IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO.65 OF 2016

Mr. Jerry D'Souza, major of age,
s/o: Peter Xavier D'souza, married,
retired, Indian National,
r/o: House No. 101/A/11,
Duke Heaven, Tamdi Mati,
opp. TVS Service Station,
Panaji, Tiswadi, Goa.
(Since deceased)

Mrs. Jean Gloria De'souza, 57 years
wife of Mr. Jerry alias Santana De'souza
Indian National and Resident of
H. No. 101/A/11, Duke Heaven
Tambdi Mati, Opp. TVS Service Station
Panaji Tiswadi Goa - Legal Heir … Applicant
(Amendment carried out as
per order dated 18.03.2021)

Versus

1. Mr. Joaquim Antonio
Fernandes, major of age,
s/o: Antonio Fernandes,
married, retired, Indian
National, r/o: House No.
364, Ambekhand, Reis
Mangos, Verem, Bardez,
Goa.

2. State,
Through Public Prosecutor,
High Court ... Respondents

Mr Ganesh Naik, Advocate for the Applicant.

Mr Nilesh V.S. Shirodkar, Advocate for Respondent No.1.

Mr Gaurish Nagvenkar, Additional Public Prosecutor for Respondent No.2.

CORAM: **VALMIKI MENEZES, J.**
RESERVED ON: **25th November, 2024**
PRONOUNCED ON: **27th November, 2024**

JUDGMENT:

1. This is a Criminal Revision Application under Section 397 Cr.P.C. impugning judgment dated 08.10.2015 passed by the Sessions Court, North Goa in Criminal Appeal No.97/2014 which has dismissed the Petitioner's appeal arising from a challenge to a judgment of conviction dated 30.06.2014 passed by the Judicial Magistrate First Class, Panaji in Criminal Case OA/33/2012/B.

2. The Respondent, who is the original Complainant instituted the aforementioned criminal case under Section 138 of the Negotiable Instruments Act (the Act). According to the complaint filed before the Magistrate, the Petitioner/Original Accused had taken on loan, three amounts, Rs.5,00,000/- in May, 2009, Rs.1,00,000/- in February 2010 and Rs.2,00,000/- in June, 2010; owing an amount of Rs.8,00,000/- to the Complainant, on demand. It is the Complainant's case that the Petitioner issued to him a cheque dated 24.08.2011 for this amount, which cheque was presented by the Complainant to his Bank on 28.09.2011 when it was dishonoured, and further presented on 23.11.2011, when it was once again dishonoured under a memo issued

by the Bank on the same day with the endorsement that there were insufficient funds in the bank account of the Petitioner. Accordingly, the Complainant sent a notice dated 07.12.2011 to the Petitioner calling upon the Petitioner to pay the amount on the dishonoured cheque, and since no reply was forthcoming from the Petitioner, within the time stipulated under the Act, he filed a complaint on 21.01.2012 before the J.M.F.C. at Panaji.

3. At the trial, the Complainant examined himself, and on his evidence being closed, the Petitioner/Accused chose not to lead evidence or examine himself, and his statement under Section 313 Cr.P.C. was recorded. The Petitioner was convicted by the Magistrate for offence punishable under Section 138 of the Act and sentenced to undergo simple imprisonment for a period of one year and to pay to the Complainant a sum of Rs.10,25,000/- towards compensation in terms of Section 353(3) Cr.P.C. and in default to undergo simple imprisonment for a period of two months.

On an appeal bearing Criminal Appeal No.97/2014 being filed, the same came to be dismissed by the impugned order dated 08.10.2015 upholding all findings arrived at by the Magistrate. During the course of the present Civil Revision Application remaining pending before this Court, the Original Petitioner passed away and by order dated 18.03.2021, this Court opined that since the amount imposed as compensation on the deceased Accused would have to be paid out of his estate, his legal representatives will have a right to continue the Revision Application, and accordingly allowed the legal representatives

of the deceased Accused to represent the Accused and agitate the question of the correctness of the orders passed by the Sessions Court and the Magistrate. It is noted that the Original Petitioner had deposited an amount of Rs.6,00,000/- in this Court under order dated 28.12.2015 and a further amount of Rs.4,25,000/- under another order of the same date as a precondition for suspending his sentence.

4. I have heard Shri Ganesh Naik for the Petitioner/Applicant and Shri Nilesh Shirodkar for the Respondent. I have perused the record of the criminal proceedings before the learned Magistrate, which have been placed before this Court by the Petitioner in the form of a compilation as also gone through the impugned judgment of the Sessions Court.

