

(2022) 06 GUJ CK 0087
In the Gujarat High Court
Case No : R/Criminal Appeal No. 1674 Of 2016

Brahmbhatt Kalicharan Babubhai

APPELLANT

Vs

State Of Gujarat & 1 Other(S)

RESPONDENT

Date of Decision : 14-06-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 378, 417
Negotiable Instruments Act, 1881 — Section 118(a), 138, 139

Citation : (2022) 06 GUJ CK 0087

Hon'ble Judges : Dr. Ashokkumar C. Joshi, J

Bench : Single Bench

Advocate : Hardik P Barot, Nadeem B. Mansuri, Jirga Jhaveri

Final Decision : Dismissed

Judgement

Dr. Jashokkumar C. Joshi, J

1. Present appeal has been filed by the appellant – original complainant under the provisions of Section 378 of the Code of Criminal Procedure, 1973 challenging the judgment and order dated 19.10.2016, passed in Criminal Case No. 1655 of 2013 by the learned Additional Chief Judicial Magistrate, Kalol, recording the acquittal.

2. The facts, in brief, are that appellant – original complainant – Brahmbhatt Kalicharan Babubhai, lodged a complaint before the Court that the respondent No. 2 herein had borrowed Rs.1,80,000/- from him for personal use and assured to repay in six months and for the same, he issued a Cheque bearing No. 956834 dated 15.03.2013 drawn on Indian Overseas Bank, Kalol Branch, which, the complainant presented in bank, but the same was returned by the bank with an endorsement "insufficient fund" and hence, the complainant issued a legal notice dated 25.03.2013 to the respondent No. 2 through his advocate by RPAD, however, since the respondent No. 2 did not repay the said amount, the complainant was constrained to file complaint before the competent Court at

Kalol under Section 138 of the Negotiable Instruments Act, 1881 (herein after referred to as "the NI Act").

2.1 Upon such complaint being filed and subsequent to service of summons, the respondent No. 2 appeared before the Court. Since the accused did not plead guilty, trial was proceeded against him. Vide impugned judgment and order dated 19.10.2016, the learned trial Judge acquitted the accused person. Being aggrieved by the same, the appellant – original complainant has preferred the present appeal.

3. Heard, learned advocate Mr. Hardik C. Barot for the appellant – original complainant, learned advocate Mr. Nadeem B. Mansuri for the respondent No. 2 and learned APP Ms. Jirga Jhaveri for the respondent No. 1 – State.

3.1 Learned advocate Mr. Hardik C. Barot for the appellant – original complainant has mainly contended that the learned trial Judge ought to have convicted the accused inasmuch as the cheque in question was duly signed by the respondent No. 2 and came to be dishonoured when presented before the bank for insufficiency of fund. Furthermore, in his submission, the learned trial Judge ought to have appreciated the fact that the cheque was issued for discharge of legal liability towards complainant. Further, it is submitted that the learned trial Judge ought to have held that legal notice upon the respondent No. 2 was issued within the stipulated time. Further, the signature on the cheque was also not in dispute. Further, in his submission, the learned trial Judge ought to have held in view of the evidence on record that the accused had failed to rebut the onus of proof and statutory presumption against him.

3.2 The learned advocate for the appellant further submitted that neither the cheque was sent to the handwriting expert nor anyone had been examined qua the cheque in question by the respondent No. 2 – accused. Accordingly, the learned trial Judge ought to have taken into consideration the said aspect of the matter.

3.3 The learned advocate for the appellant strenuously submitted that the learned trial Judge has committed a grave error in observing that the appellant – original complainant is not filing income tax return and had not produced the books of account or any other documentary evidence and thereby, has materially erred in not believing the dues to be the legally enforceable dues. He submitted that the appellant had lent the money to the respondent No. 2 out of friendship and on trust.

3.4 The learned advocate, taking this Court through the oral as well as the documentary evidence on record, submitted that though the case against the accused was proved beyond reasonable doubt, however, the learned trial Judge has not properly appreciated the evidence on record and thereby, has committed an error in recording acquittal and therefore, the impugned judgment and order suffers from material illegality, perversity and contrary to the facts and evidence on record. Accordingly, he urged that present appeal may be allowed by

quashing and setting aside the impugned judgment and order of acquittal.

4. Per contra, learned advocate Mr. Nadeem Mansuri for the respondent No. 2 – accused, while supporting the impugned judgment and order of the trial Court, submitted that the learned trial Judge has, after due and proper appreciation and evaluation of the evidence on record, has come to such a conclusion and has acquitted the accused, which is just and proper. He submitted that it is trite law that if two views are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court. Further, while exercising the powers in appeal against the order of acquittal, the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality.

4.1 The learned advocate for the respondent No. 2 – accused submitted that for invoking the provisions of Section 138 of the NI Act, the debt or other liability means a legally enforceable debt or other liability, which the complainant has failed to prove and accordingly, the learned trial Judge has rightly recorded the acquittal.

