

Meena

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.23 OF 2015

Dr. Srishti Ashutosh Prabhu Dessai
wife of Dr. Ashutosh Prabhu Dessai,
major of age, medical practitioner.
Namrata Building, Cardozo Wado,
Taleigao, Tiswadi, Goa.

...Appellant

Versus

- 1 Mr. Dadamiyan M. Bagewadi@ Imran
Mohammad Umar Bagewadi, son of Mo-
hammad Umar Qutbuddin, major of age, busi-
nessman, resident of House No.588, Near
Shahawal Ullah Masjid, Near Vaibhav Nagar, 6th
Cross, Boxite Road, Belgaum, Karnataka,

- 2 The State of Goa,
through the Public Prosecutor,
C/o. O/o the Ld. Advocate General, High Court,
Lyceum Complex, Altinho, Panaji, Goa.

...Respondents

Shri Ryan Da Piedade Menezes with Nigel Fernandes and Ms. Gina Almeida, Advocates for the Appellant.

Shri Suraj Naik, Advocate the Respondent No.1.

Shri Mahesh Amonkar, Additional Government Advocate for Respondent No.2.

CORAM:	BHARAT P. DESHPANDE, J.
Reserved on:	22nd September 2022
Pronounced on:	3rd October 2022

JUDGMENT:

The appellant/original complainant is challenging the judgment and order dated 10/09/2014 passed by the learned Magistrate at Panaji in Criminal Case No.OA/75/2012/B thereby dismissing the complaint filed under Section 138 of the Negotiable Instrument Act (for short 'N.I.Act') and acquitting the respondent/accused herein on the ground that the respondent/accused succeeded in rebutting the presumption.

2. Vide order dated 06/04/2015 in Criminal Misc. Application No.284 of 2014, leave to file an appeal was granted and records and proceedings were called.

3. Heard Shri Ryan Da Piedade Menezes, learned Counsel for the appellant, Shri Suraj Naik, learned Counsel for respondent No.1 and Shri Mahesh Amonkar, learned Additional Government Advocate for respondent No.2.

4. With the assistance of the learned Counsel appearing for the parties, I have perused records and proceedings as well as the paper book.

5. Learned Counsel Shri Ryan Menezes appearing for the appellant strongly contended that the learned Magistrate failed to consider presumption under Section 139 of N.I. Act and wrongly put a burden on the complainant to prove otherwise. He invited attention to the document executed between the parties and claimed that an amount of ₹10,00,000/- was advanced and it was agreed by the respondent that he shall pay an amount of ₹12,50,000/- which includes a share in the profit of the respondent arising from the property transaction to be given to the appellant. He, therefore, submitted that a cheque towards legally enforceable debt or liability was issued in favour of the appellant. On presentation, it was dishonoured. A legal notice was sent to respondent No.1 demanding the amount mentioned in the cheque with the stipulated period. No reply was sent from respondent No.1 to such legal notice. Therefore, the complaint was lodged under Section 138 of the N.I. Act.

6. The learned Counsel Shri Ryan Menezes then submitted that instead of drawing a presumption under Section 139 of N.I. Act, the learned Magistrate framed the question putting a burden on the complainant/appellant to prove that the cheque was issued towards

the discharge of legally enforceable liability. He then submitted that except giving suggestions, no material has been produced by the accused to discharge a presumption. Thus the learned Trial Court without considering the settled proposition of law, acquitted respondent No.1. He then submitted that all ingredients of Section 138 of N.I. Act were established and there is no material to discredit the evidence of the complainant and the documents. He submitted that the Agreement executed between the complainant and respondent No.1 makes it very clear that the cheque was issued towards legally enforceable liability and once such presumption is raised, the accused has to prove otherwise by cogent evidence and not only by giving suggestions. In support of the above contentions, learned Counsel Shri Menezes placed reliance on the following decisions:

1. **Rangappa v. Sri Mohan**¹
2. **Krishan P. Morajkar v. Joe Domnic Ferrao @ Another.**²
3. **Kailash Madanlal Charkha (Dr.) v. Sayyad : Khwaja Sayyad Noor & Another**³

¹ ((2010) 4 Bom.C.R. 652)

² ((2014) 2 Bom.C.R. (Cri) 738)

³ (2018) 2 Bom.C.R.. (Cri) 450

4. **Bir Singh v. Mukesh Kumar⁴**
5. **K.N. Beena v. Munuyappan and Another⁵**
6. **Tarmahomed Haji Abdul Rehman v. Tyeb Ebrahim Bharamchari⁶**
7. **APS Forex Services Private Limited y,. Shakti International Fashion Linkers & Others⁷**
8. **Bharthi Bhanudas Gaonkar v. Suresh Vinayak Azgaonkar @ Suresh Morajkar⁸**
9. **Y. S. Yadav v. Reena⁹**
10. **Central Bank of India and Another v/s. Saxons Farms and Others¹⁰**

