HIGH COURT OF GUJARAT
Bench: Honourable Ms. Justice Nisha M. Thakore
Date of Decision: 16th February 2024

R/CRIMINAL MISC.APPLICATION (FOR LEAVE TO APPEAL) NO. 14266 of 2022 in R/CRIMINAL APPEAL NO. 1529 of 2022
With R/CRIMINAL APPEAL NO. 1529 of 2022
With R/CRIMINAL MISC.APPLICATION NO. 14268 of 2022 in R/CRIMINAL APPEAL NO. 1530 of 2022
With R/CRIMINAL APPEAL NO. 1530 of 2022
With R/CRIMINAL MISC.APPLICATION NO. 14273 of 2022 in R/CRIMINAL APPEAL NO. 1533 of 2022
With R/CRIMINAL APPEAL NO. 1533 of 2022

JAY NARAYAN RUWALA …APPELLANT(S)

VERSUS

STATE OF GUJARAT …RESPONDENT(S)

Legislation:
Sections 138 of the Negotiable Instruments Act, 1881
Section 378(4) of the Code of Criminal Procedure

Subject: Appeals against acquittal in cases involving cheque dishonor under Section 138 of the Negotiable Instruments Act, with focus on the appellant's financial capacity to lend money and the validity of the promissory note.

Headnotes:

Appeal Against Acquittal – Cheque Dishonor under Section 138 of the Negotiable Instruments Act – Challenging the financial capacity of the appellant to lend money and questioning the authenticity of the promissory note used to support the issuance of cheques. [Paras 3-5, 9-10, 17-19]

Evidence and Cross-Examination – Contradictions in appellant's statements regarding the existence of the promissory note and inconsistency in the financial capacity to lend the amount in question – Trial court's acceptance of promissory note without adequate scrutiny. [Paras 13-14, 17-18]

Presumption under Section 139 of the Negotiable Instruments Act – Appellate Court's finding that the respondent successfully rebutted the presumption through cross-examination, leading to a reasonable doubt about the existence of a legally enforceable debt. [Paras 15-16, 19]

Decision – Special leave to appeal and appeals dismissed due to insufficient evidence to prove appellant's financial capacity and existence of a legal debt, affirming the respondent's acquittal. [Para 19]

Referred Cases:

- Hiten P Dala vs. Bratindranath Banerjee (2001) 6 SCC 16
- Bir Singh vs. Mukesh Kumar (2019) 4 SCC 197
- Rohitbhai Jivanlal Patel Vs. State of Gujarat AIR 2019 SC 1876
- Rangappa vs. Sri Mohan AIR 2010 SC 1898
- Bharat Barrel & Drum Manufacturing Company vs. Amin Chand Pyarelal (1999) 3 SCC 35
- Shree Dhaneshwari Traders vs. Sanjay Jain AIR 2019 SC 4003
- Krishna Janardhan Bhat vs. Dattatraya G Hegde (2008) 4 SCC 54
- Kali Ram vs. State of Himachal Pradesh (1973) 2 SCC 808
- Tedhi Singh vs. Narayan Dass Mahant (2022) 6 SCC 735
- Basalingappa vs. Mudibasappa (2019) 5 SCC 418
- Rajaram s/o Sriramulu Naidu (Since Deceased) through L.RS. vs. Maruthachalam (Since Deceased) through L.RS. 2023 SCC OnLine SC 48

Representing Advocates:

Mr. Harsh A Prajapati and Mr. Narendra L Jain for the Applicant(s) No. 1
Mr. Anmol Surollia and Mr. Girishkumar M Rajgor for the Respondent(s) No. 2
Ms. Vrunda Shah, Addl. Public Prosecutor for the Respondent(s) No. 1

COMMON ORAL JUDGMENT

1. Since all these application seeking leave to appeal, filed under Section 378(4) of the Code of Criminal Procedure, raises common question of law in similar set of facts, the same were finally heard together and were reserved for orders and are disposed of by this common judgment and order.