4.2 The learned advocate for the respondent No. 2 has heavily submitted that the ingredients of the offence alleged against the accused are not proved beyond reasonable doubt and therefore, the learned trial Judge has rightly acquitted the accused of the charges levelled against him. Accordingly, it is requested that no interference is required at the hands of this Court and eventually, it is urged that the present appeal may be dismissed.

5. The Court has also heard the learned APP for the respondent No. 1 – State.

6. Heard, the learned advocates for the respective parties and gone through the impugned judgment and order of the trial Court as well as the material on record.

6.1 Before advertng to the facts of the case, it would be worthwhile to refer to the scope of interference in acquittal appeals. It is well settled by catena of decisions that an appellate Court has full power to review, re-appreciate and consider the evidence upon which the order of acquittal is founded. However, the Appellate Court must bear in mind that in case of acquittal, there is prejudice in favour of the accused, firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reaffirmed and strengthened by the trial Court.

6.2 Further, if two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court. Further, while exercising the powers in appeal against the order of acquittal, the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some

manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person, and therefore, the decision is to be characterized as perverse.

6.3 Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. That the duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive at just decision on the basis of material placed on record to find out whether the accused is connected with the commission of the crime with which he is charged.

6.4 In *Mallikarjun Kodagali (Dead) represented through Legal Representatives v. State of Karnataka and Others*, (2019) 2 SCC 752, the Apex Court has observed that, "The presumption of innocence which is attached to every accused gets fortified and strengthened when the said accused is acquitted by the trial Court. Probably, for this reason, the law makers felt that when the appeal is to be filed in the High Court it should not be filed as a matter of course or as matter of right but leave of the High Court must be obtained before the appeal is entertained. This would not only prevent the High Court from being flooded with appeals but more importantly would ensure that innocent persons who have already faced the tribulation of a long drawn out criminal trial are not again unnecessarily dragged to the High Court".

6.5 Yet in another decision in *Chaman Lal v. The State of Himachal Pradesh*, rendered in Criminal Appeal No. 1229 of 2017 on 03.12.2020, 2020 SCC OnLine SC 988 the Apex Court has observed as under:

"9.1 In the case of *Babu v. State of Kerala*, (2010) 9 SCC 189, this Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 Cr.P.C. In paragraphs 12 to 19, it is observed and held as under:

12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide *Balak Ram v. State of U.P* (1975) 3 SCC 219, *Shambhoo Missir v. State of Bihar* (1990) 4 SCC 17, *Shailendra Pratap v. State of U.P* (2003) 1 SCC 761, *Narendra Singh v. State of M.P* (2004)

10 SCC 699, Budh Singh v. State of U.P (2006) 9 SCC 731, State of U.P. v. Ram Veer Singh (2007) 13 SCC 102, S. Rama Krishna v. S. Rami Reddy (2008) 5 SCC 535, Arulvelu v. State (2009) 10 SCC 206, Perla Somasekhara Reddy v. State of A.P (2009) 16 SCC 98 and Ram Singh v. State of H.P (2010) 2 SCC 445)

13. In Sheo Swarup v. King Emperor AIR 1934 PC 227, the Privy Council observed as under: (IA p. 404) "... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

14. The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State AIR 1954 SC 1, Balbir Singh v. State of Punjab AIR 1957 SC 216, M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200, Khedu Mohton v. State of Bihar (1970) 2 SCC 450, Sambasivan v. State of Kerala (1998) 5 SCC 412, Bhagwan Singh v. State of M.P(2002) 4 SCC 85 and State of Goa v. Sanjay Thakran (2007) 3 SCC 755)

15. In Chandrappa v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under: (SCC p. 432, para 42)

"(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by

the trial court.”

16. In *Ghurey Lal v. State of U.P* (2008) 10 SCC 450, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court’s acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In *State of Rajasthan v. Naresh* (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20) “20. ... an order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.”

18. In *State of U.P. v. Banne* (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include: (SCC p. 286, para 28) “(i) The High Court’s decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court’s conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court’s judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.” A similar view has been reiterated by this Court in *Dhanapal v. State* (2009) 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court’s acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.”

9.2 When the findings of fact recorded by a court can be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which

reads as under:

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide *Rajinder Kumar Kindra v. Delhi Admn* (1984) 4 SCC 635, *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons* 1992 Supp (2) SCC 312, *Triveni Rubber & Plastics v. CCE* 1994 Supp. (3) SCC 665, *Gaya Din v. Hanuman Prasad* (2001) 1 SCC 501, *Aruvelu v. State* (2009) 10 SCC 206 and *Gamini Bala Koteswara Rao v. State of A.P* (2009) 10 SCC 636)." (emphasis supplied)

9.3 It is further observed, after following the decision of this Court in the case of *Kuldeep Singh v. Commissioner of Police* (1999) 2 SCC 10, that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

9.4 In the recent decision of *Vijay Mohan Singh v. State of Karnataka*, (2019) 5 SCC 436, this Court again had an occasion to consider the scope of Section 378 Cr.P.C. and the interference by the High Court in an appeal against acquittal. This Court considered catena of decisions of this Court right from 1952 onwards. In paragraph 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in *Umedbhai Jadavbhai* (1978) 1 SCC 228. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on re-appreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under: (SCC p. 233)

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case."