7. Learned Counsel Shri Suraj Naik appearing for respondent No.1 submitted that the appellant failed to prove that the cheque was issued towards legally enforceable debt and therefore the observations of the learned Magistrate need no interference. While elaborating his submissions, he argued that the clause mentioned in the Agreement executed between the parties with regard to an additional amount of ₹2,50,000/- was a contingent contract. Therefore, the complainant was supposed to prove whether respondent No.1 gained any profit out

4 ((2019) 4 SCC 197)

5 ((2001) 8 SCC 458)

6 (1949 (51) Bom.L.R. 219)

7 ((2020) 12 SCC 724)

8 (2022 All.M.R. (Cri) 1206)

9 (2010 SCC OnLine Del 3294)

10 (1999) 8 SCC 221

of any land transaction. He then submitted that cross-examination of the complainant showed that no question of paying the said amount of ₹2,50,000/- or above ₹10,00,000/-.

8. The learned Counsel Suraj Naik then submitted that the appellant filed a Civil Suit for recovery of the said amount in Belgaum and the said Civil Suit has been decreed thereby respondent No.1 has been directed to pay only an amount of ₹10,00,000/- with interest and not the additional amount of ₹2,50,000/-. Thus, it is clear that the said additional amount of ₹2,50,000/- was only depending on the contingency of earning profit by respondent No.1 in a land transaction. But such contingency did not happen, the question of paying such profit or sharing such profit does not arise. Therefore, the demand of ₹12,50,000/- by the complainant was not at all towards legally enforceable debt.

9. Learned Counsel Shri Suraj Naik then submitted that the complainant failed to prove the source of her income so as to advance a huge amount of ₹10,00,000/-. Her explanation in the cross-examination that she received the said amount from her husband is not established as the husband of the complainant is not examined

before the Trial Court. He therefore submitted that respondent No.1 succeeded in rebutting the presumption from the cross-examination of the complainant. In this respect, he placed reliance on the following decisions:

1. **Anss Rajashekar v/s. Augustus Jeba Ananth¹¹**
2. **Sada Urban Co-Operative Credit Society Ltd v/s. Prasad U. Parab and another¹²**
3. **Subhash Chander Sharma v/s. Ravinder Alias Babli¹³**
4. **B Indramma v/s. Eshwar¹⁴**
5. **M. Palanisany v/s. K. Karvannan¹⁵**
6. **Sandeep Shirodkar v/s. Shankar Dhawaskar¹⁶**
7. **Vikas Gopi Bhagat v/s. Shivdas Pednekar¹⁷**
8. **Krishna Janardhan Bhat v/s. Dattatraya G. Hegde¹⁸**
9. **Vinay Parulekar v/s. Pramod Meshram¹⁹**
10. **Chandraprabha Vasant Mhaske v/s. Ganesh Marya**

11 (2019) AIR (SC) 942

12(2020) SCC Online Bom 742

13(2020)3 CriCC 661

14(2010 (1) AIRKarR 537)

15(2012 LawSuit(Mad) 798

16(2010)2 BomCR(Cri) 867)

172020(1) MhLJ 285

18(2008)4 SCC 54

19 (2008(2) MhLJ 115)

Waghe & Ors.²⁰

10. Rival contentions fall for a determination as under :

1. Whether the learned Magistrate committed error in not drawing the presumption under Section 139 of N.I. in favour of the complainant?

2. Whether the Agreement dated 24/09/2011 is having any aspect of a contingent contract?

11. The parties are hereinafter referred to as complainant and accused as read before the Trial Court for the sake of brevity.

12. In the nutshell, the facts leading to the present matter are as under:

13. A complaint was lodged under Section 138 of the N.I. Act on behalf of the complainant against the accused claiming therein that in the month of September, 2011, she advanced a sum of ₹10,00,000/- to the accused by way of a friendly loan to enable him to purchase a plot of land at Azam Nagar, Kangrali BK, Belgaum. Accordingly, an Agreement was executed between them dated 24/09/2011 at Belgaum wherein the accused undertook to repay the said loan

20 (2017 ALL MR (Cri) 2912)

without any interest, within two months and also volunteered to pay to the complainant a premium of ₹2,50,000/- by way of sharing the profit that the accused would derive from the said property transaction. Accordingly, the accused issued a cheque bearing No.744710 dated 23/11/2011 drawn on Karnataka Bank Ltd., Belgaum Branch amounting to ₹12,50,000/- in favour of the complainant towards the repayment of the said amount. On presentation of the said cheque, it was dishonoured due to "funds insufficient". The complainant informed the accused about it and then the accused requested her to represent the cheque again after 20/12/2011.

