

(2012) 12 BOM CK 0100

In the Bombay High Court

Case No : Criminal Appeal No's. 6, 7, 8, 9 and 10 of 2010

M/s. Enpee Earthmovers

APPELLANT

Vs

M/s. Resources International, Shri Deepak Rajani and Smt.
Meena D. Rajani and State

RESPONDENT

Date of Decision : 14-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190

Evidence Act, 1872 — Section 92

Negotiable Instruments Act, 1881 (NI) — Section 118(a), 138, 139, 141, 142

Citation : (2013) 1 ABR 646 : (2013) ALLMR(Cri) 1383 : (2013) 111 BC 616 :
(2013) 1 BomCR(Cri) 602

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : Sudesh Usgaonkar with Ms. A. Matolkar, in all Appeals, for the Appellant; S.D. Lotlikar with Ms. Sonali Mashelkar and Mr. H. Kankonkar, Advocates in all Appeals, for the Respondent

Final Decision : Dismissed

Judgement

U.V. Bakre, J.—By this common judgment, I propose to dispose of all the above Criminal Appeals as they pertain to bouncing of cheques issued in relation to the same transaction. Criminal Appeals No. 6 of 2010; 7 of 2010; 9 of 2010 and 10 of 2010 have been preferred against the judgments/orders dated 30/9/2008 passed by the learned Judicial Magistrate First Class, Ponda in Criminal Cases No. 35/OA/99/A; 34/OA/99/A; 39/OA/99/A; and 45/OA/99/A, respectively. Criminal Appeal No. 8 of 2010 has been filed against the judgment/order dated 29/9/2009 passed by the learned Judicial Magistrate First Class, Panaji in Criminal Case No. 254/OA/99/C. Vide the said judgments, impugned in the present appeals, the Complaints filed by the appellant against the accused for offence punishable u/s 138 of the Negotiable Instruments Act, 1881. (N.I. Act, for short) were all dismissed.

2. The parties shall hereinafter be referred to in the same manner as they appear

in the cause titles of the impugned judgments.

3. The Complainant is a partnership firm. The accused no. 1 is also a partnership firm and accused nos. 2 and 3 are its partners. The accused nos. 2 and 3 are also the partners of M/s. Resourceful Earthmovers, which according to the Complainant is the sister concern of the accused. The case of the Complainant is that for various works carried out by the Complainant for M/s. Resourceful Earthmovers, the said firm had become due and liable to the Complainant in September, 1998 to pay a total sum of Rs. 1,95,00,000/-, which figure was settled by the Complainant and M/s. Resourceful Earthmovers at the end of September, 1998. The Complainant further alleged that the payment of the said dues were guaranteed by the accused who issued its own posted dated cheques for the payment of the said dues of Rs. 1,95,00,000/-.

4. The details of the cheques with which we are concerned in the present appeals are as follows:

5. The said cheques were presented by the Complainant for encashment through its bankers, namely, The Goa Urban Cooperative Bank Ltd., Ponda branch. But all the said cheques came to be dishonored. The Complainant issued separate Registered A/D notices through its advocate, in each case, to the accused demanding the payment of the amount of cheques and the said notices were received by the accused and all its partners. However, neither the accused nor the partners paid the cheque amounts within 15 days from the date of receipt of the notice. Therefore, the Complainant filed the said Complaints.

6. In the Criminal case No. 254/OA/99/C, filed before the J.M.F.C., Panaji, some further details were narrated by the Complainant, which are as follows:

Accused no. 1 and the other firm M/s. Resourceful Earthmovers are jointly carrying on mining business and are closely associated and have been, in the course of business, accepting and meeting with the liabilities of each other in respect of various transactions by accepting and treating the same as joint liabilities. The Complainant is engaged in business of heavy earth moving machinery and had carried out works of excavation and other works at Codli and Sangod Mines of M/s. Resourceful Earthmovers for the period running from 21/3/1995 till December 1998. The accounts in respect of the said works were drawn up and the total sum payable to the Complainant in respect of the said works was ascertained at Rs. 1,95,00,000/- and this was done between the Complainant and accused nos. 2 and 3 and said M/s. Resourceful Earthmovers. At the relevant time the Complainant had stopped carrying out further works on the said mines due to non payment of huge outstandings. The accused no. 1 who was involved in export business and had to meet their immediate shipments, pleaded with the Complainant to recommence the said works and agreed and undertook to make payments of said amount of Rs. 1,95,00,000/- which was due and payable to the Complainant, which the accused no. 1 declared, understood and assured to be a joint and several liability of the accused no. 1 and the said M/

s. Resourceful Earthmovers and that the same was a debt payable to the Complainant by the accused. The accused guaranteed the payment of the said amount and the accused no. 1 issued 13 different cheques each for Rs. 15 lakhs towards the payment of the said liability of Rs. 1,95,00,000/-. Upon receipt of the said cheques, the Complainant recommenced the works on the said mines.