Criminal Miscellaneous Application No.14266 of 2022

2. This application is filed by applicant- original complainant under Section 378(4) of the Code of Criminal Procedure, whereby, he intends to challenge the judgment and order dated 22.1.2022 passed by the learned 11th Additional Sessions Judge, Surat in Criminal Appeal No.168 of 2021. By the said judgment and order, the learned Additional Sessions Judge has allowed the appeal and has quashed and set aside the judgment and order dated 09.11.2020 passed by the learned 4th Additional Judicial Magistrate, Surat in Criminal Case No.2102 of 2011. The learned Additional Sessions Judge has acquitted the present respondent – original appellant –accused of the offence alleged under Section 138 of the Negotiable Instruments Act. The First Appellate Court has further directed to refund fine amount, if any, deposited by the original appellant and has further directed the appellant to comply with the provisions contained in Section 437 A of the Code.

Criminal Miscellaneous Application No.14268 of 2022:

2.1. This application is filed by applicant- original complainant under Section 378(4) of the Code of Criminal Procedure, whereby, he intends to challenge the judgment and order dated 22.1.2022 passed by the learned 11th Additional Sessions Judge, Surat in Criminal Appeal No.169 of 2021. By the said judgment and order, the learned Additional Sessions Judge has allowed the appeal and has quashed and set aside the judgment and order dated 09.11.2020 passed by the learned 4th Additional Judicial Magistrate, Surat in Criminal Case No.2101 of 2011. The learned Additional Sessions Judge has acquitted the present respondent – original appellant –accused of the offences alleged under Section 138 of the Negotiable Instruments Act. The First Appellate Court has further directed to refund fine amount, if any, deposited by the original appellant and has further directed the appellant to comply with the provisions of Section 437 A of the Code.

Criminal Miscellaneous Application No.14273 of 2022

2.2. This application is filed by applicant- original complainant under Section 378(4) of the Code of Criminal Procedure, whereby, he intends to challenge the judgment and order dated 22.1.2022 passed by the learned 11th Additional Sessions Judge, Surat in Criminal Appeal No.167 of 2021. By the said judgment and order, the learned Additional Sessions Judge has allowed the appeal and has quashed and set aside the judgment and order dated 09.11.2020 passed by the learned 4th Additional Judicial Magistrate, Surat in Criminal Case No.2109 of 2011. The learned Additional Sessions Judge has acquitted the present respondent – original appellant –accused of the offences alleged under Section 138 of the Negotiable Instruments Act. The First Appellate Court has further directed to refund fine amount, if any, deposited by the original appellant and has further directed the appellant to comply with the provisions of Section 437 A of the Code.

3. The brief facts as narrated by the original complainant are reproduced as under:

3.1. It is the case of the complainant that accused and original complainant had friendly relations and since the accused was in need of financial assistance, the complainant had advanced friendly loan / financial assistance for sum of Rs.15,00,000/- in cash to the accused for a period of 10 days on 6.11.2010.

3.2. It is further the case of the Complainant that, after the expiry of period of 10 days on 15.11.2010 he approached the Accused seeking repayment. Against the aforesaid debt, the Accused instead of repaying the loan in cash, issued three Cheques of "The Sarvodaya Cooperative Bank Ltd" bearing No. 531882, 531883, 531881, dated 15.11.2010, for sum of Rs. 5,00,000/- each drawn in the name of Complainant. All three Cheques were presented by the Complainant with his bank which came to be dishonored by the bank of the Accused on the ground of "Opening Balance Insufficient Funds" as mentioned in bank return memo dated 27.11.2010.

3.3. It is stated by the Complainant that upon the subjectCheques getting dishonored, the Complainant had got demand notice issued upon the Accused, vide R.P.A.D. dated 4.12.2010, which was received by the Accused on 6.12.2010.

3.4. It is the case of the Complainant that the Accused, despitehaving received demand notice from the Complainant, failed and neglected to pay the outstanding dues of the Complainant, and hence Complainant had lodged three Criminal Complaints against the Accused for the offense punishable under Section 138 of the Negotiable Instrument Act, 1881 before the Court of learned Additional Senior Judge and Additional Chief Judicial Magistrate, Surat.

3.5. Criminal Complaint No. 2100/2011 was filed with respect to dishonor of Cheque No. 531882, Criminal Complaint No. 2101/2011 was filed with respect to the dishonor of Cheque No.531883 and Criminal Complaint No. 2102/2011 was filed respect to dishonor of Cheque No. 531881.

