# Rajendraprasad Porwal Vs Mr. Santoshkumar Parasmal Saklecha, L.R. of Mr. Parasmal Harakchand Saklecha and State of Maharashtra

**Court:** Bombay High Court (Aurangabad Bench)

**Date of Decision:** March 5, 2008

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€" Section 357(1), 357(3), 401
Evidence Act, 1872 â€" Section 114
Negotiable Instruments Act, 1881 (NI) â€" Section 138, 139, 145

**Citation:** (2008) 4 CivCC 474 : (2008) CriLJ 2955 : (2009) 5 RCR(Criminal) 186

**Hon'ble Judges:** V.R. Kingaonkar, J

**Bench:** Single Bench

**Advocate:** R.F. Totla, for the Appellant; S.B. Deshpande holding for N.S. Deshpande and B.R. Khekale, Assistant Public Prosecutor, for the Respondent

**Final Decision:** Allowed

## Judgement

V.R. Kingaonkar, J.
Challenge in this revision application is to judgement rendered by learned Additional Sessions Judge, Jalna, in

Criminal Appeal No. 53 of 2006,confirming order of conviction and sentence rendered against the present applicant for offence punishable u/s 138

of the Negotiable Instruments Act, in Criminal Case (STC) No. 640 of 2005.

2. The applicant was tried before learned Judicial Magistrate (F.C.), Partur for offence punishable u/s 138 of the Negotiable Instruments Act. The

learned Judicial Magistrate (F.C.) held him guilty and sentenced to undergo simple imprisonment for three (3) months and to pay a fine of Rs.

5000/-, in default to suffer simple imprisonment for one (1)month. He was directed to pay compensation of Rs. 25 lacs u/s 357(3) of the Code of

Criminal Procedure.

3. Questions involved in the revision application are:

(i) Whether mere admission regarding signature on the cheque would suffice to reach conclusion with aid of legal presumption available u/s 139 of

the Negotiable Instruments Act as regards existence of the liability to pay such amount shown under the cheque, or pre-existing legal debt which

was required to be discharged as such at the time of issuance of the cheque ?

(ii) Whether the accused can claim to have discharged burden of proof as regards absence of pre-existing liability to pay to the complainant, on

basis of the material gathered from cross-examination of the complainant or in view of the attending circumstances even though he does not adduce

any independent evidence as such in rebuttal of the presumption available u/s 139 of the Negotiable Instruments Act and what is the degree of

proof required from the accused to displace the presumption?

4. The facts, giving rise to the complaint, are few. Original complainant, namely, Parasmal Saklecha and the revision applicant (accused) were on

cordial terms. The case of the complainant before the Trial Court was that on request of the accused -present applicant, he lent an amount of Rs.

25 lacs to the latter on 3rd October, 2004. The accused Rajendraprasad agreed to repay the amount on 7th October, 2004. The amount was

needed by him for construction of his house and purchasing of furniture, etc. The accused - Rajendraprasad then gave a post dated cheque of 07-

10-2004 for such amount lent to him. The accused - Rajendraprasad lateron requested him not to present the cheque for encashment because of

his financial difficulties. Relying upon his words, the complainant deferred presentation of the cheque for encashment. The cheque was ultimately

presented for encashment on 05-04-2005 i.e. after a period of about six months from the date of loan transaction, but it bounced. The

complainant, therefore, issued demand notice. The accused Rajendraprasad allegedly gave a false reply to the demand notice on 2nd May, 2005,

alleging that the signed cheque was found to have been lost or stolen away on 07-10-2004. He alleged that he had informed the Bank on the same

day about loss of said cheque. He denied that there was transaction of loan between himself and the complainant for Rs. 25 lacs. He denied that

the cheque was issued by him in order to discharge the existing debt.

5. The original complainant -Parasmal filed private complaint case (STC) No. 640/2005. He died during pendency of the said criminal complaint

case. By order dated 30th December, 2005, his son -PW Santoshkumar was substituted in his stead.

