IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 164 OF 1999

P. Dhananjaya Shetty .. Appellant

v/s.

The State of Maharashtra & Anr. ..Respondents

Mr. K.S. Patil for the appellant
None for the respondent
Mrs. R.V. Newton, APP for the respondent State

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 28th OCTOBER, 2015

P.C.

1. This appeal is directed against the judgment and order dated 24.12.1998 in C.C. No.123/S/1997 whereby the learned Additional Chief Metropolitan Magistrate, 48th Court, Girgaon Mumbai has acquitted the respondent no.2 of the offence under Section 138 of the N.I. Act.

2. The case of the appellant- complainant in brief is that some time in the month of August, 1995 he had advanced to the respondent no.2 a loan of Rs.1,00,000/-. The respondent no.2 had

assured to repay the said loan within a period of 3 months. The respondent no.2-accused executed a promissory note in favour of the appellant, as a collateral security and issued a post dated cheque bearing No.75833 dated 23.03.1996 for Rs.1,00,000/- towards repayment of the said loan. The appellant-complainant deposited the said cheque in the bank but the same was dishonoured for insufficient funds. The appellant-complainant issued a demand notice dated 09.09.1996 calling upon the respondent no.2-accused to pay the cheque amount. The respondent no.2-accused having failed to pay the cheque amount, the appellant-complainant initiated proceedings under section 138 of the N.I. Act.

3. Upon being served with the summons, the respondent no.2-accused put in his appearance, pleaded not guilty and claimed to be tried. The defence of the respondent no.2-accused was that sometime in the year 1992 he had taken loan from Laxmi Chaya Co-op. Credit Society through the appellant-complainant as a broker and had issued the said blank signed cheque as a security. The Respondent–accused alleged that the complainant had not returned

the cheque despite the repayment of the loan to Laxmi Chaya Co-op. Credit Society and has misused the same in filing the proceedings under section 138 NI Act.

4. The appellant-complainant examined himself and one Harish Ram Kundan (PW-2) an employee of Bharat Co-op. Bank LTd. while the respondent no.2-accused examined himself in support of his defence. The learned Chief MM after considering the evidence adduced by the respective parties held that the appellant had failed to prove that the subject cheque was issued towards payment of legally enforceable liability. The learned Magistrate has further held that the cheque was not presented within six months from the date of issuance and further held that the complaint was not filed by the payee or the holder in due course and hence the same was not maintainable. The learned MM therefore dismissed the complaint and acquitted the accused of the offence u/s 138 of the N.I. Act. Being aggrieved by the said order, the appellant has preferred this appeal.

5. Shri K.S. Patil, the learned counsel for the appellant, while assailing the findings of the trial court that the said cheque was not issued towards discharge of the legally enforceable debt has submitted that the respondent no.2 accused has admitted having issued the cheque and as such the presumption u/s 139 of the N.I. Act is in favour of the appellant complainant. He has further submitted that the respondent no.2 has not rebutted the said presumption even by preponderance of probability and consequently the finding rendered by the learned judge is not borne from the evidence on record and is totally erroneous.

6. The learned Counsel for the appellant has further submitted that the cheque dated 23.03.1996 was presented in the bank in the month of August, 1996 which was well within the period of six months from the date of the cheque. Relying upon the decision of the Apex Court in ***Ashok Transport Agency Vs. Awadesh Kumar and Anr. (1998) 5 SCC 567,*** he has submitted that though the cheque was issued in the name of the proprietor, the complaint filed by the

proprietorship concern through its sole proprietor is maintainable. He therefore submits that the order of acquittal recorded by the learned trial Judge suffer from legal infirmity and is liable to be set aside.

7. I have perused the records and considered the submissions advanced by the learned Counsel for the appellant. At the outset, it may be mentioned that this is an appeal against the acquittal. In ***Ghurey Lal Vs. State of Uttar Pradesh, (2008) 10 SCC 450***, the Apex Court while considering the scope of interference with a judgment of acquittal, in appeal, has laid down the following principles:

> "*1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:*
> *i) The trial court's conclusion with regard to the facts is palpably wrong;*
> *ii) The trial court's decision was based on an erroneous view of law;*
> *iii) The trial court's judgment is likely to result in "grave miscarriage of justice";*
> *iv) The entire approach of the trial court in dealing with the evidence was patently illegal;*

v) The trial court's judgment was manifestly unjust and unreasonable;
vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.
vii) This list is intended to be illustrative, not exhaustive."