31.1. In *Sambasivan v. State of Kerala* (1998) 5 SCC 412, the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on re-appreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions

arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court.

While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under: (SCC p. 416)

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in *Ramesh Babulal Doshi v. State of Gujarat* (1996) 9 SCC 225 viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case."

31.2. In *K. Ramakrishnan Unnithan v. State of Kerala* (1999) 3 SCC 309, after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappraise the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial

court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In *Atley v. State of U.P.* AIR 1955 SC 807, in para 5, this Court observed and held as under: (AIR pp. 80910) "5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 Cr.P.C came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well- established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, *Surajpal Singh v. State* AIR 1952 SC 52; *Wilayat Khan v. State of U.P* AIR 1953 SC 122) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.

31.4. In *K. Gopal Reddy v. State of A.P.* (1979) 1 SCC 355, this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

(emphasis supplied)."

7. In the aforesaid backdrop, if Section 138 of NI Act is seen, it speaks as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. — Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to one year.

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]

7.1 Thus, in the case under NI Act, the cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability. Further, explanation to this section defines the debt and other liability to mean a legally enforceable debt or other liability. In this context, after due appreciation and evaluation of the evidence on record, the learned trial Judge has come to a conclusion that the debt in question cannot be said to be legally enforceable debt and the complainant has failed to prove otherwise. It is observed by the learned trial Judge that in the case before him (present case), the complainant has not produced any documentary evidence, save and except the cheque in question, to prove his case and hence, it cannot be believed that the complainant had a legal dues from the respondent – accused. Mentioning several dates, the learned trial Judge has also observed that considering the same, it is not clear as to on which date, the complainant had lent the money to the accused. In the overall facts and circumstances of the case, the learned trial Judge has come to the conclusion that the debt cannot be said to be the legally enforceable debt, which is sine qua non in such matters and the complainant has failed to prove the same beyond reasonable doubt.

7.2 Further, under Sections 118(a) and 139 of the NI Act, there are provisions as regards presumption. At this juncture, a beneficial reference may be made to a decision of the Apex Court in *Basalingappa v. Mudibasappa*, MANU/SC/0502/2019 : (2019) 5 SCC 418, wherein, the Court has observed as under:

"23. We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:

23.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

23.2. The presumption Under Section 139 is a rebuttable presumption and the onus is on the Accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

23.3. To rebut the presumption, it is open for the Accused to rely on evidence led by him or the Accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

23.4. That it is not necessary for the Accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

24.5. It is not necessary for the Accused to come in the witness box to support his defence."

7.3 Thus, the presumption Under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities. In the instant case, considering the evidence on record, it is observed by the learned trial Judge that it is not clear as to when the complainant had given the amount in question; the complainant has stated in his deposition that he could not say as regards to different handwriting on the cheque in question; and that, as per the complainant, he had filled up the date in the cheque as asked by the accused, however, it cannot be believed for the reason that if the accused had, in fact, borrowed the amount for a period of six months, he would have written the date on the cheque in question, but it is not the case. Considering all these aspect of the matter, the learned trial Judge has come to a conclusion that the accused has succeeded in rebutting the presumption, showing preponderance of probability.

7.4 At this juncture, it would be apt to refer to a decision of the Apex Court in *Krishna Janardhan Bhat v. Dattaraya G. Hegde*, passed in Appeal (Cri.) 518 of 2006 on 11.01.2008, wherein the Court has observed thus:

"The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a court of law.

Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability”.

7.5 Thus, the presumption under Section 139 of the NI Act merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability and existence of legally recoverable debt is not matter of presumption under the said section. Nonetheless, as said earlier, the complainant has failed to prove that the cheque was drawn towards legally enforceable debt. Thus, in the case on hand the learned Magistrate has rightly concluded that the complainant has failed to prove the debt to be the legally recoverable dues and the existence thereof.

7.6 On re-appreciation and reevaluation of the ocular and the documentary evidence on record, it transpires that the complainant has failed to prove the case against the accused beyond reasonable doubt inasmuch as the ingredients of the offence alleged are not fulfilled. The Court has gone through in detail the impugned judgment and order and found that the learned trial Judge has meticulously considered the depositions of all the witnesses and come to such a conclusion. The learned trial Judge has also considered the decisions relied by the complainant. A perusal of the same reveals that the learned trial Judge has rightly opined that in the facts and circumstances of the case, the same are of no avail to the complainant. Thus, in the considered opinion of this Court, the learned trial Judge has rightly come to such a conclusion, which do not call for any interference at the hands of this Court.

8. In view of the aforesaid discussion and observations, in the considered opinion of this Court, the complainant has failed to bring home the charge against accused for want of sufficient material. The findings recorded by the learned trial Judge do not call for any interference. Resultantly, the appeal fails and is dismissed accordingly. Impugned judgment and order dated 19.10.2016, passed in Criminal Case No. 1655 of 2013 by the learned Additional Chief Judicial Magistrate, Kalol, recording the acquittal is confirmed. Bail bond, if any, shall stand cancelled. R&P, if received, be transmitted back forthwith.