

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.53 OF 2017

Shri Govind B. Prabhugaonkar
Son of Shri Bhiku Prabhugaonkar
Major in age, Indian National,
Resident of H. No.832/1,
Shelim Loliem, Canacona, Goa ... Appellant

Versus

Shri Rajendra Anant Varik,
Son of Shri Anant Varik,
Major in age,
R/o. of Agas, Mashem,
Canacona Goa. ... Respondent

Shri V.A. Lawande along with Shri Parimal Redkar, Advocate for the Appellant.

Shri John A. Lobo, Advocate for the respondent.

CORAM: BHARAT P. DESHPANDE,J.

RESERVED 5th JANUARY 2023

ON :

PRONOUNCED 7th JANUARY 2023

ON :

JUDGMENT:

1. The present appeal is filed by the appellant/original complainant thereby challenging the judgment and order passed by the First Appellate Court in Criminal Appeal No.72 of 2016 dated 09/12/2017 wherein the said appeal filed by the respondent was allowed and judgment and conviction

passed by the trial Court under Section 138 of the Negotiable Instruments Act ('the N.I. Act' for short) was quashed and set aside.

2. Vide order dated 03/10/2017 in Criminal Misc. Application No. 184 of 2017, leave to file an appeal was granted. Accordingly, the appeal was registered.

3. Heard learned Counsel Shri V.A. Lawande along with Shri Parimal Redkar, for the appellant and learned Counsel Shri John A. Lobo for the respondent.

4. The parties are hereinafter called as complainant and accused as they were arrayed before the trial Court for the sake of convenience.

5. In nutshell, the complaint was filed before the learned Magistrate at Canacona against the accused which was registered as Criminal Case No.29/NI/2014. It was the complaint under Section 138 of the N.I. Act. In short, it is the case of the complainant that he knows the accused and both of them are distant relatives. The accused borrowed a sum of ₹2,00,000/- from the complainant for his personal needs. Towards repayment of such borrowed amount, the accused issued two cheques in favour of the complainant dated 04/06/2014 amounting to ₹1,00,000/- each, drawn on Corporation Bank, Loliem branch Canacona. The complainant presented both cheques for encashment on 15/07/2014. However, the cheques were returned with the endorsement "Account closed". This memorandum was received by the complainant on 15/07/2014. A legal notice dated 16/07/2014 was addressed to the accused through the registered post demanding the amount of

₹2,00,000/- within 15 days failing which action would be initiated under Section 138 of the N.I.Act. Though the accused received the notice on 18/07/2014, failed to comply with it. The accused replied to the said notice denying the liability and claimed a false defence. Accordingly, a complaint was lodged. Upon issuance of the process, the accused appeared before the trial Court and thereafter, the trial commenced. The complainant stepped into the witness box and produced both the cheques, cheque return memo, legal notice as well as reply received from the accused. One witness was examined by the complainant being the Branch Manager of Corporation Bank wherein the accused was having Savings Bank Account.

6. While answering the questions put to the accused under Section 313 of Cr.P.C., he admitted a relationship with the complainant and also borrowing of the amount of ₹2,00,000/- from the complainant while answering question Nos.1 and 2. The accused did not step into the witness box.

7. The learned Magistrate at Canacona in its judgment dated 05/08/20016 observed that the accused is guilty for the offence punishable under Section 138 of the N.I. Act as he issued the cheque for legally enforceable debt and failed to comply with the conditions of the notice when he was informed that such cheques bounced for the reason 'account closed'. The accused failed to pay the said amount of ₹2,00,000/- within 15 days from the receipt of notice and also failed to rebut the presumption under Section 139 of the N.I. Act.

8. The learned Magistrate after holding the accused guilty for the said offence passed the sentence directing the accused to undergo sentence till the

rising of the Court and to pay to the complainant compensation of ₹2,00,000/- and further compensation of ₹30,000/- as costs and in default the accused to undergo sentence of imprisonment for a period of 3 months.

9. The accused challenged the above judgment and conviction of the learned Magistrate, before Sessions Court at Margao vide Criminal Appeal No.72 of 2016.

10. The learned Additional Sessions Judge, Margao vide its judgment dated 09/02/2017 allowed the said appeal thereby quashing and setting aside the judgment and conviction of the learned trial Court basically on the ground that the accused on a preponderance of probabilities established that the complainant was indulging with money lending activities without any licence and therefore, the amount mentioned in the cheque is not legally recoverable debt.

