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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO.4 OF 2024.

SHAIKH ABDUL SHAKUR ALIAS SHAIKH
ABDUL SHAKUR XECApplicant.
VS
DILIP NAIK AND ANRRespondents.

Mr A. D. Bhobe, Ms S. Shaikh, Ms R. Prazeres, Ms A. Bandekar,
Advocates for the applicant.
Mr S. Desai, Ms M. Viegas and Ms T. Menezes, Advocates for the
respondent no.1.

CORAM: BHARAT P. DESHPANDE, J

Reserved on: 2nd April 2024.
Pronounced on : 17th April 2024.

ORDER.:

1. Heard Mr A. D. Bhobe, learned counsel for the applicant and Mr S. Desai, learned counsel for the respondent no.1.
2. This is a revision filed under Section 397 of Cr.P.C. thereby challenging the judgment passed by learned Additional Sessions Judge-2 (FTC), Margao in Criminal Appeal no. 97 of 2022 decided on 21.12.2022 wherein, judgment and order dated 25.2.2020 passed by the learned Chief Judicial Magistrate Margao was confirmed.
3. Applicant herein is an accused in a complaint filed under Section 138 of the Negotiable Instruments Act, 1881 ("NI Act" for short) by the respondent. In a nutshell, it is contention of the

respondent no.1/complainant that the applicant/accused was in need of money and accordingly, he borrowed an amount of Rs.5,00,000/- on 23.7.2016 from the complainant and on the same day affirmed an affidavit cum declaration before the Notary thereby agreeing to repay the amount of Rs.5,00,000/- within a period of three months, together with interest of Rs.6000/- on every Rs.1,00,000/- per month till repayment. However, after expiry of period of three months since the accused failed to repay the borrowed amount along with interest, complainant approached him. Accused initially avoided but later in September 2016, issued a post dated cheque for Rs.12,21,200/-dated 5.1.2018 towards outstanding amount, including interest and further interest as mentioned in paragraph 6 of the complaint. Complainant then deposited such cheque on 5.1.2018. However, it was returned unpaid with the endorsement "Funds insufficient". A notice demanding the cheque amount was issued to the accused by registered post AD. However, such notice returned with the endorsement "unclaimed", resulted in filing the complaint.

4. During the course of trial accused appeared and contested the matter and thereafter judgment was passed by the learned Magistrate holding accused guilty of the offence under Section 138 of the NI Act and directed the accused to pay cheque amount as compensation and in default to undergo sentence of six months. An appeal filed by the accused before the Sessions Court came to be rejected vide order

dated 21.12.2022. Both these orders are assailed in the present revision.

5. Mr Bhobe, learned counsel for the applicant would submit that first of all the pleadings in the complaint nowhere proved that the amount mentioned in the cheque was due and payable as on the date of issuance of cheque. He submits that both the Courts below failed to consider the important aspect of legally enforceable debt as pleadings are not supported by evidence with regard to amount of Rs.3,00,000/-. He submits that schedule mentioned in the complaint and more particularly paragraph 6 shows that calculation would not support the final figure mentioned therein. He would submit that the undertaking only speaks about the principal sum of Rs.5,00,000/- and interest upto August 2017 i.e at the rate of Rs.6,000/- per month on each sum of Rs.1,00,000/-. He would therefore submit that the applicant succeeded in rebutting the presumption and by showing that as on date of issuance of cheque, amount mentioned therein was not due and payable. Mr Bhobe would submit that subsequent explanation given by the complainant regarding oral agreement of Rs.1,00,000/- to be charged as interest, could not have been accepted by the trial Court and the Appellate Court as first of all it is excessive amount and secondly, there is no such agreement produced on record.

6. Learned counsel for the respondent no.1 Mr S. Desai would

submit that first of all accused could have put forth defence effectively before the trial Court and there is absolutely no cross examination on the contention raised by the complainant with regard to additional interest of Rs.1,000,00/- per month. He submits that such defence which is now raised is only an after thought. Notice was issued to the accused immediately after the cheque was returned unpaid. However, accused failed to raise any probable defence.