6. At trial, PW1 Santoshkumar examined himself and relied upon the cheque besides the notice correspondence. The accused - Rajendraprasad

examined DW1 Yashwant, who is clerk working in the Parbhani Peoples Cooperative Bank at Partur. He was examined in order to prove that on

07-10-2004, the said Bank was informed about loss of the cheque in question, and hence to stop the payment.

7. The learned Judicial Magistrate came to the conclusion that presumption available u/s 139 of the Negotiable Instruments Act is not displaced by

the accused - Rajendraprasad. The learned Judicial Magistrate held that once it is admitted that the cheque (Exh-21) was signed and dated by the

accused Rajendraprasad, then the entire burden is shifted on him to prove that there was no pre-existing liability to pay such amount mentioned

under the cheque. The learned Magistrate held that Rajendraprasad could not discharge burden of proof and, therefore, was liable to be convicted

for the offence punishable u/s 138 of the Negotiable Instruments Act. He was accordingly convicted and sentenced as stated earlier. The learned

Sessions Judge, while deciding criminal appeal, held that the accused was required to prove that the cheque was blank and was stolen away. The

learned Sessions Judge further observed that it was for the accused - Rajendraprasad to prove that in his bank account funds of more than Rs. 25

lacs were available at the relevant time when he issued the cheque. The learned Sessions Judge observed that once the accused - Rajendraprasad

admitted his signature on the cheque, then it was for him to establish that the contents of the cheque were false. The learned Sessions Judge

concurred with the findings of the learned Judicial Magistrate and dismissed the appeal.

8. Mr. Totla, would submit that findings of both the courts below are perverse. He would submit that the accused - revision applicant was not

required to prove absence of pre-existing liability upto the hilt. It was sufficient to probabalize the defence even through the attending circumstances

and admissions of PW1 Santoshkumar. He argued that the legal position is misconstrued by the courts below. He referred to various authorities in

support of his contention that burden of proof on the accused is comparatively not so much as to prove existence of a fact, but it is only to prove

by preponderance of probabilities that the fact could exist. Mr. Totla would further submit that there is no presumption available as regards the

existence of legally recoverable debt. The presumption available, according to Mr. Totla, merely is in regard to the execution of the cheque for

consideration. The presumption is merely in favour of the holder of the cheque that it has been issued for discharge of any other liability, but it does

not give rise to any presumption that there existed a legally recoverable debt or liability as such. Mr. Totla would submit that having regard to

quality of evidence adduced by the complainant, it is manifest that the defence of the accused -Rajendraprasad is quite probable and the burden of

proof stands discharged. Mr. Deshpande, learned advocate appearing for the respondent - complainant, would, however, submit that when the

cheque is issued by the accused under his signature, then simultaneously, the existence of legal liability to pay the amount shown under the cheque

ought to be presumed. Mr. Deshpande would submit that once the complainant has proved that the cheque bears signature of the accused, then

the burden of proof would shift on the accused to prove his defence regarding absence of legal liability to pay. He would submit that the concurrent

findings of the two courts cannot be disturbed when the fact finding process is completed by the Trial Court as well as the first Appellate Court. He

would strenuously argue that having regard to scope of the present revision application, findings of the facts rendered by the courts below should

not be interfered with. He referred to several authorities which I shall discuss during course of further delineation of the questions involved in this

matter.

9. The learned Magistrate awarded compensation of Rs. 25 lacs u/s 357(3) of the Criminal Procedure Code. The learned advocates for both sides

would submit that the compensation could be awarded only u/s 357(1) of the Criminal Procedure Code and not u/s Sub-clause (iii) when the fine

is imposed and is part of the sentence awarded by the trial Court. The irregularity can be cured by the Court in the exercise of inherent powers.

The learned advocates for both the sides agree to this legal position. Needless to say, the error in this behalf can be rectified even by suo motu

exercise of the revisional jurisdiction u/s 401 of the Criminal Procedure Code.