7. The Complainant in each case examined its partner Shri Hari Pandharinath Panandiker as PW. 1 and he produced various documents. The accused examined their Accountant Shri Sadashiv S. Dessai as DW. 1. In Criminal Case No. 254/OA/99/C, the accused also examined Advocate Joaquim Godinho as DW. 2.

8. Upon analysis of the entire oral and documentary evidence on record, the learned J.M.F.C., Panaji and the learned J.M.F.C., Ponda both found that the Complaints were not maintainable and that Complainant could not establish beyond reasonable doubt the ingredients of Section 138 of the N.I. Act, as against the accused. All the Complaints, therefore, came to be dismissed.

9. Mr. Sudesh Usgaonkar, the learned counsel appearing on behalf of the Complainant and Mr. Suresh Lotlikar, learned Senior Counsel appearing on behalf of the accused came to be heard.

10. I have minutely perused the record and considered the arguments advanced by both the parties and have gone through the citations relied upon by them.

11. The first point for determination is whether the Complaints as filed were maintainable. Relying upon the judgments of the Apex Court in the cases of *Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others*, ; *Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another*, ; "*Sabitha Ramamurthy V/s Chammabasavaradhya*" [2006 (6) ALL MR (SC) 131]; and "*K.P.G. Nair V/s Jindal Menthol India Ltd.*" [2001 ALL MR (Cri) 1206], the learned Magistrates held that since there was no averment in the Complaint that the accused nos. 2 and 3 were in-charge of and responsible to the partnership firm (accused no. 1) for conduct of its business, the Complaints were not maintainable. The learned counsel for the complainant submitted that the complaints have been wrongly dismissed on this ground. He relied upon *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, and contended that since the accused no. 2 is the signatory of the cheque, she is admittedly in-charge of and responsible to the firm and, therefore, the accused no. 2 along accused no. 1 could certainly be proceeded against. On the contrary, learned Sr. Counsel appearing on behalf of the accused submitted that there is no averment in the Complaint that the partners concerned were in charge of and were responsible to the Firm for the conduct of its business and that the accused no. 3 Meena Rajani is the signatory of the cheques. He stated that such averments are also missing in the legal notices issued to the accused. In the case of "*S.M.S. Pharmaceuticals*" (supra), question (c) as referred to the larger bench by the two-judge bench of the Apex Court was as follows: " (c) Even if it is held that specific averments are necessary, whether in the absence of such averments the

signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against". The same has been answered in the affirmative. The evidence on record clearly reveals that the accused no. 3-Meena Rajani is the signatory of the said cheques. However, insofar as of the director of the company and the partner of the firm who is not signatory to the cheque is concerned, the position is that it is necessary to specifically aver in the Complaint u/s 141 that at the time the offence was committed, such director or partner, as the case may be, was in charge of, and responsible for the conduct of business of the company. In the Complaints, admittedly there is no such averment as required by Section 141 of the N.I. Act. Since the accused no. 3 is the partner of accused no. 1 and is signatory to the cheque in question, the Complaints could have proceeded against the accused nos. 1 and 3 but could not have proceeded against the accused no. 2, since required averments are missing. Insofar as the accused no. 2 is concerned, therefore, he has been rightly acquitted, as the Complaints were not maintainable against him.

12. The learned Magistrate, Panaji has held that PW. 1 having failed to produce on record any authority on behalf of the Complainant to depose and to file the present Complaint, the Complaint is not maintainable. In this regard, learned counsel appearing on behalf of the complainant relied upon "Vishwa Mitter V/s O.P. Poddar", [(1983) 4 SCC 710] and argued that any one can set the criminal law in motion by filing a Complaint of facts constituting an offence before a Magistrate entitled to take cognizance u/s 190 of Cr.P.C. and that no Court can decline to take cognizance on the sole ground that the Complainant was not competent to file the complaint. He pointed out that the Complaint in Panaji Court was filed by both the partners and that even otherwise every partner in law is an agent of the firm and has implied authority to act on behalf of the firm. Section 142 of the N.I. Act provides that a Complaint can be made by the payee or the holder in due course of the said cheque. In the present cases, the payee is M/s. Enpee Earthmovers and the Complaints have been filed by this partnership firm. In the case before the learned Magistrate, Panaji, the said Complainant is represented by both the partners who have signed the Complaint. Thus, in view of the provision of Section 142 of the N.I. Act and the ratio laid down by the Apex Court in the case of "Vishwa Mitter" (supra), I hold that the Complaints as filed by the firm were maintainable, as against the accused nos. 1 and 3.