14. The complainant then presented the cheque for realisation with her bank at Panaji on 21/12/2011, however, it was again dishonoured due to insufficient funds. The bank vide its memorandum dated 22/12/2011 informed the complainant. A legal notice dated 26/12/2011 was issued to the accused by a registered post calling upon him to make the payment of the said cheque within a period of 15 days from the date of the receipt of the said notice.

15. The Accused received such notice on 08/01/2012, however, he

neither replied nor complied with the said notice. Thus, the complaint was lodged before the learned Magistrate who on verification of the complaint issued a process against the accused.

16. The substance of the accusation was explained to the accused on 15/02/2013 upon which he pleaded not guilty and claimed to be tried. The complainant filed an affidavit-in-evidence and produced relevant documents. She was cross-examined at length. The complainant closed her case and thereafter the statement of the accused was recorded under Section 313 of Cr.PC. The accused denied the entire case and finally claimed that the cheque which is the subject matter of the case was issued blank and without any signature to the husband of the complainant in respect of some other transaction. The accused did not step into the witness box but he examined one Maria Angelica D'Souza as Dw1, to prove that the date of the cheque is 23/04/2011 and not 23/11/2011.

17. The learned Magistrate after considering the material before it, framed two questions for a determination as found in paragraph 4 of the impugned judgment. The first question is with regard to the limitation which has been answered against the accused and in favour

of the complainant. The second question is with regard to the cheque and whether it was issued towards the discharge of legally enforceable liability.

18. The learned Magistrate while answering question No.1, observed that the date mentioned in the cheque is admittedly 23/11/2011 and therefore, a complaint filed before it is in limitation.

19. While answering question No.2, the learned Magistrate observed that the complainant was not having money and she received it as a gift from her husband and therefore, the circumstance raised by the accused that such a cheque was issued in favour of the husband of the complainant is more probable. The learned Magistrate accepted the defence raised by the accused and accordingly rejected the said complaint thereby acquitting the accused for the offence punishable under Section 138 of N.I. Act.

20. First of all, it is a well settled proposition of law that the presumption under Section 139 of N.I. Act is a presumption of law as distinguished from a presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence,

which requires the prosecution to prove the case against the accused beyond a reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

21. In the case of *Hiten P. Dalal vs Bratindranath Banerjee*²¹, the Hon'ble Apex Court has observed as above.

22. Thus, the Court shall presume the liability of the drawer of the cheques for the amounts for which the cheques are drawn. No doubt such presumption is a rebuttable presumption. However, with the aid of Section 138 of the N.I. Act which is an exception to general Rules, the burden/onus shifts on the accused to rebut it.

23. In the case of *Bir Singh*(supra), the Hon'ble Apex Court while discussing the case of *Hiten P. Dalal*(supra) and other earlier decisions observed that Section 139 of N.I. Act mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in

21 (2001 (6) SCC 16)

whole or in part, of any debt or other liability. However, such presumption is a rebuttable presumption by proving to the contrary. It is further observed that in order to rebut a presumption of law it is not sufficient for the accused to do it by mere denial or suggestions. Something cogent and convincing is required to be brought on record either through cross-examination of the complainant and his witnesses or through leading evidence by the accused, showing a reasonable possibility of the non-existence of a presumed fact. No doubt, it is also true that the burden on the accused is not heavy as compared to the burden of proving guilt to its preponderance of probability. Such probabilities must be established so as to dispel the presumption in two senses.

24. In the case of **Rangappa**(supra), the Hon'ble Apex Court observed in paragraph No.14 thus:

*“14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in **Krishna Janardhan Bhat**(supra) may not be correct. However, this does not in any way cast*

doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this

in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

25. In the case of **Krishan P. Morajkar**(supra), this Court while dealing with the provisions of Section 138 of N.I. Act specifically observed that when a person signs a cheque and delivers it, even if it is a blank cheque or a post-dated cheque, presumptions under Section 118(b) and 139 of the Negotiable Instruments Act would have to be raised and would have to be rebutted by the accused, albeit by raising a probability. Unless the Courts start discouraging flimsy defences, the acceptability of cheques would not increase.

26. The above observations are now settled by the proposition of law as discussed in the catena of decisions. Therefore, the submissions of the learned Counsel for the accused that he handed

over a blank cheque to the husband of the complainant, cannot be accepted for the simple reason that he voluntarily handed over the such cheque and more specifically the details of such cheque are found mentioned in the Agreement executed between the complainant and the accused. Thus, such defence raised by the accused is a flimsy ground and will not amount to rebutting a presumption under Section 139 of N.I. Act by any stretch of imagination.

27. In *APS Forex Services Pvt. Ltd.*(supra), the Hon'ble Apex in paragraph No.8.3 observed that the accused may adduce evidence to rebut the presumption, but mere denial regarding the existence of debt shall not serve the purpose. Relying on the observations in the case of *Kumar Exports v. Sharma Carpets*²² in paras 14, 15, 18 and 19 which are as under:

“14. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

15. Presumptions are devices by use of which the courts are

²² (2009) 2 SCC 513

enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) “may presume” (rebuttable), (2) “shall presume” (rebuttable), and (3) “conclusive presumptions”(irrebuttable). The term “presumption” is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the “presumed fact” drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means “taking as true without examination or proof”.