10. To clear the deck, I shall first advert to the recitals of the complaint and the verified statement of the complainant. According to the

complainant, Rajendraprasad (accused) requested him to lend an amount of Rs. 25 lacs on 01-10-2004. Thus, the talk about the transaction was

initiated on 01-10-2004 during the personal meeting of deceased complainant and the accused - Rajendraprasad. The accused gave reason for

requirement of the amount as requirement to construct old house and to furnish it. It is stated in the complaint that complainant - Parasmal was not

financially viable to fulfil the request of loan sought by the accused. Still, however, having regard to cordial relations, he urged for time till 03-10-

2004 to make the payment. He asserted that on 03-10-2004, he gave amount of Rs. 25 lacs to Rajendraprasad and on the same day, the cheque

for such amount was given to him though it bore subsequent date i.e. 07-10-2004. Needless to say, the loan amount was given only for four days

period.

11. The complaint and the verified statement of original complainant does not show whether the need expressed by accused Rajendraprasad was,

in fact, got verified. There is no satisfactory explanation as to why the complainant believed that the amount was so needed for urgent and

immediate purpose. Normally, construction of a house and furnishing of the same could not be regarded as the urgent need for finance. Secondly,

the complaint does not show presence of any other witness to the transactions. The list of witnesses given in the complaint would show name of a

single witness, namely, Branch Manager of Parbhani Peoples Cooperative Bank Limited, Branch at Partur. Thus, the complaint does not even

remotely show that PW1 Santoshkumar was a witness to the transaction and had any knowledge about the internal dealings between the

complainant and the accused. Merely because PW Santoshkumar is the son of the deceased complainant, it cannot be inferred or presumed that

he has knowledge about their dealings.

12. The recitals of the complaint would reveal that prior to 07-10-2004, accused Rajendraprasad approached the complainant and requested him

not to present cheque for encashment in view of his financial difficulties. So, relying on his word, the complainant deferred presentation of the

cheque for encashment. He stated that accused -Rajendraprasad all the time represented to him that the payment will be definitely made. It is for

such reason that after a period of about six months, on 05-04-2005, the cheque was presented for encashment. The recitals of the complaint do

not show whether prior to such presentation of the cheque on 05-04-2005, the complainant was assured by the accused that the amount will be

deposited in the bank and sufficient funds would be available in the account. Indeed, if the relations were so cordial, then the complainant could

have ascertained from accused - Rajendraprasad as to whether sufficient funds were available in the bank to satisfy the amount shown in the

cheque. The complainant does not show presence of any witness when accused - Rajendraprasad initially urged for extension of time prior to 07-

10-2004, or any time thereafter till presentation of the cheque.

13. The cheque (Exh-21) was dishonoured and the complainant was intimated on 08-04-2005 that the payment was stopped. There is no dispute

about the fact that the Bank gave intimation to the complainant that accused - Rajendraprasad had stopped the payment under the cheque in

question. Obviously, the cheque was not dishonoured because there was no amount in the bank account or due to insufficiency of the funds. The

cheque was admittedly dishonoured due to specific instructions of accused - Rajendraprasad that it shall not be honoured. It goes without saying

that accused -Rajendraprasad intimated to the Bank prior to 08-04-2005 that the payment shall be stopped.

14. In the wake of above fact situation, it would be necessary to peep into the statement of PW1 Santoshkumar. Though re-appreciation of the

evidence is impermissible, yet, when the complaint itself does not show that PW Santoshkumar was a witness of any transaction, whatsoever,

between his father i.e. deceased complainant and accused Rajendraprasad, then the question naturally would be as regards his credibility and

capacity to act as a witness. It is in order to find out whether he had the knowledge of transaction in question, his version needs to be perused.

