
(2013) 07 BOM CK 0075
In the Bombay High Court
Case No : Criminal Appeal No. 6 of 2012

Krishna P. Morajkar

APPELLANT

Vs

Joe Ferrao and Another

RESPONDENT

Date of Decision : 19-07-2013

Acts Referred:

Citation : (2013) 5 ABR 294 : (2013) ALLMR(Cri) 4129 : (2014) 2 BomCR(Cri) 738 : (2013) 4 RCR(Civil) 714 : (2013) 4 RCR(Criminal) 539

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : Nitin Sardessai, for the Appellant; Rohit Bras De Sa, for the Respondent

Judgement

R.C. Chavan, J.—This appeal questions appellate judgment of the learned Additional Sessions Judge, Mapusa whereby the learned Additional Sessions Judge set aside judgment of conviction of the respondent for offence punishable u/s 138 of the Negotiable Instruments Act and sentence of paying compensation quantified at Rs. 4,00,000/- or in default to suffer imprisonment for one year imposed upon the respondent by the learned JMFC, "E" Court, Mapusa Goa on the conclusion of trial of Criminal Case No. OA/NIA/759/P/06/E before the learned Magistrate. The facts which are material for deciding this appeal are as under:

The appellant claimed to be a friend of respondent. The respondent approached the appellant in last week of March, 2006 stating that the respondent wanted to renovate his premises and, therefore, needed a sum of Rs. 3 lacs which he would repay in about 7 to 8 months. The appellant claimed to have advanced a sum of Rs. 2,40,000/- against which the respondent issued 10 cheques dated 31/03/2006 to 30/09/2006 for amounts ranging from Rs. 20,000/- to Rs. 35,000/-. The first cheque for Rs. 20,000/- dated 31/03/2006 was realised. The second cheque was dishonoured on the ground that the funds were insufficient. In respect of this second cheque dated 30/04/2006, the appellant issued a notice

and upon failure of the respondent to pay the amount demanded, filed a criminal case bearing No. 478/2006, which was pending when the complaint dated 18/12/2006 was filed in respect of dishonour of the remaining cheques. The appellant presented the remaining cheques on the dates they were due and since those cheques were dishonoured, the appellant issued notice to the respondent calling upon the respondent to pay the amounts under those cheques. Since the respondent did not pay the amount of Rs. 2 lacs demanded within 15 days of the receipt of notice, the appellant filed the complaint before the learned Magistrate at Mapusa. After examining the complainant, the learned Magistrate directed issuance of process.

2. After respondent appeared, substance of acquisition was explained to the respondent and since he pleaded not guilty, he was put on trial at which the appellant examined himself in order to prove his case. The respondent was examined u/s 313 of the Criminal Procedure Code and sought to tender evidence in defence. He examined himself as DW 1 and one Lawrence Fernandes as DW 2. The defence of the respondent was that the appellant came to his house on 31/03/2006 at about 9.30 a.m. with unknown persons and demanded "hafta", protection money of Rs. 3 lacs possibly alleging that the respondent had sold his premises and, therefore, respondent had huge amount with him. On respondent telling the appellant that he had no money, the appellant saw the cheque book lying on the table and forced the respondent to write the cheques in question. The respondent stated that there was no question of respondent being in need of money to renovate his business premises by name "Sunrise Bar and Restaurant", since he had already sold the premises Sunrise Bar and Restaurant" on 11/08/2005 and had placed DW 2 Lawrence Fernandes in its possession. In fact, a shop by name M/s. Elisha Enterprises dealing with consumer goods had been inaugurated in the premises on 11/10/2005. Further, there was no question of the appellant being in a position to advance any amount to the respondent in the shop on 31/03/2006. After considering this evidence tendered before the learned Magistrate, the learned Magistrate held that the appellant had proved the charge and convicted the respondent as aforementioned. Aggrieved thereby, the respondent preferred an appeal before the Court of Sessions.

3. The learned Additional Sessions Judge held that the respondent had proved that the defence was probable and, therefore, set aside the conviction. While doing so, he relied on several judgments and also invoked provisions of Section 269SS and 271D of the income tax Act. He observed that the appellant had not produced the books of account to show that he had sum of Rs. 2,40,000/- to be advanced to the respondent. The learned Additional Sessions Judge relied on the judgments of Supreme Court in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, and Kamala S. Vs. Vidyadharan M.J. and Another, as also judgment of this Court in Vinay Parulekar Vs. Pramod Meshram, .