18. Applying the definition of the word “proved” in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The

presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase “until the contrary is proved” in Section 118 of the Act and use of the words “unless the contrary is proved” in Section 139 of the Act read with definitions of “may presume” and “shall presume” as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.”

28. Thus, it is quite evident that the presumption cannot be rebutted only on the basis of few suggestions and denial.

29. In the case of ***Central Bank of India and Another***(supra), the Hon’ble Apex Court while considering the provisions of Section 138 of N.I. Act and more specifically the proviso of clause ‘B’ regarding notice

has observed in paragraph Nos.7,8,9 and 10 as under:

“7. Though, no form of notice is prescribed in the above Clause(b) the requirement is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of the cheque as unpaid and in the notice a demand for payment of the amount of the cheque has to be made.

8. The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect honest drawer. Service of notice of demand in Clause (b) of the proviso to Section 138 is a condition precedent for filing a complaint under Section 138 of the Act. In the present appeals there is no dispute that notices were in writing and these were sent within fifteen days of receipt of information by the appellant Bank regarding return of cheques as unpaid. Therefore, only question to be examined whether in the notice there was a demand for payment.

9. The last line to the portion of notice extracted above reads as under :

"Kindly arrange to make the payment to avoid the unpleasant action of my client."

In our opinion it is a clear demand as required under Clause (b) of Section 138.

10. *Regarding demand for payment, the High Court was of the opinion that "the intention in the notice was that cheque was being presented again and the applicant/petitioner should arrange the payment on re-presentation of the cheque". The High Court overlooked the last line of notice as indicated above and, therefore, erred in holding that there was no demand of payment."*

30. In the case of ***Tedhi Singh***(supra), the Hon'ble Apex Court in paragraphs Nos.8, 10 and 11 has observed as under:

"8. It is true that this is a case under Section 138 of the Negotiable Instruments Act. Section 139 of the N.I. Act provides that court shall presume that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability. This presumption, however, is expressly made subject to the position being proved to the contrary. In other words, it is open to the accused to establish that there is no consideration received. It is in the context of this provision that the theory of 'probable defence' has grown. In an earlier judgment, in fact, which has also been adverted to in Basalingappa (supra), this Court notes that Section 139 of the N.I. Act is an example of reverse onus [see Rangappa v/ Sri Mohan (2010) 11 SCC 441]. It is also true that this Court has found that the accused is not expected to discharge an unduly

high standard of proof. It is accordingly that the principle has developed that all which the accused needs to establish is a probable defence. As to whether a probable defence has been established is a matter to be decided on the facts of each case on the conspectus of evidence and circumstances that exist.

10. The Trial Court and the First Appellate Court have noted that in the case under Section 138 of the N.I. Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the N.I. Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent the courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross-examination of the witnesses of the complainant. Ultimately, it becomes the duty

of the Courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence.

11. We have gone through the nature of the evidence in this case. We also bear in mind the fact that three Courts have held in favour of the respondent No.1. In this regard we bear in mind that though it is true that reply notice was sent by the appellant, therein he admits the case of the respondent No.1 that the parties were having a cordial relationship. In the reply notice the appellant has not set up any case that the respondent No.1 did not have the financial capacity to advance the loan. In fact even we notice that there is no reference to the loss of the cheque book or signed cheque leaf. No complaint was given of the loss of the cheque book or the signed cheque leaf either to the police or to the bank.”

31. In the light of the above settled propositions, let's examine the evidence produced by the complainant and the reasons for not accepting it by learned Magistrate.

32. The affidavit in evidence was filed by the complainant giving the necessary details thereby reiterating her contentions stated in the

complaint itself. During evidence, the complainant produced the cheque at Exh.29, the cheque return memos at Exh.30(Colly), the demand notice at Exh.31, the service of notice on the accused and more particularly the Agreement executed between the parties dated 24/09/2011 which is at Exh.47.

33. During the cross-examination, certain questions were asked with regard to the alleged money laundering business which the complainant has categorically denied. Similarly, a suggestion was put to her that the accused did not sign the cheque and that she carried out material alteration on the cheque. Another suggestion given that the accused did not receive a legal notice. All these suggestions have been firmly denied.