4. The learned Magistrate after recording of the verification of the original complainant directed issuance of process under Section 204 of the Code of Criminal Procedure upon respondent accused. The said summons were duly served upon the respondent accused and the plea of the accused came to be recorded by the learned Presiding Officer which has come on record. Having noticed the denial of the guilt by the accused, the trial Court had proceeded with the summary triable case.

5. During the course of trial, the complainant has offered himself to be examined as witness and his evidence has come on record at Exh.12. Apart

from his own evidence, the complainant has also examined witnesses viz. Nitin Hashmukhlal Shah- Bank Officer attached to the Sarvoday Cooperative Bank whose evidence has come on record at Exh.40. Apart from the aforesaid oral evidence, the complainant has also brought on record the following documentary evidence:-

Document	Exh.No.
Promissory Note.	16
Original subject cheque	17
Cheque return memo	18
Office of demand notice	19
RPAD receipt	20
Receipt of UPC	21
Acknowledgment Receipt	22
Authority Letter	43
Section 65 B certificate issued by Survoday Cooperative Bank	44
Account Opening Form, Specimen Signature, Account Close Letter, Light Bill, LIC Receipt, Driving License, PAN Card, KYC Document of Accused.	45
Cheque Book Issue Register	46
Bank Statement of Accused & Cheque Return Statement	47

5.1. On the other hand, though the accused has chosen not to lead any evidence, however, in his further statement recorded under Section 313 of the code has raised specific defence challenging the financial capacity of the complainant and that the cheques were misused by the complainant. The accused has also disputed the execution of any promissory note in favour of the complainant. The accused has specifically contended that the

complainant has wrongfully obtained cheque from the accused and has later on misused such cheque.

5.2. The learned Magistrate upon appreciation of the overall evidence which has emerged on record and considering the submission of the respective parties has arrived at a finding that there exist land transaction between the parties and the fact of issuance of disputed cheques by the accused towards the discharge of the alleged debt has been proved by the complainant. Thus, the trial Court proceeded to record the conviction of the present respondent –original accused in all three criminal cases thereon holding guilty for offence under Section 138 of the Negotiable Instruments Act and was further pleased to sentence the accused for one year simple imprisonment. The Court has further awarded compensation of an amount of Rs.9,50,000/- which was directed to be paid within a period of 30 days from the date of order, failing which, the further period of sentence of three months simple imprisonment was prescribed. The learned trial Court had further granted remission of the period undergone, if any, in terms of Section 428 of the Code of Criminal Procedure.

5.3. Being aggrieved and dissatisfied with the aforesaid order of conviction, the respondent – original accused has immediately approached the Court of learned Additional Sessions Judge, Surat by filing appeal under Section 374 of the Code challenging the said judgment and order of conviction dated 09.11.2020. Before the first Appellate Court in principal, the respondent – accused has disputed the financial capacity of the complainant to lent money to the accused. Much emphasis was led on the fact that no proof has been brought on record to show the existence of the debt as contended by the complainant in his complaint of advancing huge loan to the accused. It was submitted that the complainant has failed to produce his income tax return and account statement. It was contended that the trial Court has ignored the fact that the accused had disputed the execution of promissory note and had urged the Appellate Court to treat it as a fraudulent document. The attention of the Appellate Court was invited to the fact that

existence of promissory note was not disclosed at the very first instance at the stage of demand notice, not mentioned in the complaint or produced along with complaint. The promissory note was produced for the first time at the stage of affidavit in chief of the complainant being placed on record before the trial Court. While inviting the attention of the First Appellate Court observation about the approach of the trial Court in relation to the presumption under Sections 118 and 139 of the Act being not rebutted by the accused by not entering into the witness box or by leading any cogent evidence, it was submitted that even by showing infirmity in the case of prosecution such rebuttal of presumption takes place. According to the accused, the rebuttal of evidence was based on preponderance of probabilities in proceedings arising out of Section 138 of the Negotiable Instruments Act. Having noticed the aforesaid grounds being raised by the accused and the submission made by the original complainant, the learned Additional Sessions Judge proceeded to frame issues for consideration in the appeal. The same reads as under:

"A. Whether the Accused is able to show that Complainant has failed to prove his financial capacity to give loan to the Accused as alleged.