First, he does not say that he was personally present when the hand loan amount was demanded by accused - Rajendraprasad from his father. He

vaguely states that the accused needed loan amount for his business purpose and, therefore, on 01-10-2004, he approached deceased Parasmal

with a request to advance loan of Rs. 25 lacs for the business purpose. Basically, there is glaring discrepancy in his statement as regards the

purpose for which the amount was required by accused -Rajendraprasad. The deceased complainant, in his verified statement, categorically stated

that the accused expressed need for the amount in order to construct the house property and to furnish it. However, PW Santoshkumar states with

emphasis that the amount was needed for ""business purpose"". The version of PW Santoshkumar further reveals that on 3rd October, 2004, the

amount was paid to the accused which he agreed to repay on 07-10-2004 and, therefore, issued the cheque dated 07-10-2004. It is pertinent to

note that though it is stated in the complaint and the verified statement of deceased Parasmal that the accused urged, prior to 07-10-2004, that the

cheque be not presented to the Bank as he was facing some financial difficulties and subsequently, made representations till 05-04-2005 to defer

the presentation of the cheque due to his financial difficulties, yet, there is absolutely no reference in the version of PW Santoshkumar regarding

such reason for the delayed presentation of the cheque in the Bank. Normally, when the loan was given only for four days, then there was hardly

any reason to defer presentation of the cheque to such abnormally delayed period of about six (6) months.

15. Coming to the recitals of the demand notice dated 21-04-2005 (Exh-23), it may be gathered that details are shown as to how even after the

dishonour of the cheque the deceased complainant had a personal meeting with the accused - Rajendraprasad and again he was assured to await

for further fifteen days period. There is no trace of such statement in the deposition of PW Santoshkumar.

16. Cross-examination of PW Santoshkumar reveals that deceased Parasmal used to run a grocery shop which was closed down. Somewhere in

1998, he had let out a shop to nephew of the accused on rental basis on his obtaining hand-loan of Rs. 2 lacs. It was agreed between them that the

shop will not carry rent and the amount will not carry any interest. Subsequently, as and when the loan amount would be repaid by deceased

Parasmal, the rent was made recoverable. Thus, deceased complainant Parasmal himself was in need of loan amount. That transaction was

reduced into writing on a stamp paper of Rs. 20/-. This circumstance gives rise to two inferences. First, that deceased Parasmal himself was in

need of loan amount in 1998, and second that nephew of accused Rajendraprasad was financially sound to give such kind of loan to deceased

Parasmal. If that was the fact situation, instead of going to the complainant Parasmal, the accused could have preferred his own nephew for money

lending.

17. The cross-examination of PW Santoshkumar reveals further that the shop premises were subsequently sold in favour of accused

Rajendraprasad by virtue of a registered sale-deed dated 03-11-2003 for consideration of Rs. 3,65,000/- His father - deceased Parasmal was

required to obtain loan of Rs. 15,000/-from Parbhani Peoples Cooperative Bank in 2003. In the same year, said Parasmal was required to obtain

loan on pledging of gold from Sangli Bank. He was further required to obtain crop loan from State Bank of India Branch at Partur. Deceased

Parasmal was not an income tax payer. According to PW Santoshkumar, the entire cash amount of Rs. 25 lacs was available at his house when

the money transaction took place. Could this be believed?

18. The evidence on record projects poor financial position of deceased Parasmal. No doubt, for a bosom friend, he could have collected the

amounts from here and there. But then, that is not the version of PW Santoshkumar. For, it is the categorical statement of PW Santoshkumar that

such huge amount was available with the deceased complainant at his house. It need not be reiterated that the deceased complainant was indebted

to the Banks, was required to obtain loan from nephew of the accused and was required to alienate the shop premises in 2003 to the accused

himself. Apart from all these aspects, PW Santoshkumar is not a witness to the transaction even according to the recitals of the complaint.

Therefore, his version hardly makes head or tail in relation to the fact situation in respect of the transaction.