13. The next question for consideration is whether the accused have succeeded in rebutting the presumption arising out of Section 139 of the N.I. Act.

14. Learned counsel appearing on behalf of the Complainant submitted that there was a written agreement in July, 1995 between the Complainant and M/s. Resourceful Earthmovers for the work to be carried out at the mines from 1st August 1995 to 31st May 1996 and subsequently there was another agreement of 1st August 1996 for carrying out the work till 31st July 1997. He submitted

that the documents on record would reveal that after the agreement of August 1996 there was no written agreement but the work continued from August 1997 till May 1998 under verbal agreement. He contended that Resourceful Earthmovers failed to make payments of the complainant which resulted in huge outstanding, due to which the Complainant had stopped the work after May 1998 as a result of which a meeting was held between the parties and a memorandum of understanding was entered into on 9/7/1998 in respect finalizing the measurements of work done in respect of the pits not measured for the purpose of Joint Volume Calculations and such calculations were to be completed by 15/8/1998 and the Complainant was to issue bills in respect of those quantities. The learned counsel read out Clauses 4 to 7 of the said agreement dated 9/7/1998. He further submitted that the Joint Volume Calculations were completed on 18/8/1998 and on the basis of the same, dues were calculated in the last week of September 1998 and the liability of M/s. Resourceful Earthmovers was ascertained at Rs. 1,96,07,659/-, which included the principal amount and the interest thereon in view of the inordinate delay in settlement of dues. He invited my attention to the calculation produced on record as Annexure IX (Exhibit 70/C colly, in Criminal Case no. 39/OA/99/A). He submitted that the said amount was rounded up to Rs. 1,95,00,000/- which the accused agreed to pay and in order to induce the Complainant to re-start the work, issued the first post dated cheque for Rs. 15,00,000/-, dated 12/11/1998, in October 1998, due to which the Complainant started the work from 12/10/98 under verbal agreement. The learned Counsel submitted that this cheque was deposited on 18/11/1998 but was dishonoured and hence the Complainant stopped work as from 18/11/1998. Learned counsel invited my attention to the letter dated 19/11/1998 by which the accused no. 3, on behalf of accused no. 2, stated that the payment will be released before 26/11/1998 and that further payments are also intended to be released and to the subsequent letter dated 20/11/1998 by which the accused no. 3 forwarded 12 post-dated cheques signed by her but on behalf of accused no. 1 for Rs. 1,80,00,000/-. He then invited my attention to the letter dated 23/11/1998 by which the Complainant acknowledged the receipt of the letter dated 20/11/1998 along with the post dated cheques. The said cheques were presented to the banker of the Complainant from time to time, but all the cheques were dishonoured, after which statutory notices were issued to the accused, in spite of which no payment was made. Learned Counsel submitted that in answer to the legal notice dated 22/4/1999, addressed to the accused, M/s. Resourceful Earthmovers sent reply dated 1/5/1999 claiming that their liability was Rs. 1,20,32,731.58/- and on 11/5/1999 paid the said amount by 9 Demand drafts in favour of the Complainant. Therefore, according to the learned Counsel, Criminal Cases were filed for dishonour of five cheques only, for the balance amount i.e. Rs. 75,00,000/-.

15. The learned counsel appearing on behalf of the Complainant further argued that the learned Magistrate wrongly relied upon the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, wherein it has been held that presumption u/s

139 of the N.I. Act does not include the existence of a legally enforceable debt or liability and that Section 139 merely raises a presumption in favour of holder of the cheque that the same has been issued for discharge of any debt or other liability. He relied upon the case of Rangappa Vs. Sri Mohan, , in which the Three-Judges Bench of the Apex Court held that the presumption mandated by Section 139 of the N.I. Act includes the existence of legally enforceable debt or liability and to that extent, the impugned observations in the case of "Krishna Janardhan Bhat" (supra) may not be correct. The learned counsel relied upon M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, and submitted that there is no requirement that the Complainant must allege in the Complaint that there was a subsisting liability. He argued that once the execution of the cheques has been proved, the burden of proving that there was no existing debt or liability was on the accused persons and they have to discharge the said burden in the trial which according to him has not been done. Relying upon the judgment of the Apex Court in "I.C.D.S. Ltd. Vs Beena Shabeer" (AIR 2002 3014) and of the Single Judge of this Court in Criminal Appeal No. 70/2006 between "Balagi Agencies Pvt. Ltd. Vs. Mr. Vilas Bagi of Bagi Packages Ltd. and anr.", the learned Counsel contended that even if the cheques were given as security, as alleged by the accused, they were not given as pieces of paper and the provisions of Section 138 of the Act are attracted. He, therefore, submitted that the complainant had proved all the ingredients of Section 138 of N.I. Act and, therefore, the accused persons were liable to be held guilty and convicted. He, therefore, urged that the appeals be allowed and the impugned judgments be set aside and the accused be convicted and sentenced appropriately.