11. The learned Counsel Shri Lawande submits that once the accused admitted receipt of loan of ₹2,00,000/- which was without charging any interest and that too parties are related to each other, the question of invoking the provision of The Money Lenders Act is clearly misplaced. The provisions of The Goa Money-Lenders Act, 2001 are not at all attracted in the present case and the complainant has been unnecessarily and without any evidence been branded as a money lender though he tried to help the accused being a relative. He would submit that findings of the learned trial Court have been disturbed by the First Appellate Court on totally different grounds and without any such material on record. He would submit that before the Appellate Court, a totally new defence was raised and accepted without

material on record to that effect. According to him, such findings of the First Appellate Court are not only perverse but incorrect so as to disprove legal presumption arising in favour of the complainant. He invited the attention of this Court to the documents and the admissions on the part of the accused himself which confirm the case of the complainant on the aspect of grant of loan. The defence raised by the accused or so called repayment of such loan is not at all established. Only denying the contentions in the evidence is not sufficient to rebut the statutory presumption.

12. Mr. Lawande would then submit that provisions of the Goa Money-Lenders Act, 2001 specify as to who can be considered as money lender. There is no evidence brought on record to show that the complainant was considered as a money lender so as to invoke provisions of Section 14 of the Act of 2001 which would not attract present proceedings under Section 138 of the N.I. Act as it is not considered to be a “suit”. He then submitted that even if it is considered that there was money lending activity, it does not bar present proceeding as the present matter is only based on a cheque/negotiable instrument issued by the accused.

13. The learned Counsel Shri Lawande place reliance on the following decisions:

1. *Kalamani Tex and Another v/s. P. Balasubramanian*¹
2. *Sulekhabai Yeshwantrao Chowghule v/s. Shaik Vahid Jahangir*²

¹ (2021) 5 SCC 283

² 2015 SCC OnLine Bom 4632

3. **Guddo Devi @ Guddi v/s. Bhupender Kumar**³
4. **P. Rasiya v/s. Abdul Nazer and Another**⁴
5. **Sumeti Vij v/s. Paramount Tech Fab Industries**⁵

14. *Per contra*, the learned Counsel Shri Lobo submitted that the complaint, notice, affidavit nowhere disclose the specific dates on which the loan was given, the cheques were issued etc. The conduct of the complainant in the matter is therefore suspicious and such conduct must be considered. He then submitted that the accused wrote a letter dated 09/07/2014 which was received by the complainant wherein the accused has clearly disclosed that he repaid the entire loan and accordingly directed the complainant to return both the cheques. Only thereafter cheques were presented for encashment which again show the conduct of the complainant. He would submit that the complainant did not act in a *bona fide* manner and presented cheques only on receipt of a letter from the accused dated 09/07/2014.

15. Mr. Lobo then would submit that for the first time complainant disclosed during cross-examination that he paid an amount of ₹2,00,000/- as loan to the accused in the month of March, 2014, on the condition that he would return/repay within one month. This also, according to Mr. Lobo, needs to be taken into account for the purpose of considering the conduct of the complainant.

16. Shri Lobo then would submit that reply from the complainant to the letter dated 09/07/2014 is dated 16/07/2014 and before that date, both the

3 MANU/DE/0458/2020

4 2022 SCC OnLine SC 1131

5 [2021 SCC OnLine SC201

cheques were returned unpaid. However, this fact has not been disclosed in the said reply dated 16/07/2014. Similarly, the legal notice issued by the Advocate for the complainant is also dated 16/07/2014, however, there is no reference in the reply filed by the complainant dated 16/07/2014 about issuance of such legal notice through his Advocate. Thus, the complainant suppressed many facts and circumstances and, therefore, his conduct assumed importance in deciding the matter.

17. Mr. Lobo then submitted that the cross-examination of the complainant clearly goes to show that he is in the habit of lending money to various persons and, therefore, an inference could be drawn that the complainant is indulging with money lending activities. According to him, such an aspect which the accused has brought on record needs to be considered on the touchstone of preponderance of probabilities and when there is material to show that the complainant advanced loan to different persons, the probability of money lending activity cannot be ruled out. He, therefore, submitted that findings of the learned First Appellate Court in the impugned judgment cannot be faulted with.