B.If answer to Issue A is Affirmative, then Whether failure on the part of Complainant to prove his financial capability to advance loan to the Accused is sufficient to rebut statutory presumption and shift the burden on the Complainant.

C.If Answer to Issue A, B are in affirmative, then whether, in the facts and circumstances of the case, the Complainant has proved his case beyond reasonable doubt against the Accused.

D.Whether the impugned Judgment and Sentence passed by the Ld. Trial Court, is required to be interfered with by this Court in exercise of Appellate jurisdiction.

E. What final order."

5.4. Findings of the learned Appellate Court:

A.In Affirmative.

B.In Affirmative.

C.In Negative.

D.In Affirmative.

E.As per final order.

5.5. The learned Additional Sessions Judge, at the outset, has taken into consideration the relevant provisions with regard to the statutory presumption as available under the Negotiable Instruments Act. Having noticed that no dispute was raised with regard to the signature of the accused on the disputed cheques, the Court having noticed the contention that the cheques being wrongfully obtained by the complainant proceeded to hold that the basic ingredients necessary to invoke the statutory presumption had been satisfied. The learned Sessions Judge has thereafter proceeded to shift the burden upon the accused to rebut such presumption by proving that no such debt or liability existed. In other words, that there was no loan transaction in existence between the complainant and the accused. After noticing governing principle laid down by the Hon'ble Supreme Court in following various decisions:

(1). Hiten P Dala vs.Bratindranath Banerjee reported in (2001) 6 SCC 16.

(2). Bir Singh vs. Mukesh Kumar reported in (2019) 4 SCC 197.

(3). Rohitbhai Jivanlal Patel Vs. State of Gujarat reported in AIR 2019 SC 1876.

(4). Rangappa vs. Sri Mohan reported in AIR 2010 SC 1898.

(5). Bharat Barrel & Drum Manufacturing Company vs. Amin Chand Pyarelal reported in (1999) 3 SCC 35.

(6). Shree Dhaneshwari Traders vs. Sanjay Jain reported in AIR 2019 SC 4003.

(7). Krishna Janardhan Bhat vs. Dattatraya G Hegde reported in (2008) 4 SCC 54.

(8). Kali Ram vs. State of Himachal Pradesh reported in (1973) 2 SCC 808.

5.6. The learned Additional Sessions Judge upon appreciation of the evidence brought on record, proceeded to record the findings with respect to the financial capacity of the complainant as under:

(i). That the complainant has suppressed his income documents.

(ii). That the books of account of the complainant did not have cash balance with him. The bank statement of the complainant (Exh.63) which includes the period from 1.11.2010 to 30.11.2010 which covers the alleged loan transaction dated 6.11.2010, goes to indicate that the opening balance was of an amount of Rs. 3542.50 and closing balance was Rs. 3236.50 and the "cleared balance" mentioned sum of Rs.3698.03.

(iii). No explanation or evidence is produced by the complainant to show his business capacity and the generation of income therefrom.

6. Having recorded the aforesaid findings, the learned Sessions Judge was convinced that the accused has been successful in raising probable defence with respect to the financial capacity of the complainant and it was sufficient to rebut the presumption and shift the burden on the complainant to prove his case beyond the reasonable doubt.

6.1. Apart from the aforesaid issue of financial capacity, the learned Sessions Judge has also dealt with the aspect of loan transaction vis-a-vis promissory note. In absence of any proof with regard to the loan transaction being brought on record by the complainant, the learned Sessions Judge has found the existence of promissory note, which was subsequently introduced at the stage of the examination of chief for the first time, has created serious doubt. The learned Sessions Judge was convinced by taking note of the fact that there was no reference of the existence of promissory note on the same date when the loan was advanced on 6.11.2010 when the demand was raised or the complaint was lodged before the trial Court. The material contradiction is noticed by the learned Sessions Judge upon appreciation of the case of the complainant as narrated in the complaint as against his cross examination wherein it is stated in the complaint that accused had handed over the cheque to the complainant on 15.11.2010 is after he raised demand. Whereas, in the cross examination it is stated that cheque and promissory note were given on 6.11.2010 i.e. when the loan was given. Noticing the aforesaid material contradictions, the learned Sessions Judge has found the transactions alleged to be doubtful. On overall appreciation of evidence on record the

learned Sessions Judge has held that the complainant has failed to prove his financial capacity to advance loan amount of Rs.50 lakhs and has proceeded to allow the appeal by quashing and setting aside the order of conviction of present respondent – original accused.

