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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.45 OF 2017

Shri. Prakash Datta Dessai, [Expired]
S/o late Datta Dessai,
Aged about 65 years,
occupation retired Govt. Servant,
R/o H.no. 1191, Pansulem,
Canacona Goa.

Legal Representatives,
Mrs. Prajyoti Prakash Dessai,
W/o Shri. Prakash Datta Dessai,
Aged about 54 years,
occupation business,
R/o H.no. 1191, Pansulem, ... Appellant.
Canacona Goa.

Versus

Smt. Silverina Gracias,
W/o Serafiao Fermiano Gracias,
Aged about 62 years,
Occupation retired teacher,
R/o H.no. 262,
Behind St. Thereza Church,
Chaudi, ... Respondent.
Cancona Goa.

Mr Iftikhar Agha with Mr Ketan Morajkar, Advocates for the
Appellant.

Mr Zeller de Souza, Advocate for the Respondent.

CORAM: BHARAT P. DESHPANDE, J.
RESERVED ON: 02 February, 2023
PRONOUNCED ON: 09 February, 2023

JUDGMENT:

The Original Complainant through legal heir preferred present appeal thereby challenging the Judgment and Order dated 02.05.2017 passed by the learned Magistrate at Canacona in Criminal Case No.17/OA/Ni/2015 by which Respondent was acquitted for the offence punishable under Section 138 of N.I. Act.

2. Vide order dated 20.09.2017, leave to appeal was granted and the appeal was admitted.

3. The records and proceedings along with the paper-book were called.

4. Heard learned Counsel Mr Iftikhar Agha appearing with Mr Ketan Morajkar for the Appellant and learned Counsel Mr Zeller de Souza for the Respondent.

5. With the assistance of the learned Counsel appearing for the respective parties, I have perused the record and more specifically the findings in the impugned Judgment.

6. Mr Agha appearing for the Appellant would submit that the cheque issued by the Respondent is admitted including the signature and the amount. Thus, presumption arises under Section 139 of N.I. Act. In this respect, he would submit that in reply to the notice issued by the Appellant, Respondent clearly admitted of the loan but claimed in defence that such loan was repaid. He, therefore, would submit that once the financial transaction between the parties is accepted and a cheque is issued in discharge of such liability,

presumption arises in favour of Complainant. The so-called defence raised in the reply that entire loan has been repaid, needs to be proved by the Accused. In this case, according to Mr Agha, Accused failed to establish or discharge the burden regarding repayment of the loan. Once there is no such evidence, the question of rebutting of the presumption would not arise. He then would submit that the cross examination of the Complainant about his financial capacity was absolutely unnecessary once the Accused admits of obtaining loan from the Complainant. On this premise, he submitted that findings in the impugned Judgment regarding financial capacity of the Complainant is also required to be quashed and set aside as same is perverse. Once the Accused admits of obtaining loan from the Complainant, it is presumed that the Complainant is having financial capacity to lend money.

7. Mr Agha then would submit that Accused while answering statement under Section 313 Cr.PC. again admitted of taking loan and therefore, the cheque issued by the Accused carries presumption under Section 139 of N.I. Act. He would submit that the findings of the learned Trial Court suffers from fundamental flaw of appreciating the evidence and failing to consider presumption and therefore, it is fit case to interfere and reverse the Judgment by holding the Accused guilty of the offence under Section 138 of N.I. Act.

8. Per contra, Mr de Souza appearing for the Respondent would submit that first of all, the complaint shows that the loan of ₹4,00,000/- was given to the Accused against receipt. No such receipt is produced. Similarly, the Original Complainant failed to step into

the witness box and in his place, his wife, as power of attorney, deposed. From her cross examination, it is clear that she was not aware of all the facts and therefore, Accused succeeded in rebutting presumption of preponderance of probabilities. He then submitted that reply to the legal notice has to be looked into as a whole wherein Accused clearly denied of taking loan of ₹4,00,000/- from the Complainant. Mr de Souza then submitted that PW1 cannot be believed as she failed to produce the relevant documents showing the capacity of the Complainant to lend money. Complainant suppressed material facts and approached the Court with unclean hands. Complainant had no financial capacity and there is no evidence to show transactions between the Complainant and the Accused.

9. Mr Agha placed reliance in the case of ***Rohitbhai Jivanlal Patel vs. State of Gujarat and Anr.***¹,

10. Mr de Souza placed reliance on the following decisions:-

- a. ***Basalingappa vs. Mudibasappa***², and
- b. ***Anss Rajashekar vs. Augustus Jeba Ananth***³.