4. I have heard the learned counsel for the appellant and the learned Counsel for the respondent and with the help of both, I have gone through the entire

evidence on record. The learned Counsel for the respondent first submitted that it would not be open to this Court to set aside an acquittal unless the judgment of the acquittal was shown to be perverse or based on untenable evidence. He submitted that if the view taken by the learned Additional Sessions Judge was probable this Court may not interfere with such a finding. There can be no doubt about this proposition of law. It would therefore be necessary to find out whether the learned Judge was justified in setting aside conviction recorded by the learned Magistrate.

5. The learned counsel for the appellant submitted that the learned Additional Sessions Judge was not justified in coming to the conclusion that the appellant could not at all have advanced a sum of Rs. 2,40,000/- to the respondent or that the defence of the respondent was probalised. He submitted that if the respondent really had no need of money and had not received any amount from the appellant there is no reason why the respondent allowed a cheque of Rs. 20,000/- to be honoured. The learned Counsel further pointed out that the appellant had in fact filed another criminal case against the respondent upon dishonour of the second cheque in the series. In that case bearing No. 478/06/C, the respondent had filed an application at exhibit 34 on 8/01/2007 making a payment of Rs. 20,000/- to the appellant. This application is at page 170 of the compilation. The respondent had admitted in his deposition in the present case that he thus paid a sum of Rs. 40,000/- towards the cheques issued. The learned counsel for the appellant wondered as to why the respondent could be paying a sum of Rs. 40,000/- if the cheques were obtained by the appellant by force. He also submitted that the respondent had ample opportunity to make a complaint to the police about his being forced to sign the cheques, but he had not done so. The learned counsel submitted that if the respondent claimed that appellant was a bully and, therefore, he was under fear, there is no reason as to how this fear had gone away when the respondent avoided payment towards the remaining cheques.

6. The learned Counsel for the respondent submitted that the respondent filed an application in the case No. 478/06/C on 8/01/2007, unconditionally proposing to pay a sum of Rs. 20,000/- with the understanding that the appellant would withdraw even the present case i.e. Criminal Case No. 759/06, if he made that payment. This according to the learned Counsel for the appellant appears to be farfetched since the order passed by the learned Magistrate on application at exhibit 15 in the said case No. 478/06 shows that the complainant was not willing to compound the matter though the appellant was ready to pay a sum of Rs. 20,000/-. Therefore, there is no question of there being any understanding reached between the parties. Therefore, the payment of Rs. 20,000/- by allowing a cheque to be encashed, and an offer to pay a sum of Rs. 20,000/- made in case No. 478/06 are inexplicable and would be indicative of the respondent having some liability towards the appellant.

7. The learned counsel for the appellant submitted that the story put forth by the

respondent that he had no need of money is itself not proved. First, if the respondent was not in need of money it is not clear as to why he came up with the case of sale of his premises to DW 2/Lawrence Fernandes. Secondly, though the respondent claimed to have received consideration towards the premises from DW 2/Lawrence Fernandes, the evidence of Lawrence Fernandes in the present case as also in the earlier case No. 478/06 which have been duly considered by the learned Magistrate show that the story sought to be made out by the respondent is without any foundation. According to the respondent, the respondent had sold the premises to Lawrence Fernandes on 11/08/2005 and had placed Lawrence Fernandes in possession on the same day. But, in his examination-in-chief itself, the respondent stated that possession of second shop was also given but the agreement was made later. He then stated "we" started business in the said shop in October 2005. The learned counsel for the respondent stated that "we" should be read as "he" referring to Lawrence Fernandes. The agreements which were produced were of 11/08/2005 and 17/02/2006. There are two telephone bills of 7/01/2006 and 7/12/2005, which show that the telephone stood in the name of Lawrence Fernandes. It was also sought to be proved that a labour inspector had visited the shop. DW 3/Rupesh Kotambikar, Labour Inspector had visited the shop on 23/01/2006 and found that in the shop sale of electronic items was going on. The name of the shop was Elisha Enterprises with the address of 4-5 Punam Apartments, Angod Mapusa. The evidence of this witness, particularly, cross-examination, shows that the witness did not in fact remember anything. The learned Additional Sessions Judge, however, seems to have believed the evidence of DW 3/Rupesh Kotambikar, since he was a Government servant and performing his duty in official capacity and, therefore, could not have any reason to create fake documents with the so intention of helping the appellant

