IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1770 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE NISHA M. THAKORE

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

==========

PATEL BABUBHAI NARSINHBHAI
Versus
STATE OF GUJARAT & 1 other(s)

==========

Appearance:
MR TUSHAR CHAUDHARY(5316) for the Appellant(s) No. 1
MR C B UPADHYAYA(3508) for the Opponent(s)/Respondent(s) No. 2
MR. YOGENDRA THAKORE(3975) for the Opponent(s)/Respondent(s) No. 2
MS SHRUTI PATHAK ADDL. PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 1

==========

CORAM:**HONOURABLE MS. JUSTICE NISHA M. THAKORE**

Date : 29/04/2022

ORAL JUDGMENT

1. This Appeal is preferred under Section 378(4) of the Code of Criminal Procedure, 1973, (for short “the Code”) against the judgment and order of acquittal dated 08.09.2017 passed by the learned Judicial Magistrate First Class, Vadnagar, in Criminal Case No.104 of 2013 filed by the appellant – original complainant for the offence under Section 138 of the Negotiable Instruments

Act, 1881 (for short “N.I. Act, 1881”) acquitting the respondent No.2 – original accused.

2. It is the case of the appellant – original complainant that the accused herein had approached him for borrowing an amount of Rs.1 Lakh for the business purpose. Since the complainant had known the accused, decided to lend the amount of Rs.1 Lakh for which he had withdrawn an amount of Rs.1 Lakh from Dena Bank, Shipor Branch on 29.09.2011 and handed over the said amount to the accused at his native place Karsanpura. It is the case of the appellant that the accused had agreed to repay such amount within a period of one year, however, inspite of the same, the accused failed to repay the amount. Ultimately, on 10.01.2013, the accused had handed the cheque bearing No.086731 of State Bank of India, Thakkarbapanagar Branch, for an amount of Rs.1 Lakh on 10.01.2013. The appellant – original complainant deposited the said cheque in his bank account, but the said cheque was not realized and had returned back on 15.01.2013 with an endorsement “insufficient funds” In such circumstances, the appellant issued a legal notice to the respondent accused through his Advocate on 04.02.2013 by RPAD Post and the said notice was served upon the accused on 07.02.2013 as reflected from the acknowledgment slip signed by one of the family member of the accused. The said notice though being duly served on respondent – accused, however, did not reply to such legal notice nor he paid the cheque amount to the appellant – complainant. In such circumstances, the appellant – complainant was constrained to file the criminal complaint against the respondent – accused, which came to be registered as Criminal Case No.104 of 2013 before the learned Judicial Magistrate First Class, Vadnagar.

3. Upon examination of the complainant and on perusal of the complaint, the learned Judicial Magistrate First Class, Vadnagar, issued summons under Section 204 of the Code thereby calling upon the accused to appear before the Court. The respondent – accused had entered appearance through his Advocate and his plea came to be recorded vide Exhibit 12. Ultimately, Criminal Case was conducted as summons triable case by the learned Judicial Magistrate First Class, Vadnagar. The charge came to be framed against the respondent – accused.

4. During the course of trial, the original complainant – appellant has deposed before the trial Court vide Exhibit 16. Various documentary evidence, which include the original cheque (Exhibit 18), Memo issued by State Bank of India, Ahmedabad (Exhibit 19), original legal notice served upon respondent – accused (Exhibit 20), Postal receipt (Exhibit 21) and RPAD acknowledgment slip (Exhibit 22) were admitted as evidence. Further statement of respondent – accused under Section 313 of Code was recorded. Upon appreciation of the aforesaid oral as well as documentary evidence, the trial Court dismissed the Criminal Case mainly on the ground that the complainant has failed to discharge the burden of proof to attract the offence under Section 138 of the N.I. Act, 1881 vide judgment and order dated 08.09.2017.

5. Being aggrieved and dissatisfied with the aforesaid judgment and order of acquittal dated 08.09.2017 passed by the learned Principal Judicial Magistrate First Class, Vadnagar, in Criminal Case No.104 of 2013, the original complainant has approached this Court by way of present Appeal.

