IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.172 OF 2014

Shaikh Farooq s/o. Shaikh Amir Bagwan,
Age-43 years, Occu:Business,
R/o-Sabjimandi, Paithan Gate,
Aurangabad.

...APPELLANT
(Orig. Complainant)

VERSUS

1) Shaikh Rafiq s/o. Shaikh Ayyub,
Age-41 years, Occ:Business,
R/o-Near Joshi Hospital, Kokadpura,
Sabjimandi, Aurangabad.

(Orig. Accused)

2) The State of Maharashtra

...RESPONDENTS

...

Mr. Ajit D. Kasliwal, Advocate for Appellant.
Mr. Pathan Mohsin Khan, Advocate for Respondent No.1.
Mr. K.S. Hoke Patil, A.P.P. for Respondent No.2.

...

CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT : 5TH AUGUST, 2016

DATE OF PRONOUNCING JUDGMENT: 19TH SEPTEMBER, 2016

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JUDGMENT :

1. This Criminal Appeal has been filed by the original complainant (hereafter referred as "complainant") against the acquittal of Respondent No.1 - original accused (hereafter referred as "accused") in Summary Criminal Case No.820 of 2012 by J.M.F.C. Court No.20, Aurangabad on 27th June 2013 for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ("the Act" in brief).

2. The complaint filed by the complainant in the trial Court claimed that the accused was friend of the complainant and they had cordial relations since long and also belong to same community. In Ramzan of 2011 accused was in need of money for his business and approached the complainant with the request of hand-loan of Rupees One Lakh. Considering the request of the accused and the relations, complainant told the accused that it was a huge amount and it would be

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preferable to execute an agreement. The accused however, suggested that he will execute cheque of hand-loan amount for repayment of hand-loan to which Complainant agreed and gave hand-loan of Rupees One Lakh in cash to accused. In discharge of the liability to repay the hand-loan, the accused executed cheque bearing No.000005 dated 1st October 2011 for Rupees One Lakh drawn on Bank of Baroda, Branch Sabji Mandi, Aurangabad, in the name of the complainant. Accused agreed to repay the hand-loan on the given date of the cheque i.e. 1st October 2011. On the given date, complainant presented the cheque but it returned unpaid with memo dated 1st October 2011 with reason that opening balance was insufficient. Complainant informed this to the accused. Accused said that he was expecting funds in December. As per instructions of the accused, the complainant again presented the cheque on 21st December 2011 but again it was returned unpaid with memo dated 21st December 2011 stating reason that the opening balance was insufficient. Complainant issued

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demand notice dated 17th January 2012 by R.P.A.D. through Advocate Shakeel Ahmed. Notice was served on 19th January 2012 as on that date the postman gave intimation to the accused but he avoided to accept the notice. The amount remained unpaid and thus the complaint dated 14th February 2012 was filed.

3. The trial Court explained particulars of offence under Section 138 of the Act to the accused. The accused pleaded not guilty. His defence is of denial and as claimed in statement under Section 313 of the Code of Criminal Procedure, 1973 ("Cr.P.C." in brief) defence taken was that blank cheque was issued only against an amount of Rupees Five Thousand which was taken.

4. In the trial Court, the complainant filed his affidavit at Exhibit 20 by way of examination-in-chief on the above lines of the complaint. Complainant came to be cross-examined. Complainant proved the cheque Exhibit 23 which had been issued

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and the memo from the Bank dated 21st December 2011 at Exhibit 24. The money receipt for sending the notice by Registered Post was proved at Exhibit 25-C. Copy of the notice sent was proved at Exhibit 35. From the unserved envelope Exhibit 26(1) trial Court appears to have taken out the notice which was sent in the envelope. It turned out that the notice did not bear any signature and trial Court endorsed the document as not proved by the complainant. Consequently, the complainant examined C.W. No.2 - Advocate Shaikh Shakeel Ahmed, who deposed regarding sending of the notice by Registered Post A.D. and claimed that while sending the notice, he did not see on the back side of the notice and thus it remained unsigned by him. It was noticed that there was over-writing in the date of the copy of the notice Exhibit 35 where the printed date was scribbled and another date of 17th January 2012 was written by hand. This Advocate Shakeel Ahmed CW-2 claimed that on 5th January 2013 he had to file two examination-in-chiefs in Court and wrongly in another matter

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of Imran vs. Ravi while preparing list of documents, Exhibit 35 got wrongly listed and he put the date of notice thinking it to be of that matter and when he saw the addressee, he removed the document Exhibit 35 from that matter and thus he claimed that there was over-writing in date.