8. The learned counsel for the appellant submitted that the two agreements which have been placed on record show that the first agreement is in respect of shop No. 4. This dated 11/08/2005. The second agreement is dated 17/02/2006 and is in respect of shop No. 5. Though the respondent claimed that he had placed Lawrence Fernandes in possession of both the shops on 11/08/2005, the evidence of Lawrence Fernandes would create a doubt about the truthfulness of what the respondent stated. Lawrence Fernandes stated in his cross-examination that though the schedule of payment was mentioned in the agreements there was some delay in payment of amounts under the agreement. The payment under the first agreement was delayed by 2 to 3 months and payment under the second agreement was delayed by about an year. DW 2/Lawrence Fernandes denied having ever stated in the earlier criminal case, where he was examined, that he had received possession of shop No. 5 in compliance with agreement dated 17/02/2006. He was confronted with his evidence in the earlier case, where it was mentioned that it was true that possession of shop No. 4 was given in compliance with exhibit 33 and shop No. 5 was given in compliance with exhibit 34. On being confronted with this statement the witness stated that it

may be due to some mistake that he made such a statement. If he was so casual about making statement on oath in Court, it cannot be said that the learned Magistrate was off the mark in branding Lawrence Fernandes as a liar. In any case, on his own admission, the entire consideration has not been paid to the respondent. Therefore, to say that the respondent was not at all in possession of any part of the premises would be farfetched.

9. Further, as rightly submitted by the learned counsel for the appellant this aspect is relevant only for testing the reliability of the statement made by the appellant that he met the respondent on 31/03/2006 in the premises in question. Even if the respondent may have sold the premises to Lawrence Fernandes or have handed over possession to Lawrence Fernandes or even if it is accepted that Lawrence Fernandes had started some business of the consumer goods in the premises, that will not prevent the appellant and the respondent to meet in the said shop. Where the parties met may not be determinative of the question whether the appellant had advanced a sum of Rs. 2,40,000/- to the respondent as claimed by the appellant. Therefore, on facts, there was no reason to give any extra weightage to the claim of the respondent based on his story about sale of premises to Lawrence Fernandes, particularly, when Lawrence Fernandes had no compunction in contradicting himself with reference to his deposition in earlier case.

10. The learned Additional Sessions Judge had observed that since the respondent had received about Rs. 18 lacs, it was difficult to believe that he would be in need of another sum of Rs. 3 lacs. Now, if Lawrence Fernandes himself admits that there was some delay in payment of the amounts and that delay in respect of the first agreement was about three months and in respect of the second agreement about one year, obviously, the respondent could not claim to have received the amounts under the agreement. If it is taken for a while that the respondent was in need of money and, therefore, he sold those premises and if the payment was not forthwith coming as per the schedule, there will be nothing wrong in the respondent seeking to get some help from the complainant. Therefore, the learned Additional Sessions Judge need not have rejected the appellant's case on the ground that the accused was not in need of money.

11. On the question of fact, it has to be held that the learned Additional Sessions Judge erred in coming to the conclusion that since the respondent had agreed to sell his business he had enough money with him making it unnecessary for him to borrow any sum from the appellant-complainant. This is so because the evidence of DW 2/Lawrence Fernandes itself shows that the payment was not being made as per schedule and that in respect of the second agreement the payment was lagging behind by almost an year. Therefore, if the accused had in fact agreed to sell his premises, presumably because he needed money, rather than the business, and if money was not forthcoming for whatever needs he had, it cannot be said that he had no reason to borrow from the complainant. This is also to be considered in the context of the fact that the accused agreed to

repay in instalments which may be consistent with the promise of the purchaser Lawrence Fernandes to pay according to a schedule fixed in the agreements and not in one lump sum.

12. As to the question whether the appellant-complainant was right in claiming that the accused had sought this advance for renovating his bar, this need not have influenced the learned Additional Sessions Judge, even if it is taken that the complainant's word on this count was not true, since the complainant would depend on what the accused told him and would have no reasons to check up whether the accused really needed money for the purpose for which he was seeking it. Therefore, these things could not be said to be so material to outweigh the presumption that the amount represented in the cheque was for legally enforceable debt or liability.

