

Sri. V. Arun Kumar vs Sri. Vinod Krishnamurthy on 5 October, 2023

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NC: 2023:KHC:45627
CRL.RP No. 834 of 2023
C/W CRL.RP No. 1121 of 2023

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 5TH DAY OF OCTOBER, 2023

BEFORE
THE HON'BLE MRS JUSTICE M G UMA

CRIMINAL REVISION PETITION NO. 834 OF 2023
C/W
CRIMINAL REVISION PETITION NO. 1121 OF 2023

IN CRL.RP.NO. 834/2023
BETWEEN:
SRI. V. ARUN KUMAR
S/O. B.N. VAJRAVELU
AGED ABOUT 53 YEARS
R/AT NO. 839, 5TH BLOCK
17TH "F" MAIN, RAJAJINAGAR
BENGALURU - 560 010
ADDITIONAL ADDRESS:
R/AT: NO.1048, 2ND FLOOR
18TH "C" MAIN, 5TH BLOCK
RAJAJINAGAR
BENGALURU - 560 010.

...PETITIONER

Digitally signed
by PAVITHRA N

(BY SRI: ASHOK HARANAHALLI - SENIOR COUNSEL, FOR
SRI: AMAR CORREA, ADVOCATE)

Location: high
court of
karnataka

AND:
SRI. VINOD KRISHNAMURTHY
S/O. KRISHNAMURTHY
AGED ABOUT 43 YEARS
R/AT: NO 714, 3RD BLOCK
3RD STAGE, 8TH "D" MAIN
BASAVESHWARANAGARA
BENGALURU - 560 079.

...RESPONDENT

(BY SRI: ANANT MANDGI - SENIOR COUNSEL FOR
SRI: CHETHAN .B. ADVOCATE)

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CRL.RP No. 834 of 2023

C/W CRL.RP No. 1121 of 2023

THIS CRIMINAL REVISION PETITION IS FILED UNDER SECTION 397 READ WITH SECTION 401 CR.P.C PRAYING TO SET ASIDE THE JUDGMENT AND ORDER DATED 30.05.2023 IN CRL.A.NO.295/2022 PASSED BY THE LXVIII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE (CCH-69), BENGALURU THEREBY DISMISSING THE SAID APPEAL FILED BY THE PETITIONER AND CONFIRMING THE JUDGMENT OF CONVICTION PASSED BY THE XXIII ADDL. C.M.M., BENGALURU IN C.C.NO.22753/2016 DATED 09.02.2022, THEREBY SENTENCING THE ACCUSED TO PAY FINE OF RS.73,50,000/- FOR THE OFFENCE PUNISHABLE UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, VIDE ANNEXURE- A AND B AND ACQUIT THE PETITIONER/ACCUSED OR ALTERNATIVELY REMAND BACK THE MATTER IN C.C.NO.22753/2016 TO THE FILE OF XXIII ADDL.C.M.M., BENGALURU FOR HOLDING TRIAL.

IN CRL.RP.NO. 1121/2023

BETWEEN:

SRI. VINOD KRISHNAMURTHY

AGED ABOUT 43 YEARS

S/O. MR. KRISHNAMURTHY

OCCUPATION; BUSINESS

RESIDENT OF NO 714, 3RD BLOCK

3RD STAGE, 8TH "D" MAIN ROAD

BASAVESHWARANAGARA

BENGALURU - 560 079.

...PETITIONER

(BY SRI: ANANT MANDGI - SENIOR COUNSEL FOR

SRI: CHETHAN .B. ADVOCATE)

AND:

MR. V. ARUN KUMAR

S/O. MR. B.N. VAJRVELU

AGED ABOUT 49 YEARS

RESIDENT OF NO. 839, 5TH BLOCK

17TH "F" MAIN, RAJAJINAGAR

BENGALURU - 560 010

ADDITIONAL ADDRESS

NO 1048, 2ND FLOOR

18TH "C" MAIN, 5TH BLOCK

RAJAJINAGAR, BENGALURU - 560 010

...RESPONDENT

(BY SRI: ASHOK HARANAHALLI - SENIOR COUNSEL, FOR

SRI: AMAR CORREA, ADVOCATE)

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NC: 2023:KHC:45627

THIS CRIMINAL REVISION PETITION IS FILED UNDER SECTION 397 READ WITH SECTION 401 CR.P.C PRAYING TO SET ASIDE THE JUDGMENT AND ORDER DATED 30.05.2023 PASSED IN CRL.A.NO.1128/2022 BY THE LEARNED LXVIII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU CITY (CCH-69); MODIFY AND ENHANCE THE FINE AMOUNT DETERMINED IN THE JUDGMENT DATED 09.02.2022 PASSED IN C.C.NO.22573/2016 ON THE FILE OF THE HON'BLE XXIII ADDL. CHIEF METROPOLITAN MAGISTRATE, BANGALORE CITY.

THESE CRIMINAL REVISION PETITIONS COMING ON FOR ADMISSION THIS DAY, THE COURT PASSED THE FOLLOWING:

COMMON ORDER

The accused in CC No.22573 of 2016 on the file of the learned XXIII Additional Chief Metropolitan Magistrate, Nrupathunga Road, Bengaluru City (hereinafter referred to as 'the Trial Court' for brevity), is before this Court in Criminal Revision Petition No.834 of 2023, impugning the judgment of conviction and order of sentence dated 09.02.2022, convicting him for the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the NI Act') and sentencing to pay fine of Rs.73,50,000/- and in default to pay fine, to undergo simple imprisonment for a period of one year, which was confirmed vide judgment dated 30.05.2023 passed in Criminal Appeal No.295 of 2022 on the file of the learned LXVIII Additional City Civil and Sessions Judge, Bengaluru City NC: 2023:KHC:45627 (CCH-69) (hereinafter referred to as 'the First Appellate Court' for brevity).

2. The complainant in the above case has preferred Criminal Revision Petition No.1121 of 2023 seeking enhancement of the amount of compensation awarded by the Trial Court and the First Appellate Court, while convicting the accused for the offence punishable under Section 138 of NI Act.

3. Brief facts of the case are that, the complainant filed the private complaint in PCR No.7845 of 2016 before the Trial Court against the accused alleging commission of offence punishable under Section 138 of NI Act. It is contended that the accused and the complainant were friends. The accused was carrying on business and in that regard, he approached the complainant for lending the amount during October, 2010 and accordingly, the complainant lent an amount of Rs.31,00,000/- on 19.10.2010 and the accused executed an agreement of loan of even date agreeing to repay the loan amount with interest at the rate of 5% per month. The accused has also issued the cheque bearing No.370866 drawn on Karur Vyasa Bank, Rajajinagar Branch, Bengaluru. Since there was a direction by NC: 2023:KHC:45627 the Reserve Bank of India (for short 'the RBI') to replace the cheques with truncated cheques i.e., electronic cheque transaction system, the accused replaced the old cheque bearing No.370866 and issued the new cheque bearing No.000062 drawn on Karur Vysya Bank, Rajajinagar Branch, Bengaluru. With mutual understanding, the rate of interest was

reduced to 2% per month, while the other terms of agreement of loan continued as it is.