16. The learned Senior Counsel, appearing on behalf of the accused persons, on the other hand, strongly supported the impugned judgments and orders mainly on the ground that on the date when the said cheques were issued, the accounts were not finalized but were disputed and the sum payable was not ascertained. According to him no positive evidence has been produced by the Complainant with regard to the finalization of accounts. Incidentally, the learned Sr. Counsel also submitted that the disputes pertaining to accounts are subject matter of two Civil Suits namely Civil Suit No. 68/99 and Civil Suit No. 95/01. Learned Counsel pointed out various instances from the record to show that the accounts were not finalized on the date of handing over the post dated cheques and that there were disputes in bills, excess charging, etc.

17. The learned Counsel appearing for the accused invited my attention to the complaints wherein the Complainant has specifically stated that Rs. 1,95,00,000/- was due towards various works carried out by the complainant and there is no whisper of interest in the said Complaints. He further pointed out that there is no mention of interest even in the legal notices sent to the accused or in any correspondence prior thereto. Learned Sr. Counsel submitted that when PW. 1 was forced to admit in his cross-examination that the value of the work done calculated as per contract would not exceed Rs. 1,33,00,000/-, for the first time, he brought in the theory of interest charged for delay in payments.

Learned counsel submitted that the contract does not make any provision for payment of interest and there was no agreement for interest and in none of the letters or bills/invoices sent to Resourceful Earthmovers, the Complainant ever demanded interest. He further pointed out from the Partnership Deed of the Complainant that clause 14 required the firm to maintain accounts and show the debts receivable by the firm. He showed from the cross-examination of PW, 1 that interest was not accounted for in the books of accounts and Income Tax Returns of the complainant. Relying upon "Lakshmikant Naik Karmali V/s Santosh Naik" [2006 (2) BCR (Cri) 830], the learned Counsel submitted that when the complainant had come with a specific case as to the nature of the debt, the complainant had to prove the same. Relying upon M/s. Multimetals Limited Vs. M/s. Suryatronics Privated Limited, , the learned Sr. Counsel submitted that if the books of accounts are not produced, inference to be drawn is that interest was not charged. He further submitted that the statement of interest produced on record is neither dated nor signed by either of the parties and is manipulated and there is discrepancy in calculation and even PW. 1 was not certain about the rate of interest. Learned Sr. Counsel further submitted that the interest has been calculated on amount of provisional bills and not final bills. Relying upon "Karekar Finance Pvt. Ltd. V/s Shri M.N. Bashyam & anr." [2007 (2) Goa L.R. 465], the learned Counsel contended that no offence would be made out if the cheque has been issued for more than the amount due.

18. Learned Sr. Counsel for the accused contended that the cheques were issued under pressure since the complainant had stopped works at the mines and they were not issued towards existing crystallized or ascertained liability. He submitted that the dues of Rs. 1,20,32,731.58/- in addition to TDS of Rs. 2,33,313/- and Rs. 10,00,000/- were paid to the complainant, which payment, according to the accused, was in full and final settlement of the dues.

19. Learned Counsel for the accused submitted that the Complainant had filed one Complaint before Panaji Court and other four Complaints before Ponda Court and had set up different cases in both the courts, though pertaining to the same transaction. Relying upon "Damodar S. Prabhu V/s Sayed Babalal H" [2010 (2) BCR (Cri) 257], he submitted that the Apex Court has held that heavy costs should be imposed on the Complainants who indulge in filing complaints in multiple jurisdiction in respect of the same transaction,

20. On the scope of interference by appellate Court in appeals against acquittal, the learned Sr. Counsel appearing on behalf of the accused relied upon "Chandu V/s State of Maharashtra" [2001 DGLS (Soft) 493] and "Khedu Mohton and others V/s State of Bihar" (AIR 1911 SC 66).

21. In view of the judgment of the three-judges bench of the Apex Court in the case of "Rangappa" (supra), it is clear that the presumption mandated by Section 139 of the N.I. Act includes the existence of legally enforceable debt or liability. However, the presumption u/s 139 of N.I. Act is rebuttable. u/s 118(a) of the N.I. Act, the Court has to presume, until contrary is proved, that the promissory

note was made for consideration. In the case of "Krishna J. Bhat" as well as "Rangappa", the following extract from the earlier decision of the Apex Court in the case of Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal, , has been quoted: -

Upon consideration of various judgments as noted herein above, the position of law which emerges is that once execution of the promissory note is admitted, the presumption u/s 118 (a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising u/s 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist.