13. These conclusions are fortified by the fact that the accused had in fact allowed a cheque of Rs. 20,000/- to be honoured and was ready to pay a further sum of Rs. 20,000/- when another case of dishonour of cheque issued in the same series was before the same Magistrate. Had the complainant been a bully and had snatched the cheques from the accused and had the accused been really scared and, therefore, not made a complaint to the police, he would at least not have offered to pay Rs. 20,000/-, when a case was already filed against him and when he was before the Court. Therefore, the learned Additional Sessions Judge should have noted these aspects and held as a matter of fact that the story of complainant having made an advance of Rs. 2,40,000/- had not been rebutted.

14. The learned Additional Sessions Judge next held that the complainant did not produce his books of accounts to show that he had sum of Rs. 2,40,000/- with him which he could have advanced, since the complainant had not filed any income tax returns. The learned Judge then referred to provisions of Section 269SS and 271D of the income tax Act and the judgment of the Supreme court in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, . The reference to these provisions surfaced in the judgment of the Supreme Court in Krishna Janardhan Bhat (supra). In that judgment, the Supreme Court held that existence of legally enforceable debt is not a matter of presumption u/s 139 of the Negotiable Instruments Act. As far as this aspect is concerned, this judgment has been specifically overruled by a three Judges Bench of the Supreme Court in Rangappa Vs. Sri Mohan, .

15. In Krishna Janardhan Bhat (supra), the two Judges Bench of the Supreme Court was considering the case of four blank cheques having been issued by the accused. The trial Court had convicted the accused. The Sessions Court dismissed the appeal and in the High Court while conviction was maintained, sentence was reduced. The Supreme Court observed in paras 26 & 27 of the judgment as under:

26. The courts below failed to notice that ordinarily in terms of Section 269SS of the income tax Act, any advance taken by way of any loan of more than Rs.

20,000/- was to be made by way of an account payee cheque only.

27. Section 271D of the income tax Act reads as under:

271D. Penalty for failure to comply with the provisions of Section 269SS - (1) If a person takes or accepts any loan or deposit in contravention of the provisions of Section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner.

(Emphasis supplied).

The Supreme Court then allowed appeal and set aside the conviction of the accused.

16. As already observed the judgment in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, , in so far as it relates to interpretation of Section 139 of the Negotiable Instruments Act, has been overruled by a three Judges Bench of the Supreme Court in Rangappa (supra). In Rangappa (supra) the Supreme Court was considering an appeal against conviction recorded by the High Court reversing an acquittal by the Court below for the offence punishable u/s 138 of the Negotiable Instruments Act. In that case, the complainant had stated that the accused requested him for a hand loan of Rs. 45,000/- in order to meet construction expenses and the complainant paid Rs. 45,000/- by way of cash. The accused assured to repay the amount but failed to do so and then issued cheque for Rs. 45,000/- which was dishonoured. The accused took defence that he had lost a signed blank cheque. The Court considered the presumption under Sections 118 and 139 of the Negotiable Instruments Act and also the judgment of the two Judges Bench in Krishna Janardhan Bhat (supra). After considering several judgments the Supreme Court observed in para 26 as under:

14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

(Emphasis supplied).

Thus, on the question of presumption about existence of legally enforceable debt or liability Krishna Janardhan Bhat (supra) stood expressly overruled.

17. The learned counsel for the respondent submitted that the observations of the Supreme Court in para 14 of the judgment in Rangappa Vs. Sri Mohan, show that the Supreme Court had not in any way cast any doubt on the correctness of the decision in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, , as it was based on specific facts and circumstances therein. Therefore, he submitted that observations in Krishna Janardhan Bhat (supra) about non-compliance of provisions of Section 269SS and the implications of Section 271D of the income tax Act would still stand as good law. The learned counsel for the appellant submitted that even these observations would stand impliedly overruled. He pointed out that what was held in Krishna Janardhan Bhat (supra) was that advance taken by way of loan of more than Rs. 20,000/- was only to be made by way of an account payee cheque. He submitted that in Rangappa (supra) the Supreme Court was specifically considering the case of an advance of Rs. 45,000/- made in cash and yet the Supreme Court had upheld the conviction recorded. Thus even those observations based on the provisions of Section 269SS and 271D of the income tax Act made in Krishna Janardhan Bhat (supra) would stand impliedly overruled. I am entirely in agreement with the learned counsel for the appellant because the Supreme court in Rangappa (supra) had specifically noted the judgment in Krishna Janardhan Bhat (supra). The Supreme Court had obviously noted the observations in para 26 in Krishna Janardhan Bhat (supra) that advance of more than Rs. 20,000/- was to be made only by way of an account payee cheque, and yet the Supreme Court accepted case of a complainant who claimed to have made an advance of Rs. 45,000/- in cash and proceeded to uphold the conviction, even though the case rested on the fact that cash advance of a sum more than Rs. 20,000/- was made. Thus, on this aspect also Krishna Janardhan Bhat (supra) stood impliedly overruled by Rangappa (supra), and the judgment is to be held rendered on the facts of that case, not laying down any law. Therefore, judgments which follow Krishna Janardhan Bhat (supra) can be safely ignored.