4. It is contended that in spite of repeated demands, the accused has not repaid either the principal amount or the interest. Hence, as per the terms of loan agreement, the complainant issued legal notice dated 17.05.2016 demanding the accused to repay the loan amount with interest at 2% per month. Even though, the notice was served on the accused, he has not repaid the loan amount, but on the other hand, issued the reply on 09.06.2016 taking untenable stand. Therefore, the complainant presented the cheque bearing No.000062 dated 22.06.2016 for Rs.73,16,000/-. The said cheque was dishonored as there was insufficient funds. The legal notice as required under Section 138 of NI Act was issued to the accused informing him regarding dishonor of cheque and calling upon to NC: 2023:KHC:45627 repay the loan amount. The said notice was also served on the accused, but the accused neither replied nor complied to the demands made therein. Thereby, he has committed the offence punishable under Section 138 of NI Act. Accordingly, the complainant requested the Trial Court to take cognizance of the offence and to initiate legal action.

5. The Trial Court took cognizance of the offence and summoned the accused to appear before the Court and registered CC No.22573 of 2016. The accused appeared before the Trial Court and pleaded not guilty for the accusation made against him. The complainant examined himself as PW1, examined PW2 and got marked Exs.P1 to P26 in support of his contention. The accused has denied all the incriminating materials available on record in his statement recorded under Section 313 of Cr.P.C., but has not led any evidence in support of his defence. The Trial Court after taking into consideration all the materials on record, came to the conclusion that the complainant is successful in proving the guilt of the accused beyond reasonable doubt and accordingly, passed the impugned judgment of conviction and order of sentence as stated above.

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6. Being aggrieved by the same, the accused has preferred Criminal Appeal No.295 of 2022 and the complainant has preferred Criminal Appeal No.1128 of 2022. The First Appellate Court on re-appreciation of the materials on record, dismissed both the appeals by confirming the impugned judgment of conviction and order of sentence passed by the Trial Court.

7. Being aggrieved by the same, the accused is before this Court in Criminal Revision Petition No.834 of 2023, while the complainant filed Criminal Revision Petition No.1121 of 2023 seeking enhancement of fine amount and the amount of compensation awarded by the Trial Court and the First Appellate Court.

8. Heard Sri Ashok Haranahalli, learned senior advocate for the accused and Sri Anant Mandgi, learned senior advocate for the complainant. Perused the materials including the Trial Court records.

9. Learned senior advocate for the accused contended that lending of the amount of Rs.31,00,000/- to the accused on 19.10.2010 is not proved. The financial capacity of the NC: 2023:KHC:45627 complainant to lend such huge amount is also not proved by the complainant. However, the

complainant insisted for issuing blank cheques with signature of the accused and accordingly, the accused issued the blank cheques and blank stamp papers with his signatures. The same were misused by the complainant. The cheque in question was presented even though the accused has denied availing of loan or existence of legally recoverable debt in his reply notice. The signed blank stamp papers were misused by the complainant to create the loan agreement as per the convenience of the complainant.

10. Learned senior advocate further submitted that even though the complainant has produced Exs.P17 to 20 - the copies of income tax returns in Saral Form and Exs.P22 to 26 - the copies of bank statements, none of these documents would support the contention of the complainant regarding lending of the amount by way of cash. On the other hand, the bank statements disclose that the accused has paid in all Rs.90,00,000/- to the complainant on various dates towards clearance of the loan obtained from the complainant either by way of cheque or by way of RTGS. The ITR forms also supports the contention of the accused regarding the financial status of NC: 2023:KHC:45627 the complainant. If these documents are taken into consideration, the contention of the complainant that he was having cash of Rs.31,00,000/- on 19.10.2010 and had lent the same to the accused, cannot be accepted.

11. Learned senior advocate further submitted that during cross examination of the complainant, as he is examined as PW1, he categorically admitted that he had availed loan from various banks. When the complainant himself was not having sufficient amount with him, it cannot be accepted that he had availed loan from the bank for the purpose of lending it to the accused. PW1 further admitted payment of Rs.90,00,000/- by the accused, but there is no explanation as to what had happened to the said amount. The complainant filed in all 9 criminal cases alleging commission of offence punishable under Section 138 of NI Act by presenting 9 blank cheques issued by the accused.

12. Learned senior advocate also contended that Ex.P14

- agreement of loan is rank fabrication by misusing the signature of the accused on the blank stamp papers. The cheque number, the amount and even the date of agreement

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NC: 2023:KHC:45627 varies at each places and the complainant has no explanation for the same. Even though, the complainant contends that it was the accused who purchased the stamp paper and got prepared the agreement, the document itself falsifies the said contention, as the stamp paper disclose that the same was purchased by the complainant himself.

13. Learned senior advocate further submitted that when the complainant is not successful in proving his lending capacity and actual lending of the amount, it cannot be said that the presumption under Sections 118 of 139 of NI Act would operate in his favour. Even though, the accused admitted his signature on the cheque - Ex.P1 and the loan agreement - Ex.P14, that will not enure to the benefit of the complainant, when the accused specifically contended that his signatures were taken on the blank cheque and blank stamp papers. Since the accused has taken probable

defence, the accused is entitled to be acquitted. The Trial Court and the First Appellate Court have committed an error in ignoring this position of law and proceeded to convict the accused mechanically without giving valid reasons.

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14. Learned senior advocate submitted that the Trial Court has commented that the accused has not initiated any action against the complainant for misusing the blank cheques and the stamp papers and proceeded to convict the accused. Therefore, the accused filed an application under Section 391 of Cr.P.C. producing additional documents in support of his defence before the First Appellate Court. The additional documents disclose that the complainant has filed series of criminal complaint against the accused alleging cheating and criminal breach of trust. Similarly, he has also filed a civil suit seeking declaration with respect of the loan agreement, which are concocted by the complainant by misusing the blank stamp papers. Strangely, the First Appellate Court has never referred to any of these additional documents nor it has rejected the claim of the accused to produce additional evidence. This has resulted in great injustice to the accused. Therefore, it is submitted that the additional documents produced before the First Appellate Court are to be taken into consideration in deciding the Criminal Revision Petitions.

15. Learned senior advocate placed reliance on the decision of the Hon'ble Apex Court in Basalingappa Vs

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NC: 2023:KHC:45627 Mudibasappa¹, in support of his contention that the standard of proof for the accused to rebut the presumption is only the preponderance of probability and when the accused disputed the financial capacity of the complainant to lend such huge amount, the burden shifts on the complainant to prove the same. When the complainant failed to discharge his burden to establish his financial capacity, the accused is entitled for acquittal.

16. Learned senior advocate also placed reliance on decision of the Hon'ble Supreme Court in Tedhi Singh Vs Narayan Dass Mahant² in support of his contention that even when there is concurrent finding of fact by both the Courts, if the same are erroneous, it is liable to be set aside. He also placed reliance on the decision of the Hon'ble Apex Court in Kundan Lal Rallaram Vs The Custodian, Evacuee Property Bombay³, to contend that, to rebut the legal presumption, either the accused has to lead evidence or he may rely on various circumstances and the documents that are produced by the complainant and upon which the burden again shifts on the (2019) 5 SCC 418 (2022) 6 SCC 735 AIR 1961 SC 1316

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NC: 2023:KHC:45627 complainant to prove the guilt of the accused beyond reasonable doubt.

17. Learned senior advocate placed reliance on the decision of the Hon'ble Apex Court K Subramani Vs K Damodar Naidu⁴ to contend that no materials are placed by the complainant to prove the source of income and under such circumstances, the accused is entitled to be acquitted.

