IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL APPEAL (AGAINST ACQUITTAL) NO. 1849 of 2023
FOR APPROVAL AND SIGNATURE:
HONOURABLE MRS. JUSTICE M. K. THAKKER

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	YES

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PATEL MALPESHKUMAR KANTILAL
Versus
STATE OF GUJARAT

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Appearance:
MR JIGAR D DAVE(6528) for the Appellant(s) No. 1
MR KAIVAN K PATEL(6338) for the Opponent(s)/Respondent(s) No. 2
MS DIVYANGNA JHALA, ADDL.PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MRS. JUSTICE M. K. THAKKER**
Date : 22/01/2024
ORAL JUDGMENT

1. With the consent of the parties, appeal is being decided finally on admission stage.

2. This appeal is filed under Section 378 of the Code of Criminal Procedure, 1973 ('the Cr.P.C.' hereinafter) challenging the

impugned judgment and order dated 20.06.2023 passed by the learned Additional Civil Judge and Judicial Magistrate first Class, Vijapur in Criminal Case No.1599 of 2022 below Exhibit 27, whereby the the respondent-accused is acquitted from the offence under Section 138 of the Negotiable Instruments Act, 1886.

3. The case of the complainant is that the complainant and the accused were knowing to each other as the accused is doing the trading business of potato and having the cold storage at Bardoli. The complainant used to visit the cold storage and the complainant and the accused become a friend. In the year March 2022, the accused had purchased the potatoes through the complainant of the amount of Rs.11,12,146/-. As the said goods were purchased through the complainant,

payment was made to the complainant of Rs.80,146/- in cash and for the remaining amount of Rs.10,32,000/- three cheques were issued in favour of the complainant. The details of the cheques are mentioned hereinbelow:

Sr.	Cheque No.	Bank Name	Cheque Date	Cheque Amount (Rs.)
1	007828	Axis Bank, Bardoli Branch	29.06.2022	4,00,000/-
2	873533	HDFC BANK, Bardoli Branch	29.06.2022	3,00,000/-
3	873535	HDFC BANK, Bardoli Branch	20.06.2022	3,32,000/-

3.1. An assurance was given that on depositing the aforesaid cheque in the Bank, it would be honored and the amount would be credited in the account of the complainant. On depositing the aforesaid cheques with the complainant Bank, the same was dishonored with an endorsement of 'Account Closed' on 30.06.2022. Again, the said cheques were deposited with the same

endorsement and the same was returned on 05.08.2022. The demand notice came to be issued by the complainant on 01.09.2022, which was served on 05.09.2022. As neither demand notice was complied nor the replied, a private complaint came to be filed being Criminal Case No.2599 of 2022.

3.2. To prove the case, the complainant has examined himself below Exhibit 5 and produced the documentary evidence in the nature of three original cheques below Exhibits 8, 9 and 10, check returned advice below Exhibit 11, cheque returned memos below Exhibit 12, 13, 14, copy of the notice below Exhibit 15, copy of the registered Post A.D. window slip below Exhibit 16, copy of the acknowledgment below Exhibit 17, reply to the notice below Exhibit 18, carbon copy of the bill

below Exhibits 19 to 22, GST certificate below Exhibit 23.

3.3. On filing the closing pursis, the accused file pursis below Exhibit 26 disclosing that he did not want to give the further statement. Thereafter judgment and order on acquittals after considering the material placed on record was passed by the learned trial Court below Exhibit 27, which is impugned before this Court.

4. Heard the learned advocate Mr.Jigar Dave for the applicant, learned advocate Mr.Kaivan Patel for the respondent No.2 and learned APP Ms.Divyangna Jhala for respondent-State.

5. Learned advocate Mr.Jigar Dave for the appellant submits that unique method has been adopted by the learned trial Court for acquitting the respondent-accused. That on

appearing the accused, the complainant was cross examined which was over in five lines wherein the complainant was asked to identify the respondent-accused, for which the complainant failed to identify, only on that ground the learned trial Court had acquitted the respondent-accused.