18. There is another aspect of the matter. The learned counsel for the respondent pointed out that in Krishna Janardhan Bhat (supra) attention of the Supreme Court was possibly not drawn to the actual wording of Section 269SS of the income tax Act. He submitted that Section 269SS of the income tax Act, in fact, does not cast any burden upon a person making advance in cash to record it in his returns and does not prevent any such cash advance from being made. It may be useful to quote provisions of Section 269SS and 271D of the income tax Act as under:

Section 269SS: No person shall, after the 30th day of June, 1984, take or accept from any other person (hereafter in this section referred to as the depositor), any loan or deposit otherwise than by an account payee cheque or account payee bank draft if,--

(a) the amount of such loan or deposit or the aggregate amount of such loan and deposit; or

(b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or

(c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is twenty thousand rupees or more:

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by--

(a) Government;

(b) any banking company, post office savings bank or co-operative bank;

(c) any corporation established by a Central, State or Provincial Act;

(d) any Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:

[Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and neither of them had any income chargeable to tax under this Act.]

Section 271D-(1) If a person takes or accepts any loan or deposit in contravention of the provisions of section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) any penalty imposable under sub-section (1) shall be imposed by the joint Commissioner.

(Emphasis supplied).

A plain reading of Section 269SS shows that no person can accept any loan or deposit of a sum of Rs. 20,000/- or more otherwise than by an account payee cheque or account payee bank draft. It does not say that a person cannot advance more than Rs. 20,000/- in cash to another person. It is clear that the restriction on cash advances was in fact on the taker and not the person who makes the advance. The penalty for taking such advance or deposit in contravention of provisions of Section 269SS was to be suffered by one who takes the advance. Therefore, it was obviously impermissible to invoke these provisions for preventing a person from recovering the advance which he has made.

19. The learned Counsel for the respondent submitted that the view taken in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, has been consistently followed by this Court. He also relied on judgment of this Court in Sayeeda Iqbal Vakil Vs. Javed Abdul Latif Shaikh and Another and Patricio D'Souza Vs. Oscar D'Souza and Another which in turn relied on observations in Vasudev Ramchand Ahuja v. Vilas Shripati Kamble, reported at 2006 (2) Bom CR (Cri) 1 : (2006 (6) ABR (NOC) 1114) to the following effect:

The observation seen by the trial Court that amount allegedly paid by complainant during period has not been reflected in Income Tax returns as well as in books of account. Reasons recorded by the Court below on appreciation of evidence on record, impugned judgment cannot be said to be unreasonable and perverse.

This and some other circumstances led the Court to refuse leave to file appeal against acquittal.

20. In Peter Mascarenhas Vs. Monsabre Ashley Oswald Dias and Others, and Sandeep Shirodkar v. Shankar Dhawaskar & Anr., reported at 2010 (2) Bom CR (Cri) 867 : (2011 (4) AIR Bom R 303) on which the learned counsel for the respondent placed reliance, the Court had quoted from Krishna Janardhan Bhat (supra). The Court then observed that the judgment in Krishna Janardhan Bhat (supra) lays down a proposition that existence of a legally enforceable debt is not a matter of presumption u/s 139 of the Act.

21. As already observed, since Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, does not lay down any proposition of law, judgments which follow Krishna Janardhan Bhat (supra) would have to be ignored. This leaves question of advance not being reflected in books of account. The learned counsel for the respondent relied on judgment in Sanjay Mishra Vs. Kanishka Kapoor @ Nikki and Another, where the question of unaccounted money is considered. In this judgment too, a learned single Judge of this Court copiously quoted from the judgment of Supreme Court in Krishna Janardhan Bhat (supra) in paragraphs 9, 10 & 11. It need not be restated that since Krishna Janardhan Bhat (supra) was expressly overruled on the nature of presumption u/s 139 and impliedly on the question of cash advances, it remains a decision on facts of that case and so the observations in Sanjay Mishra (supra) based on Krishna Janardhan Bhat (supra) may be safely excluded from consideration.