18. Learned senior advocate further submitted that according to the complainant, he is entitled for charging interest at the rate of 5% per month, which is clearly barred under the provisions of Karnataka Prohibition of Exorbitant Interest Act, 2004. When there is prohibition to charge such exorbitant interest, the complainant cannot contend that the amount claimed by him under the cheque is legally enforceable debt or liability which includes the principal amount with such exorbitant interest. Even as per the Notification issued by the State of Karnataka as required under the Act, the maximum rate of interest that could be levied is only 16% per annum. Even if the contention of the complainant that he has reduced (2015) 1 SCC 99

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NC: 2023:KHC:45627 the rate of interest to 2% per month and charging the same is taken into consideration, it violates the provisions of the Act and thus the amount claimed by the complainant is not the legally enforceable debt. Therefore, Section 138 of NI Act cannot be attracted.

19. Placing reliance on these decisions, learned senior advocate prayed for allowing the revision petition by setting aside the impugned judgment of conviction and order of sentence passed by the Trial Court and the judgment passed by the First Appellate Court, in the interest of justice and to acquit the accused.

20. Learned senior advocate submitted that since the complainant is not successful in proving the guilt of the accused and when the accused is entitled to be acquitted, Criminal Revision Petition No.1121 of 2023 filed by the complainant is also liable to be dismissed in limine. Accordingly, he prays for dismissal of the said revision petition.

21. Per contra, learned senior advocate for the respondent - complainant opposing the revision petition filed by the accused submitted that Section 139 of NI Act was inserted

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NC: 2023:KHC:45627 by amending the Act with effect from 01.04.1989. The legislature in their wisdom brought the amendment to NI Act with the object of giving credibility to the commercial transactions involving negotiable instruments. The accused categorically admitted issuance of the cheque with his signature. He also admits his signatures on the loan agreement. The contention of the accused that he had issued the blank cheque and blank stamp papers with his signature is not probablised. The accused has not approached the Court with clean hands. He has not even complied the order of this Court to deposit the portion of the fine amount before the Trial Court. Even when the Trial Court directed the accused to deposit 20% of the cheque amount as required under Section 143A of NI Act, the same was challenged upto the Hon'ble Apex Court, but however, the said order was confirmed throughout.

22. Learned senior advocate submitted that admittedly, the complainant is a business man. Even the accused admits that he had availed loan from the complainant agreeing to pay interest at rate of 5% per month and as security he had issued blank cheques with his signatures. As per Section 20 of NI Act, the accused has given authority to the complainant to fill

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NC: 2023:KHC:45627 up the inchoate stamped instrument. Even though, the accused contended that he had repaid Rs.90,00,000/- to the complainant, it is not his contention that he had given any instructions to appropriate the same in a particular manner. It is not disputed that the accused had borrowed huge sums of amount on various dates. He admits that he had issued in all 12 cheques and signed 12 stamp papers. There is absolutely no reason as to why the accused has to issue such cheques and stamp papers when he has not borrowed any amount from the complainant. Admittedly, the complainant has filed only 9 criminal cases. There is no explanation by the accused as to what had happened to the other three cheques, which admittedly he had given to the complainant.

23. Learned senior advocate submitted that initially the accused has borrowed Rs.31,00,000/- and he has executed the loan agreement as per Ex.P14 agreeing to repay the loan amount with interest at 5% per month. The deficit stamp duty was paid by the complainant on the said agreement which was got prepared by the accused as usual trade practice. Small discrepancies which are highlighted by the learned senior advocate for the accused is only typographical error and it will

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NC: 2023:KHC:45627 not go to the root of the matter. After entering into agreement as per Ex.P14, the accused has issued the cheque bearing No.370866 drawn on Karur Vysya Bank, Rajajinagar Branch in favour of the complainant. But during 2013, the electronic cheque transaction system (CTS) came into force as per the policy of RBI and accordingly, the accused had withdrawn the said cheque bearing No.370866 and issued the fresh cheque bearing No.000062 which is marked as Ex.P1. The accused issued the endorsement in the form of a letter which is as per Ex.P15 describing under what circumstances, the old cheque was withdrawn and new cheque Ex.P1 was issued. In none of these documents, the accused contended that he has issued the blank cheques or the blank stamp papers. Therefore, the contention of the accused now raised before this Court is against the written document and therefore, the same is not permitted under law.

24. Learned senior advocate further submitted that the complainant has issued the notice as per Ex.P2 on 17.05.2016 calling upon the accused to repay the loan amount with interest at 2% per month. There was reference to issuance of the cheque bearing No.370866, withdrawing the same and issuing

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NC: 2023:KHC:45627 the fresh cheque on 22.06.2016 bearing No.000062. The accused was also warned of initiating the proceedings under Section 138 of NI Act and also filing of the suit of recovery of the amount, if in case, the accused fails to repay the loan amount. Instead of complying with the demands made therein, the accused issued the reply as per Ex.P7. In the reply notice, the accused has taken a defence that he had availed loan of Rs.51,00,000/- from the complainant either through cheque or through RTGS from 20.08.2010 till 07.06.2012 agreeing to pay interest at the rate of 5% per month. However, he contends that he had paid the principal amount with interest by way of cash or through RTGS. However, he refers to payment of only Rs.72,45,000/- on various dates which is said to be including 5% interest per month on the loan amount of Rs.51,00,000/-. He also contends that 12 blank cheques and blank stamp papers were issued by him, even though it is contended that he had taken loan on 4 various dates as mentioned in the reply. However, the accused has submitted written statement under Section 313(5) of Cr.P.C., wherein, he has contended that he has availed loan under 5 different transactions and has repaid all those amounts. Even though, it is contended that those

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NC: 2023:KHC:45627 blank cheques and stamp papers were not returned by the complainant, no legal action was initiated against the complainant by the accused. He has not even chosen to give stop payment instructions to the bank. He has not initiated criminal proceedings against the complainant. The additional documents now sought to be produced by the accused disclose that criminal complaints and civil suit were filed against the complainant only after the complainant filing the private complaint before the Trial Court, which shows the intention of the accused.

25. Learned senior advocate contended that the complainant has examined PW2 who is the attesting witness to the agreement Ex.P14. Nothing has been elicited from him to disbelieve his version. He further submitted that when the criminal appeal was pending before the First Appellate Court, the accused had raised additional grounds, wherein, he had categorically admitted borrowal of the amounts on various dates from the complainant from 2010 to 2012. However, he has taken the defence that he had repaid all those loan during 2014. If at all, the accused had repaid the loan amount during 2014, why he has kept quite till 2016 to demand the blank

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NC: 2023:KHC:45627 cheques and blank stamp papers and to initiate legal action against the accused.

26. Learned senior advocate also contended that receipt of Rs.90,00,000/- from the accused is not disputed by the complainant. On the other hand, as admitted by the accused he had availed in all 12 loan from the complainant and the amount paid by the accused were appropriated towards 3 such loans. The complainant is entitled to appropriate the payment made by the accused to any of the loan of his choice as per Section 60 of Indian Contract Act.

27. Learned senior advocate further submitted that when the accused categorically admits that he had availed huge loan from the complainant, he cannot dispute his financial capacity. The complainant has produced his IT returns as per Exs.P17 to 20 and bank statement as per Exs.P22 to 26. However, the complainant has not produced his profit and loss account or balance sheet. The bank account disclose that the complainant is having turn over of crores of rupees. Thereby, he has proved his financial capacity to lend the amount.

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28. Learned senior advocate further submitted that even though, the legal notice as required under Section 138 of NI Act was issued as per Ex.P9 which was served on the accused as per Ex.P12, the accused has never issued any reply and thereby he has conceded the averments made in the notice. The accused has never stepped into the witness box to speak about his defence.