7. Mr Desai would further submit that even after receipt of the summons from the trial Court, accused had an opportunity to raise his probable defence, however, he only kept quiet and raise such issue belatedly.

8. Mr Desai, would then submit that presumption under Section 139 of the NI Act cannot be rebutted only by raising suspicion. Accused must establish by preponderance of probabilities that there is no legally recoverable debt. Only thereafter burden shifts on the complainant to prove it beyond all reasonable doubts.

9. Rival contentions fall for determination.

10. Contents of the complaint filed before the learned Magistrate under Section 138 of the NI Act would clearly go to show that hand loan of Rs.5,00,000/- was given to the accused by the complainant since he was in need of it. On the date of handing over such loan, i.e. 23.7.2016, accused executed an affidavit cum declaration before a

Notary public. Contents of such affidavit cum declaration in paragraph 2 to 6 read thus:-

2. *I say that I am was in need of Financial assistance of Rs.5,00,000/(Rupees Five Lakh only) and as such I have approached Mr. Dilip Naik, s/o. Mr. Baban Naik, r/o. H.No.348, Cottamol, Cuncolim, Salcete, Goa, with a request to lend me the said hand loan.*
3. *I say that at my request the said Mr. Dilip Naik, has lent me today a sum of Rs.5,00,000/-(Rupees Five Lakh only) by cash as a hand loan.*
4. *I say that towards the security of the above said hand loan of Rs.5,00,000/-(Rupees Five Lakhs only) I have deposited /kept with the said Mr. Dilip Naik the original Deed of sale dated. 18.2.2016, duly registered before the Sub-Registrar of Quepem, under no.QPM-BK1-00239-2016, CD no.QPMD6, on 2.3.2016, by virtue of which I have purchased a Plot A-1, admeasuring an area 2000 sq. mts. of the property surveyed under survey no. 20/1 of Village Cordem, Quepem, Goa.*
5. *I say and declare that I shall repay the said loan of Rs.5,00,000/(Rupees Five lakhs only) within a period of three months from the date of execution of this Affidavit cum Declaration.*
6. *I say that I have agreed to pay a sum of Rs.6000/- on every one lakh per month as an*

interest towards the said loan amount of Rs.5,00,000/till repayment of the entire loan amount on or before three months from today.

11. This affidavit cum declaration is produced before the learned Magistrate at Exh.C-17. Perusal of the contents as quoted above would go to show that loan of Rs.5,00,000/- was on the security of the title deed dated 18.2.2016. Paragraph 6 of the said undertaking would clearly go to show that accused agreed to pay Rs.6,000/- on every Rs.1,00,000/- per month as an interest towards loan amount till repayment. Complainant in the complaint and more specifically in paragraph no.6 disclosed as to how amount of Rs.12,21,200/- mentioned in the cheque was worked out. He calculated the interest from August 2016 to September 2017 i.e 14 months X Rs.30,000/- which comes to Rs.4,20,000/-. Thus it is clear that when the accused agreed to pay interest of Rs.6,000/- on every Rs.1,00,000/- per month, it is as agreed between the parties though as per the affidavit cum declaration, accused agreed to repay the said loan within a period of three months as found in paragraph no.5 of the undertaking. It is contention of the complainant that the accused failed to repay the said loan along with interest till September 2017 i.e. for a period of 14 months. When he gave final ultimatum the accused issued post dated cheque having date 5.1.2018 amounting to

Rs.12,21,200/-. Complainant explained in paragraph 6 itself as to how the figure of Rs.12,21,200/- is worked out. Contents of paragraph 6 of the complaint reads thus:-

6. *The amount of Rs. 12,21,200/- was worked out between the accused and the complainant as under :a) From August 1016 | To September 2017 (14 months x Rs.30,000) equal to Rs.4,20,000/-. For further three months from October 2017 to December 2017 accused agreed to pay Rupees One Lakh per month in addition to the fees of the Notary to register affidavit cum declaration dated 23.7.2016 plus cost of stamp paper .*

12. Thus, it is specific case of the complainant that apart from the principal amount of Rs.5,00,000/-, an amount of Rs. 4,20,000/- was calculated as interest from August 2016 to September 2017 (14 months) at the rate of Rs.30,000/- per month. Thereafter from October 2017 to December 2017, it was orally agreed between the parties that the accused shall pay Rs.1,00,000/- per month in addition to the fees of notary etc, since the cheque was post dated i.e. 5.1.2018.