22. There can be no dispute that the debt or liability referred to in Section 138 of the Act means the debt or liability which existed on the date on which the cheques were issued. Further, it is well settled that when a cheque is for an amount more than due by the accused, Section 138 of the Act is not attracted. In the case of "Angu Parameshwari Textiles (P.) Ltd. And Ors. V/s Sri Rajam and Co." [2001 CompCas 105 (Mad) 186], the Madras High Court has held that if the cheque is for an amount which is more than the amount of the debt due, Section 138 cannot be attracted. Similar view has been taken by learned Single Judge of this court in the case of "Karekar Finance Pvt. Ltd. "(supra). In the case of Pawan Enterprises Vs. Satish H. Verma, , the cheque was for an amount of Rs. 17,745/- and there was no dispute that the amount that was due by the accused was only Rs. 10,975/-. The Court held that it could not be said that the cheque was issued for discharging the liability to the extent of Rs. 17,745/- when what was due was

only Rs. 10,975/-. Relying upon the said judgment, the learned Single Judge of this Court in the case of " Laxmikant D. Naik Karmali Vs. Santosh V Naik " [2006 (2) Bom. C.R. (Cri.) 830] has held that when the cheque is for an amount more than due by the accused, Section 138 of the Act is not attracted.

23. In the case of "M.M.T.C. Ltd." (supra), the Apex Court has held that there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. Therefore, there can be no dispute about that. But that does not mean that the Complainant would specifically allege something in the Complainant and would then enlarge the scope of the same during trial. In the present case a perusal of the complaints reveal that the complainant has specifically stated that the amount of Rs. 1,95,00,000/- was due towards various works carried out by the complainant which in other words means that the said amount due is towards the works carried out and not towards the interest calculated on account of delay in payment. In his affidavit-in-evidence, PW. 1 stated the same thing as averred in the Complaint. PW. 1 did not produce any document in his examination-in-chief showing the calculation of dues. In his cross-examination, PW. 1 admitted that he has not produced any document to show that M/s. Resourceful Earthmovers became due and liable to the Complainant, in September 1998, a total sum of Rs. 1,95,00,000/- and that this figure was settled by the Complainant and M/s. Resourceful Earthmovers at the end of the month of September, 1998, after taking detail accounts. He further admitted that he has not produced on record the accounts referred to by him in paragraph 3 of his affidavit. When PW. 1 was questioned as to on the basis of which document, the figure of Rs. 1,95,00,000/- was ascertained, PW. 1, for the first time, stated that the same was on the basis of bills submitted and the interest on delays as agreed by Resourceful Earthmovers. It is, however, pertinent to note that PW. 1 who is one of the partners of the complainant firm could not state as to what was the rate of interest charged for the delay. He stated that approximately it was at the rate of 18% to 24% and that the interest which he charged for the delay is included in the said amount of Rs. 1,95,00,000/-. But he was unable to state as to what was the principal amount which was due and payable and as to what was the amount of interest that was included in the said total of Rs. 1,95,00,000/-.

24. According to PW. 1, the accounts for the works done till July 1998 were settled along with interest payable on arrears, for which the cheques were issued and there were no disputes about the same. Further, according to PW. 1, there were no disputes prior to 1999 and that the disputes were raised somewhere in 1999 after the Complainant had stopped work in December 1998. If that be so, then the question arises as to why there had to be a meeting held on 9/7/1998. Nothing was stated by the Complainant in the Complaint and by PW. 1 in his affidavit-in-evidence regarding the said meeting and the minutes prepared in that meeting. The memorandum of understanding dated 9/7/1998 came on record in the cross-examination of PW. 1. When PW. 1 was asked as to why the said MOU dated 9/7/1998 was executed though the accounts were finalized and

cheques were given after finalisation of accounts, he answered that some calculation to ascertain the quantity was still to be done. The above goes to show that the accounts were not really finalized.