29. Learned senior advocate drawn my attention to the application filed before the Trial Court by the complainant under Section 91 of Cr.P.C. praying to summon the Manager of the Bank to which the cheques in question were pertaining to. The accused filed his objection to the said application, wherein, he categorically stated that he is not disputing issuance of any of the cheques referred to by the complainant. He also admits substitution of cheques during 2013 and therefore, he said that summoning of the Bank Manager was not necessary. Under such circumstances, now the accused cannot be permitted to turn around and contend that Ex.P15 is the concocted document and the accused has not substituted the new cheques for the old one in view of the change of policy of RBI.

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30. Learned senior advocate contended that when the accused admits borrowing of huge amount from the complainant on various dates, he cannot contend that the complainant has to prove his financial capacity. When Exs.P17 to P26 were not controverted, the accused cannot contend that the complainant has not proved his financial capacity. When the accused categorically admits issuance of the cheque - Ex.P1 with his signature and his signatures found on Exs.P14 and P15, the attempt on the part of the accused to raise contradictory defences at each stage of the proceedings is to be considered against him. The presumption under Sections 118 and 139 of NI Act would operate in favour of the complainant and the burden shifts on the accused to rebut the presumption. Except taking inconsistent defences, the accused has not probablised the same. He has not even stepped into the witness box to speak about his defence. Therefore, adverse inference will have to be drawn against him.

31. Learned senior advocate submitted that decisions relied on by the accused are not at all applicable to the facts of the present case. The Trial Court and the First Appellate Court have recorded concurrent findings of fact. This Court being the

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NC: 2023:KHC:45627 revisional Court is not suppose to re-appreciate the oral and documentary evidence at length. Even if such an exercise is undertaken, it is to be held that the accused has not probabalised any of his defence. But on the other hand, the complainant is successful in proving the guilt of the accused beyond reasonable doubt.

32. Learned senior advocate submitted that almost all the decisions relied on by the learned senior advocate for the revision petitioner disclose that issuance of blank cheque as security would attract Section 138 of NI Act. The presumption under Sections 118 and 139 of NI Act would operate in aid of the complainant. The decisions referred to by the revision petitioner were decided on peculiar facts and circumstances of the case, where the financial capacity of the complainant could not be proved by him to establish lending of the amount. But in the present case, the complainant has produced the loan agreement and the letter issued by the accused replacing the cheques by issuing the fresh cheques towards discharge of legally enforceable debt. The complainant has produced his bank statement, which disclose that he is a businessman who is dealing in crores of rupees. He has produced the Saral form to

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NC: 2023:KHC:45627 show that the complainant is an income tax assessee. The accused categorically admitted borrowal of more than Rs.90,00,000/- from the complainant. Under such circumstances, the accused cannot dispute the financial capacity of the complainant.

33. Even otherwise, the complainant has produced his bank statement as per Exs.P22 to P26. It is for the period from 01.04.2010 to 13.04.2017. These statements disclose that the complainant is having dealings in crores of rupees. Even though Exs.P17 to 20 are the Income Tax Return acknowledgement for the year 2011-12 to 2015-16, wherein, the gross total income of the complainant is shown in few lakhs. Only on that ground, it cannot be concluded that the complainant was not having financial capacity to lend the amount. Proving of the financial capacity of a person does not mean to say that the complainant is required to show the exact cash with him on the date of lending of the amount to the accused. When the complainant is admittedly a businessman who is dealing in crores of rupees as per the bank statement, the contention of the accused that the complainant was not having the financial capacity, cannot be accepted.

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34. Learned senior advocate submitted that Karnataka Prohibition of Exorbitant Interest Act, 2004, is a State enactment. The same is not applicable to a criminal case under Section 138 of NI Act. The NI Act is a Central enactment. Section 79 of NI Act refers to the interest when the rate is specified. This section enables to calculate the interest at the specified rate on the amount of principal money. As per Section 80 of NI Act, even when no rate of interest is specified, the interest on the amount

due shall be calculated at the rate of 18% per annum from the date at which the amount ought to have been paid by the accused. Therefore, it is clear that the provisions of Karnataka Prohibition of Exorbitant Interest Act, 2004, is not applicable for the proceedings under Section 138 of NI Act, but the provisions of NI Act which is applicable.

35. Learned senior advocate in support of his contentions, placed reliance on the decision of the Hon'ble Apex Court in *Bir Singh Vs Mukesh Kumar*⁵, to contend that the presumption under Sections 118 and 139 of NI Act is available to the complainant even when the accused contends that he had issued the blank cheques with his signatures and further in (2019) 4 SCC 197

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NC: 2023:KHC:45627 support of his contention that the revisional Court cannot interfere with the order of conviction by exercising its jurisdiction under Section 397 of Cr.P.C., unless there is any jurisdictional error or error of law in the impugned judgment of conviction and sentence.

36. Learned senior advocate has placed reliance on the decision of the Hon'ble Apex Court in *M/s Kalamani Tex and another Vs P Balasubramanian*⁶, in support of his contention that unless the accused rebuts the legal presumption under Sections 118 of 139 of NI Act, he is liable for conviction and that when the complainant is successful in proving the guilt of the accused beyond reasonable doubt, he is liable for fine double the cheque amount. Therefore, learned senior advocate would contend that the Trial Court and the First Appellate Court have committed an error in imposing disproportionate sentence on the accused by showing maximum leniency. The conduct of the accused in raising untenable and inconsistency defence was not taken into consideration to impose fine at double the cheque amount. Therefore, the complainant has preferred Criminal Revision Petition No.1121 of 2023 seeking (2021) 5 SCC 283

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NC: 2023:KHC:45627 enhancement of the fine amount. Hence, he prays for allowing the said revision petition and to modify the order of sentence and to sentence the accused proportionately.

37. Learned senior advocate also placed reliance on the decision of the Hon'ble Apex Court in *Sumeti Vij Vs M/s Paramount Tech Fab Industries*⁷, to contend that when the accused has not replied to the legal notice issued by the complainant nor stepped into the witness box to depose about his defence and had not discharged his burden of rebutting the presumption under Section 139 of NI Act, he is liable for conviction.

38. Learned senior advocate also placed reliance on the decision of the Hon'ble Apex Court in *Rohitbhai Jivanlal Patel Vs State of Gujarat and Others*⁸, to contend that when the accused has not replied to the legal notice and when he has failed to raise any probable defence to rebut the legal presumption under Section 139 of NI Act, he is liable for conviction.

2021 (1) Kar.L.R 378 (SC) AIR 2019 SC 1876

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39. Learned senior advocate also placed reliance on the decision of the Hon'ble Apex Court in T P Murugan (Dead) through Lrs. Vs Bojan Posa Nandhi 9, to contend that the conduct of the accused in contending that he had issued 12 blank cheques with his signatures and various blank stamp papers with signatures to the complainant and even after repaying the loan amount he had not demanded back the same would operate against him and he is liable for conviction.

40. Learned senior advocate also placed reliance on the decision of Hon'ble Apex Court in B M Basavaraj Vs Srinivas S Datta¹⁰, in support of his contention that even it is not necessary for the complainant to produce any document to prove the existence of an agreement entered into between the parties regarding payment of the amount as the proceeding under Section 138 of NI Act would be founded on the dishonor of cheque and not on the basis of any other document as in the case of civil suit for recovery of amount. AIR 2018 SC 3601 MANU/SC/0686/2016

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41. Learned senior advocate also placed reliance on the decision of the Hon'ble Apex Court in Rangappa Vs Mohan¹¹, in support of his contention that when the accused failed to issue reply to the legal notice after accepting the same without any demur, he is liable for conviction.