6. I have heard Mr. Tushar Chaudhary, learned advocate for the appellant, Mr. Yogendra Thakore, learned advocate for the respondent No.2 – original accused and Ms. Shruti Pathak, learned APP for the respondent – State.

7. Mr. Chaudhary has drawn attention of this Court to the findings and reasons recorded by the learned Judicial Magistrate First Class while dismissing the Criminal Case. He submitted that sufficient evidence has been brought on record to bring home the charge of offence under Section 138 of the NI Act to convict the respondent No.2 – original accused. In support of his submission, learned advocate for the appellant has drawn attention of this Court to the various documentary evidence. He further relied upon Sections 118 and 139 of the N.I. Act. He submitted that the Act itself envisages raising of presumption in favour of the complainant whereas the execution of cheque is not disputed. He submitted that once the cheque relates to the account of the accused and he accepts and admits signature on the said cheque, then initial presumption as contemplated under Section 139 of the N.I. Act has to be raised by the Court in favour of the complainant. He submitted that such presumption provided under the Act is not a general presumption but mandatory presumption though the accused is entitled to rebut such presumption. He submitted that the learned trial Court had recorded incorrect findings as reflected in para 12 at page 14 of the impugned judgment and order of acquittal. Thus, the impugned judgment and order is required to be quashed and set aside on the ground of perversity. He further submitted that the learned trial Judge has ignored the material evidence placed on record and has failed to properly appreciate the same. He submitted that consistently it is the case of the complainant all throughout that the amount was borrowed by the

accused for the business purpose. Specific details as regards the date of the cheque from which such amount was withdrawn and the place where the said amount has been handed over to the accused has been stated. He further submitted that no further defence has been put forth except the statement under Section 313. In such circumstances, learned trial Judge committed error in assuming preponderance of evidence being satisfied by the respondent accused. The trial Court committed further error by shifting burden of proof by calling upon the original complainant to produce the evidence to establish the offence committed by the accused. Mr. Chaudhary therefore, prays to quash and set aside the impugned judgment and order.

8. On the other hand, this appeal is vehemently objected by Mr. Yogendra Thakore, the learned advocate for the respondent No.2 – original accused. Mr. Thakore has drawn attention of this Court to the findings and reasons recorded by the trial Court. He further invited attention of this Court to the deposition of the original complainant recorded before the Court below at Exhibit 16. Mr. Thakore has drawn attention to the examination-in-chief as well as cross-examination of the original complainant. He emphasized on the admission of the original complainant as brought on record in the form of cross-examination, more particularly, where the original complainant himself has categorically admitted that he is not aware about the date and place of the transaction. The original complainant has even failed to prove for having given details about presence of any witness in whose presence, such transaction had taken place.

9. Mr. Thakore has relied upon the decision of the Supreme Court in the case of ***Basalingappa Vs. Mudibasappa*** reported in

2019 (5) SCC 418. He referred to and relied upon the principles enumerated by the Hon'ble Supreme Court in para 23. By referring the said principles, he has submitted that the accused could not adduce direct evidence to prove that the cheque was not supported by consideration and that there was no debt or liability to be discharged by him, the accused can always rely on evidence brought on record by the parties to raise probable defence. In the facts of the case, the trial Court has rightly not insisted and has accepted the defence put forward by the accused raising probability as regards the non-existence of consideration. He further submitted that the presumption raised by the complainant in support of Sections 118 and 139 of the N.I. Act came to be discharged by the respondent – original accused upon cross-examination of the complainant. He therefore, submitted that as held by the Supreme Court, the accused even in absence of having entered the witness box has been successfully to raise "preponderance of probability" and upon appreciation of such evidence, the learned trial Court has rightly shifted the burden of proof upon the complainant to establish the factum of consideration as well as existence of debt or liability by producing substantial evidence. He, therefore, submitted that the error of fact or law is committed by the learned trial Court in recording the acquittal of the original accused. He, therefore, prayed to not entertain the present appeal.