5. It is the contention of the Petitioner that in the absence of the Complainant leading positive evidence to establish that he had the capacity to transfer to the Petitioner the loan amount, the presumptions in terms of Section 139 of the Act ought to have been held by the Trial Court and by the Sessions Court as sufficiently rebutted. Learned Shri Ganesh Naik for the Petitioner further submits that the Complainant has not averred anywhere in his complaint or led evidence as to the fact that he had sufficient funds of his own to be able to advance the loan of Rs.8,00,000/- to the Petitioner between May, 2009 and June, 2010; he submits that the Complainant ought to have produced his Bank accounts and documents showing his source of income, which were never produced. He submits that the Complainant was a retired Government employee with a pension of hardly Rs.5,000/- per month,

and in the absence of showing his source of income, the Trial Court ought to have drawn an inference that the Complainant lacked a source of income to be able to advance the loan to the Accused. Reliance was placed on *S. Murugan vs. M.K. Karunagaran,* ***2023 SCC OnLine SC 2041,*** *K. Subramani Vs. K. Damodara Naidu,* ***(2015) 1 SCC 99*** *and Rohitbhai Jivanlal Patel vs. State of Gujarat & Anr,* ***(2019) 5 S.C.R. 417,*** to contend that in the absence of leading positive evidence to prove the complainant's capacity to pay out the loan to the accused, the presumptions under Section 139 of the Act stood rebutted.

Further reliance has been placed on the judgments of the Supreme Court in *Krishna Janardhan Bhat vs. Dattatraya G. Hegde,* ***(2008) 4 SCC 54*** *and Rangappa vs. Mohan,* ***2010 AIR (SC) 1898*** to contend that for proving the defence raised by the accused, the accused was not required to step into the witness box and the presumptions under Section 139 to be rebutted by eliciting in cross-examination of the Complainant evidence to prove that the Complainant did not have the capacity to advance the loan.

Learned Advocate for the Petitioner has taken me through the evidence of the Complainant and submits that there was enough evidence on record to suggest that the three cheques concerned in the complaint were forcibly taken by the Complainant and a Police complaint had been made to that effect before the Panaji Police Station on 03.09.2011, thus raising a doubt as to whether the cheques were issued in discharge of a liability; he further contends that the defence that the cheques were taken through coercion from the Accused was a

plausible defence which both Courts who have considered the case have failed to address.

6. Shri Nilesh Shirodkar appearing for the Respondent/ Complainant submits that even in the cross-examination of the Complainant, none of the defences now sought to be argued i.e. the lack of capacity to advance the loan or that the cheques were obtained by coercion, were put to the Complainant during the trial; he submits that even the Police complaint referred to during the arguments is not part of the record nor was even produced during the examination of the Accused under Section 313 Cr.P.C. He further submits that on a reading of the Statement of the Accused under Section 313, none of the defences sought to be raised for the first time in the arguments advanced at the hearing of this Revision Application had been set out as the case of the Accused. He further contends that the view taken in *Janardhan Bhat* (supra) has been overruled by a Larger Bench in *Rangappa* (supra). He, therefore, contends that the Revision Application ought to be dismissed.

7. At the outset, it is to be noted that in *Krishna Janardhan Bhat* (supra), the Supreme Court expressed that in the absence of the Complainant producing the books of accounts or any other proof to show his capacity to pay, and further in terms of Sections 269SS of the Income Tax Act, if any advance taken by way of a loan of more than Rs.20,000/- it was required to be made by cheque, such transaction itself would be illegal. This view was examined by the Supreme Court in *Rangappa* (supra) which has observed in para 14 that the

presumptions mandated by Section 139 of the Act include the presumption of the existence of a legally enforceable debt or liability. The Supreme Court further noted that, to that extent, the observations in *Krishna Bhat* (supra) may not be correct. It further noted that this does not in any way cast doubt on the correctness of the decision in that case since it is based on the specific facts and circumstances therein. In fact, that is what is noted by the Supreme Court in para 35 of *Krishna Bhat* (supra), that keeping in view the peculiar facts and circumstances of that case, the Courts below had approached the entire matter from wrong application of legal principles. Clearly therefore these judgments proceed on the accepted proposition that the presumptions mandated by Section 139 of the Act include the presumption in favour of the existence of a legally enforceable debt or liability, even where positive evidence may not be led by a party to show his capacity to advance the loan.

8. In *S. Murugan* (supra), the Supreme Court held that to rebut the presumptions under Section 139, it is open to the Accused not only to rely on the evidence led by him, but he can also rely on the material submitted by the Complainant to raise a probable defence. The Complainant, in cross-examination, in that case stated that he had borrowed the amount given in loan from his mother, however, the Complainant has not examined his mother to prove this statement nor produced his bank accounts or other material to prove that he had borrowed from other sources to advance the loan. In *K. Subramani* (supra), a specific defence was taken that the Accused had no capacity/source of income to be able to advance the loan to the

Accused. The Complainant and the Accused in this case were working as Lecturers in a Government college and were thus governed by the Government Servants' Conduct Rules, which prescribe the mode of lending and borrowing. The record did not show that the prescribed mode was followed. The source of the sum advanced in loan by the Complainant was claimed by him to have been savings from his salary and Rs. 5 Lakhs derived from the sale of Site No. 45, which belonged to him. However, neither in the complaint nor in the chief examination had the Complainant averred the sale price of Site No. 45. The sale deed was not produced, and the Complainant had not produced any bank statement to substantiate his claim. Both, *S. Murugan* (supra) and *K. Subramani* (supra) are judgments rendered in the specific facts of those cases and where a specific defence was taken that the Complainant had lacked the capacity or source of income to be able to advance the loan to the Accused.