42. Placing reliance on these decisions, learned senior advocate for the respondent submitted that even though the Trial Court and the First Appellate Court were right in convicting the accused, have committed an error in imposing the fine of paltry sum ignoring the mandate of law under Section 138 of NI Act and also the dictum of Hon'ble Apex Court in M/s Kalamani Tex (supra). Hence, the complainant has also preferred Criminal Revision Petition No.1121 of 2023. Therefore, he prays for dismissal of the Criminal Revision Petition No.834 of 2023 as devoid of merits, while allowing Criminal Revision Petition No.1121 of 2023 by imposing the fine double the cheque amount, in the interest of justice.

43. In view of the rival contentions urged by learned senior advocates for both the parties, the point that would arise for my consideration is:

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NC: 2023:KHC:45627 "1. Whether the revision petitioner-

accused in Criminal Revision Petition No.834 of 2023 has made out any grounds to allow the petition and the impugned judgment of conviction and order of sentence passed by the Trial Court, which was confirmed by the First Appellate Court suffers from any infirmities and calls for interference by this Court?"

2. Whether the revision petitioner- complainant in Criminal Revision Petition No.1121 of 2023 has made out any grounds to enhance the fine amount imposed by the Trial Court, which was confirmed by the First Appellate Court and calls for interference by this Court?"

My answer to point No.1 is in the 'Negative' and point No.2 in the 'Affirmative' for the following:

REASONS

44. It is the specific contention of the complainant that he is a businessman by profession and was having acquaintance with the accused, who is also a businessman. Accused approached the complainant to lend money for expanding his business during 2010 and he promised to repay the loan amount with good returns by way of interest.

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NC: 2023:KHC:45627 Accordingly, the accused and complainant entered into various agreements of loan from 2010 to 2013.

45. It is contended by the complainant that during October, 2010, the accused approached the complainant seeking financial assistance of Rs.31,00,000/- and accordingly, the complainant had lent the amount on 19.10.2010. In that regard, the complainant and the accused have entered into an agreement of loan of even date and the accused agreed to repay the loan amount of Rs.31,00,000/- with interest at 5% per month payable on or before 20th of every month. The accused issued the cheque bearing No.370866 drawn on Karur Vysya Bank, Rajajinagar Branch, Bengaluru. Later, when there was change in the policy of RBI and it issued guidelines for having electronic cheque transaction system, the accused had taken back the cheque bearing No.370866 and had issued the new cheque bearing No.000062 drawn on Karur Vysya Bank, Rajajinagar Branch, Bengaluru for Rs.73,16,000/- in compliance of the guidelines of RBI. Even though, it was mutually agreed to charge interest at the rate of 5% per month, later it was reduced to 2% per month from the date of loan i.e., 19.10.2010.

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46. It is the further contention of the complainant that the accused had not repaid the loan amount nor paid the interest as agreed and therefore, the complainant issued the legal notice dated 17.05.2016 demanding the loan amount with interest at 2% per month. After service of notice, the

accused issued the reply denying his liability. Therefore, the cheque in question was presented for encashment. The said cheque was dishonored as funds insufficient. The complainant issued the legal notice on 25.06.2016 informing the accused regarding dishonor of cheque and calling upon him to pay the cheque amount. In spite of service of notice, the accused has neither replied or complied with the demands made therein. Thereby, he has committed the offence punishable under Section 138 of NI Act.

47. To prove his contention, the complainant examined himself as PW1 and also examined PW2 who is the attesting witness to Ex.P14 - the agreement of loan. Both these witnesses have withstood the cross examination by the learned counsel for the accused. The complainant has produced the cheque in question as per Ex.P1; the copy of legal notice as per Ex.P2; the postal receipts and acknowledgements as per Exs.3

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NC: 2023:KHC:45627 to 6; the reply issued by the accused as per Ex.P7. In the reply, the accused has denied the contention taken by the complainant regarding availing of the loan, failure to repay the same etc., However, the accused admitted that he had availed loan of Rs.51,00,000/- at the rate of 5% per month from the complainant through cheque or transferred through RTGS from 20.09.2010 to 29.10.2014. The accused has also taken the contention that the entire amount of Rs.51,00,000/- with interest at 5% per month were repaid to the complainant through cash or through RTGS on various dates.

48. It is contended that the accused has paid in all Rs.72,45,000/- by way of cash and Rs.64,20,000/- through RTGS towards the loan of Rs.51,00,000/-. The accused also contended that he had issued 12 blank signed cheques and 12 blanks signed stamp papers in favour of the complainant. It is not made clear as to why the accused has issued as many as 12 cheques and stamp papers that too blank cheques/stamp papers with his signatures, when according to him, he had availed loan of Rs.51,00,000/- on 4 different dates. It is stated by the accused that after repaying the loan amount from 20.09.2010 till 29.10.2014, he had requested the complainant

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NC: 2023:KHC:45627 to return the blank cheques and stamp papers, but the complainant has not returned the same.

49. It is interesting to note that the accused being a businessman had not taken any action against the complainant for not returning so many blank cheques and blank stamp papers even after repaying the entire loan amount. He had not even issued stop payment instructions to his banker. It is also pertinent to note that the accused has not replied to the legal notice issued under Section 138 of NI Act, which is as per Ex.P9.

50. The legal notice as per Ex.P9 was admittedly served on the accused as per Ex.P10 to P12, which are not disputed. The tenor of cross examination of PW1 disclose that the accused has stick on to the

contention that even though he had availed loan from the complainant, the same is already repaid either by cash or through RTGS. It is the contention of the accused that the blank cheques and the stamp papers with his signatures were made use by the complainant and presented the cheques for encashment and concocted the agreement of loan as per Ex.P14. Even though PW1 - the complainant and

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NC: 2023:KHC:45627 PW2 - the attesting witness to Ex.P14 were examined before the Trial Court and they were cross examined at length, nothing has been elicited from them to disbelieve their version.

51. The facts discussed above disclose that the accused is not disputing that Ex.P1 - the cheque belongs to his bank account and it bears his signature. The only defence taken by the accused is that he has issued the blank cheques in favour of the complainant.

52. The complainant has placed reliance on Ex.P14 - the agreement of loan entered into between the complainant and the accused on the date of loan i.e., 19.10.2010. The accused contends that he had also signed on the blank stamp papers and the complainant has misused the same and concocted the agreement of loan. As noted above, one of the attesting witness to Ex.P14 is examined before this Court. During cross examination of PWs.1 and 2, nothing could be elicited from any of the witnesses to probablise the defence of the accused that he had given the blank cheques and blank stamp papers with his signatures. Merely taking a defence

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NC: 2023:KHC:45627 denying the issuance of cheque and executing the agreement will not amount to raising probable defence.

53. The complainant has also relied on Ex.P15 - the letter issued by the accused on 29.07.2013, wherein, he acknowledges getting back the cheque bearing No.370866 dated 19.10.2010 and issuing the new cheque bearing No.000062 in view of new policy of RBI to have electronic cheque transaction system. The accused also taken a similar defence stating that his signature was made use by the complainant to concoct the document.

54. My attention was drawn to the memorandum of additional grounds filed by the accused before the First Appellate Court in Criminal Appeal No.295 of 2022. In para 7 of the additional grounds, the accused has made a candid admission as under:

"It is submitted that the appellant has indeed borrowed money for his business necessities from the respondent between the years 2010 and 2012. However, the entire money along with huge interest was repaid to the respondent by the appellant by the year 2014 itself....."