25. DW. 1 in his deposition stated that the post dated cheques were issued as security for the future work and that there was an understanding that after the accused made the payment, the complainant would return back the cheques. As per the minutes of M.O.U. dated 9/7/1998, the quantity for the period from 2/8/1996 to 16/11/1996 was not jointly recorded in respect of Codli mines and the quantity for the period from 14/11/1996 to 24/12/1996 was not jointly recorded in respect of Pit No. 1 at Sangod mines and for the period from 14/11/1996 to 26/7/1997 in respect of Pit No. 2 at Sangod mines. Manual Joint Volume Calculations were agreed to be completed by 15/8/1998. It was further recorded in the said minutes that the quantity which was not jointly checked will be cross checked through the computer calculations which were to be finalized by 31/12/1998 and if there was any difference between the manual calculations and computer calculations, the same will be adjusted in subsequent bills. Though it is contended by the Complainant that Joint Volume Calculations were completed on 18/8/1998 and that on the basis of the same, dues were calculated in the last week of September, to be Rs. 1,96,07,659/-, however, there is no document signed by both the parties having agreed that these are the dues. The computer calculation were to be finalized by 31/12/1998. But the post dated cheques were forwarded on 20/11/1998, i.e. much before the date fixed by the parties to complete computer calculation. It is an admitted fact that the complainant had stopped the work at the Sangod mines on 18/11/98 on the ground of non payments of dues and hence by letter dated 19/11/98, M/s. Resourceful Earthmovers had requested the Complainant to re-commence the work by promising to make payments on or before 26/11/98. The letter dated 20/11/1998, by which the said cheques were forwarded to the complainant shows that the said cheques were sent as required by the complainant. The post dated cheques were forwarded with a request to the complainant to deposit them only after confirming with Ms. Resourceful Earthmovers. The accused re-commenced the works from 21/11/98.

26. The case of the accused that they were thus pressurized by the Complainant to issue the post dated cheques by stopping the works at Sangod mines and that the accounts were not finalized at the time of giving of those cheques, cannot be brushed aside lightly and in fact the same is a probable case. There is no document produced by the Complainant to prove that the accounts were finalized on or before the date of issuance of the cheques.

27. The statement of account for the period from 01/04/98 to 30/09/98 is produced by PW. 1 in his cross-examination. It is Annexure V as filed in the suit and Exhibit 63/C colly in Criminal case No. 39/OA/99/A. It is seen that this statement of account is based on provisional bills and shows the provisional amount payable as Rs. 89,43,144.36 as on 31/8/98. PW. 1 has also admitted

that the statement of account is based on provisional bills. The calculation of interest is produced by PW. 1 in cross-examination and this is Annexure IX as filed in the suit and Exhibit 70/C colly in the said Criminal Case No. 39/OA/99/A. This statement shows that monthly interest is calculated on the provisional amounts shown in the Annexure V (Exhibit 63/C colly). Thus, there were no final bills and no calculation of final amounts and interest on the basis of final amounts.

28. It is also to be noted that according to PW. 1, the interest claimed by the complainant was at the rate of 24% per annum. However, while calculating the same, in the statement (Annexure IX) produced on record, it has been calculated on monthly basis. In Criminal Case No. 254/OA/99, in cross-examination, PW. 1 was asked whether they have mentioned, in the bills raised against M/s. Resourceful Earthmovers, after completion of manual calculation, that interest works out to Rs. 63 lakhs. PW. 1 answered that the interest was not mentioned in the bills but it was calculated separately since it was for entire period from 95-98. However, it is pertinent to note that in the statement of interest, the interest calculated till September 1998 is Rs. 50,14,502/- whereas, interest calculated thereafter till May 1999 is Rs. 12,93,863/-. The contention of the learned Counsel for the accused that it can, therefore, be said that the calculation of interest is manipulated, only to arrive to a figure close to Rs. 1,95,00,000/-, cannot be just discarded and is a probable defence.

29. The said statement of calculation of interest has not been signed by either of the parties. There is no date on the said statement in order to show as to when it was prepared. Admittedly, in the agreement there is no clause for charging interest nor there is any separate written agreement to charge the interest. There is no acknowledgment by Ms. Resourceful Earthmovers regarding charging of interest on the bills raised. Several written communications between the parties reveal that previously no bills were raised towards interest nor any demand was made for interest in the past. Admittedly, interest was not accounted for in the complainant's books of accounts and Income Tax Returns. Clause 14 of the partnership firm of the complainant requires the firm to maintain accounts to show the debts receivable by the firm. PW. 1 has deposed that the principal amount of Rs. 1,33,00,000/- has been shown as receivable from M/s. Resourceful Earthmovers, as per books of accounts and Income Tax returns but interest was not shown.

30. It is the contention of learned Counsel appearing for the Complainant that though there was no clause in any of the written agreement for charging interest for delays in payment, however, there was oral agreement in this regard. In support of his contention that oral agreement is valid without any clause for interest in the written agreements, he relied upon the case of "Bhan Singh Vs. Gopal Chand" (AIR 1919 Lah 42). In the case supra, the bahi entry of Rs. 825/- contained no reference to interest. It was contended that the evidence of witnesses who allege that it was settled at the time that interest was to be paid,