11. Rival contentions fall for the determination of this Court as under:-

1. Whether Respondent/Accused succeeded in rebutting presumption under Section 139 of N.I. Act.

1 (2019) 18 SCC 106

2 (2019) 5 SCC 418

3 (2020) 15 SCC 348

12. Before adverting to the facts of the matter, the points for determination framed by the learned Magistrate in para 5 of the impugned Judgment needs to be looked into. The Code of Criminal Procedure provides that points for determination are required to be framed at the time of passing of the judgment. Section 354 of Cr.PC. deals with language and contents of the judgment. Sub-Section 1(b) postulates that the judgment shall contain the point or points for determination, decision therein, and the reasons for the decision.

13. Therefore, as per the Code of Criminal procedure, while pronouncing judgment, points for determination are required to be framed and reasons are required to be disclosed on each point. This means that after the entire trial is over including the arguments of both the sides, the Magistrate/Judge is necessarily required to frame points for determination while pronouncing judgment. This is the stage where entire material including the defence is available on record for the purpose of framing correct and appropriate points for determination of the dispute.

14. The purpose behind such procedure for framing of correct and accurate points for determination is to understand the matter on each aspect and thereafter to give reasons on each point separately, or together if connected with each other.

15. Specifically in the cases where statutory presumptions are available in favour of the Prosecution/Complainant, the Magistrate/Judge needs to be careful while framing such points for determination. Incorrect framing of points for determination unnecessarily causes distraction from the main issue and creates

confusion. The Magistrate/Judge, therefore, must be acquainted thoroughly with the facts, evidence and the law involved in the matter together with arguments advanced by both the sides. I say so because when there are statutory presumptions, the burden has to be properly fixed on the respective party either to prove or disprove a particular fact.

16. In the present matter, from the material on record, it was crystal clear that there was no dispute raised by the Accused about issuance of cheque, the handwriting, the signature appearing on it as well as the account maintained with the bank. Similarly, there is sufficient material to show that such cheque was presented for encashment within its validity period, however, it was returned unpaid for the reason “Funds Insufficient” in the account maintained by the banker of the Accused. It is also not in dispute that during the specified period as provided under Section 138 of N.I. Act, legal notice was issued to the Accused which she received. There is also reply filed by the Accused to such legal notice wherein, though, there is denial regarding such transaction, a specific statement is made in para 3 stating that Accused borrowed ₹5,00,000/- from the Complainant with the agreement that such loan will be repaid with interest. Accused took specific stand that entire loan of ₹5,00,000/- was repaid along with interest. It was further claimed that the Accused has paid the entire loan together with interest and therefore, she is not liable to pay any further amount.

17. While answering questions put to the Accused under Section 313 Cr.P.C., Question no. 29 and answer given to it reads thus:-

“Q.29. What do you have to say about the complainant's case?”

Ans: I had taken loan of Rs.5,00,000/- from Prajoti Dessai and she had taken 3 blank cheques from me. I repaid the loan, but cheques were not returned to me. The present case is filed by Mr. Prakash Desai misusing the blank cheques given to Prajyothi. She still has two more cheques.”

18. The case was filed by Prakash Datta Dessai and Prajyoti is his wife. Admittedly, said Prakash expired during the pendency of the matter. Prajyoti, being the power of attorney holder of Prakash/Complainant, stepped into the witness box as PW1 and she was cross-examined at length. Interestingly, in reply to legal notice, accused stated that loan was taken from Prakash and repaid with interest. Said reply did not state that loan was taken from Prajyoti.

19. From this material, it was necessary for the learned Magistrate to frame points for determination correctly, and more so, by considering presumption under Section 139 of N.I. Act.

20. Once Accused admits to issuance of cheque towards discharge of liability, which is found in the present case from the reply as well as from the answer given to Question no.29 by the Accused, putting burden on the Complainant to prove that such cheque was issued by the Accused towards legally enforceable debt and thereafter answering against the Complainant, was wholly unwarranted and against the presumption itself. It shows that the learned Magistrate did not even look into the presumption arising in favour of

Complainant and as settled in catena of decisions of the Supreme Court.

21. In the case of ***Rangappa vs. Sri Mohan***⁴, the Apex Court in para Nos.26 and 27 observed thus:-

“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 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.”