19. Mr. Deshpande, seeks to rely on State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand and Others, , Selvaraj v. State of Tamilnadu

(2007) 3 CRIMES 435"", Shri Shivshankar Tulsiram Pande and Ors. v. State of Maharashtra 2004 ALL MR (Cri) 772 and Keshav Mahadeo

Ingole v. State of Maharashtra 2004 ALL MR (Cri) 459, in support of his contention that the concurrent findings of the two Courts below, based

on appreciation of the facts, should not be disturbed in the exercise of revisional jurisdiction. There cannot be duality of opinion that in exercise of

revisional jurisdiction, normally, this Court will not undertake the fact finding process afresh. There cannot be dispute about the proposition that

when thorough appreciation of facts is rendered by the Trial court and the first Appellate Court, then unless there is perversity appearing in the

process of appreciation of evidence, this Court will not interfere with the fact finding. Clinching question is whether the totally erroneous approach

of the Courts below to the evidence of PW Santoshkumar can be maintained as it is only because there is concurrency of the opinion expressed in

both the judgements under challenge. The findings of the facts must be based on material evidence, is the well known principle. Herein, PW

Santoshkumar entered witness box without laying any foundation as regards his capability to highlight details of the transaction. His version does

not show that he was present when the loan transaction took place between his father and accused -Rajendraprasad. As stated before, he even

does not properly known the purpose of loan sought by accused Rajendraprasad. He gives out the purpose as ""requirement for business"" though

since inception, case of the complainant was that the purpose was for construction of house and furnishing it. In legal parlance, therefore, the

version of PW Santoshkumar is worthless in so far as it relates to the details of transaction in question. However, his version is relevant in order to

locate the financial disabilities of deceased Parasmal. The resultant impact is that a void is created as regards factual background which existed

before execution of the cheque. Therefore, it will have to be said that there is only dishonoured cheque (Exh-21) coupled with admission of

accused Rajendraprasad regarding his signature on the cheque in question.

20. Now, it is necessary to examine the legal position available in the form of presumption u/s 139 of the Negotiable Instruments Act. Learned

advocate Mr. Deshpande, would submit that when the accused failed to discharge burden of proof, the presumption available u/s 139 of the

Negotiable Instruments Act may be treated as sufficient to displace the burden which could be casted on the complainant. He heavily relied on

Hiten P. Dalal Vs. Bratindranath Banerjee, . In the given case, the Apex Court held that when the facts which required to form the basis of

presumption of law, would exist, no discretion is left with the Court but to draw the satisfactory conclusion; however, this does not preclude the

person against whom the presumption is drawn from rebutting it and proving the contrary. The Apex Court held that in the case of discretionary

presumption, the presumption, if drawn may be rebutted by an explanation which ""might reasonably be true and which is consistent with the

innocence"" of the accused. On the other hand, in case of a mandatory presumption ""the burden resting on the accused person in such a case would

not be a light as it is where a presumption is raised u/s 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact

that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words

unless the contrary is proved which occur in this provision make it clear that the presumption has to be rebutted by proof and not by a bare

explanation which is merely plausible.

21. There is no difficulty in accepting the proposition that the statutory presumption available u/s 139 of the Negotiable Instruments Act would shift

burden on the accused to prove contrary and rebut the effect of presumption. The question is as to whether the rebuttal is always essentially by

leading separate contrary evidence or that it would suffice if the accused can demonstrate from the cross-examination of the complainant that the

burden to prove contrary is discharged. In the given case, the burden on the accused i.e. appellant Hiten Dalal was held as not discharged. It was

found that the Special Court gave finding that the appellant - Hiten Dalal was required to pay the Bank a sum of Rs. 280.00 crores which was

several times the amount covered under the four cheques in question. It was also noticed that the burden placed on the appellant Hiten Dalal was

not discharged because he failed to adduce any evidence and his mere averment in the written statement was held as insufficient. In other words,

there was proof available as regards pre-existing liability in relation to the four cheques which were issued by appellant Hiten Dalal and moreover,

except and save filing of the written statement, he did not adduce any evidence to the contrary to disprove the presumption. It was in the wake of

special circumstances that the Apex Court held that the statutory presumption would displace the burden of proof and that the accused was under

obligation to disprove the presumptive facts.