5.1. Learned advocate Mr.Dave submits that though the presumption which is in favour of the complainant under Sections 118 and 139 of the N.I.Act was not rebutted by the learned trial Court, learned trial Court had acquitted the respondent-accused only on the ground that the present complainant could not identify the respondent-accused in the court. Learned advocate Mr.Dave further submits that though along with the complaint, bills were produced below Exhibits 19 to 22 showing that the

respondent-accused had purchased the goods worth of Rs.11,12,146/-, which was not denied by the respondent-accused. There was no any further statement was recorded. The learned trial Court had acquitted the respondent-accused in haste by adopting the method of identifying the respondent-accused in the Court.

5.2. Learned advocate Mr.Dave further submits that to support the contents of the complaint the documentary evidences were produced, which were not controverted by the respondent-accused either during the cross examination of the complainant or by the independent evidence or by proving any circumstances, learned trial Court had passed the judgment and order of acquittal. Learned advocate Mr.Dave further submits that without any cogent

reason the judgment and order of the acquittal was passed, therefore, the impugned judgment and order is required to be quashed and the respondent-accused is required to be convicted.

6. On the other hand, learned advocate Mr.Kaivan Patel for the respondent-accused submits that the contention of the complainant in the notice as well as in the complaint is with regard to having the friendly relations was falsified during the trial as the complainant was not able to identify to the respondent-accused which amounts to rebutting the presumption, which is in favour of the complainant. Therefore, the learned trial Court had rightly acquitted the respondent-accused from the charges.

6.1. Learned advocate Mr.Patel further submits that as the respondent-accused was

able to rebut the presumption by asking the complainant to identify the respondent-accused which he could not do, therefore, learned trial Court had rightly not believed the case of the complainant and acquitted the respondent-accused. Learned advocate Mr.Patel further submits that the case of the respondent-accused in the reply to the demand notice is that the cheques which are lying in the motorcycle dickey was stolen by the present complainant and the same was established during the cross examination therefore, there was no any error committed by the learned trial Court in acquitting the respondent-accused. By submitting the same, learned advocate Mr.Patel submits that after considering the evidence and the material placed before the learned trial Court, the learned trial Court had

acquitted the respondent-accused and therefore, there was no any interference is required and the appeal is prayed to be dismissed and judgment and order passed by the learned trial Court requires to be confirmed.

7. Considering the arguments advanced by the learned advocates for the respective parties, few dates which are required to be noted are mentioned hereinbelow:

03.10.2022	Complaint came to be filed.
20.06.2023	Accused appeared and his plea was recorded below Exhibit 24
20.06.2023	Cross examination of the complainant below Exhibit 5 was made by the learned advocate for the respondent-accused.
20.06.2023	Closing pursis came to be filed by the complainant below Exhibit 5.
20.06.2023	Pursis came to be filed by the accused not to give any further statement below Exhibit 26.
20.06.2023	Judgment and order acquitting the respondent-accused was passed.

From the aforesaid dates, it can be averred that, the learned trial Court in haste concluded the

proceedings in two dates; first is date of filing complaint and the process issued i.e. 03.10.2022 and the remaining procedure was followed i.e. 20.06.2023. It is true that as per the directions issued by this Court as well as the Apex Court the case is to be concluded as expeditiously as possible, but not at the cost administrate on justice. The cross examination which was conducted by the learned advocate for the respondent-accused reproduced hereinelow:

> *"I know the accused. By raising the finger, he identified the accused and stating that his name is Sanjaybhai Dahyabhai Patel. The Court had called that person and asked his name and his name was Rahulbhai Gopalbhai Patel and his Election Card Number was mentioned as 1311943. It is admitted by the complainant that he mentioned in the complaint and in his verification that he is knowing to the respondent-accused. The last*

question was replied that it is not true that the false case is filed against the respondent-accused."

By giving this answer the cross examination was over.

