15th June 2012 and produced at Exh.22 is concerned, the averments in the complaint needs to be looked into as there is clearly variance between the contents of the complaint and the evidence produced on record. Another aspect which needs to be noted is the promissory note produced by the complainant at Exh-23 which is admittedly executed by the husband of the accused. During evidence it is the case of the complainant that the promissory note at Exh-23 for ₹1,30,000/- was executed by the husband of the accused and in discharge of such loan amount, the accused issued cheque in favour of the complainant dated 15th July 2012 for ₹1,30,000/- produced at Exh-22.

54. However, averments in the main complaint and specifically paragraph 1 show otherwise. Said paragraph 1 shows that the accused took a hand loan and she executed two promissory notes dated 28th April 2012 amount to ₹3,00,000/- and ₹1,30,000/-

respectively, registered with the Notary public. Similarly, towards repayment and the said amount of loan accused issued two cheques dated 15th July 2012 for ₹3,00,000/- and ₹1,30,000/-. Thus paragraph 1 of the complaint specifically shows that the accused took loan of ₹4,30,000/- and executed two promissory notes in favour of the complainant and thereafter in discharge of such loan she issued two separate cheques.

55. The affidavit-in-verification also say in paragraph no.1 the same thing that the accused took loan of ₹4,30,000/-. The substance of the accusation was explained to the accused stating that she took a loan of ₹4,30,000/- and in discharge issued two separate cheques.

56. The affidavit-in-evidence of the complainant produced at Exh-18 reiterates the same averments in paragraph 1. Therefore, it is a consistent case of the complainant that the accused took a hand loan of ₹4,30,000/- and executed two promissory notes. During cross-examination the complainant admitted on page 3 that a promissory note for the sum of ₹1,30,000/- produced at Exh.23 shows the name of Mr. Shaikh Mohammad Rafiq, who is the husband of accused. Similarly on page 5 of the cross-examination, the complainant stated thus:

“I paid Rs.1,30,000/- in cash to Mr. Shaikh Mohammad Rafiq.”

57. It is thus clear that in the evidence and specifically during cross-examination the complainant admitted that she did not hand over an amount of ₹1,30,000/- to the accused as hand loan. He deviated from the complaint and stated that such amount of ₹1,30,000/- was given to the husband of the accused as hand loan who executed promissory note produced at Exh-23. Thus aspect of repaying the loan given to the husband of the accused, by the accused is not at all pleaded in the complaint or in the evidence produced on record. It is nowhere case of the complainant that though a loan was given to the husband of the accused, she voluntarily accepted it and agreed to repay to the complainant such loan.

58. The learned Senior Counsel Ms. Agni tried to submit that section 138 of the N.I. Act refers to the word “any debt or other liability”. With respect, the word “debt or other liability” as mentioned in Section 138 of the N.I. Act cannot be stretched to the extent as tried to be projected in the present matter. No doubt, the accused issued a cheque of ₹1,30,000/- however it is admitted fact that such loan of ₹1,30,000/- was not given to her but to her husband. In such circumstances, the complainant was required to

plead that the accused being the wife agreed to repay loans of her husband and accordingly issued a cheque in discharge of such liability. In absence of such pleadings, the complainant cannot be permitted to raise such grounds only because she admitted during cross examination that the amount of ₹1,30,000/- was not given to the accused.

59. The learned Senior Counsel Ms. A. Agni while relying in the case of **ICDS Ltd** (supra) claimed that the word “any debt or other liability” has to be construed in favour of the complainant since the cheque was issued by the wife in discharge of loan given to her husband.

60. In **ICDS Ltd** (supra), the question for consideration was to the effect as to the maintainability of the proceedings under Section 138 of N.I. Act viz-a-viz the guarantor. In that matter the husband of respondent No.1 entered into a hire-purchase agreement with the appellant for the purpose of purchase of car and his wife stood as guarantor in respect of hire-purchase facilities. In that respect, the Supreme Court observed that respondent no.1 being the wife, was guarantor in the hire-purchase agreement for repayment of loan obtained by her husband, issued cheque towards part payment in

favour of the appellant, which was not accepted by the High Court thereby dismissing the complaint as not maintainable. In this context the Supreme Court observed that the cheque is issued by the guarantor though the wife of the borrower therefore the wording under Section 138 of the N.I. Act “any debt or other liability” would mean the cheque issued even by the guarantor.

61. Said proposition is not applicable to the facts of the present matter as the accused being the wife nowhere accepted or guaranteed to repay loan of her husband qua the promissory note. Therefore, it is clear from the record that the second cheque for ₹1,30,000/- was issued by the accused for which she was not liable to repay the amount. Evidence of the complaint clearly goes to show that such amount of ₹1,30,000/- was not given as loan to the accused but to her husband. There are no averments that accused volunteered to clear the loan of her husband and accordingly issued such cheque. Therefore, so far as the second cheque dated 15th June 2012 for ₹1,30,000/- (Exh.22), is concerned, the accused succeeded in rebutting presumption under Section 139 of the N.I. Act.

62. The complainant by admitting in the cross-examination and by not producing any other material to prove beyond all reasonable

doubt that the accused was liable to pay an amount of ₹1,30,000/- which was given to her husband as loan by the complainant, cannot be held guilty for bouncing of the second cheque.

63. Having said so, the observations of the learned trial Court insofar as the cheque of ₹3,00,000/- is concerned, needs to be quashed and set aside. However, in connection with the cheque amounting to ₹1,30,000/-, no interference is warranted though on different reasons.

64. Thus, the impugned judgment needs to be quashed and set aside qua cheque dated 15th April 2012 for ₹3,00,000/- at Exh-21 (colly). The accused is found guilty for the offence punishable under Section 138 of the N.I. Act in connection with the cheque at Exh.21, however, the accused is not found guilty for the cheque of ₹1,30,000/- produced at Exh.22 (colly).

65. Having said so, I hold the accused guilty for the offence punishable under Section 138 of the N.I. Act in connection with a cheque dated 15th June 2012 for ₹3,00,000/- produced at Exh-21.

66. Since the transaction is of the year 2012, a proportionate sentence and compensation needs to be awarded.

67. The accused who is found guilty for the offence under Section 138 of the N.I. Act in connection with the cheque at Exh-21, is hereby sentenced to suffer simple imprisonment for a period of one month and to pay compensation of ₹6,00,000/- to the complainant and in default to undergo simple imprisonment for 15 days.

68. The accused shall surrender before the learned Magistrate within a period of two weeks from today. Learned Magistrate shall take necessary steps on failure of the accused to surrender as directed above.

BHARAT P. DESHPANDE, J

MEENA
VISHAL
BHOIR

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MEENA VISHAL
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