34. Much energy was consumed while cross-examining the complainant on the so called date mentioned on the cheque. The accused tried to project that the cheque was dated 23/04/2011 and not 23/11/2011. The complainant firmly denied all these suggestions. A bare perusal of the cheque shows that it is dated 23/11/2011 and cannot be by any stretch of imagination as 23/04/2011. Secondly, the Agreement produced at Exh.47 executed between the complainant

and the accused shows in paragraph No.3 the details of the cheque including the Serial Number, date, amount which reads thus:

“(1) Cheque no. 744710 — dated 23/11/2011 drawn on 2 Karnataka Bank Ltd. for Rs 12,50,000/(Rupees Twelve Lakhs Fifty Thousand only)”

35. Thus, this aspect has been rightly considered by the learned Magistrate and the contention of the accused has been rejected with regard to the confusion created regarding the date mentioned on the cheque.

36. Further cross-examination of the complainant is with regard to a legal notice which only mentions about the advance taken of ₹12,50,000/- and not the advance of ₹10,00,000/-. Such aspect is again covered by the observations of the Hon’ble Apex Court in the case of ***Central Bank of India and Another***(supra). Admittedly, the legal notice issued by the complainant shows a demand made by the complainant for ₹12,50,000/- which include the advance of ₹10,00,000/- and sharing of profit of ₹2,50,000/- as agreed in the Agreement produced at Exh.47 dated 24/09/2011. Thus, the legal notice clearly goes to show the demand made by the complainant of

the amount mentioned in the cheque. Therefore, there is no discrepancy or illegality as tried to be projected with regard to issuance of such notice and the contents therein.

37. As far as sharing of profit is concerned as found in the Agreement, the complainant was cross-examined on this aspect wherein she firmly stated that there was no percentage fixed for sharing of profit and the amount was fixed at ₹2,50,000/-. On showing clause 3 of the Agreement to the complainant, she firmly deposed that the accused was liable to pay ₹2,50,000/- to her even if there was no profit from his property transaction. She denied the suggestion that the Agreement at Exh.47 was an uncertain Agreement and therefore void.

38. In this respect, the contents of the Agreement produced at Exh.47 are required to be interpreted so as to find out whether the accused agreed to pay a loan amount of ₹10,00,000/- together with an additional amount of ₹2,50,000/- towards a share in profit. It is also necessary to find out whether the accused agreed to pay such an amount on the happening of any event of a contingency. Paragraph Nos.1 to 7 of the Agreement reads as under:

“1. Whereas the Party Of the First Part has received a total sum of Rs 10,00,000/-(Rupees Ten Lakhs only) from the Party Of the Second Part for the Purchase of the said Property, in the following manner :

(1) Cheque no.000221 dated 22/09/2011 drawn on Dhanalaxmi Bank for Rs 4,00,000/-(Rupees Four Lakhs only)

(2) Cheque no.000222 dated 23/09/2011 drawn on Dhanalaxmi Bank for Rs 4,00,000/-(Rupees Four Lakhs only)

(3) Cheque no. 000223 dated 23/09/2011 drawn on Dhanalaxmi Bank for Rs 2,00,000/-(Rupees Two Lakhs only).

2. The Party Of the First Part hereby undertakes and bind himself to return the amount of Rs 10,00,000/- (Rupees Ten Lakhs only), borrowed from Party Of the Second Part by Party Of the First Part, to the Party Of the Second Part at the end of 2 (two) months of the date of execution of the present agreement, without any further interest accrued on the Principal amount.

3. The Party Of the First Part gives the Party Of the Second Part the following cheque of Rs. 12,50,000/- Rupees Twelve lakhs Fifty Thousand only) towards repayment of debt of Rs 10,00,000/-(Rupees Ten Lakhs only) as well as Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) towards a share in profit of Party of the First arising from property transaction

which the Party Of the First Part has shown willingness to give to the Party Of the Second Part.

(1) Cheque no. 744710 dated 23/11/2011 drawn on Karnataka Bank Ltd. for Rs 12,50,000/- (Rupees Twelve Lakhs Fifty Thousand only)

5. The Party Of the Second Part can deposit the cheque given by the Party Of the First Part at the end of 2 (Two) months of execution of this agreement i.e. on 23/11/2011 towards recovery of the amount f.e. Rs.12,50,000/- (Rupees Twelve Lakhs Fifty Thousand Only) due to them.

6. The Party Of the First Part hereby agrees to and acknowledges the debt of Rs. 12,50,000/ (Rupees Twelve Lakhs Fifty Thousand Only) and further declares to honour the said cheque.

Cheque no. 744710 dated 23/11/2011 drawn on Karnataka Bank Ltd for Rs.12,50,000/- (Rupees Twelve Lakhs Fifty Thousand only)

And further declares that in the event the said cheques are dishonoured for any reason whatsoever the Party Of the First Part shall pay the amount of Rs.12,50,000/-(Rupees Twelve Lakhs Fifty Thousand only), within 3 days of intimation of the dishonour of the cheque.