7.1. Immediately, the closing pursis was filed below Exhibit 5, declaring that the respondent-accused filed pursis declaring that he did not want to give further statement below Exhibit 26 and the judgment and order of acquittal was passed below Exhibit 27.

8. The question before this Court is that merely non-identifying to the respondent-accused would lead to the conclusion that respondent-accused had rebutted the presumption which is in favour of the complainant. To answer the same, this Court had gone through the law

laid down by the Apex Court in case of ***Rajesh Jain vs. Ajay Singh,*** reported in ***2023 (10) SCC 148*** wherein the relevant paragraphs which are required to be considered are reproduced hereinbelow:

> **"23.**Since the execution of the cheque is, admittedly, not under dispute, the limited question to be considered, is (i) whether the accused can be said to have discharged his 'evidential burden', for the courts below to have concluded that the presumption of law supplied by Section 139 had been rebutted**?**
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> **23.1** If the answer to this question is found in the affirmative, the next question to be considered is (i) whether the complainant has, in the absence of the artificial force supplied by the presumption under Section 139, independently proved beyond reasonable doubt that the cheque was issued in discharge of a debt/liability**?** The necessity of dealing with point No. (ii) will only arise if the answer to point No. (I) in the affirmative. Hence, we shall take up point (i) for consideration.
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25.Essentially, in all trials concerning dishonour of cheque, the courts are called upon to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act.

26.In Gimpex Private Limited vs. Manoj Goel 7, this Court has unpacked the ingredients forming the basis of the offence under Section 138 of the NI Act in the following structure:

(1) The drawing of a cheque by person on do account maintained by him with the banker for the payment of any amount of money to another from that account;

(i) The cheque being drawn for the discharge in whole or in part of any debt or other liability;

(iii) Presentation of the cheque to the bank arranged to be paid from that account,

(iv) The return of the cheque by the drawee bank as unpaid either because the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount,

(v) A notice by the payee or the holder in due course

making a demand for the payment of the amount to the drawer of the cheque within 30 days of the receipt of information from the bank in regard to the return of the cheque; and

(vi) The drawer of the cheque failing to make payment of the amount of money to the payee or the holder in due course within 15 days of the receipt of the notice.

27. In K. Bhaskaran v. Sankaran Vaidhyan Balan 8 this Court had summarised the constituent elements of the offence in fairly
similar terms by holding:

> "14. The offence Under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (3) failure of the drawer to make payment within 15 days of the receipt of the notice."

29.There are two senses in which the phrase 'burden of

proof ' isused in the Indian Evidence Act, 1872 (Evidence Act, hereinafter). One is the burden of proof arising as a matter of pleading and the other is the one which deals with the question as to who has first to prove a particular fact. The former is called the 'legal burden' and it never shifts, the latter is called the 'evidential burden' and it shifts from one side to the other. [See Kundanlal v. Custodian Evacuee Property (AIR
1961 SC 1316)].

30. The legal burden is the burden of proof which remains constant throughout a trial. It is the burden of establishing the facts and contentions which will support a party's case. If, at the conclusion of the trial a party has failed to establish these to the appropriate standards, he would lose to stand. The incidence of the burden is usually clear from the pleadings and usually, it is incumbent on the plaintiff or complainant to prove what he pleaded or contends. On the other hand, the evidential burden may shift from one party to another as the trial progresses according to the balance of evidence given at any particular stage; the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be is adduced by either side (See Halsbury's Laws of England, 4th Edition para 13). While the former, the legal burden arising on

the pleadings is mentioned in Section 101 of the Evidence Act, the latter, the evidential burden, is referred to in Section 102 thereof. [G.Vasu V. Syed Yaseen (AIR 1987 AP139) affirmed in Bharat Barrel Vs. Amin Chand [(1999) 3 SCC 35].

31.Presumption, on the other hand, literally means "taking as true without examination or proof". In Kumar Exports v. Sharma Exports 9, this Court referred to presumption as "devices by use of which courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence."