9. In the present case, one would have to first examine whether the Accused in fact took a defence that the Complainant had no source of income or capacity to advance the loan, and if such defence is in fact found taken during the course of recording evidence, whether there is sufficient cross-examination and enough of material elicited during cross-examination of the Complainant for the Courts to conclude that the presumptions under Section 139 as to the consideration, stood sufficiently rebutted. The question really is whether the Accused had discharged the burden of proof placed upon him under the statute, in the absence of having led evidence through himself, through cross-examination of the Complainant that his defence was a plausible one.

10. The Complainant, in his examination in chief, has, apart from giving details of the amounts loaned by him in cash, produced his Bank passbook showing entries. There is no denial of the signature of the Accused on the cheques, thus raising a presumption that they were issued in discharge of the consideration stated thereon. There is no specific defence raised that the cheques were forcibly taken by threatening the Accused except by putting a suggestion in cross-examination to that effect. If it were the case of the Accused as argued before this Court, that a Police complaint has been lodged to this effect prior to the filing of the complaint under Section 138, such complaint ought to have been brought on record and there ought to have been adequate cross-examination of the Complainant to establish that the cheques were in fact taken under coercion. On the contrary, apart from a mere suggestion, the Complainant was never cross examined on his source of income nor was even a suggestion put to him that he had neither a source of funds nor the capacity to advance the loans to the Accused as claimed by him in the complaint. Thus, in the complete absence of a defence being raised as to the capacity to pay or the source of income of the Complainant, the presumptions in favour of the cheques did not stand rebuttal.

11. Reading through the judgment of the learned Magistrate, the well-reasoned conclusions arrived at on the basis of the evidence before the Trial Court cannot be faulted. The Magistrate has specifically recorded that during the recording of the Statement under Section 313 Cr.P.C., the Accused produced his Bank statement wherein the statement shows that a sum of Rs.2,00,000/- was paid to the

Complainant. However, it was noted by the Trial Court that none of these facts were put to the Complainant and in fact, the Complainant, in cross-examination stated the specific number of his Bank account, of which he has produced a passbook showing Bank entries made therein. The Complainant also denied having received the amount of Rs.2,00,000/- by cheque from the Accused stating that the account number referred to in the entries produced by the Accused did not pertain to his account.

12. In the appeal, the learned Sessions Court on reappreciating the entire evidence before the Magistrate and has specifically noted that mere denials put to the Complainant or a few questions put during cross-examination would not amount to a plausible explanation and be sufficient to rebut the presumptions in favour of the cheques. The learned Sessions Court, on considering the Statement of the Accused under Section 313 Cr.P.C., has noted that the Accused has not examined any witness to prove the contents of the complaint claimed to have lodged by him before Panaji Police Station on 03.09.2011 and in the absence of leading any positive evidence on the question of the cheques being obtained forcibly, the presumptions were not rebutted. The findings of the Magistrate on both these issues were confirmed by the Sessions Court.

13. In *Malkeet Singh Gil vs. State of Chhatisgarh*, reported in **(2022) 8 SCC 204**, the Supreme Court has held that it is apt to mention that where there are concurrent findings arrived at by two Courts after detailed appreciation of the material and evidence brought on record,

the High Court, in Criminal Revision against conviction, is not supposed to exercise the jurisdiction alike to the Appellate Court, and the scope of interference in revision is extremely narrow. It further holds that Section 397 Cr.P.C. vests jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court. The object of the provision is to set right a patent defect or error of jurisdiction or law and whilst considering the same, the Revisional Court does not dwell at length upon facts and evidence of the case to reverse those findings.

14. *Malkeet Singh Gil* (supra) further holds that the settled legal position is that after conviction by the Trial Court and the Appellate Court, the High Court ought not to interfere with the finding of fact recorded by the Trial Court and Appellate Court.

Considering the concurrent findings of fact as discussed above, and arrived at by the Trial Court and the Sessions Court in the present case, and applying the ratio laid down by the Supreme Court in *Malkeet Singh Gil* (supra), there is no scope for interference by this Court in exercise of its jurisdiction under Section 397 Cr.P.C. The Revision Application is accordingly dismissed.

15. This Court, by its order dated 22.07.2023 passed in Cr.M.A. No.297/2023 (F), had permitted the Respondent to withdraw an amount of Rs.2,56,250/- which was in fact withdrawn. The total amount deposited before this Court by the Petitioner was

Rs.10,25,000/-. Needless to state, the Registry shall release the residue amount from Rs.10,25,000/- deposited by the Petitioner in this Court, to the Complainant/Respondent along with interest accrued thereon by transferring the same to the account of the Complainant within a period of ten days from today. The Complainant/Respondent shall furnish within two days of this order, details of his bank account to enable the Registry to effect the transfer of the deposited amount.

VALMIKI MENEZES, J.