22. In Sanjay Mishra (supra) the Court had also noted in para 14 the observations of the Supreme Court in M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd., and, ultimately, refused leave for filing an appeal against acquittal, possibly principally on account of the following facts noted by the Court in paras 6, 7 & 8 of the judgment.

6. I have given careful consideration to the submissions. I have perused a copy of the complaint and notes of evidence. In the cross-examination, the applicant has categorically stated thus:

.... The entire amount was given in cash. The entire amount was my cash amount. The cash amount was kept at my Chembur's residence. At that time, it was unaccounted. I had not disclosed this amount to the Income Tax after giving the loan till date. There was no agreement for interest on the amount given.....

(Emphasis added)

The complaint was filed in the year 2005. The evidence of the applicant was recorded on 28th February, 2006. The applicant admitted that the amount allegedly paid by him to the 1st respondent by way of loan was a cash amount kept at his residence and at that time it was an unaccounted amount. He categorically admitted that till date (i.e. till 28th February, 2006) he has not disclosed the amount to the Income Tax. According to the case of the complainant, he had advanced loan on 14th September, 2004 which was repayable within 90 days. Thus, on 14th September, 2004 the amount allegedly paid by him to the 1st respondent was stated to be an unaccounted amount which was kept at the residence of the applicant. Moreover, till February, 2006, when the evidence was recorded, the said amount was not disclosed in the Income Tax Returns of the applicant. Thus it continued to be an unaccounted amount.

7. It is true that merely because amount advanced is not shown in Income Tax Return, in every case, one cannot jump to the conclusion that the presumption u/s 139 of the said Act stands rebutted. There may be cases where a small amount less than a sum of Rs. 20,000/- is advanced in cash by way of loan which may be repayable within few days or within few months. A complainant may not show the said amount in the Income Tax Return as it is repayable within few days or few months in the same financial year. In such a case the failure to show the amount in the Income Tax Return may not by itself amount to rebuttal of presumption u/s 139 of the said Act. If in a given case the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, the failure to disclose the amount in income tax return or Books of Accounts of the complainant may be sufficient to rebut the presumption u/s 139 of the said Act.

8. In the present case, the amount was allegedly advanced in September 2004. The amount is a large amount of Rs. 15 lacs. This is a case where not only that there is a failure to disclose the amount of loan in the Income Tax Return of the applicant till the year 2006 but there is a categorical admission on the part of the applicant that the amount was an "unaccounted" amount.

(Emphasis supplied).

23. It may be seen that even in Sanjay Mishra (2009 (4) AIR Bom R 436) (supra) failure to show the advances in income tax returns is not held to be always fatal. While observing that small amounts of less than Rs. 20,000/- could be so advanced, the Court was obviously influenced by observations in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, and provisions of Sections 269SS and

271D of income tax Act, which as already pointed out, require a borrower to receive amount in excess of Rs. 20,000/- only by cheques. In the case at hand, the amount was advanced in the last week of March, 2006 and was to be repaid by 30/09/2006 i.e. within 6 months. Thus, even observations in Sanjay Mishra (supra) (minus the ceiling of Rs. 20,000/- which has no legal sanctity), would not make the appellant's case untenable.

24. The learned counsel for the appellant submitted that the amounts which were not reflected in the income tax returns or in the books of accounts do not become irrecoverable. He relied on a judgment of this Court in Deelip Apte Vs. Nilesh P. Salgaonkar and Another, in support of this proposition. It was observed therein at para 4 as under:

4. It is now common knowledge that the Negotiable Instruments Act, 1881, was amended with a view to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers, as the evil practice of issuing cheques in settlement of liabilities without there being adequate amount in the accounts had become rampant and the amendment was carried out with a view to curb the same effectively by enacting a stringent law while at the same time taking care to safeguard the interest of honest drawers. If that be the object of the amendments, the provisions of the Act are required to be interpreted in the light of the said objects intended to be achieved.