10. The only question, which falls for consideration of this Court is whether in the given facts and circumstances of the case, the learned trial Court has committed any error of fact or law which is required to be interfered with in exercise of power conferred under Section 378(4) of Code of Criminal Procedure, 1973. I have carefully considered the submissions of learned advocates for the

parties and have perused the Record and Proceedings of the learned trial Court and has also examined the impugned judgment and order of acquittal passed by the learned trial Court.

11. Before adverting to the facts of the case and evidence on record, as per the scheme of the Act obviously the legal principle of presumption is required to be drawn under Section 118 and 139 of the N.I. Act. Such presumption is rebuttal by the accused. It is further evident that Chapter XIII of the Act relates to "Special Rule of Evidence". Section 118 provides for presumption as to negotiable instruments. Section 118 reads as under:

> *"118. Presumptions as to negotiable instruments. Until the contrary is proved, the following presumptions shall be made:*
> *(a) of consideration that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;*
>
> *(b) as to date that every negotiable instrument bearing a date was made or drawn on such date;"*

Similarly the presumption is also provided under Section 139 of the N.I. Act. Section 139 of the N.I. Act provides for presumption in favour of the holder. The same reads as under:

> *"139. Presumption in favour of holder. 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."*

12. The Supreme Court in the case of ***Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Pyarelal***,

reported in ***(1999) 3 SCC 35*** had an occasion to consider the Section 118 (a) of the N.I. Act. The Supreme Court held that once the execution of promissory note is admitted, the presumption under Section 118(a) of the N.I. Act, would arise that "it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence." Section 139 of the N.I. Act raises presumption that the instrument is drawn against legally enforceable debt or liability. This presumption is alway of rebuttal in nature and onus is on the accused to raise a probable defence. In series of decisions of this Court as well as Hon'ble Supreme Court, it has been held that both the aforesaid presumption mandated under Section 118 and Section 139 of the N.I. Act, are the examples of reverse onus. As held by the Hon'ble Supreme Court, in absence of compelling justification as per reverse onus clauses imposes evidentary burden upon the accused which cannot be termed as persuasive burden. Thus, when the accused has to rebut 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 yet creates doubt about existence of legally enforceable debt or liability, the prosecution fails in absence of any supporting or substantial evidence brought on record by the complainant. It is also settled legal position that to raise such "preponderance of probabilities", the accuse may not even enter the witness box and relying upon the materials submitted by the complainant or as may be available on record can raise such defence and it is considerable that the

accused may not need to adduce the separate evidence of his or her own.

13. On bare reading of Section 138 of the N.I. Act, before a person can be prosecuted, the complainant is required to satisfy the following conditions.

(i) That the cheque is drawn by a person and the account is maintained with bank.
(ii) for the payment of any amount for money of any person involved whole or in part of any debt or other liability.
(iii) The said cheque is returned by bank anybody either because of amount of money standing to credit to with account is sufficient to honour cheque or that it exists the amount.

14. In view of the aforesaid requirement, the complainant is expected to satisfy the Court that the accused is a person, who is a signatory to the cheque and the cheque is drawn by that person on the account maintained by him and the accused is under obligation to discharge any whole or other liability and the said cheque has been returned by the bank. On such requirement being satisfied, such person is stated to have committed an offence under Section 138 of the N.I. Act.

15. Now so far as the facts of the present case are concerned, this Court has carefully examined “preponderance of probabilities” raised by the respondent – original accused under the guise of cross-examination of the original complainant. In the cross-