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55. But now it is contended by the petitioner that he had borrowed loan only on 5 occasions i.e., on 20.08.2010 for Rs.10,00,000/-, on 19.10.2010 for Rs.31,00,000/-, on 27.12.2011 of Rs.25,00,000/-, on 07.02.2012 for Rs.15,00,000/- and on 07.06.2012 for Rs.10,00,000/-, in all Rs.91,00,000/-. It is the further contention of the accused that he had repaid Rs.7,60,000/-, Rs.6,60,000/-, Rs.25,80,000/- and Rs.10,00,000/- from 24.02.2012 till 29.05.2012. Thereafter, Rs.40,00,000/- was paid on 29.10.2014. But strangely, the additional grounds urged by the petitioner refers to repayment of loan during 2014 and there is no reference to payment during 2012 itself. Moreover, according to the accused, he had repaid the principal amount along with huge interest at the rate of 5% per month. But now it is his contention that out of the loan of Rs.91,00,000/-, he had repaid only Rs.90,00,000/- and thereby cleared all the loans. It is quite contrary to the contention taken by the accused in his reply notice - Ex.P7.

56. Interestingly, the accused has submitted his written statement under Section 313(5) of Cr.P.C., wherein, he has referred to the borrowals from the complainant through

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NC: 2023:KHC:45627 cheques or through RTGS and refers to the transaction dated 20.08.2010 for Rs.10,00,000/-, 19.10.2010 for Rs.31,00,000/-, 07.06.2012 for Rs.10,00,000/- and during 2012 Rs.25,00,000/- in all, Rs.76,00,000/-. He also states that the entire amount is repaid either by cash or by cheque or through RTGS i.e., Rs.7,60,000/- on 24.02.2012, Rs.6,60,000/- on 20.04.2012, Rs.40,00,000/- on 29.10.2014, Rs.25,80,000/- on 26.04.2012 and Rs.10,00,000/- on 25.09.2012. The borrowal of amount as of now admitted at Rs.91,00,000/- was never the contention of the accused before the Trial Court at the stage of statement under Section 313 of Cr.P.C. Therefore, the contention taken by the accused is inconsistent and do not inspire confidence in the mind of the Court.

57. It is pertinent to note that the accused has not denied any of his signatures relied on by the complainant. The signatures on the cheque - Ex.P1, agreement of loan - Ex.P14, Ex.P15 - the letter dated 29.07.2013 replacing the cheque are categorically admitted by the accused. The accused is not a layman, but he is a businessman dealing in crores of rupees. Under such circumstances, it cannot be believed that he has simply issued 12 blank cheques and 12 blank stamp papers

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NC: 2023:KHC:45627 with his signatures in favour of the complainant on mere asking, without there being any reason. Moreover, even after repayment of the entire loan amount during 2014, he had not bothered to collect back those blank cheques and blank stamp papers from the complainant. It is interesting to note that the accused has no explanation whatsoever to Ex.P15. If at all, the accused has issued blank cheques in favour of the complainant and had repaid about

Rs.50,00,000/- during 2012, there was no occasion for the accused to replace the earlier cheques with new one as per the new policy of RBI. Ex.P14 discloses that the accused has even signed at the place where corrections were made in the agreement. If at all, the contention of the accused that he had signed the blank stamp paper is to be accepted, then his signatures where corrections were carried out could not have appeared.

58. It is also pertinent to note that as per the terms of agreement of loan, the complainant has issued the legal notice as per Ex.P2. The accused has issued reply denying the contention of the complainant. It is thereafter, the cheque in question was presented for encashment, which was dishonored as funds insufficient. The complainant had issued the legal

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NC: 2023:KHC:45627 notice as per Ex.P9 which was served on the accused. But strangely, there is no reply from the accused. It is also to be noted that the accused has not chosen to step into the witness box to depose about his defence. Adverse inference will have to be drawn against the accused looking to his conduct.

59. When the accused admits his signature on Ex.P1 - cheque, the primary burden on the complainant stands discharged. The burden shifts on the accused to rebut the presumptions under Sections 118 and 139 of NI Act. Even though the standard of proof for the accused to rebut the presumption is only preponderance of probabilities, denying the contents of documents including the cheque after admitting the signature found thereon would not amount to raising probable defence.

60. The accused has failed to give reasonable explanation as to why he being the businessman issued 12 blank cheques and 12 blank stamp papers with his signatures to the complainant; why he substituted all those 12 blank cheques during 2013 by issuing fresh cheques; why he has not demanded back the blank cheques and stamp papers from the

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NC: 2023:KHC:45627 complainant even after repaying the entire amount of loan with interest; why there are glaring inconsistencies in the defence taken by the accused at each stages; why he had not chosen to issue reply to the legal notice issued under Section 138 of NI Act; why the accused has not chosen to step into the witness box to depose about his defence; why the accused has not taken any action against the complainant for misusing the blank cheques and blank stamp papers?

61. Learned senior advocate for the revision petitioner contends that the additional documents were produced before the First Appellate Court in one of the appeals with an application under Section 391 of Cr.P.C. The additional documents pertain to 8 suits filed by the accused against the complainant seeking declaration that the agreement of loan relied on by the complainant is void and unenforceable and for permanent injunction restraining the complainant from making use of the same and one criminal case for misusing the blank cheques and stamp papers and cheating and

committing criminal breach of trust. Even according to the accused, all these proceedings were initiated only after the complainant filed the complaint before the Trial Court against the accused

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NC: 2023:KHC:45627 for the offence punishable under Section 138 of NI Act. Moreover, those suits and the criminal case are still pending before the Trial Court. There is no reason as to why the accused was not diligent in prosecuting those suits and criminal complaints. Therefore, no reliance could be placed on those additional documents.

62. Now let me revert to the decisions relied on by both the parties.

63. In Basalingappa (supra), the Hon'ble Apex Court considered the facts of the case, where the complainant is a retired bus conductor who got retirement benefit of only Rs.8,00,000/- in the year 1977. He had no other income. But he contends that he had lent an amount of Rs.6,00,000/- to the accused. Only during cross examination, the complainant contended that he had lent the amount during November, 2011. There was absolutely no material to show that the complainant was earning or having any income to lend the said amount. Under such circumstances, taking into consideration the position of law that the presumption under Section 139 of NI Act is a rebuttable presumption and the standard of proof for

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NC: 2023:KHC:45627 the accused to probabalise his defence is preponderance of probabilities and not proof beyond reasonable doubt, it was held that it is not necessary for the accused to step into the witness box to speak about his defence and that the judgment of acquittal passed by the Trial Court was well reasoned one. It is also held that, the High Court has committed an error in holding that finding recorded by the Trial Court regarding financial capacity of the complainant is perverse. Accordingly, the judgment of acquittal passed by the Trial Court was confirmed, while setting aside the judgment of conviction passed by the High Court.

64. In Tedhi Singh (supra), the Hon'ble Apex Court again placing reliance on Basalingappa (supra), highlighted the standard of proof for the accused to probablise his defence and held in paragraph 10 as under:

"10. The trial court and the first appellate court have noted that in the case under Section 138 of the NI Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the NI Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the

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NC: 2023:KHC:45627 reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially

lead evidence to show that he had the financial capacity. To that extent, the courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross-examination of the witnesses of the complainant. Ultimately, it becomes the duty of the courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence."