5. The complainant and his witness, both were cross-examined. Trial Court considered the evidence brought and after considering the evidence and the defence, the trial Court passed Judgment of acquittal.

6. I have heard learned counsel for both sides. Learned counsel for the Appellant - complainant made reference to the evidence and claimed that the complainant should have been believed when he deposed that the accused being friend, was given an hand-loan and the cheque given was dishonoured. The learned counsel submitted that when it was not in dispute that the accused did in fact issue the cheque and had

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signed the same, it was necessary to raise presumption under Section 139 of the Act that the cheque was issued towards legally enforceable debt. According to the learned counsel in the cross-examination of the complainant the suggestions show that it was not disputed that for money taken cheque was issued. According to the counsel, the trial Court wrongly held that the cheque had been issued by way of security only. It was stated that the accused did not show for what security the cheque had been issued. The defence that only Rupees Five Thousand had been taken, was put up only at the time of statement under Section 313 of Cr.P.C.

7. The counsel for the accused submitted that there was no dispute that the accused had taken loan but dispute was only if it was of Rupees One Lakh. As stated by the accused in statement under Section 313 of Cr.P.C. he had taken amount only of Rupees Five Thousand. Referring to the evidence of the complainant it

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was stated that when in the evidence complainant claims that profit in business which he gets is of only Rs.8,000 - 9,000/-, it was not proved by the complainant that when he allegedly gave loan he had the capacity to give loan of Rupees One Lakh. The counsel stated that if for money given the cheque was taken, it must be treated as for security. The learned counsel relied on the case of **M.S. Narayana Menon Alias Mani vs. State of Kerala and another, reported in (2006) 6 S.C.C. 39,** to claim that in para 52 of the Judgment the Hon'ble Supreme Court had observed that if a cheque was issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act. The counsel submitted that it should be held that there was no notice as the notice which was sent and allegedly not received, was not signed by the Advocate. The learned counsel supported the reasons recorded by the trial Court and stated that the Appeal should be dismissed. The counsel relied on the Judgment in the matter of **K. Prakashan vs. P.K. Surenderan,**

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reported in 2008 All M.R. (Cri.) 314 (S.C.) and referring to Para 13 of the Judgment stated that even if presumptions under Section 118 (a) and Section 139 of the Act were to be relied on the standard of proof as far as prosecution is concerned is to prove guilt beyond all reasonable doubt while the one on the accused is only mere preponderance of probability. Thus, referring to the defence taken by the accused in his statement under Section 313 of Cr.P.C. the counsel stated that the accused discharged the onus which was on him.

8. The learned counsel for the accused further relied on the case of **Sanjay Mishra vs. Ms. Kanishka Kapoor @ Nikki & Anr., reported in 2009 All M.R.(Cri.) 1080,** to submit that in that matter it has been held that provisions of Section 138 of the Act can not be relied on to recover unaccounted money. It is stated that in the present matter complainant claimed to have lent Rupees One Lakh and although complainant claims to

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be business-man, admittedly he does not pay any income tax and at the time of evidence he tried to claim that the amount was available with him from sale proceeds of house but no such document was proved.

9. The learned counsel for accused further relied on the case of **Sheshrao s/o. Krishnarao Umredkar vs. Shri. H.K. Pande & Another, reported in 2010 All M.R. (Cri.) 1446,** to submit that it has been held in that matter by this Court that there can not be justification in disturbing the order of acquittal unless there is a specific and compelling reason to overturn the acquittal or unless grave miscarriage of justice has resulted from the impugned order of acquittal.

10. The learned counsel for accused further referred to the case of **Gundappa Virbhadrappa Kalyani vs. Dnyandeo Shankarrao Jangle, reported in 2007 All M.R. (Cri.) 1046,** in which, on the

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facts of that matter, it was found that the legal liability of the accused was not proved.