13. As far as interest part is concerned as agreed in the affidavit cum declaration and more specifically in clause no.6, is concerned, it is found that such understanding was agreed between the parties and

it was reduced in the form of affidavit cum declaration before the notary public.

14. Affidavit in evidence of the complainant also gives a similar facts which are found in Exh.C-2. Cross examination of the complainant nowhere disputes about such affidavit cum declaration and its contents. In fact it is brought on record that such affidavit cum declaration was prepared by the accused as per his own desire and he agreed to pay interest at the rate of Rs.6,000/- per one lakh per month. Further cross examination revealed that even though original sale deed dated 18.2.2016 was kept with the complainant, the same was taken by the accused forcibly from the complainant and for that purpose police complaint was also filed. Interestingly, even during the cross examination the complainant admitted that original sale deed was kept as security with him by the accused. Thereafter suggestion was given to the complainant which reads thus:-

“It is not true to suggest that since the accused has paid entire loan amount, original was returned back to the accused.”

15. From the entire cross examination, it is clear that contention of the complainant in his affidavit and more particularly paragraph 6 of the affidavit which confirms his contention in the complaint itself about charging of interest upto December 2017, is not at all disputed or denied. Only a single denial of all the contents of the affidavit is

found recorded.

16. In the light of the above factual aspects, contentions raised by Mr Bhobe regarding claim of rebutting the presumption under Section 139 of the NI Act will have to be looked into.

17. Mr Bhobe, while placing reliance on the decision of the ***Dashrathbhai Trikambhai Patel Vs Hitesh Mahendrabhai Patel and another***,¹ would submit that accused succeeded in proving that as on the date of issuance of post dated cheque, there was no legally recoverable debt.

18. In the case of ***Dashrathbhai Trikambhai Patel*** (supra), the Apex Court was dealing with an appeal challenging the judgment of the Courts and was called upon to decide whether offence under Section 138 of the Act would deem to be committed if the cheque does not represent enforceable debt at the time of encashment.

19. In that matter, admittedly post dated cheque was issued by the accused for an amount of Rs.20,00,000/-. Loan was borrowed on 16.1.2012 for an amount of Rs. 20,00,000/- and accused in discharge of said liability issued a post dated cheque dated 17.3.2014 for the same amount. Learned trial Court in that matter acquitted the accused on the ground that accused paid a sum of R.4,09,315/- between 8.4.2012 to 30.12.2013 thereby partly discharging his

1 (2023)1 SCC 578

liability and accordingly it was observed by the learned trial Court that cheque of Rs.20,00,000/- when presented for encashment was not legally recoverable debt. Observation of the trial Court was challenged by the complainant before the High Court of Gujarat wherein additional evidence was led and thereafter the High Court dismissed the said appeal. While considering this fact, the Apex Court observed in paragraph 34 as under:-

34 In view of the discussion above, we summarise our findings below:

34.1 For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation.

34.2 If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque.

34.3 When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138

will stand attracted.

20. The Apex Court in the above decision therefore summarized that when the drawer of the cheque pays part or whole of the sum between the period when the cheque is drawn and when it is encashed upto maturity, then legally enforceable debt on the date of the maturity would not be sum represented on the cheque. The above observations of the Apex Court in the case of **Dashrathbhai Trikambhai Patel** (supra) are distinguishable from the facts of the present matter. In that case, admittedly part payment was made and it was admitted by the complainant which is not at all the case in the present matter.

21. Loan of Rs.5,00,000/- was taken by the accused from the complainant on 23.7.2016 and on the same day accused executed affidavit cum declaration duly sworn before notary public.

22. Though accused agreed to repay the entire loan with interest within three months, admittedly there is no such payment or part payment towards discharge of such liability.