The Court further observed in respect of requirement to show advances in the income tax returns as under:

.....The learned J.M.F.C. has also held against the complainant the fact that the complainant had not shown the amount advanced by him in his income tax returns. I do not think that every person who gives friendly loans does in all cases show such loans in their income tax returns more so if they are payable on demand after short time. The learned acquitting J.M.F.C. entirely lost sight of the several presumptions which the law has enacted in favour of the complainant. As already stated in the case at hand, the complainant had sufficiently discharged his initial burden by deposing that the complainant had given a loan in the sum of Rs. 1,70,000/- towards the repayment of which the accused had issued the said cheques. In one of the cases, the accused took a plea that although the cheque was signed and filled by him, the amount of the loan was not written by the accused. In this context, it may be stated that the complainant had denied the suggestion that he had taken three blank Cheques without the date and amount from the accused as security. As regards the date, reference could be made to Section 118(b) of the Act, which provides that only when the Contrary is proved, a negotiable instrument is presumed to have been made on the date shown on the instrument.

25. Incidentally in Sanjay Mishra Vs. Kanishka Kapoor @ Nikki and Another, on which the learned counsel for the respondent relied on the question of object of Section 138 of the Negotiable Instruments Act, this Court held in para 15 as under:

15. The Apex Court has held that the laws relating to the said Act are required to be interpreted in the light of the object intended to be achieved by it despite there being deviation from general law. The Apex Court expressed that the object of section 138 of the said Act was to ensure that commercial and mercantile activities are conducted in smooth and healthy manner. The explanation to section 138 of the said Act clearly provides that a debt or other liability referred to in section means a legally enforceable debt or other liability. The alleged liability to repay an unaccounted cash amount admittedly not disclosed in the Income Tax Return cannot be a legally recoverable liability. If such liability is held to be a legally recoverable debt, it will render the explanation to, section 138 of the said Act nugatory. It will defeat the very object of section 138 of the Act of ensuring that the commercial and mercantile activities are conducted in a healthy manner. The provision of section 138 cannot be resorted to for recovery of an unaccounted amount. A cheque issued in discharge of alleged liability of repaying "unaccounted" cash amount cannot be said to be a cheque issued in discharge of a legally enforceable debt or liability within the meaning of explanation of section 138 of the said Act. Such an effort to misuse the provision of section 138 of the said Act has to be discouraged.

(Emphasis supplied).

The underlined observations do not disclose as to where can one find a prohibition on recovering amounts not disclosed in income tax returns. With utmost humility, I have to state that I have not come across any provision of income tax Act, which makes an amount not shown in the income tax returns unrecoverable. The entire scheme of the income tax Act is for ensuring that all amounts are accounted for. If some amounts are not accounted for, the person would be visited with the penalty or at times even prosecution under the income tax Act, but it does not mean that the borrower can refuse to pay the amount which he has borrowed simply, because there is some infraction of the provisions of the income tax Act. Infraction of provisions of income tax Act would be a matter between the revenue and the defaulter and advantage thereof cannot be taken by the borrower. In my humble view, to say that an amount not disclosed in the income tax returns becomes irrecoverable would itself defeat the provisions of Section 138 of the Negotiable Instruments Act. Apart from the purpose of this Act, which has been outlined by the learned single Judge in Shri. Deelip Apte (supra) as well as in Sanjay Mishra (supra), it ought to be seen that the moment a person seeks to recover through a cheque an amount advanced in cash it gets accounted for in the system and the revenue authorities can keep a track of that and if necessary tax the person. To brand an amount which is not shown in income tax Act as unaccounted money would be too farfetched and,

therefore, I am in respectful disagreement with the observations in Sanjay Mishra (supra), which in fact amounts to reading an additional requirement in Section 138 of the Negotiable Instruments Act, and legislating that such amounts becomes irrecoverable. At the cost of repetition, for saying that an amount not disclosed in income tax returns cannot be legally recoverable liability, some provisions of law to that effect would have to be shown. Such provision was not noticed by me and even the learned Counsel for the respondent could not show any such provision to me. For this reason, the judgment in Sayeeda Iqbal Vakil (supra) and Vassudev Ramchand Ahuja (supra) cannot be followed. Judgments in Patricio D'Souza Vs. Oscar D'Souza and Another and Sandeep Shirodkar v. Shankar Dhawaskar & Anr., reported at 2010 (2) Bom CR (Cri) 867 : (2011 (4) AIR Bom R 303) are on facts unfolded in those cases.