11. In reply, the learned counsel for the complainant referred to the Judgment of the Hon'ble Supreme Court in the matter of **I.C.D.S. Ltd. vs. Beemna Shabeer and another, reported in A.I.R. 2002 S.C. 3014,** in which matter the High Court had concluded that when a cheque was issued as security, no complaint would lie under Section 138 of the Act but Supreme Court did not agree. That matter related to the hire purchase agreement of Maruti Car and the Respondent No.1 wife had stood guarantor for husband and issued cheque which was dishonoured. The Hon'ble Supreme Court found that the High Court fell into a manifest error in such finding. The learned counsel for the Appellant-complainant submitted that the Judgment of the Hon'ble Supreme Court in the matter of **I.C.D.S. Ltd.** (supra) has been followed by this Court in the matter of **Mrs. Heena Naresh Rupani**

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vs. Sarita Nandlal Choudhari, reported in 2008 ALL M.R.(Cri.) 3419, to held that proceeding under Section 138 of the Act would lie even if the cheque was issued towards liability as a guarantor or by way of security. The counsel stated that the Judgment of Hon'ble Supreme Court was further followed in the matter of **VPK Urban Co-operative Credit Society Limited vs. Mrs. Nandini Shankar Waingade & Another, reported in 2013 ALL M.R. (Cri.) 1204,** where considering the facts in that matter this Court found that accused had failed to rebut presumption under Section 139 of the Act. The learned counsel for the complainant stated that similar view has been taken in the matter of **Balagi Agencies Pvt. Ltd. vs. Mr. Violas Bagi of Bagi Package Ltd. and another, reported in 2008 All M.R. (Cri.) 2230** where it was held that even if the cheque was issued for security, the same would come under the purview of Section 138 of the Act.

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12. Learned counsel for the complainant submitted that Judgment in the matter of **Sanjay Mishra vs. Ms. Kanishka Kapoor @ Nikki & Anr.,** cited supra, relied on by the accused was dealt with in another Judgment of this Court in the matter of **Mr. Krishna P. Morajkar vs. Mr. Joe Ferrao and another, reported in 2013 All M.R. (Cri.) 4129** and this Court considered the effect of the Judgment in the matter of **Krishna Janardhan Bhat vs. Dattatraya G. Hegde, reported in 2008 All M.R. (Cri.) 1164** which was considered by the Hon'ble Supreme Court in the matter of **Rangappa vs. Sri Mohan, reported in 2010 (11) S.C.C. 441.** In the Judgment in the matter of **Krishna Janardhan Bhat** (supra), the Supreme Court had held that existence of legally enforceable debt is not a matter of presumption under Section 139 of the Act. As far as this aspect was concerned, the Judgment in the matter of **Krishna Janardhan Bhat** was specifically overruled by the Three Judges Bench of the Supreme Court in the matter of

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Rangappa vs. Sri Mohan (supra). Learned counsel for complainant stated that this Court in the matter of **Mr. Krishna P. Morajkar** (supra) discussed the provisions under Section 269SS and 271D of the Income Tax Act which were dealt with in the matter of **Krishna Janardhan Bhat** (supra) as well as the Judgment in the matter of **Sanjay Mishra** (supra) as well as the provisions under Section 138 of the Act to find that there was no prohibition to recover the amounts not disclosed in the income tax returns. It was concluded in para 31 of the Judgment that when a person signs a cheque and delivers it, even if it is a blank cheque or a post dated cheque, presumptions under Section 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. Thus, according to the learned counsel the claim of the complainant can not be rejected merely because the transaction was not shown in the income tax returns.

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13. Learned counsel for the complainant further relied on the Judgment in the matter of **T. Vasanthakumar vs. Vijayakumari, reported in 2015 ALL M.R. (Cri.) 3667 (S.C.),** which referred to the ratio of Judgment in the matter of **Rangappa vs. Sri Mohan (Supra),** in Para 9 as under:-

> "9. This Court has held in its three judge bench judgment in Rangappa v. Sri Mohan (2010) 11 SCC 441 : [2010 ALL SCR 1349]
>
> > "The presumption mandated by Section 139 includes a presumption that there exists a legally enforceable debt or liability. 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 respondent complainant."