4 (2010) 11 SCC 441

22. Thus, instead of putting burden on the Complainant to prove that cheque issued by the Accused was towards legally enforceable debt, as found in Point No.1 appearing in para No.5 of the impugned Judgment, the learned Magistrate ought to have given effect to the mandate of law laid down by the Apex Court by putting burden on the Accused by framing the Point No.1 as to whether Accused succeeded in rebutting the presumption under Section 139 of the N.I. Act.

23. By not doing so, the learned Magistrate has committed a serious error by putting unnecessary burden on the Complainant and thereafter discussing it in the reasoning part even though the Magistrate was bound to presume in favour of the Complainant. Such error cannot be just brushed aside. It shows that the learned Magistrate failed to consider the facts, evidence and the arguments of the respective parties in proper perspective. Since the burden was unnecessarily put on the Complainant, the reasoning also suffers as the learned Magistrate considered that such burden has not been discharged by the Complainant though she was bound by law laid down by the Apex Court to presume that such cheque was issued towards legally enforceable debt.

24. Though in the Judgment, the learned Magistrate has referred to Section 139 of N.I. Act and the presumption arising out of it, the entire reasoning clearly goes to show that the burden was specifically put on the Complainant himself to establish his case, which is again evident from para no.17 wherein the learned Magistrate observed thus:-

“This takes me to consider as to whether the complainant has established its case.”

25. It further shows that unnecessary importance was given to the contentions raised in the cross-examination by the Accused thereby challenging the capacity of the Complainant to lend money. The learned Magistrate discussed this aspect in great detail but failed to consider the admission on the part of Accused firstly in the reply notice and secondly while answering Question No.29 under Section 313 of Cr.P.C. It further shows that the learned Magistrate distracted from the facts and the evidence produced on record and unnecessarily considered the material which is clearly against the admission of the Accused. It is well settled proposition of law that admission is the best evidence unless it is proved that such admission is obtained either by fraud, coercion, threat or otherwise.

26. In the present matter and before filing of the complaint, legal notice was sent to the Accused demanding the amount mentioned in the cheque on the ground that the cheque in question was issued towards legally recoverable debt and on presenting it, returned unpaid. The legal notice sent by the Complainant is produced at Exh.34 dated 06.05.2015. In the legal notice, it was specifically mentioned that Accused took loan of ₹4,00,000/- from the Complainant and issued cheque bearing No.097476 dated 15.01.2015 for the entire repayment of said loan of ₹4,00,000/-. Complainant presented the said cheque within time, however, it was returned unpaid with the endorsement “funds insufficient”. Complainant received memo of return of cheque dated 13.04.2015

and therefore, notice was issued demanding amount mentioned in the cheque, within 15 days from the receipt of such notice.

27. The postal acknowledgement and the receipt show that Accused received such notice and then vide her reply dated 16.05.2015, she contended in para Nos. 3 to 6 as under:-

“3. That at the time of borrowing an amount from you Rs 5,00,000/-, it was agreed between us that said amount will be return to you with an interest on the said above amount. Further it was also stated that I have paid you an entire amount of Rs. 13,50,000/-. The said amount is calculated along with the interest amount which was mutually agreed between both of us.

4. That the said amount which was duly received by you are combined of strict proof with me along with the witnesses. I hereby deny that the said Cheque issued through Corporation bank was an amount of Rs. 3,00,000/- paid thereby to you is not dishonoured as “Insufficient Funds” as per my knowledge.

5. That I have paid you an appropriate amount along with the interest amount and I am not liable to pay you any further amount. That the present notice is an attempt from you to extract money from me which I m not at all liable to pay to you and also I have all the proofs of the payments paid to you which I have noted in my diary.

6. That please take note if you still wish to file case against me, the same shall be defended by me and the cost and consequences of which you will have to pay.”

28. Similarly, answer of the Accused to Question No.29 is already quoted above. A co-joint reading of the above reply from para Nos.3 to 6 and answer of the Accused to Question No.29 would clearly suggest of admission on the part of Accused of receiving money from

