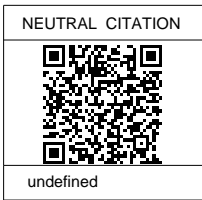


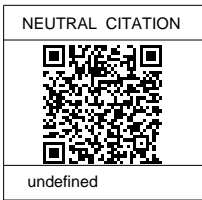
**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/CRIMINAL MISC.APPLICATION (FOR LEAVE TO APPEAL) NO. 6012 of
2024****In F/CRIMINAL APPEAL NO. 8559 of 2024****With
F/CRIMINAL APPEAL NO. 8559 of 2024****=====**
JITESHBHAI JAGMALBHAI CHAUDHARY
Versus
STATE OF GUJARAT & ANR.
=====**Appearance:****JUCKY LUCKY CHAN(8033) for the Applicant(s) No. 1**
for the Respondent(s) No. 2
MR.JAY MEHTA, APP for the Respondent(s) No. 1
=====**CORAM:HONOURABLE MRS. JUSTICE M. K. THAKKER****Date : 18/06/2024****ORAL ORDER**

1. This application is filed seeking leave to prefer an appeal against the judgment and order passed by the learned Judicial Magistrate First Class, Bhabhar in Criminal Case No.317 of 2022 (Old Case No.285 of 2013) below Exh.41 dated 16.01.2024 whereby, the respondent was acquitted from the offence punishable under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I.Act").
2. It is the case of the complainant that the complainant



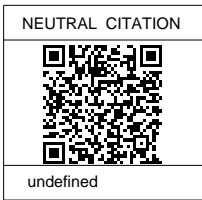
and the accused both are doing the business of imitation jewelry and therefore, they were known to each other since last 15 years. In the year 2018, on demand of the accused, the complainant has lent the amount of Rs.4,00,000/- and at that time, assurance was given that as and when demand would be raised, he would return the said amount. On raising the demand the cheque bearing No.00248 of Rs.4,00,000/- dated 15.01.2022 was issued in favour of the complainant on assurance that on depositing the same cheque it would be honoured and the amount would be credited to the complainant's account.

2.1. On depositing the cheque it was returned with an endorsement of "Funds Insufficient" and therefore after following due procedure under the N.I.Act, a private complaint came to be filed. To substantiate the charge, complainant himself was examined below Exh.5 and has produced 7 documentary evidence and on filing the closing pursis, further statement under section 313 came to be recorded of the respondent-accused, wherein the respondent accused had stated that, there is no shop run by him as stated by the complainant namely



Annapurna Jewelers, his shop's name is Kamdhenu Jewelers. Cheque in dispute has been given to one Ramabhai Dosabhai as the complainant has borrowed the money from said Ramabhai and though the amount was paid this cheque was misused by the complainant after getting the same from Ramabhai and for the other two cheques, the other complaints were filed in Rajkot and Ahmedabad. In order to prove his defence he has produced the copy of the Criminal Case No.423 of 2023 below Exh.32 filed before the Ahmedabad Metropolitan Magistrate Court, the Criminal Case No.12882 of 2022 filed before the learned Rajkot Court below Exh.33. The statement showing that the account is closed in the year 2019 with Bank of Baroda is produced below Exh.34, Registration Certificate of Kamdhenu Jewelers below Exh.35, Occupation certificate below Exh.36, Ration card below Exh.37 and Renewal Fee receipt below Exh.38 was produced.

2.2. Learned trial court after considering the evidence and the arguments advanced by learned advocate for the respective parties has acquitted the respondent-accused on the ground that complainant fails to establish the

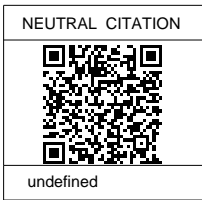


legally enforceable debt against the respondent-accused and the respondent-accused has successfully established his defence that the cheque was handed over by Ramabhai who is the brother-in-law of the complainant. The aforesaid judgment and order of acquittal is subject matter of challenge before this Court in the present application.

3. Heard learned advocate Mr.Jucky Lucky Chan for the applicant-original complainant.

3.1. Learned advocate Mr.Chan submits that, learned trial court has committed error in believing the defence of the respondent-accused that cheque was taken from Ramabhai, though the said Ramabhai was not examined by the respondent-accused in order to prove his defence. Learned advocate Mr.Chan submits that, in the reply to the demand notice, name of two witnesses are mentioned by the respondent-accused, however, none of the witnesses were examined by the respondent-accused.

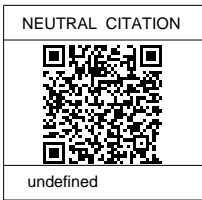
3.2. Learned advocate Mr.Chan further submits that, learned trial court has believed the evidence produced by the respondent-accused below Exh.34 i.e. the



statement of Bank of Baroda showing that the account is closed since 22.11.2019. Learned advocate Mr.Chan submits that, infact this statement itself shows that respondent-accused, with an intention to cheat the complainant has given the cheque on 18.01.2022 from the account which was closed in the year 2019.

