



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 762 OF 2004

Tukaram s/o Narayan Reddy,
Age 52 years, Occu. Agri.,
R/o Jewali, Tq. and Dist. Latur,
At present residing at Kailasnagar,
Barshi Road, Latur,
District Latur.

... Appellant
[Original Complainant]

Versus

01. Dileep s/o Shashikant Deshpande,
Age 42 years, Occu. Agri.,
R/o Laxmi Niwas, Khore Galli,
Latur, at present residing at Jewali,
Tq. and Dist. Latur.

02. The State of Maharashtra.

... Respondents
[R.No.1 Orig. accused]

.....
Mr. V. D. Gunale, Advocate for the Appellant.
Mr. V. S. Kadam, Advocate for Respondent No.1.
Mrs. Chaitali Choudhari Kutti, APP for Respondent No.2-State.
.....

CORAM	: ABHAY S. WAGHWASE, J.
RESERVED ON	: 17.04.2024
PRONOUNCED ON	: 11.06.2024

J U D G M E N T :-

1. The original complainant, who instituted proceeding under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act), is dissatisfied by the judgment and order of acquittal passed by the learned 3rd Judicial Magistrate, First Class, Latur in S.T.C.C. No.3288 of 1997 dated 04.08.2004.
2. Present appellant filed above proceedings on the premise that he and accused are agriculturists. The accused purchased 60 tons of sugarcane buds worth Rs.46,000/- and accused agreed to pay the price of buds within a month. Accused failed to repay, but only on repeated demand he issued cheque drawn on Latur District Co-operative Bank, Branch Kapad Bazar. On its presentation, the cheque returned dishonoured and therefore the accused was put to legal notice. In spite of receipt of same, the cheque amount was not paid and therefore the above proceedings were instituted.
3. JMFC conducted trial vide S.T.C.C. No.3288 of 1997 and on appreciating the oral and documentary evidence, reached to a finding that complainant failed to make out a case beyond reasonable doubt and there

being no legally enforceable debt, learned trial Judge acquitted the accused vide judgment and order dated 04.08.2004.

Precisely above order of acquittal is questioned by way of instant appeal.

SUBMISSIONS

On behalf of the appellant/complainant :

4. Learned Counsel for the appellant would point out that complainant and accused are well acquainted, they both being agriculturists. That, there was transaction of purchase of sugarcane buds and towards price of the same, cheque was issued. It is pointed out that issuance of cheque and signature over it was not disputed. Therefore, there was strong presumption available under law i.e. under Sections 118 and 139 of the N. I. Act.

5. Learned counsel for the appellant further submitted that, accused failed to rebut the said presumption. That, there was clear legally enforceable debt in the backdrop of above transaction. However, learned trial court failed to consider and appreciate the case of the complainant and according to him,

learned trial court arrived to an erroneous conclusion in spite of ingredients for attracting Section 138 of the N.I. Act being patently available. Hence, he seeks indulgence at the hands of this Court in setting aside the judgment passed of the learned trial Judge by allowing the appeal.

On behalf of the respondent/accused :

6. In answer to above, learned counsel for the respondent/accused pointed out that the complainant utterly failed to establish legally enforceable debt or issuance of any cheque towards the same. In that backdrop, he pointed out that in fact the cheque which was handed over by his father in a distinct transaction of mortgage of land, was misused. There was no transaction of purchase of any sugarcane buds and therefore, according to him, no error whatsoever is committed by the learned trial court in acquitting the accused.

SUM AND SUBSTANCE OF EVIDENCE IN TRIAL COURT

7. It appears that the complainant has examined himself as well as a bank official in order to prove his case. The sum and substance of their evidence is as under:

PW.1 Tukaram at Exhibit 60 testified that he and accused were having lands at Jewali. According to him, accused took 60 tons of sugarcane buds worth Rs.46,000/-. Towards payment of the same, he issued cheque dated 16.04.1997, but on its presentation, it was returned dishonoured and therefore, as required by law, legal notice was dispatched by way of both modes, i.e. R.P.A.D. as well as U.P.C. The postal acknowledgments were placed on record. According to this witness, in spite of notice, accused failed to pay the cheque amount. Hence, the complaint.

PW.2 Madhukar – a bank official deposed at Exhibit 79 that he is Accountant in Latur DCC Bank. The accused has account in their bank and it is operated by way of use of cheques. He deposed that accused issued cheque to the complainant and the same was presented in the bank. He gave the number of the cheque and identified the same and the amount over it to be Rs.46,000/-. He further deposed that the balance in the account of accused was only Rs.912/-. Therefore, as there was no balance worth the cheque amount, the cheque was dishonoured.