the Complainant as a loan. Surprisingly, the Accused claimed that she borrowed an amount of ₹5,00,000/- and not ₹4,00,000/- from the Complainant. The quantum is immaterial but the fact remains that Accused admitted of receiving ₹5,00,000/- as a loan from the Complainant. This admission clearly goes to show that Complainant was having capacity to lend money to the Accused. The admission itself proves this fact. Therefore, when the power of attorney of the Complainant stepped into the witness box, the questions regarding capacity of the Complainant to lend money were asked. To my mind, such cross-examination could have been avoided by the learned Trial Court if the Magistrate would have been vigilant with the facts and the circumstances of the case. Similar is the case with the findings on Point No.1 wherein there is unnecessary discussion with regard to capacity of the Complainant to lend money. Once the Accused admits of receiving loan from the Complainant, subsequently questioning his capacity to pay such amount would never arise as a defence. Such cross-examination could have been curtailed by pointing out the admission of the Accused in the legal notice. Such unnecessary cross-examination leads to further confusion which is reflected in the impugned Judgment as learned Magistrate has not even considered the admission of the Accused in the reply as well as while answering Question No.29.

29. The learned Trial Court observed in para No.37 of the impugned Judgment that it is quite improbable that the deceased Complainant could have raised an amount of ₹4,00,000/- and lent it to the Accused without there being any document about the

transaction accepting the cheque. This observation of the learned Trial Court is clearly perverse as it goes against the admission of the Accused as found in the reply notice as well as the answer to Question No.29. Thus, the findings of the learned Trial Court on Point No.1 are necessarily to be considered as perverse and not following the settled propositions of law by taking into consideration presumption arising in favour of Complainant under Section 139 of N.I. Act.

30. At one stage, the learned Magistrate considered that Complainant has failed to prove that he lent money to the Accused and accordingly answered Point No.1 in negative. However, on the other side, the learned Magistrate also observed that the Accused successfully discharged the burden under Section 139 of N.I. Act. These observations in the impugned Judgment are contrary to each other. If the Complainant failed to discharge the initial burden, there was no question of bringing the presumption under Section 139 of N.I. Act into effect. It is settled proposition of law that presumption under Section 139 of N.I. Act is required to be drawn mandatorily by the Magistrate where the fact of signature on the cheque is admitted. However, it is also settled that such presumption is a rebuttable presumption and the nature and the onus on the Accused is to raise probable defence. Therefore, when the signature on the cheque is admitted by the Accused, the Magistrate is bound to raise presumption under Section 139 of N.I. Act by presuming that such cheque was issued towards legally enforceable debt. The said presumption would therefore shift the onus on the Accused to prove,

on the preponderance of probabilities, that he/she is not liable to pay such debt. One of such ground could be raised by challenging the capacity of the Complainant to lend money. However, when there is clear admission on the part of the Accused of receiving even higher amount mentioned in the cheque as loan from the Complainant, the challenge regarding capacity of the Complainant to lend money would not arise. Such challenge could have been curtailed if the Magistrate remained vigilant of the facts of each case.

31. Be that as it may, the contention raised during cross-examination of the power of attorney of Complainant regarding so called capacity of the Complainant to lend money, to my mind, was wholly unwarranted in view of the clear admission of the Accused of receiving the money from the Complainant which was even more than the amount mentioned in the cheque.

32. The specific defence raised in the reply notice as well as during cross-examination of PW1 clearly goes to show that Accused repaid entire loan along with interest. However, there is absolutely no document produced to prove such defence. The cross-examination of PW1 clearly shows that she denied all such suggestions put to her about repayment. In fact, the Accused in her reply notice claimed that she had all the proofs of repayment of the said loan along with interest. Such statement is found in para No.5 of the reply of the Accused as quoted earlier. No such proof or the diary as mentioned in para No.5 of her reply was ever produced. Admittedly, Accused did not step into the witness box. The suggestions put to the witness of

the Complainant carries no meaning when the same were denied specifically by the witness.

33. In the case of *Basalingappa* (supra), the Hon'ble Apex Court after considering all earlier decisions, summarized the principles in para No.25 which reads thus:-

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

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

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

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

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

25.5. It is not necessary for the accused to come in the witness box to support his defence.”

34. It therefore shows that once execution of cheque is admitted by the Accused, presumption under Section 139 of the Act is mandatorily required to be drawn that such cheque was issued for discharge of any debt or liability. In the present matter, the learned Magistrate has failed in its duty to draw such presumption which is evident from the Point No.1 framed by putting burden on the Complainant to prove that such cheque was issued towards legally enforceable debt and further discussing about such evidence which was otherwise against admission of the Accused of receiving money as loan from the Complainant.

35. In the case of *Basalingappa* (supra), there was sufficient evidence to probabilise the defence thereby successfully rebutting presumption on preponderance of probabilities, which is not found in the present case. Therefore, when the principles as laid down in para 25 as quoted above, the said decision is distinguishable on facts and not helpful to the Accused.