22. At this juncture, I may usefully refer to the judgement of Apex Court in M.S. Narayana Menon @ Mani Vs. State of Kerala and Another,

The Apex Court, after consideration of ratio in Hiten P. Dalal v. Bratindranath Banerjee (supra), observed thus:

42. The Court, however, in the fact situation obtaining therein, was not required to go into the question as to whether an accused can discharge the

onus placed on him even from the materials brought on record by the complainant himself. Evidently in law he is entitled to do so.

23. The Apex Court after analysing the dictum in "" Hiten P. Dalal"", held that the accused is entitled to discharge the onus placed on him even on the

basis of the materials brought on record by the complainant himself. Needless to say, it is not obligatory on the accused to separately adduce

evidence or to enter the witness box if he can successfully gather material from the evidence of the complainant which would sufficiently disprove

the presumptive facts, particularly, in relation to the pre-existence of legal liability or the debt for discharge of which the cheque was issued. The

Apex Court further, in Krishna Janardhan Bhat v. Dattatraya G. Hegde AIR 2008 SCW 738"", succinctly dealt with the question pertaining to

burden of proof on the accused qua rebuttal of presumption available u/s 139 of the Negotiable Instruments Act. The relevant observations may be

usefully quoted as below:

21. The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a

court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable

debt is not a matter of presumption u/s 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been

issued for discharge of any debt or other liability.

22. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also.

The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step

into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not

correct.

23. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the

basis of the materials already brought on records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an

accused and that of the prosecution in a criminal case is different.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

26. A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore,

be determined keeping in view the other evidences on record. For the said purpose, stepping into the witness box by the appellant is not

imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties

together with their legal requirements are required to be taken into consideration.

24. Once it is found that the revision applicant was not required to examine himself or to adduce separate evidence in rebuttal, it is essential to see

whether the material brought on record is sufficient to demolish the facts which can be presumed u/s 139 of the Negotiable Instruments Act. The

aforesaid observations of the Apex Court, particularly in para 21, referred to above, would make it manifest that existence of legally recoverable

debt is not a matter of presumption u/s 139 of the Negotiable Instruments Act. The Trial Court as well as the first Appellate Court erroneously

proceeded on the footing that pre-existence of legally recoverable debt has to be presumed u/s 139 of the Negotiable Instruments Act because the

cheque (Exh-21), admittedly, bears signature of the petitioner - Rajendraprasad. This is the error which altered the entire course of the trial and the

decision making process of both the Courts.

25. As stated before, the cross-examination of PW1 Santoshkumar reveals that the deceased complainant was himself indebted to various Banks

and was also required to sell his shop to the applicant Rajendraprasad. The deceased complainant did not satisfactorily explain as to how he raised

such huge amount of Rs. 25 lacs within a short period of 2- 3 days after the request for loan was made by applicant Rajendraprasad to him. The

first Appellate Court referred to an affidavit (Exh-7) while reaching conclusion that there was such explanation given by deceased complainant -

Parasmal. The discussion of the first Appellate Court in this context appears at the fag end of para 19 of the impugned judgement. The first

Appellate Court observed:

...Not only this, the affidavit of Parasmal at Exh. 7 mentions clearly as to how he could collect such a huge amount till 3.10.2004. According to that

affidavit, after the talk with accused on 1.10.2004, Parasmal contacted and had talks with his brothers and his brother Suwalal advanced Rs.

15,00,000/-to Parasmal. Whereas another brother Tarachand paid Rs. 5,00,000/- from him and from his income of land with him Parasmal

himself had Rs. 8,65,000/-with him. Out of these amounts he has advanced Rs. 25,00,000/-in cash to accused on 3.10.2004. It is true that now

Parasmal is not available for cross-examination to test his such contentions but then, the contents of the affidavit cannot be lost sight of.

26. This approach of the first Appellate Court is quite perverse, illegal and patently erroneous. The said affidavit (Exh-7) was filed by deceased

Parasmal (original complainant) on 16-07-2005. The learned Judicial Magistrate recorded plea of the accused/revision applicant on 26-09-2005.