8. The accused has also adduced evidence of his own father Shashikant-DW1, who is examined at Exhibit 105. The sum and substance of the defence witness is that accused is his son and that he knew the complainant who is resident of their own village. He deposed that, in 1993 he had obtained amount of Rs.25,000/- from the complainant and in lieu of the same, he executed a sale-deed of land admeasuring 19 Gunthas in gat no. 170. According to him, at that time it was agreed that possession of the said land was not to be transferred and only on repayment of Rs.25,000/- to the complainant, there was to be a reconveyance deed in favour of this witness. He deposed that complainant in the year 1994 got his own name mutated to the land. In 1997, complainant demanded the amount. He had no money at that time and therefore the complainant demanded a cheque. However, as this witness did not maintain any account in the bank, on suggestion of the complainant, a blank cheque of his son was issued and it was specifically agreed that the complainant should return the blank cheque to this witness on payment of Rs.25,000/-. As this witness could not repay the amount, accused took possession of the land. Therefore, the blank cheque was demanded back by this witness, but accused refused to return and moreover misused the same and filed false complaint.

9. Section 138 of the N.I. Act has three essential ingredients viz. ;

Firstly, that there is legally enforceable debt.

Secondly, that the cheque was drawn from account of bank for discharge in whole or in part any debt or other liability which presupposes a legally enforceable debt.

Thirdly, cheque so issued has been dishonoured.

Sections 118 and 139 of the N.I. Act make available statutory presumption. However, wording of Section 139 explicitly shows that the said presumption is rebuttable. Law is fairly settled that defence can rebut the presumption even by preponderance of probabilities, rely on the evidence adduced by the complainant or even available circumstances can be taken recourse to, to rebut the presumption.

10. It is further fairly settled position that, fundamental burden is on complainant to prove existence of legally enforceable debt and only if it is so proved, only then presumption available under law i.e. under Sections 118 and 139 of N.I. Act, automatically comes into play. The Hon'ble Apex Court in

the case of *Krishna Janardhan Bhat v. Dattatraya Hegde* [AIR 2008 SC 1325], has also clarified that existence of legally enforceable debt is not a matter of presumption. It merely raises a presumption in favour of the holder of the cheque that the same has been issued for discharge of any liability or debt. Only when accused fails to rebut the presumption, offence under Section 138 can be said to be brought home.

11. Therefore, the whole question here involved in this proceeding is whether the cheque in question was issued in discharge of legally enforceable debt and further, whether accused is able to rebut the presumption. Here, on re-appreciating and re-analyzing the entire evidence discussed above, it seems to be the complainant's case that accused respondent purchased 60 tons of sugarcane buds worth Rs.46,000/-. Towards payment of such transaction, accused issued cheque but the same was dishonoured.

12. On the other hand, accused has denied the very above said transaction at the threshold and precise defence set up by accused is that there was no such transaction of purchase or sale of sugarcane buds. On the contrary, case set up is that there was a transaction between DW1, who is father of accused,

and the complainant. DW1 father had borrowed Rs.25,000/- from the complainant and in lieu, had executed a sale deed and there was further understanding between DW1 and complainant that on repayment of Rs.25,000/-, complainant would reconvey the land. Because of inability to repay, complainant demanded cheque from DW1. However, as DW1 was not maintaining any bank account and therefore, only on insistence and suggestion of complainant, DW1 handed over cheque, but from the account which was held by his son/accused and the same was misused.

13. In view of above discussed legal proposition, initial burden on complainant is to first prove the foundational facts alleged by him regarding so called transaction of sale and purchase of sugarcane buds. On re-appreciating the entire evidence it is noticed that, evidence of complainant is conspicuously silent as to exactly when and where said transaction took place. There is no oral or documentary supportive evidence of complainant to be involved in the business of sale of sugarcane buds and he selling buds to accused as is claimed by him. Where this transaction took place is not coming on record. There is no evidence to suggest that accused was also owning and possessing land which was available for cultivation of sugarcane crop.

14. In the light of above defence and stand taken by accused, that in fact there was transaction between DW1, who is father of accused, and complainant, line of cross to complainant taken up in the trial court goes to show that there are specific questions in that direction and even complainant has admitted that there was transaction of some portion of land gat no. 170 with DW1. Such admission has fortified and probabilized the defence set up by accused that the cheque in possession of complainant, though signed by accused, was not towards transaction of sale or purchase of sugarcane buds, but was towards guarantee of repayment of loan taken by DW1.

15. Consequently, here it is emerging that though initial presumption was available by virtue of issuance of cheque and signature over it, onus had shifted to accused to rebut the said presumption and to greater extent, said defence has been probabilized. Accused is expected to establish his stand by mere preponderance of probabilities, and here, by examining DW1, whose testimony has remained intact throughout in cross also, it can safely be held that presumption has been dislodged.

16. To sum up, complainant failed to establish and demonstrate transaction and sale of sugarcane buds to accused worth Rs.46,000/- and accused issuing cheque towards price of the buds and not otherwise. Though presumption available under Section 118 and 139 of N.I. Act was shown to be in existence, there is material demonstrating defence taken up by accused. Therefore, acquittal from offence under Section 138 of N.I. Act cannot be said to be illegal or against evidence and law so as to disturb the findings reached at by learned trial court. No case is made out to interfere. There being no merit in the appeal, I proceed to pass the following order:

ORDER

The appeal stands dismissed.

[ABHAY S. WAGHWASE, J.]