3.3. Learned advocate Mr.Chan submits that, merely establishing that he is doing the business in the name and style of Kamdhenu Jewelers does not amount to rebut the presumption which is in favour of the complainant, as that evidence would not falsify the case of the complainant for issuance of the cheque and dishonouring of the cheque. Learned advocate Mr.Chan submits that, without any cogent reason the judgment and order of acquittal is passed and therefore, the present application seeking leave to prefer an appeal is required to be allowed and appeal is required to be admitted.

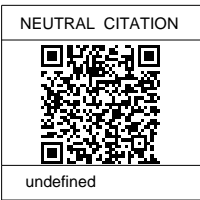
4. Considering the argument advanced by the learned advocate for the applicant-original complainant and examining the record and proceedings thoroughly, it transpires that as per the averments made in the



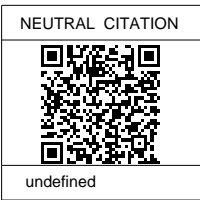
complaint, the respondent-accused was doing the business of imitation jewelry in the name and style of Annapurna Jewelers. The amount which was borrowed by the respondent-accused of Rs.4,00,000/- was repaid through cheque bearing no.000248 which was dishonoured and the impugned complaint came to be filed.

- 4.1. In order to rebut the presumption, the complainant was cross-examined by the respondent-accused and following admissions were made by the complainant in his cross-examination:

“the disputed cheque was received through Ramabhai Dosabhai. Ramabhai Dosabhai has filed the complaint before the Ahmedabad Court and Kuberbhai filed the complaint before the Rajkot under the N.I.Act. Ramabhai is the brother in law and Kuberbhai is brother of the complainant. There is no entry showing that there is business relation between the complainant and the respondent-accused. He used to visit in the shop of the accused which runs in the name of Annapurna Jewelers situated at Ahmedabad to hand

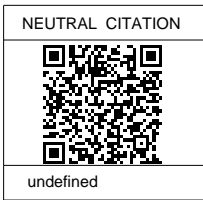


over the goods. The accused has demanded the amount in the presence of Ramabhai on 04.06.2018. No writing was executed at the time of lending the amount. He lent the amount on the same day when it was demanded. The amount which was lent is not shown in the I.T. return. He demanded the amount in cash as he lent in cash. No cheque number is mentioned in the bank slip at the time of depositing the cheque. In return memo no account number and name of bank has been shown by the bank. He does not recollect that how many transactions have taken place through the Banaskantha District Co-operative Bank and before how many years this account was opened. Return memo was received from the Bhabhar Branch. He has no knowledge with regard to whether the same advocate has issued notice for returning of cheque of Ramabhai and Kuberbhai. The fact that the amount which was borrowed from Ramabhai was repaid with an interest is not in his knowledge. It is true that Ramabhai had

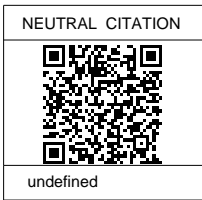


given assurance at the time of settling accounts to accused that said cheques are for the security and would not be misused. He has no knowledge about the accused having sold the goods of Rakhdi on 23.02.2021 to Ramabhai and has issued the bill of Kamdhenu Jewelers. The demand notice was replied by the accused and in the reply to the demand notice it is contended that the account was closed in the year 2019 and Ramabhai was informed with regard to the same. The complaint which was prepared previously, showing the different name of the bank in paragraph 8 which is of the ICICI Bank CTL Branch and belongs to Ramabhai's Bank.”

4.2. In addition to the above cross-examination the complainant has produced reply to demand notice below Exh.23 wherein, it is contended that the amount of Rs.3,00,000/- was taken on 01.01.2017 from one Ramabhai Dosabhai Patel brother-in-law of the complainant at the rate of 10% interest which is to be paid quarterly. The said amount is paid through RTGS



and NEFT. However, Ramabhai has conveyed on 30.11.2019 that the amount of Rs.15,00,000/- is yet to be paid. Under the threats of filing police case cheques were taken by said Ramabhai being 000246 of Rs.4,00,000/-, 000247 of Rs.4,00,000/-, 000248 of Rs.4,00,000/-, 000249 of Rs.3,00,000/- towards security of above amount. The aforesaid cheques were given in the presence of two witnesses namely Alpesh Ishwarlal Thakkar and Hiralal Gokaldas Thakkar. After three months of issuance of aforesaid cheque amount of Rs.4,00,000/- was given to Ramabhai on 15.02.2019 and said Ramabhai has returned being No.000246 to the complainant. Further amount of Rs.11,00,000/- towards interest was demanded and when it was conveyed that accused is unable to pay this amount the goods of Rakhdi of Rs.2,34,000/- was taken by Ramabhai for which the bills were issued in the name of Kamdhenu Jewelers. Said Ramabhai in order to recover the exorbitant interest has handed over this cheque to the complainant and other cheque to Kuberbhai and three different complaints were filed after issuance of Notice before the learned Court of law.