6.2. Being aggrieved and dissatisfied with the order passed by the learned Sessions Judge, original complainant has thus approached this Court by seeking special leave to appeal under Section 378(4) of the Code of Criminal Procedure. Hence, these appeals.

7. Heard learned advocate Mr. Narendra L Jain for the applicant – original complainant, learned advocate Mr.Anmol Surallia for the respondent no.2 – original accused and learned Additional Public Prosecutor for the respondent State.

8. Learned advocates for the respective parties were heard at length and were permitted to place on record the written submission along with authorities relied upon and same are forming part of the record of the present special leave to appeal.

9. Mr. Jain, learned advocate for the applicant – original complainant has made following submissions:

9.1. The liability of the accused i.e., the respondent no. 2 herein, covered by the cheques in question were supported by the issuance of the Promissory Note by the accused i.e., the respondent no. 2 herein in favour of the complainant i.e., the appellant herein. Therefore, the accused i.e., the respondent no. 2 herein admits that there was a loan transaction and thus, the complainant i.e., the appellant herein need not prove his financial capacity.

9.2. The accused i.e., the respondent no. 2 herein has not disputed the issuance of the promissory note and the signature on the promissory note. Therefore, the accused i.e., the respondent no. 2 herein admits that there was a loan transaction and thus, the complainant i.e., the appellant herein need not prove his financial capacity.

9.3. The accused i.e., the respondent no. 2 herein has further chosen not to send the Promissory Note for a forensic examination. Therefore also, the accused i.e., the respondent no. 2 herein admits that there was a loan transaction and thus, the complainant i.e., the appellant herein need not prove his financial capacity.

9.4. The case of the complainant i.e., the appellant herein is that, the loan which was advanced to the accused was advanced from the money that the complainant i.e., the appellant herein had at home and the same fact has not been denied or rebutted by the accused i.e., the respondent no. 2 herein. Therefore also, the accused i.e., the respondent no. 2 herein has failed to rebut the statutory presumption under Section 139 of the Negotiable Instruments Act, 1881 and thus, the complainant i.e., the appellant herein need not prove his financial capacity.

9.5. In light of the statutory presumption envisaged under the Section 139 of the Negotiable Instrument Act, 1881, the complainant i.e., the appellant herein need not prove his financial capacity.

9.6. In light of the fact that the accused i.e., the respondent no. 2 herein has not rebutted the presumption under the Section 139 of the Negotiable Instruments Act, 1881. Therefore, the complainant i.e., the appellant herein need not prove his financial capacity.

9.7. In light of the fact that the accused i.e., the respondent no. 2 herein has merely denied and the same is not sufficient to rebut the statutory presumption under Section 139 of the Negotiable Instruments Act, 1881. In the scheme of Section 139 of the Negotiable Instruments Act, 1881, mere denial is not sufficient to rebut the statutory presumption and therefore also, the complainant i.e., the appellant herein need not prove his financial capacity.

9.8. Interference by the learned Appellate Court was only possible if the view taken by the Learned Trial Court was perverse. Merely because the

evidence recorded can be interpreted in a different mode or manner, the appellate court cannot disturb the findings of the trial court.

9.9. The Learned Appellate Court proceeded with the matter as if the presumption envisaged under the Section 139 of the Negotiable Instruments Act, 1881 did not exist and that the complainant i.e., the appellant herein was required to prove his case beyond reasonable doubt.