18. The learned Counsel Shri Lawande place reliance on the following decisions:

1. **Tanveer Khatib v/s. Oscar Vaz⁶**
2. **Govind B. Prabhugaonkar v/s. Romaldina Barreto E Carneiro⁷**

⁶ CRIA 25 of 2017

⁷ CRMA 164 of 2018

3. **Girdhari Parmanand Motiani v/s. Vinayak Bhagwan Khavnekar and others**⁸
4. **Harendra Ramchandra Pathak v/s. Dharmendra Ratan Mhatre**⁹
5. **Goa Plast Pvt. Ltd. V/s. Shri Chico Ursula D'Souza**¹⁰
6. **Anil s/o Baburao Kataria v/s. Purshottam s/o. Prabhakar Kawane**¹¹
7. **Basalingappa v/s. Mudibasappa**¹²

19. Rival contentions fall for the determination of this Court.

20. Point for determination is as under:

1. Whether the accused succeeded in rebutting presumption under Section 139 of the N.I. Act?

21. In the case of ***Kalamani Tex***(supra), the Hon'ble three judges Bench of the Apex Court considered the provision of Sections 139 and 118 of the N.I. Act. Similarly, the powers of the High Court under Section 378 of the Cr.P.C. are also discussed in paragraph 11 wherein it is observed that it is also trite in law that the High Court ought to have compelling reasons to tinker with an order of acquittal and no such interference would be warranted when there were to be two possible conclusions? Nonetheless, there are numerous decisions of this Court, justifying the invocation of powers by the High Court

8 (2015) 3 AIR Bom R (Cri) 476

9 2020(3) Mh.L.J.

10 1996 CRI.L.J. 2344

11 2010 (2) Mh.L.J. 466

12 (2019) 5 SCC 418

under Section 378 CrPC, if the trial Court had, inter alia, committed a patent error of law or grave miscarriage of justice or it arrived at a perverse finding of fact.

22. In the case of *Sumeti Vij*(supra), the Supreme Court after considering the provisions of Sections 118 and 139 of the N.I. Act, observed in paragraphs No.15,16,17 and 22 as under:

“15. The scope of Section 139 of the Act is that when an accused has to rebut the presumption, the standard of proof for doing so is that of “preponderance or probabilities” which has been examined by a three Judge Bench of this Court in Rangappa vs. Sri Mohan [(2010) 11 SCC 441], which reads as under:-

“26. 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 [(2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] 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.

27. 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 defendant-accused cannot be expected to discharge an unduly high standard or proof.”

16. It is well settled that the proceedings under Section 138 of the Act are quasi-criminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.

17. Likewise, under Section 139 of the Act, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced by the accused which on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved. In Rohitbhai Jivanlal Patel vs. State of Gujarat and Another ((2019) 18 SCC 106), this Court has examined the scope of Sections 138 and 139 of the Act, which reads as under:-

“15. So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 of the NI Act is concerned, apparent it is that the appellantaccused could not deny his signatures on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs 3 lakhs each. The said cheques were presented to the bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The trial court had also consciously taken note of these facts and had drawn the requisite presumption.

Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e. the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the appellant-accused to establish a probable defence so as to rebut such a presumption.

.....

17. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasised that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged under Sections 118 and 139 of the NI Act. This Court stated the principles in Kumar Exports [Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513]

“20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration

and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

21. *The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, therefore, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.”*

22. That apart, when the complainant exhibited all these documents in support of his complaints and recorded the statement of three witnesses in support thereof, the appellant has recorded her statement under Section 313 of the Code, but failed to record evidence to disprove or rebut the presumption in support of her defence available under Section 139 of the Act. The statement of the accused recorded under Section 313 of the Code is not a substantive evidence of defence, but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case of the accused. Therefore, there is no evidence to rebut the presumption that the cheques were issued for consideration.”

23. In the case of **Basalingappa**(supra) the Apex Court discussed in detail drawing of presumption under Sections 118, 138 and 139 of the N.I. Act and how such presumption could be rebutted, what could be the standard of proof? It was held that while the prosecution must establish its case beyond a reasonable doubt, the accused to prove a defence must only meet the standard of preponderance of probabilities.