65. In Kundal Lal Rallaram (supra), which is of the year 1961, the Hon'ble Apex Court held that the defendant may adduce direct evidence or he may rely on circumstantial

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NC: 2023:KHC:45627 evidence and even he may rely on the presumptions of facts under Section 114 of Evidence Act to prove his defence. It is pertinent to note that Section 139 of NI act was inserted by Act 66 of 1988 only with effect from 01.04.1989. The proposition of law referred by the Hon'ble Apex Court that the burden of proof to rebut the presumption may be discharged either by leading direct evidence or by cross examining PW1 or by relying on the documents relied on by the complainant is well settled one and the same cannot be disputed.

66. In K Subramani (supra), the complainant and the accused were lecturers working in Government College. The complainant contended that he had lent amount of Rs.14,00,000/- to the accused, which is disputed by the accused. The Hon'ble Apex Court considered that since the complainant and the accused are Government servants, Conduct Rules prescribes mode of lending and borrowing. There is nothing on record to show that either the complainant or accused followed the said procedure. The source of income claimed by the complainant is only by savings from his salary. It was found that the complainant himself had borrowed loan of about Rs.1,00,000/- to Rs.1,50,000/- from LIC and under such

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NC: 2023:KHC:45627 circumstances, the judgment of acquittal passed by the Trial Court was held to be on proper appreciation of the materials evidence on record.

67. In Bir Singh (supra), the Hon'ble Apex Court has raised a question as to whether the High Court was right in reversing the concurrent factual findings of the Trial Court and of the First Appellate Court in exercise of its revisional jurisdiction. It also considered as to whether the revisional Court in exercise of its discretionary jurisdiction can interfere with an order of conviction in the absence of any jurisdictional error or error of law and whether the payee of a cheque disentitled to the benefit

of the presumption under Section 139 of NI Act and held in paragraphs 14 to 16 as under:

"14. The trial court, on analysis of the evidence adduced by the respective parties arrived at the factual finding that the respondent-accused had duly issued the cheque in question for Rs.15 lakhs in favour of the appellant complainant, in discharge of a debt or liability, the cheque was presented to the bank for payment within the period of its validity, but the cheque had been returned unpaid for want of sufficient funds in the account of the respondent-accused in the bank on

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NC: 2023:KHC:45627 which the cheque was drawn. Statutory notice of dishonour was duly issued to which there was no response from the respondent-accused.

15. The appellate court affirmed the aforesaid factual findings. The trial court and the appellate court arrived at the specific concurrent factual finding that the cheque had admittedly been signed by the respondent-accused. The trial court and the appellate court rejected the plea of the respondent-accused that the appellant complainant had misused a blank signed cheque made over by the respondent-accused to the appellant complainant for deposit of income tax, in view of the admission of the respondent-accused that taxes were paid in cash for which the appellant complainant used to take payment from the respondent in cash.

16. It is well settled that in exercise of revisional jurisdiction under Section 482 of the Criminal Procedure Code, the High Court does not, in the absence of perversity, upset concurrent factual findings. It is not for the Revisional Court to re-analyse and re-interpret the evidence on record."

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NC: 2023:KHC:45627

68. The Hon'ble Apex Court referred to its earlier decision in Laxmi Dyechem Vs State of Gujarat¹² and held in paragraph 22 as under:

"22. In Laxmi Dyechem v. State of Gujarat, this Court reiterated that in view of Section 139, it has to be presumed that a cheque was issued in discharge of a debt or other liability but the presumption could be rebutted by adducing evidence. The burden of proof was however on the person who wanted to rebut the presumption. This Court held "however, this presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act".

(emphasis supplied)

69. Regarding the plea of the accused taken that a blank cheque with signature was issued in favour of the complainant, the Court held in paragraphs 33, 34 and 36 as under:

"33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in (2012) 13 SCC 375

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NC: 2023:KHC:45627 particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

(emphasis supplied)

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70. In a recent decision, the Hon'ble Apex Court in M/s Kalamani Tex (supra), referring to its various decisions including Basalingappa (supra), Rohitbhai Jivanlal Patel Vs State of Gujarat¹³ and Bir Singh (supra), held in paragraph 18 as under:

"18. Even if we take the arguments raised by the appellants at face value that only a blank cheque and signed blank stamp papers were given to the respondent, yet the statutory presumption cannot be obliterated. It is useful to cite Bir Singh v. Mukesh Kumar, where this court held that:

"Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the

cheque was not issued in discharge of a debt.""

(Emphasis supplied)

71. In T P Murugan (supra), the Hon'ble Apex Court considered the defence taken by the accused that he had issued in all 10 cheques towards repayment of the loan in 1995 and the same was misused by the complainant was disbelieved (2019) 18 SCC 106

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NC: 2023:KHC:45627 by both the Trial Court and the Sessions Court as to why the accused has not insisted for return of cheques after repayment of loan amount and held that the accused has failed to rebut the presumption of law under Section 139 of NI Act.

72. In Prakash Madhukarrao Desai Vs Dattatraya Sheshrao Desai¹⁴, the Division Bench of High Court of Judicature at Bombay, Nagpur Bench, Nagpur, considered the question referred to it, which is as under:

"Whether in case the transaction, is not reflected in the Books of account and/or the Income Tax Returns of the holder of the cheque in due course and thus is in violation to the provisions of Section 269-SS of the Income Tax Act, 1961 whether such a transaction, can be held to be "a legally enforceable debt" and can be permitted to be enforced, by institution of proceedings under Section 138 of the Negotiable Instruments Act?"

73. The Division Bench considered the facts of the case that the complainant had advanced a hand loan of Rs.1,50,000/- to the accused and the accused has issued a CrI.A.No.795/2018 DD 19.08.2023

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NC: 2023:KHC:45627 cheque drawn in favour of the complainant. The cheque was dishonored as there was insufficient funds. The legal notice was issued to the accused, but he had not repaid the amount. The Trial Court dismissed the complaint on the ground that the complainant had not proved lending of the amount, as the same was not reflected in the Income Tax Returns of the complainant. When the complainant challenged the judgment of acquittal by preferring an appeal, learned Single Judge came across divergent findings delivered by the co-ordinate Benches and therefore, the above question was formulated and referred to the decision of the Division Bench. The Division Bench considered the facts of the case in light of various provisions of law and the decisions of High Court and Supreme Court, and concluded by holding in paragraphs 17 and 18 as under:

"17. It can thus be said that the validity of Section 269-SS of the Act of 1961 having been upheld in Assistant Director, Inspection Investigation (supra), breach thereof being subjected to penalty under Section 271-D with a further provision for waiving

the penalty under Section 273-B of the Act of 1961, it will have to be held that such transaction in violation of Section 269-SS of the Act of 1961 at the behest of the

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NC: 2023:KHC:45627 drawer of a cheque cannot be treated as null and void. Similar is the case when there is an omission of any entry relevant for computation of total income of such person to evade tax liability under Section 271-AAD of the Act of 1961. Such person, assuming him to be the payee/holder in due course, is liable to be visited by penalty as prescribed. Such act is not treated to be statutorily void. we may in this context refer to paragraph 4 of the decision in M/s Gujarat Travancore Agency, Cochin (supra) wherein reference has been made to the following statement in Corpus Juris Secundum, Volume 85 page 580, paragraph 1023:

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of a criminal penal laws."

Further, in Atul Mohan Bindal (supra), the penalty referred to in Section 271(1)(c) of the Act of 1961 has been referred to as a civil liability and not one which is criminal or quasi-criminal in nature.

Thus, in the light of statutory presumption under sections 118 and 139 of the Act of 1881, it

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would be for the accused to rebut such

presumption in the light of what has been held in Rangappa (supra).