9.10. Mr. Jain, learned advocate for the applicant has relied upon the following decisions in support of his case.

1. Tedhi Singh versus Narayan Dass Mahant reported in (2022) 6 SCC 735 (Para 10).

2. Rohitbhai Jivanlal Patel versus State of Gujarat and Anr.; reported in (2019)18 SCC 106 (Para 20 and 21).

3. Prajapati Kailashben Arunbhai versus State of Gujarat; reported in (2018) SCC OnLine Guj 1959 (Para 7.15 and 7.19).

10. Learned advocate Mr.Anmol Surallia for the respondent no.2 – original accused has made following submissions:

10.1. The impugned judgment before this Court acquitted the respondent no.2 on largely two accounts, firstly, the complainant- appellant failed to prove that he possessed the financial capacity to lend an amount to the tune of Rs.15,00,000/- to the respondent no.2 and secondly, the respondent no.2 has been able to raise a “probable defence” in his favour by raising pertinent questions to the complainant during his cross examination. During the course of the cross examination the complainant took contradictory stands; his stand in the demand notice and the complaint was different where he had never mentioned about executing any promissory note as also he gives different dates as to when the cheques were given to him.

10.2. The respondent no.2 supplements the grounds of acquittal in the impugned judgment by emphasizing on the statutory provision of Section 139 of the Negotiable Instruments Act, 1881, which has been interpreted in a way

where undoubtedly the presumption is in favour of the holder of the cheque. However, the accused can make out a case of “probable defence” by showing infirmities in the case of the prosecution/ complainant. This raising of defence could be done by way of an extensive cross examination of the complainant or leading of evidence. In the present case, the complainant has failed to bring to the notice of the trial Court the existence of a promissory note for a period of five years. He also takes contradictory stands during his cross examination and the demand notice and complaint tendered earlier. The cross-examination is a cardinal way of culling out the truth in any case whether a civil or criminal one. An entire case could be broken down into pieces if there are contradictory versions of the story. Learned advocate for the respondent has relied upon the decision of the Hon’ble Supreme Court in the case of Basalingappa versus Mudibasappa reported in (2019) 5 SCC 418 (relevant para 23 and 27) as well as in the case of Rajaram s/o Sriramulu Naidu (Since Deceased) through L.RS. versus Maruthachalam (Since Deceased) through L.RS. reported 2023 SCC OnLine SC 48.

11. Mr. Jain learned advocate for the applicant in rejoinder has tried to distinguish the aforesaid decisions relied upon by the learned advocate for the respondent. The facts of the present case and the facts of the judgments relied upon by the accused are completely different. In the facts of the judgements relied upon by the accused i.e., the respondent no. 2 herein, the legal debt was not supported by any other positive evidence and the only determining factor in those cases was the rebuttal of the statutory presumption by the accused under Section 118 and 139 of the Negotiable Instruments Act, 1881. However, in the present case, the case of the complainant, i.e., the appellant herein, is not only based upon the cheques in question but it is also supported by other positive evidence in addition to the cheques i.e., the issuance of the Promissory Note. He emphasized that in the present case the accused i.e., the respondent no. 2 has failed to rebut the statutory presumption under Section 118 and 139 of the Negotiable Instruments Act, 1881. In the present case, it is the clear case of the

complainant i.e., the appellant herein that the complainant had lent the loan to the accused i.e., the respondent no. 2 herein from the money which was with the complainant at his home and that very fact has not been denied or rebutted by the accused. Thus, since the accused i.e., the respondent no. 2 herein has not been able to rebut the statutory presumption under the Sections 118 and 139 of the Negotiable Instruments Act, 1881 the accused i.e., the reliance placed by respondent no. 2 herein on the two above mentioned judgments is misconvinced. Learned advocate, therefore, urged this Court to allow this appeal by granting present applications seeking special leave to appeal.

12. Having heard the learned advocates for the respective parties and having perused the impugned order as well as order passed by the learned trial Court, the only question which falls for consideration of this Court in the present special leave to appeal is as to whether in the facts and circumstances of the case and the evidence brought on record the accused has raised probable defence rebutting the statutory presumption under Section 118 and Section 139 of the Negotiable Instruments Act. At the outset, this Court is called upon to adjudicate on two different views taken by the trial Court as well as by the First Appellate Court on same set of evidence being brought on record by the respective parties. In other words, while dealing with the challenge to the order impugned by the First Appellate Court reversing the findings and conclusion arrived by the trial Court, it would be relevant to re-visit the findings of the conclusion drawn by the trial Court.