24. In the case of **Dr. Srishti Ashutosh Prabhu Dessai v/s. Mr. Dadamiyan M. Bagewadi@ Imran Mohammad Umar Bagewadi** (Criminal Appeal No.23 of 2015) decided on 03/10/2022, considered the presumption and observed in para 20 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.

25. First of all the contention of the learned Counsel Shri Lobo that the complaint, affidavit as well as notice issued by the complainant, nowhere disclosed the date on which loan was given, the dates on which cheques were issued, which amounts to suppression and shows the conduct of the complainant, has no relevance in the present matter for the simple reason that the accused himself admitted that he took a loan of ₹2,00,000/- from the complainant. In this respect and during cross-examination of the complainant, the accused himself brought on record as under:

“It is true that the accused had written a letter dated 09/07/2014. It is true that the accused had stated in the said letter that the cheques handed over to him be returned as the amount has paid by him.”

26. Similarly while answering questions put to the accused under Section 313 of Cr.P.C., he admitted while answering question No.2 that he took a loan of ₹2,00,000/-from the complainant for his personal work. Question No.2 and answer of the accused reads thus:

“Q.2. It is in the evidence of Pw-1 that you accused has borrowed from him a sum of Rs.2,00,000/- to pay your personal dues. Whether you want to say anything?”

Ans: It is true but for personal work.”

27. Thus, first of all the complaint in paragraph 2 shows that the complainant and the accused are distant relatives. It is also brought in

evidence of the complainant and then admitted by the accused while answering question No.1 recorded under Section 313 of Cr.P.C. Therefore, mentioning about the dates in the complaint, notice or in the evidence cannot be considered as any irregularity on the part of the complainant. The accused came with a specific case that he repaid the entire loan however admittedly there is no such material brought on record except giving few suggestions to the complainant during cross-examination which he specifically denied. It is admitted that only by giving suggestions, presumption under Section 139 of the N.I. Act cannot be claimed to have been rebutted. The probability must be shown to convince the Court. Suggestions are only considered to be an attempt while cross-examining the witness to elicit facts. However, once a suggestion put to the witness is denied the onus remains as it is on such a party to prove it otherwise. In other case, if a suggestion is admitted by the witness, there is no need for producing further proof. Thus, it could be said that giving suggestions is only by way of an attempt to try and get admission from the witness and nothing more.

28. The learned Counsel Shri Lobo though vehemently tried to claim that the conduct of the complainant needs to be looked into but failed to satisfy this Court about the so called defence raised by the accused regarding repayment of the entire loan. The accused failed to step into the witness box. Thus, only on the contentions of few suggestion which in fact were denied by the complainant, no inference could be drawn even on the basis of probability in favour of the accused.

29. The second aspect which the learned Counsel Shri Lobo tried to demonstrate is in respect of the complainant indulging in money lending activities. In this respect, he heavily relied upon the cross-examination of the complainant wherein he admitted of giving loans to different persons. The cross-examination of the complainant shows that he lend money to six different persons including the accused. He also filed a complaint under Section 138 of the N.I. Act against Romaldina Barreto E Carneiro. However, the complainant firmly denied that he is indulging in money lending activity. His entire cross-examination nowhere suggests that he is lending money to different persons for earning interest as a business activity. In fact he categorically denied of charging any interest on the money lend by him to different persons.

30. In order to consider whether the complainant could be branded as a money lender so as to protect the accused from recovery, provisions of Goa Money-Lenders Act, 2001 needs to be considered in detail. The said Act of 2001 was enacted for the purpose to make better provisions for the regulation and control of transaction of money-lending in the State of Goa, few provisions along with the definitions needs to be taken into account. First of all Section 2(b) defines “business of money- lender” and reads thus:

“business of money-lending” means the business of advancing loans whether in cash or kind and whether or not in connection with or in addition to any other business”

31. Section 2(h) deals with the “interest” and reads thus:

“interest” includes any sum, by whatsoever name called, in excess of the principal paid or payable to a money-lender in consideration of or otherwise in respect of a loan, but does not include any sum lawfully charged by a money-lender for or on account of costs, charges or expenses in accordance with the provisions of this Act, or any other law for the time being in force”

32. Section 2(k) defines “loan” and reads thus:

(k) “loan” means an advance at interest, whether of money or in kind, but does not include—