. Relying on the Judgment, it was stated that in the present matter it should be held that

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there was legally enforceable debt and presumption under Section 139 of the Act needs to be raised and burden is on the accused to show that no such liability existed.

14. The learned counsel for the complainant further relied on the Judgment in the matter of **Rajesh Chari vs. Zuari Structural Works, reported in 2006 ALL M.R. (Cri.) 513,** in which matter on its facts it was held that the complainant in that matter had proved his case and the accused failed to rebut presumption under Section 139 of the Act.

15. Having heard counsel for both sides and seen the various Judgments they are relying on, I am keeping the law as is reflected from above arguments and counter arguments in view and I proceed to consider the facts of the present matter to see if offence under Section 138 of the Act is proved.

16. Before referring to the evidence, as this

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is an Appeal against acquittal, I am first making reference to the findings recorded by the trial Court. This would be necessary because if the view taken by the trial Court of the evidence is a possible view, there would be no justification for me to interfere. The trial Court recorded in its reasons that the fact of the accused issuing cheque and signature thereon was not in dispute except regarding the amount. Trial Court recorded that the defence taken by accused is that he had issued blank cheque only for Rupees Five Thousand. After referring to the evidence of the complainant and the notices, trial Court held that the envelope Exhibit 26(1) showed that notice was served on accused on 19th January 2012. Trial Court observed that there was no dispute from the side of the accused that the complaint was in limitation. Trial Court considered evidence of the complainant that he had deposed that he earns Rs.8000 - 10,000/- per month and that he did not pay income tax but still claims to have advanced huge amount of Rupees One Lakh. The reason given

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by the complainant that due to cordial relations the amount was given, was dealt with by the trial Court. The trial Court considered that in the cross-examination of the complainant he was asked and even given opportunity to show that he had the concerned amount but the complainant did not file documents to show that indeed he had sold a house and had the concerned money. Trial Court observed that looking to the small income of the complainant if the fact is juxtaposed with not filing of the documents of sale of house, the preponderance of probability was that the complainant was not having that much money on the alleged date when he claimed that he paid the amount to the accused. Thus, the trial Court concluded that the accused succeeded to rebut presumption under Section 139 of the Act. Trial Court observed that the complainant was making different claims regarding sale of house and apart from not filing the documents, complainant was some time claiming that he advanced share to his brother and some time claimed that the brother did

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not have share. Thus the trial Court doubted the evidence of the complainant. Referring to the evidence of the complainant, the trial Court found that the cheque was given only by way of security. Trial Court referred to the evidence to find that the complainant and accused were in different businesses and would not even meet often and that there was no earlier transaction between them. Trial Court did not accept the evidence that due to cordial relations the money was advanced. The cheque was given as a post-dated cheque and was only as a security. Trial Court also found that the Advocate examined by the complainant had given improbable justification of inadvertent mistake in over-writing in the date of notice Exhibit 35. However, the trial Court found that the explanation regarding not signing the copy of notice sent in the envelope as probable. Still, trial Court found that notice Exhibit 35 was served on the accused. The trial Court held that the accused had been able to show on preponderance of probability that the complainant did not have

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the ability to give Rupees One Lakh and thus according to the trial Court the cheque was only as a security. Thus the trial Court held that it was not proved that the cheque was issued towards discharge of debt or legally enforceable liability.

17. Keeping such findings of the trial Court in view, I have gone through the evidence. The complainant in cross-examination claimed that he is running a hotel but does not pay any income tax. He claimed that his business per day was Rs.5000/- to Rs.6000/- but he claimed that he earns profit in a month only Rs.8000/- to Rs.10,000/-. Although it is not claimed in the complaint, in cross-examination complainant stated that the accused was his relative, without stating as to what was the relation. The cross-examination showed that the accused was not in hotel business and earlier there was no transaction between them. He admitted that as the accused and he are in different business, they do not meet often.