13. The trial Court upon appreciation of the record, more particularly, the evidence brought on record has noticed few undisputed facts. Taking into consideration the documentary evidence brought on record by the original complainant, more particularly, disputed cheque (Exh.17), the trial Court was convinced that cheque bears dated 15.11.2010 for an amount of Rs.5 lakhs which is endorsed in words as well as in figures and is signed by the accused. The fact of dishonor of cheque has also been established as evident from the cheque return memo (Exh.18) wherein the cheque was returned an

endorsement of today's opening balance insufficient as reported on 27.11.2010.

As against that, the trial Court has also taken into consideration the evidence of Bank witness- Nitin Hashmukh Shah (Exh.40). The inward clearing register has been admitted at Exh. 46, as evidence, as proved by the said witness. The demand notice has also been proved by the original complainant (Exh.19), whereby, the complainant had called upon the respondent-accused to make repayment of the disputed amount within a period of 15 days. Such notice has been duly served as evident from the Exhs. 20,21 and 22. However, no reply has been given to such legal notice by the respondent accused.

14. Having noted the aforesaid undisputed facts, the learned trial Court has proceeded to try statutory presumption in favour of the complainant and applying the principle of preponderance of probabilities, the trial Court has entered into the appreciation of the cross-examination of the complainant, in the absence of any evidence being led by the respondent- accused. In the course of appreciation of the cross examination of the evidence, the trial Court has concluded that no contradictions has been pointed out by the accused. Additionally, the trial Court has taken into consideration the promissory note (Exh.60). The trial Court has concluded that the respondent -accused has not challenged the aforesaid promissory note. On the contrary, from the argument raised by the advocate for the accused, it was submitted that except cheque and the promissory note, no other document has been led by the complainant to prove his case and has urged this Court to acquit the accused. Noticing the aforesaid submission, the trial Court is convinced about the execution of the promissory note in favour of the complainant. The trial Court has also taken into consideration the fact that at no stage the accused had applied for verification of such document by the FSL. However, the Court has treated such document as secondary evidence as against the substantial evidence being brought on record by the complainant to prove his case with regard to existence of transaction between the parties. With such finding, learned trial Court has further noted that though the defence of misuse of cheque has been raised by the respondent accused, however no such explanation has been offered by the complainant as to how and in what manner the cheque had travelled in the custody of the original complainant. In light of the aforesaid findings, the trial Court has proceeded to conclude that the accused

has failed to dislodge the presumption that the cheque was issued towards discharge of legally enforceable debt. The trial Court has further noted discrepancy pointed out by the accused with regard to the execution of the promissory note as against the issuance of the cheque. However, it has treated such discrepancy in the dates as a minor discrepancy considering the fact that promissory note was executed in the year 2010, whereas complainant was examined in 2019. The trial Court has thus accepted the case of the complainant in absence of any probable defence being brought on record by the respondent accused and has arrived at conclusion that there existed loan transaction between the parties and in absence of realization of the amount, the offence under Section 138 of the Negotiable Instruments Act has been attracted.

15. As against the aforesaid observations of the trial Court, the learned Sessions Judge upon re-appreciation of the evidence on record though at one stage has agreed that the applicability of statutory presumption in favour of the complainant that the disputed cheques were issued by the accused towards discharge of debt i.e. repayment of loan, however, has noticed that no categorical findings supported with valid reasons are recorded by the Magistrate on the aspect of issue of financial capacity of the complainant. It is a settled legal position as culled out from the various decisions of the Hon'ble Supreme Court that whenever accused challenges the financial capacity of the complainant then it is always incumbent upon the original complainant to prove his financial capacity, failing which, the Court may treat it to be sufficient for rebuttal of presumption raised in eyes of law. Learned advocate for the applicant – original complainant has referred to and relied upon the judgment of the Hon'ble Supreme Court in the case of Tedhi Singh (supra) for the proposition of law in absence of any case being setup in the reply notice to the legal notice sent by the complainant with regard to financial capacity of the complainant, the same cannot be permitted to be raised for the first time at the stage of cross examination of the complainant. The principle underline by the Hon'ble Supreme Court was that the complainant did not have the wherewithal and thus it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity to advance loan. Appropriate would be to quote and reproduce the

further observation of the Hon'ble Supreme Court in the aforesaid decision. It reads thus;

"The proceedings under Section 138 of the NI Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity."