18. In view of the aforesaid discussion, it is held that a transaction not reflected in the books of accounts and/or Income Tax returns of the holder of the cheque in due course can be permitted to be enforced by instituting proceedings under Section 138 of the Act of 1881 in view of the presumption under Section 139 of the Act of 1881 that such cheque was issued by the drawer for the discharge of any debt or other liability, execution of the cheque being admitted. Violation of Sections 269-SS and/or Section 271- AAD of the Act of 1961 would not render the transaction unenforceable under Section 138 of the Act of 1881. The decisions in Krishan P. Morajkar, Bipin

Mathurdas Thakkar and Pushpa Sanchalal Kothari (supra) lay down the correct position and are thus affirmed. The decision in Sanjay Mishra (supra) with utmost respect stands overruled."

(emphasis supplied)

74. It is also relevant to refer to Section 20 of the Negotiable Instruments Act, which deals with the inchoate stamped instruments. If a person signs and delivers the

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NC: 2023:KHC:45627 cheque or the negotiable instruments either wholly or partially blank or having written thereon, the law recognizes that the drawer of the cheque thereby gives prima facie authority to the holder thereof to make or complete the instruments and the person so signing shall be liable under such instrument in the capacity in which he signed the same to the holder or holder in due course.

75. In view of the above, the position of law is very well settled that the accused cannot get away by taking a bald defence that he had issued blank cheque in favour of the complainant as security or otherwise and the complainant had misused the same and therefore, he is not liable under Section 138 of NI Act. On the other hand, when the complainant primarily discharges his burden of placing the cheque with the signature of the accused, the presumption under Sections 118 and 139 of NI Act operates and it is for the accused to rebut the same. Ofcourse, the accused can rebut the presumption either by cross examining the complainant and his witnesses or relying on the documents that are relied on by the complainant or by adducing evidence by stepping into the witness box or by producing any other oral or documentary evidence. It is for the

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NC: 2023:KHC:45627 accused to rebut the presumption by probabalising his defence. The mode of probabalising the defence is left to the accused. Once the accused raised a probable defence, the burden again shifts on the complainant to prove the guilt of the accused beyond reasonable doubt.

76. When the accused admits that he had borrowed lakhs of rupees from the complainant, he cannot be permitted to raise the defence that the complainant was not having the financial capacity to lend such huge amount. It is not for the complainant to prove that he was having sufficient cash or bank balance to lend the same to the accused. It is sufficient for the complainant to prove his overall financial capacity to lend such amount to the accused. Even though, the complainant has not declared lending of the amount in his Income Tax Returns, the same cannot be a ground to reject his claim to prosecute the accused under Section 138 of NI Act. Absence of having money lender's license is not a ground to acquit the accused. If these settled positions of law are applied to the facts of the present case, I have no hesitation to hold that even though the accused admits issuance of several cheques and stamp papers with his signatures and admits availing of loans from time to

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NC: 2023:KHC:45627 time from the complainant, has taken untenable and contradictory stand and thus failed to rebut the legal presumptions. On the other hand, the complainant is successful in proving the guilt of the accused beyond reasonable doubt and therefore, the accused is liable for conviction. The Trial Court and First Appellate Court on proper appreciation of the materials on record, recorded the concurrent factual findings, which do not call for interference.

77. The Trial Court while sentencing the accused imposed fine of Rs.73,50,000/-. The cheque Ex.P1 is for Rs.73,16,000/-. Therefore, compensation of Rs.73,45,000/- was ordered to be paid to the complainant as per Section 357 of Cr.P.C. No substantive sentence was imposed on the accused. In default to pay the fine amount, the accused was ordered to undergo simple imprisonment for one year. The same was confirmed by the First Appellate Court.

78. Section 138 of NI Act prescribes punishment for the offence with imprisonment for a term which may extend to 2 years or with fine which may extend to twice the amount of cheque or with both. The Trial Court and the First Appellate

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NC: 2023:KHC:45627 Court have not assigned any reason to take such a lenient view towards the accused for imposing fine of only Rs.73,50,000/- and awarding compensation of Rs.73,45,000/- to the complainant. As noted above, under Section 79 of NI Act, when the rate of interest is specified expressly, the interest shall be calculated at such rate on the principal money due thereon from the date of instrument till realization. As per Section 80 of NI Act, even when no rate of interest is specified, the interest at the rate of 18% per annum from the date of amount due could be charged till realization.

79. The Hon'ble Apex Court in M/s Kalamani Tex (supra) held in paragraph 20 as under:

"20. As regards the claim of compensation raised on behalf of the respondent, we are conscious of the settled principles that the object of Chapter XVII of NIA is not only punitive but also compensatory and restitutive. The provisions of NIA envision a single window for criminal liability for dishonour of cheque as well as civil liability for realisation of the cheque amount. It is also well settled that there needs to be a consistent approach towards awarding compensation and unless there exist special circumstances, the courts should

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NC: 2023:KHC:45627 uniformly levy fine up to twice the cheque amount along with simple interest @ 9% per annum".

(emphasis supplied)

80. However, the Hon'ble Apex Court considered that the respondent therein cannot take advantage of the principle laid down to seek compensation, as he had never sought for compensation before the High Court nor he has chosen to challenge the judgment passed by the High Court. On the other hand, he accepted the judgment passed by the High Court.

81. In the present case, it is the specific contention of the complainant that the accused had agreed to pay interest at the rate of 5% per month. However, later it was mutually agreed to reduce it to 2% per month. This fact was categorically admitted by the accused. The complainant has also challenged the impugned order of sentence by filing Criminal Revision Petition and sought for enhancement of the compensation. The conduct of the accused as discussed above discloses that he has taken all possible defence after admitting his signatures found on the cheques, agreement and the letter Ex.P15 to escape his liability and also hoodwink and mislead

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NC: 2023:KHC:45627 the Courts. The cheque Ex.P1 is dated 22.06.2016 and in the same year, complaint came to be filed. The impugned judgment of the Trial Court came to be passed after 6 years i.e., on 09.02.2022. As of now, 7 years have lapsed. It is also relevant to note that the complainant was compelled to pay stamp duty and penalty of Rs.9,000/- on Ex.P14.

82. Under such circumstances, I find considerable force in the contention taken by the learned senior advocate for the respondent seeking enhancement of the fine amount and compensation. Taking into consideration the amount of cheque, I deem it appropriate to award the maximum sentence i.e., fine of Rs.1,46,32,000/-, out of which, the complainant is entitled for Rs.1,45,82,000/- as compensation and the balance amount of Rs.50,000/- to be appropriated to the State. Accordingly, I answer point No.1 in the Negative and point No.2 in the Affirmative and proceed to pass the following:

ORDER

(i) Criminal Revision Petition No.834 of 2023 is dismissed.

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(ii) Criminal Revision Petition No.1121 of 2023 is allowed.

(iii) The judgment of conviction passed by the Trial Court is confirmed. However, the order of sentence is modified as under:

Accused is sentenced to pay fine of Rs.1,46,32,000/-, out of which, the complainant is entitled for Rs. 1,45,82,000/- as compensation and the balance amount of Rs.50,000/- to be appropriated to the State as fine amount. In default of payment of

fine amount, the accused shall undergo imprisonment for a period of two years.

(iv) The amount in deposit, if any, be transmitted to the Trial Court and the complainant is entitled to receive the same towards compensation after deducting the fine amount to be appropriated to the State.

Registry is directed to send back the Trial Court records along with copy of the order.

Sd/-

JUDGE *bgn/-