The said affidavit was not, therefore, filed in stead of deposition as enumerated under provisions of Section 145 of the N.I. Act. The learned

Magistrate did not permit filing of the affidavit nor referred to it as part of the evidence. Therefore, it was impermissible for the appellate Court to

make any use of it. Secondly, the version of PW Santoshkumar does not show that the amounts were borrowed from the brothers of the deceased

complainant as enumerated in the affidavit. His version is that entire amount was available in his house. To this, response of the Appellate Court is

that such fact is not challenged during the cross-examination. It is difficult to go by the logic of reasoning adopted by the first Appellate Court.

There was no need for the revision applicant/accused to deny such fact when he denied the pre-existing liability itself and the very transaction of

loan. The absence of suggestion in this behalf cannot be interpreted to mean admission of the fact that such huge amount was available with the

deceased complainant and he could pay it in lumpsum. Moreover, the first Appellate Court totally overlooked the fact that the evidence of brothers

of the deceased complainant, namely, Suwalal and Tarachand, was not adduced at all in support of the so called affidavit (Exh-7). Obviously, it

will have to be said that patent error is committed by the Appellate Court while relying upon recitals of the affidavit (Exh-7), which is neither

proved nor has any evidentiary value.

27. Reverting to the version of PW1 Santoshkumar, it may be gathered that the deceased complainant was not financially sound to raise such huge

amount within a short span. The following circumstances are explicitly brought on the surface of the record.

(i) Deceased complainant himself was indebted and was under financial difficulties which prompted him to alienate the shop prior to about one year

of the alleged loan transaction, in favour of the petitioner Rajendraprasad, when he could not repay the loan amount of the loan borrowed from

nephew of the latter;

(ii) There is no satisfactory explanation as to why deceased complainant Parasmal did not verify urgency of the loan requirement as put forth by the

revision applicant Rajendraprasad;

(iii) There is glaring discrepancy in the cause of loan demanded by the petitioner as shown by the deceased complainant in his complaint and as

deposed to by PW1 Santoshkumar;

(iv) The version of PW Santoshkumar is blank as regards source of his knowledge in respect of the loan transaction and details thereof;

(v) Deceased complainant was dealing in kirana business which had to be closed down and, therefore, his occupation is shown in the complaint as

Agriculture"", which is a general and sweeping statement. There is no substantial statement made in the complaint as regards the agricultural income

available to the deceased complainant, nor any documentary evidence is adduced in order to prove his financial viability to raise such huge amount

out of the agricultural income. One cannot totally ignore the social context in this behalf.

A judicial notice can be taken of the fact that in this area, there are cases of agriculturists committing suicide due to losses in the agricultural

business. So, it was more expected of the deceased complainant to explain as to how he was a successful agriculturist to overcome the difficulties

and could have raised such huge amount from his agricultural sources.

(vi) The explanation given by the petitioner regarding theft of the signed cheque may not be true, but it has no serious impact on the defence

because from the other evidence and circumstances, he successfully improbabalized the statement regarding pre-existing debt. I mean to say, the

loan transaction between the petitioner and the deceased complainant itself is rendered improbable in view of the attending circumstances brought

on record. For, the deceased complainant could not have blindly relied upon word of the revision applicant -Rajendraprasad because while

entering into the transaction of giving shop on rent to nephew of the petitioner, the terms were reduced into writing on a stamp paper of Rs. 20/-.

So also, while alienating the shop to the petitioner - Rajendraprasad, a due care was taken to reduce the transaction in writing under the sale-deed

executed by the deceased complainant.

(vii) There is no iota of evidence to corroborate the allegation that the revision applicant - Rajendraprasad made representation to the deceased

complainant to delay presentation of the cheque from time to time, and assured to deposit sufficient funds in the account and, therefore, the cheque

was presented for encashment after a considerable delay of six (6) months. It does not stand to reason that such an inordinate delay would have

been committed by deceased complainant when he was required to borrow loans for raising of the huge amount and he himself was indebted to

others.