15.1. In light of the aforesaid principle laid down by the Hon'ble Supreme Court though the Court has held that complainant cannot be expected to show his financial capacity while in witness box when no such case was raised in reply to legal notice. However, the Court has furhter observed that the accused has right to demonstrate that the complainant in a particular case did not have the capacity. The Court also observed that the accused can establish said aspect by pointing out all the relevant material, which has emerged on record and it was the duty of the Court to consider carefully and appreciate the totality of the evidence to find out whether probable defence has emerged on record. The learned Sessions Judge has in depth re- appreciated the evidence of the complainant and has noticed that the complainant has been unable to explain source of income i.e. loan of Rs.15,00,000/- cash lying at home as contended. A specific question was raised with regard to proof of such cash on hand which the complainant specifically admitted that he had no such proof. The learned Sessions Judge further noticed that merely in his cross examination he has accepted that books of account, balance sheet, cash book were maintained by him and income tax returns were filed by him, however no such material has been placed on record. In my opinion, no fault can be found with the approach of the learned Sessions Judge who in fact after recording the findings upon evaluation of the cross examination of the complainant was satisfied that the accused has been successfully able to raise probable defence challenging the financial capacity of the complainant to advance loan to the accused. During the course of cross examination, the burden was in fact shifted upon the complainant to prove his case beyond the reasonable doubt.

16. Having noted so, even otherwise the complainant has failed to lead cogent material on record to prove not only his financial capacity but the entire loan transaction beyond the reasonable doubt with cogent evidence. The Court cannot ignore the evidence which has emerged on record though in the

form of cross examination of the complainant which has potency to dislodge the presumption drawn in favour of the complainant as regards existence of the loan transaction.

17. Learned advocate for the applicant has tried to distinguish the judgment relied upon by the learned advocate for the respondent accused in the case of Basalingappa (supra) and Rajaram s/o Sriramulu Naidu (since deceased) through hers (supra) to contend that even in case where legal debts was not supported by any other positive evidence, the only determining factor in those cases was the rebuttal of the statutory presumption by the accused under Section 118 and 139 of the Negotiable Instruments Act, 1881. However, for the reasons stated by the learned Sessions Judge as noticed in earlier paras, the Court having confirmed the approach of the learned Sessions Judge in treating the evidence in the form of cross examination as a successful attempt on the part of the accused to rebut the presumption, the aforesaid argument of the learned advocate for the applicant is not accepted. Having noticed contradictions being pointed out by the respondent accused in the cross examination which challenges the very existence of the legal debt, it was expected that the original complainant to prove his case by leading cogent evidence on record. The attempt by the learned advocate for the applicant by contending that accused has not challenged the fact as emerged in the evidence of the complainant that the loan amount was handed over to the accused from the money which was lying at his home does not inspire confidence to believe such version where stake of cash amount involved is sizable. The Court cannot ignore evidence which otherwise has been pointed out by the accused in the cross examination of the complainant. Upon weighing of such evidence of the complainant, no due weightage can be given to absence of challenge to the evidence of the complainant.

18. So far as issue of acceptance of the promissory note to be read as evidence is concerned, learned Sessions Judge has rightly noticed the contradictions in the dates of issuance of the cheque, as against alleged execution of the promissory note. As rightly pointed out by the learned advocate for the respondent, the complainant has failed to bring on record the fact of existence of promissory note at the initial stage of raising demand, lodging of complaint. Indisputably, existence of promissory note as emerged on record after a period of 5 years of the lodging of the complaint I,.e. at the stage of examination in chief. The trial Court has ignored the challenge to the

promissory note, which otherwise has been successfully brought on record by the accused in the cross examination of the complainant by pointing out this material contradictions. In my opinion, the trial Court committed serious error in observing that no challenge was made to the signature on the promissory note and calling for verification of the promissory note by forwarding it to the FSL office. In any case, the fact remains that the contradictions brought on record during the cross examination does raise serious doubt on the execution of such promissory note at relevant stage as contended by the original complainant.

19. For the forgoing reasons, in the opinion of this Court, no arguable case is made out for grant of special leave to appeal as well as for admission of appeal. Hence, present applications seeking special leave to appeal are hereby refused.

Consequently, appeals also fail and are also dismissed.