(i) a deposit of money or other property in a Government post office bank or in any other bank or in a company or with a Co-operative Society;

(ii) a loan to, or by, or a deposit with any society or association registered under the Societies Registration Act, 1860 (Central Act 21 of 1860), or any other enactment relating to a public, religious or charitable object;

(iii) a loan advanced by the Government or by any local authority authorised by the Government;

(iv) a loan advanced to a Government servant from a fund, established for the welfare or assistance of Government servants, and which is sanctioned by the Government;

(v) a loan advanced by a Co-operative Society;

(vi) an advance made to a subscriber to, or a depositor, in a provident fund, from the amount standing to his credit in the fund in accordance with the rules of the fund;

(vii) a loan to or by an insurance company as defined in the Insurance Act, 1938 (Central Act 4 of 1938);

(viii) a loan advanced to, or by a bank;

(ix) a loan to, or by, or deposit with, anybody (being a body not falling under any of the other provisions of this clause), incorporated by any law for the time being in force in the State of Goa;

(x) an advance of any sum exceeding rupees three thousand made on the basis of a Negotiable Instrument as defined in the Negotiable Instruments Act, 1881 (Central Act 26 of 1881), other than a promissory note;

(xi) an advance of any sum exceeding rupees three thousand made on the basis of a hundi (written in English or any other Indian language);

(xii) an advance made bonafide by any person carrying on any business, not having for its primary object the lending of money, if such advance is made in the regular course of his business;

(xiii) except for the purposes of sections 29 and 31,—

(A) a loan, by a landlord to his tenant for financing of crops or seasonal finance, of not more than Rs. 5 per acre of land held by the tenant;

(B) a loan advanced to an agricultural labourer by his employer.

Explanation:— The expression “tenant” shall have the meaning assigned to it in the Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Act 7 of 1964), or any other relevant tenancy law in force relating to tenancy or agricultural lands”

33. Section 2(l) defines “money-lender” wherein Section 2(o) defines “principal” which means in relation to a loan, the amount actually advanced to the debtor.

34. Section 14 deals with stay of suits by money-lender not holding licence and provide that no court shall pass a decree in favour of a money-lender in

any suit to which this Act applies, unless the court is satisfied that at the time when the loan or any part thereof, to which the suit relates was advanced, the money-lender held a valid licence, and if the court is satisfied that the money-lender did not hold a valid licence, it shall dismiss the suit.

35. Thus, definition of “loan” under the above Act specifically mean that the loan is an advance at interest, whether of money or in kind, but does not include (i) to (xiii) as provided in the said definition. At (x) it include an advance of any sum exceeding rupees three thousand made on the basis of a Negotiable Instrument as defined in the Negotiable Instruments Act, 1881 (Central Act 26 of 1881), other than a promissory note. At (xii) it again include an advance made bonafide by any person carrying on any business, not having for its primary object the lending of money, if such advance is made in the regular course of his business.

36. Thus, only because complainant advances money to few persons without charging any interest and on humanitarian ground or for helping such persons, cannot be branded as a money-lender.

37. The word “loan” as defined in Section 2(k) of the above Act must be strictly construed as a loan/ advance at interest. A very purpose of money-lender as defined in Section 2(l) is to an individual or friend and to carry out such business of lending of money on the basis of licence. When an advance is made without charging any interest, it clearly shows that the said person is not having any intention to carry out money lending business. First of all the purpose of the Act of 2001 is for the regulation and control of transaction of money lending in the State of Goa.

38. If it is considered that the complainant advanced loan without charging any interest from the borrower, such transaction cannot be brought within the definition of loan as found in Section 2(k) of the Money-Lenders Act. Similarly, in the present matter the accused issued cheque towards repayment of the said advance i.e. only principal amount and, therefore, provisions of Section 2 (k)(x) of the Money-Lenders Act 2001 stands attracted.

39. The complainant specifically deposed that he advanced an amount of ₹2,00,000/- to the accused who agreed to return it within a period of two months. Thus, it is clear from the cross-examination that such advance was made in the month of March, 2014 and it is accepted from the accused to refund it within the agreed time period. However, both the cheques are dated 04/06/2014. This also shows that the accused issued cheques in discharge of the loan which he admittedly received from the complainant. Both cheques are of ₹1,00,000/- each. Thus, it is again clear that neither complainant claimed any interest nor the accused agreed to pay any interest on such loan.