36. In the case of *Anss Rajashekar* (supra), the appellant/accused therein specifically denied in the reply notice about any loan transaction and succeeded in rebutting presumption during the trial on preponderance of probabilities. On that count, the appellant/accused was acquitted by the Apex Court. The facts in that case are totally separate and distinct from the matter in hand as the defence in that case was considered as probable for the purpose of rebutting presumption under Section 139 of N.I. Act. The matter in hand clearly goes to show that first of all Accused admitted of receiving loan from the Complainant and then claimed that she

repaid the entire loan, without producing any material towards such repayment. Accused failed to step into the witness box to prove her defence. Therefore, only creation of doubt would not be sufficient enough to rebut the presumption under Section 139 of N.I. Act.

37. In the case of *Rohitbhai Jivanlal Patel* (supra), the Apex Court has observed in para Nos.18 and 19 as under:-

“18. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused. The aspect relevant for consideration had been as to whether the appellant-accused has brought on record such facts/material/circumstances which could be of a reasonably probable defence.

19. In order to discharge his burden, the accused put forward the defence that in fact, he had had the monetary transaction with the said Shri Jagdishbhai and not with the complainant. In view of such a plea of the accused-appellant, the question for consideration is as to whether the appellant-accused has shown a reasonable probability of existence of any transaction with Shri Jagdishbhai? In this regard, significant it is to notice that apart from making certain suggestions in the cross-

examination, the appellant-accused has not adduced any documentary evidence to satisfy even primarily that there had been some monetary transaction of himself with Shri Jagdishbhai. Of course, one of the allegations of the appellant is that the said stamp paper was given to Shri Jagdishbhai and another factor relied upon is that Shri Jagdishbhai had signed on the stamp paper in question and not the complainant.

19.1. We have examined the statement of Shri Jagdishbhai as also the said writing on stamp papers and are unable to find any substance in the suggestions made on behalf of the accused-appellant.”

38. While concluding, the Apex Court has observed in para Nos.21 and 22 as under:-

“21. On perusing the order of the trial court, it is noticed that the trial court proceeded to pass the order of acquittal on the mere ground of 'creation of doubt'. We are of the considered view that the trial court appears to have proceeded on a misplaced assumption that by mere denial or mere creation of doubt, the appellant had successfully rebutted the presumption as envisaged by Section 139 of the NI Act. In the scheme of the NI Act, mere creation of doubt is not sufficient.

22. The result of discussion in the foregoing paragraphs is that the major considerations on which the trial court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the trial court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the trial court and after examining the evidence on record as a whole, found that

the findings of the trial court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter.”

39. The above observations of the Apex Court are squarely applicable to the facts and circumstances of the matter in hand. Once Accused admits of financial transaction between her and the Complainant, issuance of cheque has to be considered as towards discharge of legally enforceable debt. The defence of the Accused of alleged repayment of the entire loan must be adduced by the Accused unless it is specifically admitted orally or by documentary evidence by the Complainant. In the present matter, Accused by only giving suggestions to the Complainant, tried to claim rebuttal of the presumption, which is uncalled for. Therefore, findings of the learned Trial Court by acquitting the Accused are considered as perverse and need interference.

40. Appeal therefore must succeed. The Judgment and acquittal passed by learned Trial Court necessarily requires to be quashed and set aside. Evidence brought on record shows that presumption under Section 139 of N.I. Act is in favour of Complainant. The Accused failed to rebut such presumption and therefore, Accused is found guilty for the offence punishable under Section 138 of N.I. Act. I, therefore, hold Accused guilty for the offence punishable under Section 138 of N.I. Act.

41. Hence, the order:-

a. The appeal stands allowed.

- b. Impugned Judgment and acquittal is quashed and set aside.
- c. The Accused is found guilty for the offences punishable under Section 138 of N.I. Act.
- d. The Accused is therefore sentenced under Section 138 of N.I. Act to suffer imprisonment of 15 days and to pay compensation of ₹8,00,000/- and in default to undergo simple imprisonment for 15 days.
- e. If the compensation is paid, the same shall be handed over to the Complainant.
- f. The appellant-accused shall surrender before the trial Court within a period of 15 days from today to suffer the sentence. If the appellant failed to surrender, the trial Court shall take necessary steps to implement the order.
- g. Parties shall bear their own cost.

BHARAT P. DESHPANDE, J.