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Complainant claimed that the money of Rupees One Lakh was given to the accused in cash in the month of Ramzan of 2011. His evidence is that when the accused asked for the money, complainant told the accused that it was a huge amount and it would be preferable to execute an agreement. Thus, admittedly for the complainant it was a huge amount and he wanted an agreement to be executed. He however appears to have settled for the cheque. The evidence is that the accused had agreed to repay the hand-loan on the given date of the cheque. In cross-examination complainant claimed that he delivered money to the accused at his home. There is no corroborative evidence to such evidence. Admittedly, the amount was huge for the complainant to lend. No such thick relations are shown for the complainant to advance such huge amount to the accused. In the cross-examination complainant stated that he had sold his house at the concerned time and so he had money to advance the same to the accused. Even if one was to sell a house and had the money, it would not mean that

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the person would simply advance the money to anybody. Trial Court found that cordial relations so as to lend such amount were not proved. Apart from there being no witness of the handing over of such cash, the complainant inspite of cross-examination on this count, did not bring any evidence to show that he indeed had such money in his possession.

18. The evidence of the complainant shows that he tendered envelope Exhibit 26(1) in evidence to say that the same was sent by his Advocate and returned back unserved. The complainant claimed that the notice was served on the accused on 19th January 2012. The complainant made this claim on the basis of endorsement of the postman on the envelope. The endorsement behind envelope Exhibit 26(1) shows two endorsements, one is dated 19th January 2012 and another is dated 20th January 2012 with the heading of giving intimation. Reading the evidence of the complainant as well as his Advocate Shaikh Shakeel

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Ahmed, what appears is that such envelope Exhibit 26(1) was sent to the accused. It appears that in the trial Court, from this envelope the notice which was sent was taken out. Trial Court found that the said notice did not bear any signature. Consequently, it appears that on the date of 5th January 2013 the trial Court endorsed on the undated notice that it was not proved by the complainant. It also endorsed that the notice did not bear signature. It appears that the complainant then called his Advocate Shaikh Shakeel Ahmed who deposed at Exhibit 40 and after his evidence, on the back side of the unsigned notice it was marked as Exhibit 41 proved by CW-2. Although the trial Court has held that the notice Exhibit 35 was served on the accused, if Exhibit 41 the unsigned notice is seen which was taken out from envelope Exhibit 26(1) which was sent to the accused, what must be held is that an unsigned document in the form of notice was sent. The law raises presumption of service if the notice under R.P.A.D. is refused. However, if the envelope

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Exhibit 26(1) is to be read with the unsigned notice Exhibit 41, what could be said is that the unsigned typed paper was sent to the accused in the form of notice claiming to be from the Advocate. When there is no signature of anybody, it appears difficult to find that there is compliance of clause (b) of Section 138 of the Act which requires that notice should be given in writing. If the Advocate was to write the notice in his own hand, or if the complainant was to write notice in his own hand and send in which signature remains, it could be still said to be notice of the Advocate or the complainant. But when there is typed document in the form of Notice with no signature (not even an initial) of anybody, it cannot be said to be a legal notice. Nobody could be said to own up the correctness of the contents.

19. The trial Court found that the complainant wanted a document of agreement executed for the huge amount but accepted a cheque

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instead. The Judgment of the trial Court shows that the cheque was thus taken as a security and it also found that the complainant failed to prove cordial relations between him and the accused and thus it was improbable that the cheque issued was towards legally enforceable debt. Going through the material, it does not appear that there were any such thick relations that the complainant should have parted with what he himself says to be a huge amount of Rupees One Lakh in favour of the accused. The complainant further failed to show that he did have capacity to lend such huge amount. Complainant is not corroborated by any other evidence other than his evidence that he had such money and did handover such money to the accused. In the cross-examination accused has shown that complainant has failed to show availability of such amount or capacity and also that there were no such relations to lend such huge amount. Thus the presumption putting onus on accused is rebutted. Looking to the evidence on record, I find myself in agreement with the trial

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Court that the complainant cannot be said to have proved offence under Section 138 of the Negotiable Instruments Act. Additionally, I am finding that the service of legal notice itself is not proved in this matter.

20. For such reasons, on facts, the offence is not proved. Going through the Judgment of the trial Court, I do not find any reason to interfere in the acquittal recorded by the trial Court so as to convert the same into conviction.

21. There is no substance in the Appeal. The Appeal is dismissed.

[A.I.S. CHEEMA, J.]

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