40. Similarly, cross-examination of the complainant with regard to grant of loan to some other persons clearly goes to show that he did not charge interest from anyone and only claimed the principal amount. Such activity of the complainant without charging any interest cannot be considered as a business of money lending. It completely defeats the purpose of the business of money lending for the simple reason that the complainant would not be earning any interest on such money which he advanced to different persons. Therefore,

only because the complainant advanced loan to 5 to 6 persons including the accused, he cannot be branded as a money-lender.

41. The learned First Appellate Court, therefore, committed serious error in presuming that the complainant is a money-lender and, therefore, the amount which he advanced to the accused cannot be recovered as legally recoverable debt.

42. Section 2(l)(a) defines “money-lender” and provides that “money-lender” means,—(i) an individual; or (ii) an undivided Hindu Family; or (iii) a company; or (iv) an unincorporated body of individuals, who or which—
(a) carries on business of money-lending in the State; or does any activity of lending of any finance. Thus, the question precisely is the interpretation of the above Section. The Court is duty bound to look into the word “carries on business of money lending” and “any activity of lending of any finance”. The cross-examination of the complainant clearly goes to show that the money advanced by him to the accused was not connected with the business of the accused. Such an advance was given to the accused being his relative and to allegedly pay the dues of the accused to others. It is no doubt true that cross-examination of the complainant further shows that he advanced money to 4-5 persons but categorically denied that such advance was in connection with any business activity and that any interest on such advance was charged.

43. It can thus be construed from the tenor of the cross-examination of the complainant that advance of money given by him to different persons was not a part of his business activity or any activity of lending of any finance towards

the business of the accused person or others. He did not charge a single pie towards interest in refund of such advances.

44. In the case of *Romaldina Barreto E Carneiro*(supra), it has been brought on record that a promissory note was executed by her in favour of the complainant, which brings such a case under exception of the definition of loan in Section 2(k) as quoted earlier.

45. In the case of *Sulekhabai* (supra), after considering the definition in the Money Lenders Act, 2001, observed that the expression “activity” as held that a solitary instance of giving a loan does not make a person “Money Lender”. Taking clue from the said observation and considering it further on the basis of definition clause itself, even if there are multiple instances of advances, it cannot be labelled as money lending activities unless the conditions as found in Section 2(k) are fulfilled and the case is not covered under the exceptions.

46. In the case of *Girdhari Parmanand Motiani*(supra), two complaints were filed by Girdhari under Section 138 of the N.I. Act claiming that he advanced loan to respondent/Vinayak who issued cheque towards the repayment, however, both the cheques were dishonoured. The learned Magistrate acquitted the accused / Vinayak and accordingly, the appeals were followed before this High Court. The defence taken by Vinayak that Girdhari was carrying out money lending business illegally and he advanced loan with exorbitant rate of interest. The High Court observed that the Magistrate doubted truth in the complainant version. The accused/Vinayak claimed that he took loan of ₹30,000/- whereas the cheque in question which was kept

with the complainant at the time of loan shows the amount of ₹96,000/- which includes exorbitant rate of interest. On such submissions the learned Magistrate concluded that the version of the complainant Girdhari is not reliable and that he advanced a loan in contravention of the provisions of Bombay Money Lenders Act. While dealing with these appeal, the High Court observed in paragraph 17 that even if another view is possible, the same cannot be replaced with the view taken by the trial Court which is found to be probable on the facts and circumstances of that case. There is no discussion with regard to the provisions of the Money Lenders Act. Thus, the decision in the case of *Girdhari* (supra) is not of any help of the respondent.

47. In the case of *Anil s/o. Baburao Kataria*(supra), the original complainant approached the High Court for leave to file appeal against the judgment and order of acquittal passed by the learned Magistrate. It was observed that since the complainant was carrying on business of money lending without licence, he was not entitled to recover such amount. Similarly, it was observed that the cheque was not issued towards legally enforceable debt. This decision will not help the respondent since in that matter it was clearly admitted that Anil Kataria was doing the business as money lender without licence which is not the case in the present matter.

48. The learned Counsel Shri Lobo then placed reliance in the case of *Goa Plast Pvt. Ltd.* (supra), however, the said judgment of this Court was overruled by Supreme Court in *Goa Plast Pvt.Ltd. V/s. Shri Chico Ursula D'Souza*¹³ .