26. The learned counsel for the respondent submitted that if this Court was taking a view different from that taken in Vassudev Ramchand Ahuja (supra) or Sanjay Mishra (supra), this Court ought to make a reference to a Division Bench. I do not think it is necessary because first there is also a judgment of single Judge of this Court in Shri. Deelip Apte (supra) which has already taken such a view and, secondly, in the absence of express provision which would make such loans unrecoverable it would not be possible for any Court to so hold.

27. The learned counsel for the respondent next submitted that the presumptions are rebuttable and the accused is not required to tender evidence or bear burden of proof of the same magnitude as the prosecution. The learned counsel for the respondent relied on judgment of Supreme Court in M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, , which deals with how presumptions under the Evidence Act as also under the Negotiable Instruments Act could be rebutted and the Court observed on the consideration of facts in that case, that the standard of proof is preponderance of probabilities and inference of preponderance of probabilities can be drawn, not only from the materials on record, but also by reference to the circumstances upon which the accused relies. The Court also observed that the accused need not disprove the existence of consideration by way of direct evidence and that the onus on an accused is not as heavy as that of the prosecution and that it is comparable with that on a defendant in civil proceedings. There can be no dispute about this proposition. In fact, similar are the observations of three Judges bench of Supreme Court in Rangappa Vs. Sri Mohan, where the Court held as under:

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption u/s 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private

parties involved in commercial transactions. In such a scenario, the 21 test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption u/s 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

28. The question in this case is however that the defence evidence tendered by the accused in this case, far from rebutting the burden, only reinforces the case of the complainant. There would be no reason for the accused to allow the cheque of sum of Rs. 20,000/- to be honoured and offer to pay another sum of Rs. 20,000/- if in fact nothing was due and he had been forced to write the cheques. This itself makes the story of the accused suspicious.

29. The learned counsel for the respondent next submitted that since this Court is considering an appeal against acquittal, this Court ought to be extremely slow in setting aside an acquittal. There can be no doubt about this proposition. In fact, the learned counsel for the appellant himself drew my attention to four judgments which discuss as to when a judgment of acquittal could be set aside. They are:

- (1) Bhajan Singh @ Harbhajan Singh and Others Vs. State of Haryana, ,
- (2) The State of Maharashtra Vs. Haribhau Krishnaji Deshmukh and Others, ,
- (3) Fahim Khan Vs. State of Bihar Now Jharkhand, ,
- (4) Babu Vs. State of Kerala, .

I have carefully gone through the judgments. In the case at hand, the conclusions drawn by the learned Additional Sessions Judge were thoroughly unwarranted and based on an untenable appreciation of the evidence. As already observed, the learned Additional Sessions Judge had principally relied on provisions of Section 269SS and 271D of the income tax Act, which have absolutely no bearing and therefore the judgment is unsustainable.

30. Before I conclude, with all humility at my command, it has to be noted that even after noticing the object of enacting Section 138 of Negotiable Instruments Act, namely to enhance the acceptability of cheques, Courts have been accepting virtually any argument advanced to nullify the liability created, like ignoring or

misreading presumption u/s 139 of the Act, misreading provisions of Sections 269SS and 271D of the income tax Act, unmindful of the consequence that unscrupulous individuals go on signing cheques irresponsibly. When a person signs a cheque and delivers it, even if it is a blank cheque or a post dated cheque, presumptions under Sections 118(b) and 139 of the Negotiable Instruments Act would have to be raised and would have to be rebutted by the accused. albeit by raising a probability. Unless the Courts start discouraging flimsy defences, acceptability of cheques would not increase. The problem of unaccounted money would be reduced if transactions take place by cheques. Even a cash advance when repaid by cheque gets accounted. Making it unrecoverable, would only push the persons to extra judicial methods of recovery. The Courts would thus not only be defeating the object of the provision but also indirectly be party to increase lawlessness. This, in my humble view, cannot be allowed by Courts. In view of this, the appeal is allowed. The judgment of the learned Additional Sessions Judge is set aside and the judgment convicting the respondent of offence punishable u/s 138 of the Negotiable Instruments Act is restored. The learned Counsel for the respondent submitted that since the respondent wants to take the matter to higher forum the judgment may be kept in abeyance for a period of 8 weeks. If the compensation is not deposited within a period for 8 weeks the learned Magistrate shall proceed to execute the sentence in default.