32.Broadly speaking, presumptions are of two kinds, presumptions of fact and of law. Presumptions of fact are inferences logically drawn from one fact as to the existence of other facts. Presumptions of fact are rebuttable by evidence to the contrary. Presumptions of law may be either irrebuttable (conclusive presumptions), so that no evidence to the contrary may be given or rebuttable. A rebuttable presumption of law is a legal rule to be applied by the Court in the absence of conflicting evidence (Halsbury, 4th Edition paras 111, 112]. Among the class of rebuttable presumptions, a further distinction can be made between discretionary presumptions ('may presume') and compulsive or

compulsory presumptions ('shall presume'). [G. Vasu V. Syed Yaseen (Supra)].

33. The Evidence Act provides for presumptions, which fit within one of three forms: 'may presume' (rebuttable presumptions of fact), 'shall presume' (rebuttable presumption of law) and conclusive presumptions (irrebuttable presumption of law). The distinction between 'may presume' and 'shall presume' clauses is that, as regards the former, the Court has an option to raise the presumption or not, but in the latter case, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved, [G.Vasu V. Syed Yaseen (Supra)].

34. The NI Act provides for two presumptions: Section 118 and Section 139. Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that 'unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability'. It will be seen that the 'presumed fact'

directly relates to one of the crucial ingredients necessary to sustain a conviction under Section 138.

35.Section 139 of the NI Act, which takes the form of a 'shall presume' clause is illustrative of a presumption of law. Because Section 139 requires that the Court 'shall presume' the fact stated therein, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established.

36. The Court will necessarily presume that the cheque had been issued towards discharge of a legally enforceable debt/liability in two circumstances. Firstly, when the drawer of the cheque admits issuance/execution of the cheque and secondly, in the event where the complainant proves that cheque was issued/executed in his favour by the drawer. The circumstances set out above form the fact(s) which bring about the activation of the presumptive clause. [Bharat Barrel Vs. Amin Chand] [(1999) 3 SCC 35].

37.Recently, this Court has gone to the extent of holding that presumption takes effect even in a situation where the accused contends that 'a blank cheque leaf was voluntarily signed and handed over by him to the complainant. [Bir Singh v. Mukesh Kumar 11].

Therefore, mere admission of the drawer's signature, without admitting the execution of the entire contents in the cheque, is now sufficient to trigger the presumption.

38. As soon as the complainant discharges the burden to prove that the instrument, say a cheque, was issued by the accused for discharge of debt, the presumptive device under Section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to transfer the evidential burden on the accused of proving that the cheque was not received by the Bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.

39.John Henry Wigmore on Evidence states as follows:

> "The peculiar effect of the presumption of law is merely to invoke a rule of law compelling the Jury to reach the conclusion in the absence of evidence to the contrary from the opponent but if the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption 'disappears as a rule of law and the case is in the Jury's hands

free from any rule.”

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41. In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested. The words ‘until the contrary is proved’ occurring in Section 139 do not mean that accused must necessarily prove the negative that the instrument is not issued in discharge of any debt/liability but the accused has the option to ask the Court to consider the non-existence of debt/liability so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that debt/liability did not exist. [Basalingappa Vs. Mudibasappa (AIR 2019 SC 1983) See also Kumar Exports Vs. Sharma Carpets (2009) 2 SCC 513].

42. In other words, the accused is left with two options. The first option-of proving that the debt/liability does not exist-is to lead defence evidence and conclusively establish with certainty that the cheque was not issued in discharge of a debt/liability. The second option is to prove the non-existence of debt/liability by a preponderance of probabilities by referring to the particular circumstances of the case. The preponderance of probability in favour of the

accused's case may be even fifty one to forty nine and arising out of the entire circumstances of the case, which includes: the complainant's version in the original complaint, the case in the legal/demand notice, complainant's case at the trial, as also the plea of the accused in the reply notice, his 313 statement or at the trial as to the circumstances under which the promissory note/cheque was executed. All of them can raise a preponderance of probabilities justifying a finding that there was 'no debt/liability'. [Kumar Exports and Sharma Carpets, (2009) 2 SCC 513].