23. Complaint clearly discloses that since there was no payment forthcoming, final ultimatum was given to the accused somewhere in 2017 and only thereafter he issued a post dated cheque. Thus, when the post dated cheque was handed over to the complainant in the last

week of 2017, not a single pie was paid by the accused to the complainant from the outstanding amount as well as interest. The date of the cheque is 5.1.2018 for an amount of Rs.12,21,200/-. The complainant has fully explained as to how he arrived at the said figure. Paragraph 6 of the complaint and affidavit as quoted above would clearly go to show that the outstanding amount was Rs.12,21,200/-. It is not at all the case of the accused that from 23.7.2016, he repaid part or full loan together with interest. Except giving some suggestions with regard to return of the original sale deed, there is absolutely no cross examination on these aspects.

24. Therefore, observation in the case of **Dashrathbhai Trikambhai Patel** (supra) will not help the accused/applicant in the present matter.

25. It is well settled proposition of law that once signature on the cheque is admitted, presumption arises under Section 139 of the NI Act which includes, existence of legally enforceable debt, as held in **Rangappa Vs Sri Mohan**². Matter in hand and specifically the cross examination of the complainant would go to show that no probable defence is raised to rebut such presumption.

26. In the case of **Rajesh Jain Vs Ajay Singh**³, the Apex Court after discussing all earlier decisions, it has been held that once the

² (2010) 11 SCC 441

³ (2023) 10 SCC 148

presumption arises under Section 139 of the NI Act, the Court ought to have proceeded on the premise that cheque was indeed issued in discharge of a debt/liability. The entire focus would then necessarily have to shift on the case set up by the accused, since the activation of the presumption has the effect of shifting evidential burden on the accused. In such circumstances, the nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the Court can straightaway proceed to convict the accused subject to satisfaction of other ingredients of Section 138 of the NI Act. However, if the Court finds that the evidential burden placed on the accused has been discharged, complainant would have been expected to prove the said fact independently and without taking aid of the presumption. Matter in hand would clearly go to show that except raising some defence, which cannot be considered as a probable defence, no material has been brought on record to rebut presumption under Section 139 of the NI Act.

27. Contention of Mr Bhobe, that there is no material placed on record by the complainant to show that there was any agreement between the complainant and the accused for payment of interest from October 2017 to December 2017 at Rs.1,00,000/- per month cannot be accepted at all for the simple reason that there is not even a single denial or dispute about this evidence which the complainant

has mentioned in his complaint, notice as well as affidavit in evidence.

28. After cheque was returned unpaid, legal notice was issued to the accused which returned unclaimed. In this notice same averments as found in paragraph 6 of the complaint and affidavit in evidence are disclosed. Postal envelope produced on record would go to show that this notice was sent to the accused on his registered address by registered post acknowledgment and it was returned unclaimed. Summons issued by the learned Magistrate vide Exh. 26 clearly go to show that he was served on the same address as mentioned in the cause title of the complaint as well as notice issued to him under Section 138 of the NI Act. Address mentioned in the present revision application is also the same. Thus notice was duly served on the accused but he failed to claim it. Admittedly, there was no reply to the legal notice. Cross examination is very cryptic and no denial with regard to specific amount or interest as claimed in the complaint is found.

29. In ***Dr. Srishti Ashutosh Prabhu Dessai Vs. Mr Dadamiyan M. Bagewadi and others.***⁴, this Court discussed in detail various provisions of NI Act including decision of the Apex Court and more particularly regarding rebuttal of presumption under Section 139 of the NI Act, which are squarely applicable to the matter

4 Criminal Appeal No.23 of 2015 decided on 3.10.2022.

in hand.

30. In sum and substance grounds which has been raised in the revision are devoid of merits and accordingly, revision fails and hence the order:

ORDER

Criminal Revision application stands disposed of. Applicant/accused to surrender before the learned trial Court for serving sentence, within two weeks from today.

BHARAT P. DESHPANDE, J.

VINITA VIKAS NAIK Digitally signed by VINITA VIKAS NAIK
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