7. The Party Of the First Part hereby further declare &

assure the Party Of the Second Part that -

If the Party Of the First Part is unable to pay the Party Of the Second Part at the end of 2 (Two) months from the date of execution of this agreement the sum of Rs.12,50,000/- (Rupees Twelve Lakhs Fifty Thousand only) then the Party Of the First Part and shall compensate the Party Of the Second Part, with interest payable at the rate of 12 (Twelve) percent per annum on Rs.12,50,000/- (Rupees Twelve Lakhs Fifty Thousand only) in addition to returning the sum of Rs.12,50,000/- (Rupees Twelve Lakhs Fifty Thousand only) at the earliest possible i.e. within a period of 1 month from 23/11/2011.”

39. Bare perusal of the above clauses of the Agreement executed between the complainant and the accused clearly goes to show that it is not a contingent contract as tried to be projected that the accused received hand loan of ₹10,00,000/- and such amount was paid by the complainant to the accused by three cheques as found in paragraph 1 quoted above. Thus, the said transaction is through a Bank and not a cash transaction. The amount was transferred from the account of the complainant to the account of the accused, on the basis of an Agreement executed between the parties. Accordingly, it was agreed that such amount was borrowed by the accused for a period of two

months without any further interest accrued on the principal. However paragraphs 3 and 4 of the above Agreement show that the accused issued cheque in favour of the complainant for an amount of ₹12,50,000/- towards repayment of the debt of ₹10,00,000/- as well as an amount of ₹2,50,000/- towards a share in profit of the accused arising from the property transaction for which accused has shown willingness to give to the complainant.

40. In paragraph No.6, the accused clearly admits and acknowledges a debt of ₹12,50,000/- and further declared to honour the said cheque. Thus, when it is clearly agreed between the parties in writing and duly executed before the notary public thereby acknowledging a debt of ₹12,50,000/-, it does not lie in the mouth of the accused thereafter to claim that the amount of ₹2,50,000/- was only on some contingency which would happen subsequent to the Agreement as there is nothing mentioned in the Agreement itself. The accused clearly admitted that he is liable to pay ₹12,50,000/- as debt and acknowledges it and further issued a cheque for the said amount in favour of the complainant which further fortifies that such cheque together with the amount mentioned therein was towards the

debt.

41. In the case of *Sampelly Satyanarayana Rao v/s. Indian Renewable Energy Development Agency Limited*²³, wherein the Hon'ble Apex Court has observed as under:

"9. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways(supra) with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section 138 of the Act. We are of the view that the question of whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque, liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

10. Reference to the facts of the present case clearly shows that though the word "security" is used in Clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28-2-2002 which was prior to the date

²³ (2016) 10 SCC 458

of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.

11. The Judgment in Indus Airways (supra) is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in praesenti in terms of the loan agreement, as against the case of Indus Airways (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also described

as “security” in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

12. The crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.”

42. In **Rangappa**(supra), this Court held that once issuance of a cheque and signature thereon are admitted, a presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though the accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, a mere statement of the accused may not be sufficient to rebut the said presumption. A postdated cheque is a well-recognized mode of payment.

43. The learned Counsel Shri Suraj Naik appearing for the accused, tried to produce a copy of the judgment and decree passed by the Senior Civil Judge, Belgavi in Original Suit No.303 of 2014 decided on 24/04/2018. When repeatedly asked about the provision of law under which, he could produce such a document at the time of the final hearing and that to without any application, he was unable to justify his action.

44. Be that as it may, the civil suit, though based on the same Agreement between the parties, is for the purpose of recovery of the amount whereas present proceedings are under Section 138 of the N.I. Act which is a penal provision on the ground that the accused failed to pay the amount mentioned in the cheque within a stipulated period of 15 days from the date of receipt of a legal notice. Thus, the civil action is completely separate and distinct and cannot be mixed up with the present proceedings.

45. He placed reliance on the decision in the case of **Anss Rajashekar**(supra), in that matter the Hon'ble Apex Court observed that the accused therein successfully rebutted presumption under Section 139 of N.I. Act by adducing sufficient material. First of all

reply was filed to the demand notice taking a specific stand and thereafter such aspect was proved during the trial. The observations of the Apex Court in paragraph No.13 of the above decision are as under:

“13. Besides what has been set out above, an important facet in the matter was that the complainant failed to establish the source of funds which he is alleged to have utilized for the disbursement of the loan of Rs.15 lakhs to the appellant. During the course of his cross-examination the complainant deposed that earlier, the appellant had furnished two cheques, one of ICICI Bank for Rs.5 lakhs and another of Canara Bank for Rs.10 lakhs which he had presented. The complainant admitted that he had not mentioned anything about the accused having issued these two cheques in his complaint. Nothing was stated by the complainant in regard to the fate of the earlier two cheques which were allegedly issued by the appellant. The non-disclosure of the facts pertaining to the earlier two cheques, and the steps, if any, taken for recovery was again a material consideration which indicated that there was a doubt in regard to the transaction.”