- 4.3. The respondent-accused has also produced the statement given by the bank below Exh.34 which reveals that account was closed on 22.11.2019. Exh.35 showing that respondent-accused is running the business of resale of imitation jeweler in the name of Kamdhenu Jewelers.
5. At this stage, the presumption provided under section 118 and 139 of the N.I.Act is required to be re-looked which is reproduced herein below:

Section 118 – Presumptions as to negotiable instruments

Until the contrary is proved, the following presumptions shall be made:

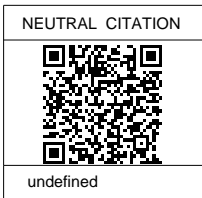
of consideration; that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

as to date; that every negotiable instrument bearing a date was made or drawn on such date;

as to time of acceptance; that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

as to time of transfer; that every transfer of a negotiable instrument was made before its maturity;

as to order of indorsements; that the indorsements appearing upon a negotiable instrument were made in the



order in which they appear thereon;

as to stamp; that a lost promissory note, bill of exchange or cheque was duly stamped;

that holder is a holder in due course; that the holder of a negotiable instrument is a holder in due course: Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an SP offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him.

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

Provided that nothing contained in this section shall apply



unless—

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

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

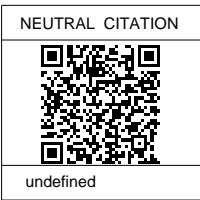
(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

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

Section 139 in The Negotiable Instruments Act, 1881

139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

6. The presumption under section 139 of the N.I.Act helps the court to presume that cheque was drawn i.e returned, signed and delivered by the accused. It can only help the court to presume that the cheque was



issued for the discharge of legally enforceable debt or liability. The presumption is only for casting the burden of proof as to who should adduce evidence in the case. It is open to accused to adduce evidence to rebut the said presumption. It is held by the Supreme Court in catena of decisions that standard of proof in discharging of burden in presumption under section 118 and 139 of N.I.Act being preponderance of probability, the inference thereof can be drawn not only from the material brought on record but also reference to the circumstances upon which accused relied upon. The burden to rebut the presumption on the accused is not as high as that of complainant.

7. This court has laid has considered the decision rendered by the Hon'ble Apex Court in the case of ***Basalingappa V/s. Mudibasappa*** reported in ***(2019) 5 SCC 418*** where summarize the principle enumerated in paragraph No.25, which reads as under:

“25. We having noticed the ratio laid down by this Court in the above cases on [Section 118\(a\)](#) and [139](#), we now summarise the principles enumerated by this Court in the following manner:



25.1. Once the execution of cheque is admitted [Section 139](#) of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

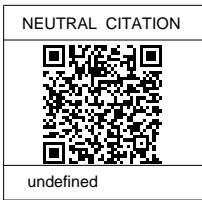
25.2. The presumption under [Section 139](#) is a rebuttable presumption and the onus is on the accused to raise probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

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

25.4. That it is not necessary for the accused to come in the witness box in support of his defence. [Section 139](#) imposed an evidentiary burden and not a persuasive burden.”

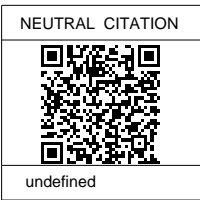
25.5. It is not necessary for the accused to come in the witness box to support his defence.”

8. It transpires from the record that accused has established his defence that the cheque was handed over to Ramabhai and the account was closed in the year



2019 with the Bank of Baroda. Further two cases which are filed before the Rajkot and the Ahmedabad Court having cheque no. 247 and 249. In the instant case, the cheque number is 248. The complainant in his cross-examination has admitted that he had no knowledge that whether the respondent-accused is running his business in the name and style of Annapurna Jewelers or Kamdhenu Jewelers and has admitted that Ramabhai is brother in law of the complainant and in his presence only the transactions have taken place. The respondent-accused has successfully established the defence by creating the circumstances from the evidence lead by the complainant as well as rebutted the presumption by producing the statement of Bank of Baroda as well as the registration certificate showing respondent-accused is doing the business of Kamdhenu Jewelers.

8.1. Further, it is established by the respondent-accused that in order to grab the money the impugned complaint is filed at the instance of Ramabhai as it is admitted by the complainant that in the first complaint in paragraph 8 the name of bank of Ramabhai was mentioned and the cheque numbers are also in the same series which were



subject matter of complaint which was filed by Ramabhai and Kuberbhai before different courts.

9. On overall facts and circumstances of the case this Court finds no infirmity or illegality in the impugned order and judgment of acquittal and therefore, the leave as prayed is not required to be granted.
10. Resultantly, this application is dismissed.

ORDER IN F/CRIMINAL APPEAL NO. 8559 of 2024

In view of the order passed in Criminal Miscellaneous Application No. 6012 of 2024, the registration of this appeal is refused.

ARCHANA S. PILLAI

(M. K. THAKKER,J)