is inadmissible u/s 92 of the Evidence Act. Since the entries in bahis cannot be said to bear any formal character and may be of various descriptions, the High Court of Lahore held that the evidence relating to an oral agreement to pay interest is admissible under Proviso 2 to Section 92 of the Evidence Act. In my view, the above citation is not applicable to the present cases because the document concerned therein was a bahi which had no formal character. Learned Counsel appearing for the accused argued that if the agreement is silent on interest, there cannot be supplement of interest by way of afterthought, u/s 92 of the Evidence Act. However, the judgment in the case of "Gopal Madhoroa Deshpande Vs. Achut Sadasheo Deshpande" [(28) AIR 1941 Nag 271], relied upon by the learned Counsel for the accused, in my view, is also not applicable since in that case, the document mentioned the rate of interest and the party wanted to prove that the rate of interest was different. It was held that a fortiori evidence is not admissible in a case where the document mentions a rate of interest to prove that the rate was different from that mentioned in the document. In the present cases, there were two agreements one of July 1995 and the other of August 1996, both of formal character, containing the scope of work and rates to be charged. There is no clause of interest in these agreements. There is also no previous or subsequent correspondence between the parties to show that interest at the rate of 24% or at any rate was agreed. Interest sometimes may become payable from the date of work or sometimes from a date thereafter, as may be agreed upon. It may be on monthly basis or may be on yearly basis. It may be simple interest or compound interest. PW. 1 himself was not even sure about the rate of interest. In my considered opinion, Proviso to Section 92 of the Evidence Act cannot come to the rescue of the complainant. Besides the above, the fact that there was verbal agreement regarding interest is not proved by the Complainant beyond reasonable doubt. This is one more circumstance helping the accused to rebut the presumption u/s 139 of the Act.

31. There is contradictory version stated in the complaint filed in Panaji Court as compared to that stated in the Complaints filed in Ponda Court. In Criminal Cases No. 34/OA/99, 35/OA/99, 39/OA/99 and 45/OA/99, filed in Ponda Court, the averment of the Complainant is that for various works carried out by the Complainant for M/s. Resourceful Earthmovers, the said firm became due and liable to the Complainant, in September 1998, to pay a total sum of Rs. 1,95,00,000/-. But in Criminal Case No. 254/OA/99, filed in Panaji Court, it is averred that the Complainant carried out works at Codli and Sangod mines of M/s. Resourceful Earthmovers for the period running from 21/3/1995 till December 1998 and in respect of the said works the accounts were drawn up and the total sum payable to the Complainant was ascertained at Rs. 1,95,00,000/-. In addition to the above inconsistency in averments, there is no averment in any of the Complaints that the total sum ascertained was Rs. 1,96,07,659/- including interest at the rate of 24% per annum and that the same was however settled for Rs. 1,95,00,000/-. There is no explanation as to why the amount of Rs. 1,07,659/- has been waived. This is another circumstance favouring the accused.

32. There are various discrepancies in the case of the complainant brought out in the cross-examination of PW. 1, regarding the charges made by the complainant on different items.

33. There is on record a letter dated 27/11/1998 addressed to the Complainant by M/s. Resourceful Earthmovers which reveals that the said post dated cheques were issued as security pending finalization of accounts and to cover the estimated value of the work to be done in future. No doubt, the receipt of the letter dated 27/11/1998 has been disputed by the complainant. However, there is A/D card on record, with postal stamp. Learned Counsel appearing for the complainant submitted that this A/D card is doubtful as it does not bear the parcel number and further since the postal receipt has not been produced. He further pointed out that this letter came on record for the first time in the cross of DW. 1 without even putting it to PW. 1. It is true that in the Cases filed in Ponda court, the said letter dated 27/11/1998 came on record, for the first time, in the cross-examination of DW. 1. But in the case filed in Panaji Court, PW. 1 was shown the said letter along with A/D card, in his cross-examination. A bare statement has been made by PW. 1 that the signature on the A/D card does not seem to be his. The above answer is given by an educated businessman. It is pertinent to note that PW. 1 did not state with certainty that the signature on the said A/D card is not his. His answer that the signature does not seem to be his signature speaks about his conduct and by preponderance of probability, it can be said that PW. 1 had received the said letter. In the case of "Vasco Urban Co-operative Credit Society Ltd. Vs. Shobha D. Korgonkar" [2005 (2) Bom. C.R. (Cri) 111], which has been duly considered by the Hon'ble Apex Court in the case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, , it has been held that once the notice is sent on the proper address and the A/D card is received, it can be presumed that the letter has been duly acknowledged by the sendee. Therefore, in the facts and circumstances of the case, it can be said that the letter dated 27/11/1998 was received by the Complainant. This letter helps the accused to rebut the presumption u/s 139 of the act.