46. Thus, it is clear from the facts as well as the observations as quoted above, the said decision is distinguishable from the matter in hand. There was in fact more than sufficient material brought on

record to dispel the presumption and also to disbelieve the case of the complainant. Thus, the said decision is not helpful to the accused on any count.

47. In the present case, the complainant paid the amount of ₹10,00,000/- to the accused by cheques which are reflected in the Agreement. The accused admitted a receipt of such an amount. The complainant stated that she received the said amount as a gift from her husband. Therefore, when the bank transaction clearly shows that the complainant was having an amount of ₹10,00,000/- which she paid to the accused by way of three cheques and the accused admitted of the receipt of such amount in an Agreement, the said accused cannot be allowed to question the capacity of the complainant to pay such amount. The evidence to that effect is more convincing on the basis of the Agreement and the cheques by which the amount was paid to the accused a friendly loan.

48. Learned Counsel Shri Suraj Naik then placed reliance in the case of *Sada Urban co-operative Credit Society Ltd* (supra), wherein this Court observed that the accused therein succeeded in rebutting the presumption under Section 139 of N.I. Act and the complainant failed

to prove that the signature on the document was that of the accused. Thus on facts itself, the said matter is not going to help the accused in the present matter as the Agreement produced at Exh-47 itself proved that the accused agreed that he is liable to pay the amount mentioned in the cheque as debt and accordingly the cheque details are also disclosed in it. There is no other material to disprove such aspects.

49. The learned Counsel Shri Suraj Naik then placed reliance on the case of ***Sandeep Shirodkar*** (supra) and more particularly paragraphs 32 and 34 wherein this Court observed that the accused for discharging the burden of proof placed upon him under a statute need not examine himself and he may discharge his burden on the basis of the material already brought on record. An accused has a constitutional right to maintain silence. The standard of proof on the part of an accused and that of the prosecution in a criminal case is different. The prosecution must prove the guilt of an accused beyond all reasonable doubt whereas the accused by showing "preponderance of probabilities" can discharge such presumption.

50. However, in the case of ***Bir Singh***(supra), the Hon'ble Apex Court has observed in paragraphs No.20 and 21 as under :

“20. Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from the presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond a reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact as held in Hiten P. Dalal (supra).

21. Presumption of innocence is undoubtedly a human right as contended on behalf of the respondent No.1-accused, relying on the judgments of this Court in Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Anr⁵ and Rajesh Ranjan Yada @ Pappu Yadav vs. CBI through its Director⁶. However, the guilt may be established by recourse to presumptions in law and presumptions in facts, as observed above.”

51. Thus, it is clear that the accused need not enter the witness box to rebut the presumption. However, such presumption of law cannot be considered as rebutted only by giving denials and suggestions.

There has to be some cogent material brought on record during the evidence of the complainant and his witnesses, on the preponderance of probabilities so as to rebut such presumption.

52. In the present matter and from the cross-examination of the complainant, it is clear that the accused failed to rebut the presumption under Section 139 of N.I. Act.

53. In the case of ***Subhash Chander Sharma***(supra), it was admitted by the complainant himself that the cheque in question was given to him by the accused for the sake of safe dealing and not towards any Agreement or transaction. Therefore, it was observed that the accused succeeded in rebutting the presumption.

54. However, the matter in hand is quite different and the facts clearly go to show that in the Agreement at Exh.47 the accused clearly admitted that he has to pay an amount of ₹12,50,000/- to the complainant. The said Agreement was never challenged. Thus, the above case of ***Subhash Chander Sharma*** (supra), will not be helpful to the accused.

55. In the case of ***Vikas Gopi Bhagat*** (supra), this Court observed

that the accused succeeded in bringing out on record probable defences and rebutted presumption but thereafter the complainant failed to discharge his burden beyond all reasonable doubt. Again fact of this case is distinguishable and will not help the accused in the present matter on any count.

56. *Krishna Janardhan Bhat* (supra) is relied upon by learned Counsel Shri Suraj Naik. However, the view taken in the said decision of ***Krishna Janardhan Bhat***(supra) is already overruled by a three Judges Bench of Hon'ble Supreme Court in the case of ***Rangappa***(supra). Therefore, the above decision is of no help to the accused.

57. He then placed reliance in the case of ***B Indramma*** (supra). However, it is clear that the said decision is based on the findings in the case of ***Krishna Janardhan Bhat***(supra), as found in paragraph 10 and thus, the same is of no help to decide the present matter.

58. He then placed reliance in the case of ***M.Palanisamy***(supra), to claim that the cheque in question was not issued for discharging legally enforceable debt as the complainant had no financial status to

lend him money. Again such preposition is of no help in view of the document at Exh.47 produced by the complainant wherein the accused acknowledged receipt of the amount by cheque and that he is liable to pay the amount as debt.