13 [2004 2 SCC 235]

49. In the case of *Harendra Ramchandra Pathak*(supra), this Court While considering the provisions of Section 378 of Cr.P.C. observed in paragraph 12 that though the High Court can re-appreciate the evidence and conclusions drawn by the trial Court and an order of acquittal can be interfered with only when the judgment is perverse. The provisions in terms as understood in law is considered in *Gamini Bala Koteswara Rao and others v/s. State of Andhra Pradesh through Secretary*¹⁴ and the same has also been relied upon in *Basalingappa*(supra). There is no much dispute about the settled proposition of law in dealing with an appeal challenging acquittal. However, when the order of the trial Court or the First Appellate Court as the case may be is found to be perverse and without considering the provisions of the Money Lenders Act in proper manner and thereby branding any one as money-lender, the High Court will be fully justified in interfering with such findings.

50. First of all paragraph 26 of the judgment of the First Appellate Court show points for determination. The first point reads thus:

1. Whether it was proved that the cheques were issued towards a legally enforceable debt?

51. At this stage, once again it is necessary to remind the Court/ Judges that framing of points in a criminal matter is not an empty formality and points for determination needs to be framed in order to answer the disputed questions effectively.

14 (2009) 10 SCC 636

52. This Court in the case of **Tanveer Khatib**(supra), observed in paragraph Nos. 12 to 15 as under:

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

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

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

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

53. Since framing of points for determination by the First Appellate Court at the time of passing of the judgment or at the most at the time of hearing

parties, assumes significance as in case the points for determination are framed in wrong manner, the reasoning is also going to affect.

54. In the present matter, the learned First Appellate Court after hearing of the arguments and after perusing the entire records of the trial Court, framed the points for determination in paragraph 26 of the impugned judgment. Thus, it presumed that the learned First Appellate Court was entirely aware of the facts as well as defence raised by the accused before the learned Magistrate and even before the First Appellate Court. Paragraph 10 of the impugned judgment shows the arguments advanced on behalf of the accused thereby categorically state that in his reply to the demand notice he stated that he repaid the entire amount along with interest by making payment on monthly basis. Thus, it is clear from the record of the trial Court as well as arguments advanced before the First Appellate Court that the accused never disputed about issuing signed cheques in favour of the complainant. Though it was his defence that he handed over such blank signed cheque as a security. It is now well settled that even a cheque duly signed by the accused for the purpose of security of any loan, attracts the provisions of Section 138 of the N.I. Act. It is also well settled that blank signed cheque issued by the accused is presumed to have been handed over to the complainant with a understanding or the condition that blank portions on the cheque would be filled up before presenting it. Hence, now in the present matter there is absolutely no dispute about the issuance of cheque by the accused in favour of the complainant. Similarly, it is proved by the complainant that he presented the cheque within its validity and the same was dishonoured for the reason "Account closed". In the above circumstances and citing the decision in the case of **Rangappa v/s.**

Sri Mohan¹⁵ in paragraph 28 of the judgment, the learned First Appellate Court failed to rely on the presumption under Section 139 of the N.I. Act in favour of the complainant and framed point No.1 in the manner stated above thereby putting burden on the complainant himself to prove that the cheque was issued towards legally enforceable debt. The point for determination ought to have been as under:

“Whether the accused succeeded in rebutting presumption under Section 139 of the N.I.Act?”

55. Be that as it may, placing reliance on the observations in the case of *Kedar Ramakant Kakodkar v/s. Auduth Timblo* in CRA No.17 of 2009 dated 05/02/2010, is completely misplaced. In **Kedar Kakodkar**(supra), a recovery suit for the sums advanced under loan agreements with interest on compounding basis @2% per month was instituted before the Civil Court at Panaji. The said suit was filed by Avdhut claiming that Kedar approached him on four occasions and sought money on loan basis and after discussion agreements were executed at the time of advancing loan. In the agreement, there was specific clause of repayment together with interest and that too on monthly basis. Kedar being the defendant filed the application under Order VII Rule 11 of C.P.C. for rejection of the plaint on the ground that Avdhut is involved in money lending business. On such premises, this Court observed that the scope of business activity as defined under Section 2 of the Goa Money Lenders Act is wide enough and accordingly allowed the said revision

15 AIR 2010 SC 1898

thereby remanding the matter to reconsider the matter in view of the observations.

