

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 49 OF 1999

Dilip Ramchandra Jagad

.. Appellant

v/s.

Ramesh V. Unecha & Anr.

..Respondents

None for the Petitioner.

Mr. Yashpal Thakur, Advocate appointed as Amicus Curie.

None for the Respondent.

Mrs. R.V.Newton APP for the State.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : OCTOBER 21, 2015.**

ORAL JUDGMENT.

1. The appellant-original complainant has challenged the order of acquittal dated 18.12.1996 in C.C.No. 1282 of 1992 passed by the Judicial Magistrate, First Class, Court No.8, Pune.

2. The appellant had claimed that he is running the business under the name and style of C.R.Transport Company. The respondent no.1-accused in CC No.1282 of 1992 was running

transport business at Vithalwadi. They had friendly relations with each other. The accused had requested the appellant-complainant to advance loan of Rs.40,000/- and that the appellant-complainant had advanced loan of Rs. 40,000/- from 4.4.1991 to 4.6.1991 in several installments. The appellant-complainant claims that he had demanded the money back and the respondent accused had issued a cheque dated 10.4.1992 towards repayment of the said loan amount. The said cheque was deposited in the bank, but was dishonoured for insufficient funds. Statutory notice was issued. The Respondent-accused however, did not pay the said amount. Hence the complaint came to be filed under Section 138 of the Negotiable Instruments Act.

3. Upon being served with summons, the respondent-accused put in his appearance, pleaded not guilty and claimed to be tried.

4. The appellant-complainant as well as the respondent-accused adduced evidence, and upon considering the evidence, the learned Magistrate acquitted the accused mainly on the ground that the

appellant herein had not proved the issuance of statutory notice as well as the receipt of statutory notice. The learned Magistrate therefore acquitted the respondent-accused for offence under Section 138 of the Negotiable Instruments Act. Being aggrieved by the said order, the appellant has preferred this appeal.

5. Since the appellant was not present and was not represented by any advocate, the learned Counsel Shri Yashpal Thakur was requested to assist the court in deciding the matter. Learned Counsel Shri Thakur has submitted that the evidence adduced by the complainant amply proves that the notice was duly dispatched on the correct address of the accused. Relying upon the judgment of the Apex Court in C.C.Alavi Haji vs. Palapetty Muhammed & Anr. MANE/SC/2263/2007, he submitted that the notice was dispatched at the correct address and was deemed to have been served.

6. With the assistance of the learned Counsel Shri Yashpal Thakur, I have gone through the evidence as well as the documents produced before the trial court. The evidence of the complainant P.W.1 Dilip

Jagad reveals that he had sent the notice to the respondent-accused through this Advocate on 24.11.1992. He has stated that the said notice was received by the accused. He had placed on record office copy of the said notice, which was taken on record and marked Exhibit 36. The complainant had also produced the A.D.Card in respect of the notice at Exhibit 37. The learned Magistrate has held that the complainant has not made any effort to produce the original copy of the notice. The learned Magistrate had lost track of the fact that the original notice was served on the accused and the complainant could not have been expected to produce the original copy of the said notice. It is also to be noted that the learned Magistrate has held that the acknowledgement card does not bear the signature of the accused. The notice was undisputedly dispatched on the correct address and in terms of Section 27 of the General Clauses Act, the presumption would be that the notice was deemed to have been served on the accused. The respondent accused had not adduced any evidence to rebut the said presumption. Under the circumstances, service of the notice is deemed to have been effected. The requirement of section 138 N I

Act had been sufficiently complied with. Consequently, the findings of the learned Magistrate that the statutory notice was not served on the accused and or that the accused had not received the notice are totally erroneous.

7. The case of the complainant was that the subject cheque was issued towards repayment of the loan. Whereas, the accused had raised the defence that it was given towards Bhishi, a fund raising scheme. The learned Magistrate has disbelieved the defence and has held that the complainant has proved that the said cheque was issued towards repayment of the loan which is legally enforceable debt.

8. It is pertinent to note that the complainant has deposed that the accused had issued the cheque towards repayment of the loan. He has stated that he had advanced loan to the accused in several instalments. He has stated that he does not have any documents to prove the loan transaction. He has denied that the subject cheque was issued as security of Bhishi. Whereas the evidence of DW1, DW2 and DW3 reveals that they along with 20 other members had started 'Bhishi' a fund saving scheme and that the said scheme was supervised by the complainant. The members of the Bhishi used to

handover blank cheques signed in red ink to the complainant. The subject cheque was one of such cheques issued by the accused to the complainant as security towards Bhishi Scheme. These witnesses have deposed that the complainant had not returned the said cheque.

9. It is to be noted that the complainant has not given the details of the loan transaction, He has not produced any documentary evidence to prove such loan transaction. Whereas, the testimony of the defence witnesses probabalises the defence that the cheque was not issued towards existing liability but was issued towards the security of Bhishi. The defence evidence therefore sufficiently rebuts the presumption under Section 139 of the Negotiable Instruments Act. The learned Magistrate has failed to consider these material aspects and has erred in holding that the cheque was issued towards discharge of liability.

10. In the circumstances and in view of the discussion, the respondent-accused cannot be held guilty of the offence under Section 138 of the Negotiable Instruments Act. Consequently, the appeal is dismissed. Before parting, I would like to place on record

my deep sense of appreciation for the valuable assistance rendered by the learned Counsel Shri Yashpal Thakur, in the disposal of this appeal.

(ANUJA PRABHUDESSAI, J.)