28. Considering the foregoing reasons and attending circumstances, I am of the opinion that pre-existing legally recoverable debt is not proved

through PW Santoshkumar, nor, it is a matter of presumption u/s 139 of the N.I. Act. Even if such legal presumption is to be raised, then also non-

examination of the accused or his failure to adduce separate evidence in defence is of no consequence. The above attending circumstances are

sufficient to displace the burden of proof which is somewhat lighter on him. The law regarding the degree of proof required from the accused to

prove his defence is well settled. The accused is required only to prove by preponderance of probabilities that the defence bears ring of truth. The

accused is not required to prove his defence beyond reasonable realm of doubt as is required to be done by the prosecution. The complainant,

through PW Santoshkumar failed to discharge the initial burden when the existence of the legally recoverable debt cannot be presumed. Under

these circumstances, the revisionist was not required to disprove anything, but still, however, even assuming that he was required to disprove so

called presumptive existence of the pre-existing debt, yet, it will have to be held that in view of the aforesaid circumstances and the evidence on

record, the burden stands discharged. For, it is quite improbable that the deceased complainant could have raised such a huge amount within a

short span and could have lent it to the revisionist without there being any document about the transaction, except and save the cheque (Exh-21)

29. Learned advocate Mr. Deshpande referred to various cases viz.

(i) Siddhivinayak Sewa Mandal and Ors. v. Smt. Shoba Sant and Ors. 2003 (1) DCR 529

(ii) M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd.,

(iii) M.M.T.C. Ltd.and Anr. v. Medchl Chemicals & Pharma (P) Ltd. 2002 ALL MR (Cri.) 230

(iv) Goa Plast (P) Ltd v. Chico Ursula DSouza 2004 (1) DCR 1

(v) P.V. Constructions v. K.J. Augusty 2007 (2) DCR 27

(vi) Suresh Fulchand Bumb v. Shantikumar K. Damani 2004 (2) DCR 176

(vii) Vijay Nandeoraoi Bidwalkar v. Ramvtar Madanlal Aggrawal and Anr. 2002 STPL 457

(viii) Shri Vinod Tanna and Another Vs. Shri Zaheer Siddiqui, Constituted Attorney of Ahsan Exports Pvt. Ltd. and Others,

(ix) Bimal Kumar Nopani Vs. State of Uttar Pradesh and Ajay Bathwal,

(x) Johnson Scaria v. State of Kerala 2007 (1) Cri.C.C. 161

(xi) Purshottam v. Manohar K. Deshmukh and Anr. 2007 (1) Cri.C.C. 682.

So also, various cases are referred on behalf of the revisionist, including

(i) Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay AIR 1961 S.C. 1316

(ii) Goa Handicrafts, Rural & Small Scale Industries Development Corporation Ltd. v. Samudra Ropes Pvt. Ltd. and Ors. 2005 9 ALL MR (Cri)

2643

(iii) Girish Kantappa Shetty v. State of Maharashtra 2004 ALL MR (Cri) 1721

30. It is not necessary to elaborately discuss the ratio of each of the case mentioned above. The applicability of the precedent depends on fact

situation of each case. In the case in hand, the only two questions which are referred at the outset are involved. In my opinion, the first question

needs to be answered in the negative. It must be said that mere admission of the signature on the cheque does not relieve the complainant from

requirement to prove the pre-existing debt or legal liability to pay the amount shown in the cheque. The second question raised at the outset will

have to be answered in the affirmative. The revisionist - accused Rajendraprasad could legally have discharged the burden of proof, assuming that

it was on him to prove the non-existence of the loan transaction, through material on record.

In this view of the matter, the revision application succeeds and will have to be allowed.

31. In the result, the criminal revision application is allowed. The impugned judgements of both the courts are hereby set aside. The complaint

stands dismissed. The petitioner - Rajendraprasad is acquitted of the offence punishable u/s 138 of the Negotiable Instruments Act. His bail bonds

be deemed as cancelled. At request of learned advocate for respondent No. 1 -Santoshkumar, the amount deposited by the petitioner in the Court

of Sessions is directed to be kept without disbursement, for a period of one month.