56. In the present matter,, there is absolutely no material to show that the activity of giving loan by the complainant to the accused is by way of charging any interest and that too when both parties are related to each other. Each transaction has to be considered in the light of definition of “loan” as defined in Section 2(k) of Goa Money Lenders Act, 2001. Thus, the observations in paragraphs 36 to 40 of the impugned judgment are erroneous and without considering the definition of “loan” as defined in Section 2(k) of the Act of 2001. Simply because the complainant advanced loan to 4 to 5 persons and that too without charging any interest, it cannot be presumed that such activity is covered under the Money Lenders Act and, therefore, recovery of it is barred. While deciding point No.2 of the impugned judgment, the learned First Appellate Court has given undue importance to certain aspects which are not found recorded in the complaint, legal notice and the affidavit of the complainant. Similarly, much importance is given to the letter addressed by the accused dated 09/07/2014 thereby demanding both the cheques. It needs to be kept in mind that simply mentioning in a letter that the accused has repaid the entire amount without disclosing the details and without leading any evidence to that effect cannot be construed as rebuttal of the presumption. The said letter dated 09/07/2014 is so cryptic and reads thus :

“Sub: Request to return cheques given as security.

I, Rajendra A. Varik, hereby request you to return the cheques bearing Nos.031631 and 031632 drawn on Corporation Bank, Loliem Branch of Rs.1,00,000/- each issued to you as security as

the loan amount has been fully repaid to you. Huge interest has been collected by you besides overpayment has collected as repayment.

Please return the same within 15 days.”

57. First of all the accused in this letter conveniently failed to disclose when and by which mode he repaid the said loan. One thing is clear that by this letter the accused admits that he obtained loan of ₹2,00,000/- and issued cheques in repayment of it though as security. However, he is conveniently silent as to how much he paid towards the interest. Thus, such letter issued by the accused cannot be considered as evidence to rebut presumption under Section 139 of the N.I. Act.

58. The accused had an opportunity to produce evidence to show that he repaid the entire loan and that too along with alleged interest. However, he did not produce any such document along with his reply notice, at the time of cross-examination of the complainant, the Branch Manager of his own bank has examined as Aw2 and then while answering questions put to him under Section 313 of Cr.P.C.

59. It is found that the accused filed his written statement after necessary questions put to him under Section 313 of CrPC which is at Exh.-27. In this written statement, for the first time he claimed in paragraph 6 that he repaid the entire loan along with interest on instalments. However, suggestions put to the complainant with regard to such repayment together with alleged interest have been specifically denied. Thus, onus to prove which accused asserted about repayment certainly lies on the accused himself. Though he

had an opportunity to prove it by stepping into the witness box or by examining any witness regarding such repayment as alleged, he failed to avail such opportunity. In such circumstances, instead of recording any adverse inference, the contention of the accused has been accepted by putting undue burden on the complainant himself by the First Appellate Court and more so on the basis of so called letter written by the accused.

60. Having said so, the observations of the first Appellate Court in reversing the judgment of the learned Magistrate are required to be considered as perverse. Putting unnecessary burden on the complainant and not raising presumption under Section 139 of the N.I. Act needs to be considered as error in the eyes of law. Thus, such findings required interference as it cannot be construed that the view taken by the learned First Appellate Court is a plausible view in the facts and circumstances of the case in hand. At the most such view could be considered as in the nature of impossible view and thus this Court would not only be justified but duty bound to step in.

61. Having regards to the circumstances discussed above, the only option available is to quash and set aside the impugned judgment passed by the First Appellate Court and to restore the judgment and conviction awarded by the learned Magistrate.

O R D E R

1. The appeal is therefore allowed. The impugned judgment dated 09/02/2017 in Criminal Appeal No.72 of 2016 passed by the learned Additional Sessions Judge, Margao is hereby quashed and set aside.

Consequently, the judgment in Criminal Case No.29/NI/2014 passed by the learned Magistrate at Canacona dated 05/08/2016 is restored by maintaining the findings, conviction and compensation as awarded therein.

2. The parties to bear their own costs.

BHARAT P. DESHPANDE, J.

MEENA
VISHAL BHOIR

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MEENA VISHAL BHOIR
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