59. Learned Counsel Shri Suraj Naik then placed reliance in the case of ***Vinay Parulekar***(supra), in that case, it is observed in paragraph No.24 that the Complainant has failed to prove that the cheque was issued in discharge of any debt due or other liability either through the documents or oral evidence. Therefore, it was observed that the accused in that case succeeded in rebutting the presumption. However, the matter in hand is a quite different form of fact and law as Exh.47 is clinching material to hold that the complainant succeeded in the matter and therefore, the Trial Court was duty bound to draw a presumption. Similarly, the accused failed to discharge a burden. Hence, such a decision is of no help.

60. Finally, learned Counsel Shri Suraj Naik placed reliance in the case of ***Chandrapabha Vasant Mhaske***(supra), to claim that in an appeal if two plausible views are possible of evidence, the view favouring the accused adopted by the Trial court should not be

interfered with by the Appellate Court. There is no dispute about such a proposition. However, first of all, it is required to consider whether the view taken by the learned Trial Court is a plausible view.

61. To my mind reasons disclosed in the impugned order clearly goes to show that the learned Magistrate first of all committed error in framing question No.'b' thereby putting a burden on the complainant to prove that the cheque was issued towards discharge of legally enforceable liability. Admittedly, the complainant by producing the cheque, Bank memos, the legal notice and more specifically the Agreement at Exh.47, established that she is entitled to draw a presumption under Section 138 of N.I. Act. The Agreement at Exh.47 as quoted earlier clinchingly shows that the accused accepted and acknowledged the debt of ₹12,50,000/- and in the discharge of it, issued a cheque in question. Paragraph 6 of the Agreement quoted earlier is sufficient to prove this aspect. Therefore, it was for the accused to rebut such presumption and more particularly the Agreement at Exh.47. However, cross-examination of the complainant is not sufficient enough to discharge or rebut such presumption. The learned Counsel Shri Suraj Naik at the time of final arguments

submitted that on the basis of the same Agreement, the complainant filed a civil suit in Belagavi and the decree was passed in her favour. However, he claimed that the Civil Court has only allowed the claim of ₹10,00,000/- and not ₹12,50,000/-. Thus, it means that even the Civil Court has accepted the Agreement in question executed between the parties though in this matter the accused tried to deny everything. Once the accused acknowledged the debt of ₹12,50,000/- as mentioned in the Agreement itself, there was no need for the complainant to prove anything further. However, the accused was required to rebut such presumption by leading cogent and convincing evidence or by showing probabilities in his favour from the cross-examination of the complaint, both are absent in the present matter.

62. The learned Magistrate in paragraphs No.20 and 21 of the impugned judgment, therefore erred in observing that the complainant was not having money, which is contrary to Exh-47 and the documents placed on record. Accused by oral evidence could not have been permitted to prove contrary to a document at Exh.47. On one hand he admitted receipt of three cheques issued by the complainant in his favour for a sum of ₹10,00,000/- as hand loan and

thereafter tried to raise the defence that the complainant was not having sufficient finance, which cannot be permitted. Thus, the observations of the learned Trial Court are against the settled propositions of law and therefore, need interference.

63. As far as the date of the cheque is concerned, the learned Magistrate has clearly observed that it was drawn on 23/11/2011 and not on 23/04/2011 as tried to be projected. Such findings are not challenged by the accused in any proceedings. Even otherwise such ground is of no substance as the Agreement at Exh-47 clearly discloses the number of the cheque, the date and the amount. Hence, point no. 1 is answered in affirmative and point no 2 is in negative.

64. Having said so, the appeal must succeed and hence I pass the following :

O R D E R

(i) The appeal stands allowed.

(ii) The impugned judgment dated 10/09/2014 in Criminal Case No.OA/75/2012 is hereby quashed and set aside. The accused/respondent No.1 herein is found guilty of

the offence punishable under Section 138 of the N.I. Act.

(iii) Accused/respondent No.1 to be heard on point of sentence.

BHARAT P. DESHPANDE, J

Judgment continued at 2.30pm

Heard learned Counsel Mr. Suraj Naik for the respondent No.1/accused on the point of sentence. Considering this matter is of 2012 and the amount involved, the following sentence is hereby awarded:

(iv) The accused is therefore sentenced to suffer Simple Imprisonment for a period of 6 months and to pay compensation of double the amount of cheque to the complainant i.e. ₹25,00,000/- (Rupees Twenty Five Lakhs only), within a period of one month, failing which he shall suffer simple imprisonment for a period of three months.

(v) The accused is directed to surrender before the learned Magistrate within a period of 15 days from today.

(vi) Records and proceedings shall be returned to the learned Magistrate immediately with the direction that if the accused failed to surrender within a period of 15 days, he

shall take necessary recourse of law to issue a warrant for the purpose of the sentence awarded herein above.

(vii) Pending application, if any, stands disposed of accordingly.

BHARAT P. DESHPANDE, J.

MEENA
VISHAL BHOIR

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