34. In the Criminal Case No. 254/OA/99/C, the accused examined Advocate Joaquim Godinho as DW. 2. DW. 2 had written letter dated 19/3/99 to the complainant on behalf of the accused and this letter was produced by DW. 1 as Exhibit C-96. The evidence of DW. 2, read with the contents of the said letter, show that the accounts were not finalized and the post dated cheques were given in the anticipated payment and not towards existing debt. This letter was duly received by the learned advocate for the Complainant, prior to presenting the cheques for encashment. The Complainant did not bother to reply this letter dated 19/3/1999. In the two letters dated 8/4/1989 and 1/5/1999 which were produced by DW. 1 as Exhibits C-118 and C-199, DW. 2, Advocate Joaquim Godinho had pointed out to the Complainant various discrepancies and had set out the amount of Rs. 1,20,32,731.58 as the legitimate amount payable to the Complainant by Ms/Resourceful Earth Movers. By these letters, the Complainant was called upon to return back the cheques issued by the accused so that fresh

cheques could be issued in respect of the legitimate dues. None of the letters addressed to the Complainant by Advocate J. Godinho on behalf of Ms. Resourceful Earthmovers were replied by the Complainant. Post dated cheques were issued vide letter dated 20/11/1998 and in terms of the Minutes of Memorandum of Understanding dated 9/7/1998, the date fixed by the parties to complete the computer calculation was 31/12/1998. PW. 1 in his cross-examination has admitted that as per the Minutes dated 9/7/1998, as on that date the accounts were not finalized and the last date was given as 31/12/1998. However, he further added that he was not aware whether the computer calculations were completed or not by 31/12/1998.

35. The accused and M/s. Resourceful Earthmovers have filed Special Civil Suit No. 68/99 against the Complainant, inter alia, for declaration that the liability of M/s. Resourceful Earthmovers to the Complainant under the agreements dated May 1995, July 1995 and 1st August 1996 stands closed and the account stands settled at Rs. 1, 20, 32,731.58. Subsequently, the Complainant has also filed Special Civil Suit No. 95/01/A for recovery of the balance amount of liability till September 1998 and for part recovery of the amount due for the work done from October 1998 to 31/12/1998, totally amounting to Rs. 1,49,00,748/-, with further interest thereon at the rate of 24% per annum to be calculated from 01/01/2001. Therefore, there are disputes between the parties, regarding the amount due. This shows bonafides of the accused and is one more circumstance in favour of their case that the cheques were not issued for ascertained/finalized debt or liability.

36. As has been held by the Apex Court in the case of "Rangappa" (supra), it is a settled position that when an accused has to rebut the presumption u/s 139 of the Act, the standard of proof for doing so is that of "preponderance of probabilities". The accused, in the present cases, in my considered opinion, has brought on record the preponderance of probabilities by reference to various circumstances, thereby cogently showing reasonable probability that as on the date of the cheques, the existing liability was not as claimed by the Complainant but was much less than that and that the accounts were not settled due to which the debt or liability was not ascertained. The accused, therefore, has raised probable defence sufficient to rebut the presumption u/s 139 of the Act. The onus of proving the legally enforceable debt or liability had shifted to the Complainant. The standard of proof for the Complainant is not "preponderance of probabilities" but "proof beyond reasonable doubt". Complainant has failed to prove the existence of consideration as claimed, as a matter of fact.

37. From the discussion supra, I am of the view that the complainant has failed to establish beyond reasonable doubt that the cheques which are the subject matter of all the above criminal appeals were issued in respect of the ascertained existing debt. Therefore, the complainant has failed to prove that the accused has committed offence punishable u/s 138 of the Negotiable Instrument Act.

38. The Complainant tried its luck by filing one case in Panaji Court and other

four separate cases in Ponda Court, though in respect of the same transaction. The Apex Court, in the case of "Damodar S. Prabhu " (supra), has taken note of filing of multiple complaints that are relatable to the same transaction in multiple jurisdictions which causes harassment and prejudice to the drawers of the cheque. The Apex Court has directed that it should be mandatory for the complainant to disclose that no other complaint has been filed in any other Court in respect of the same transaction and such disclosure should be made on a sworn affidavit which should accompany the complaint and if it is found that such multiple complaints have been filed, orders for transfer of the complaint to the first Court should be given by the High Court by imposing heavy costs.

39. In the present Cases, both the lower Courts have dismissed the complaints and acquitted the accused. In the case of "Khedu Mohan" (supra), the Apex Court has held that if on the evidence on record, two views are possible and one view is adopted by the trial Court, there is no scope for interference by the High Court against that order even if the High Court is inclined to accept the other view. The impugned judgments and orders passed by the learned Magistrates of Ponda and Panaji Courts are in accordance with the settled principles of law and no interference is warranted. In the result, I pass the following:

ORDER

All the above criminal appeals are dismissed.