43. The nature of evidence required to shift the evidential burden need not necessarily be direct evidence i.e., oral or documentary evidence or admissions made by the opposite party; it may comprise circumstantial evidence or presumption of law or fact.

44.The accused may adduce direct evidence to prove that the instrument was not issued in discharge of a debt/liability and, if he adduces acceptable evidence, the burden again shifts to the complainant. At the same time, the accused may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling the burden may likewise shift to the complainant. It is open for him to also rely upon

> presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act. The burden of proof may shift by presumptions of law or fact. In Kundanlal's case- (supra) when the creditor had failed to produce his account books, this Court raised a presumption of fact under Section 114, that the evidence, if produced would have shown the non-existence of consideration. Though, in that case, this Court was dealing with the presumptive clause in Section 118 NI Act, since the nature of the presumptive clauses in Section 118 and 139 is the same, the analogy can be extended and applied in the context of Section 139 as well."

9. On considering the aforesaid law and the records, it transpires that though in reply of the demand notice the accused had stated that his bike as well as the cheques were stolen. But, neither the said fact was proved by adducing pleading or evidence which may be in the standard of preponderance of probabilities or during the cross examination creating circumstnaces. In the cross examination, undoubtedly, the complainant

failed to identify to the respondent-accused, but this Court is of the view that the prosecution of the private complaint for an offence under Section 138 of the N.I.Act largely differs from the prosecution of the complaint in respect of other offences punishable under the Indian Penal Code. The proceedings under Section 138 of the N.I.Act, though criminal in nature, do not really signify the criminal intent and flow from the act, the basic object and the purpose of N.I.Act is to harness the violators of the transactions arising from the Mercantile Law and to ensure that the necessary commitment flows from the obligations and make them liable for criminal prosecution to achieve aforesaid object. Learned trial Court ought to have followed the procedure in fair and judicious manner and ought not to intend to serve a short cut to dismissal of case by

snap judgment.

10. In the instant case, the accused neither created any circumstances to rebut the evidence or had established the defence through any independent evidence nor given the statement under Section 313 of the Cr.P.C. was recorded.

11. This Court is of the view that nothing insignificant has been elicited in the cross examination of the complainant to raise any suspicion in the case set up by the complainant. The complainant, undoubtedly, not identified the accused in the Court, but it does not mean that the false complaint is filed by the accused without having rebutted the presumption which is in favour of the complainant. Signature on the cheque having not disputed in view thereof the presumption under Sections 118 and 138 of the N.I.Act

having taken effect, the complainant case stood satisfied every ingredients necessary for sustaining the conviction under Section 138 of the N.I.Act. The case of the defence was limited only through the reply of the demand notice, that the cheques and the bike were stolen. However, to support his defence, he neither gave his statement under Section 313 of the Cr.P.C. nor lead any evidence therefore, mere bald words cannot be accepted and cannot be suggested that he rebutted the presumption.

12. This Court could have concluded the appeal without remitting the matter back to the learned trial Court, however, it transpires from the record that neither the fledged cross examination was concluded nor the accused had given the statement under Section 313 of the Cr.P.C. nor his defence

was put through an independent evidence. Therefore, this Court with a view to see that further impairment of administration of criminal justice may not be occurred and to give fair opportunity to both the sides to lead the evidence, deemed it fit to remit back to learned trial Court.

13. In view thereof, the appeal is partly allowed. The the impugned judgment and order dated 20.06.2023 passed by the learned Additional Civil Judge and Judicial Magistrate first Class, Vijapur in Criminal Case No.1599 of 2022 below Exhibit 27 is quashed and set aside. The Case Criminal Case No.1599 of 2022 is remanded back to the learned trial Court to decide afresh from the stage of the cross examination of the complaint.

(M. K. THAKKER,J)

M.M.MIRZA