examination, the original complainant has specifically questioned the details related to transaction with the accused as reflected in the complaint to which the complainant had admitted that he has not mentioned the date, time of transaction in the complaint. He further admits in his cross-examination that he has not given details in whose presence such transaction had taken place. Though in his cross-examination, he clarifies that the transaction had taken place in the year 2011 and the complaint was filed in the year 2013. In his cross-examination, the complainant has denied that the cheques were accepted by way of security. He further denies that the details of amount were entered by him in cheque. He further denies that on having rewritten the amount in cheque. He also denies the fact put by the accused as regards such fact of rewritten being not clarified in legal notice served upon him. In cross-examination, the complainant was subjected to specific question as regards the alleged land transaction of village: Shipor entered upon by the complainant with the accused. He denies of having purchased the land at Shipor and has also denied the fact of consideration being fixed for an amount of Rs.7.50 Lakh. He further denies that such amount was given to the accused by cheque. He further denies that because of dispute amongst brothers, the accused has refunded the Bana amount of Rs.1.28 Lakh. He has cross-examined the complainant on the aspect of financial capacity of the complainant whereby the complainant had responded that he is a retired School teacher and is aware about the Income Tax laws. He further denies about filing of the complaint before Metro Court, Ahmedabad in respect of second cheque.

16. Upon close evaluation of the cross-examination of the complainant, the question which is required to be examined is whether any probable defence has been raised by the accused. Upon comparison of the contents of the documentary evidence which has come on record in nature of extract of cheque, legal notice of the original complainant, this Court finds that there is contradiction in what was initially stated by the complainant in his complaint and in his cross-examination regarding the date on which the loan was given which he has been unable to satisfactorily explain. On the other hand, this Court finds that a probable defence has come record on as regards the land transaction. It is true as submitted by the learned advocate for the complainant that no direct evidence has been led by the accused to support the probable defence of land transaction being entered upon with the complainant. However, this Court cannot ignore the fact which has emerged on record, more particularly, the manner in which the complainant had lodged the complaint in the year 2014 before the Metro Court, Ahmedabad, which had been reported to have resolved by way of compromise. The gist of the complaint in the said case was with regard to the financial help being sought by the accused from the complainant for an amount of Rs.50,000/- claimed to have been given by the complainant to the accused on 31.07.2014. Copy of the said cheque has come on record vide Exhibit 39. There is one more aspect of the matter, which also needs to be considered. During the cross-examination of the complainant, the accused has specifically questioned the complainant about his financial capacity to which the complainant has admitted that he is a retired school teacher.

17. In view of the aforesaid circumstances which has emerged on record, I am of the view that the accused has successfully raised “preponderance of probabilities” for which the standard of proof may not be necessary. The probable defence on behalf of the accused has emerged on record whereby the accused has been successful in shifting the burden on the complainant to prove his case by leading substantial evidence.

18. The trial Court while recording the findings and the reasoning has noted that the accused has been successful in raising the defence in the form of cross-examination of the complainant, which has led to shift the burden of the complainant to prove his case. On the other hand, the trial Court has recorded findings that the complainant has failed to discharge the burden to prove his case, more particularly, as regards the amount of disputed cheque being part of debt or liability of the accused. This Court agrees with the findings and reasons of the trial Court while recording the order of acquittal of the respondent accused. There is no perversity or any error of fact or law being committed by the trial Court while recording such findings and reasons leading to acquittal of the accused.

19. Even otherwise, the presumption of law as provided under Sections 118 and 139 of the N.I. Act by itself cannot be considered as substantial piece of evidence to convict the accused for the offence punishable under Section 138 of the N.I. Act. At the most, by virtue of presumption as provided under Section 118(a) of the N.I. Act, the presumption as regards the cheque being issued for consideration is provided. Thus, the extract of cheque having been

brought on record vide Exhibit 18 raises presumption as regards the consideration of amount of Rs.1 Lakh but at the same time, this Court cannot ignore the cross-examination of the complainant whereby the accused has successfully raised “preponderance of probabilities” of such amount being forming part of last transaction.

20. For the foregoing reasons, this Court finds no error with the trial Court findings which can be termed as perverse when such findings are based on appreciation of evidence as emerged on record from the cross-examination of the complainant. It is settled legal position by now that it is open for the High Court to reappraise the evidence and conclusion drawn by the trial Court. However, this Court finds that this is a case where judgment of the trial Court cannot be said to be perverse. Thus, I am of the view that the judgment and order of acquittal passed by the learned trial Court is required to be upheld and appeal is accordingly ordered as dismissed.

R & P, if called, be sent back to the concerned trial Court.

(NISHA M. THAKORE,J)

Y.N. VYAS