8. In the present case, the learned magistrate has held that the complaint was not maintainable since the cheque was issued in the name of the proprietor whereas the complaint was filed in the name of the proprietorship concern. Section 142 of the NI Act provides that the complaint under section 138 can be filed by the payee or the holder of the cheque in due course. There can be no dispute that the complaint under section 138 must satisfy the eligibility criterion prescribed under the statute. In the instant case the subject cheque at Exh.P-1 was issued in favour of P. Dhananjay Shetty whereas the complaint has been filed in the name of M/s. Jaya Trading Corporation, through its sole proprietor Mr. P. Dhananjay Shetty. It is well settled that the proprietary concern is not an independent entity but is only a business name. In ***Ashok Transport Agency Vs. Awadesh Kumar (Supra)***, the Apex Court has held that a

proprietorship concern is only the business name, in which the proprietor of business carries on the business. It is held that that a suit by or against the proprietorship concern is by or against the proprietor of the business. In view of the aforesaid principles, there is no doubt that the complaint in the name of the proprietorship concern is in fact a complaint by the proprietor of the business and hence the same was maintainable.

9. Reverting to the factual matrix of the case, PW1 has deposed that sometime in the month of August 1995 the Respondent no. 2 had availed from him a loan of Rs 1,00,000/ with an assurance to repay the same within three months. PW1 has deposed that the Respondent no.2 had issued the subject cheque at Ex P1 towards repayment of the said loan. Pw1 has also relied upon the promissory note at Ex. P2 executed by the Respondent no.2. PW-1 has stated that the Respondent no.2 had issued the subject cheque dated 23.03.1996 towards repayment of the loan.

10. The Respondent no.2 has not disputed his signature on the said

cheque or having issued the said cheque in favour of the Appellant. Hence, in terms of Section 139 of the Negotiable Instruments Act, 1881 the initial presumption is that the holder of the cheque had received the cheque for the discharge, in whole or in part, of any debt or other liability. There is no dispute that the accused is entitled to rebut this presumption by raising a reasonably plausible defence, the standard of reasonability being that of the prudent man. Once the presumption is rebutted, the onus shifts on to the complainant to not only establish that the cheque was issued for the discharge of a debt of other liability but that such debt or liability was legally enforceable.

11. In this regard, the respondent no.2 accused – DW1 Shridhar Shetty .has deposed that in the year 1992 he had taken loan from Laxmi Chaya Credit Society through the Appellant as a broker and that PW1 had signed the promissory note as a broker. DW-1 has further stated he had handed over the said blank signed cheque to the Appellant as a security. It is pertinent to note that PW-1 has admitted in his cross-examination that he is a Director of Laxmi

Chayya Credit Society Ltd. and that he had business transactions with the accused. It is also not in dispute that the promissory note at ExhP-2, was signed by PW-1 as a broker.

12. It is also pertinent to note that in the reply to the demand notice, it is merely stated that the cheque which was issued for consideration was dishonoured. The Respondent-accused had called upon the complainant to give details of the consideration or transaction. He had stated that the said cheque was given in the year 1992.

13. It is pertinent to note the evidence of PW-2 vis-à-vis the statement of account of the accused at Exh.8 indicates that the last cheque of the cheque book, from which the subject cheque was issued was honoured on 3rd March, 1992. This fact reveals that the said cheque book was issued to the accused in the year 1992 and this fact probabalises the defence of the accused that the subject cheque was issued in the year 1992 towards security of loan.

14. DW-1 has deposed that though he had repaid the said loan, the appellant had evaded returning the cheque under the pretext that he had misplaced the said cheque. The accused has produced a letter dated 19.10.1992 at Exh.11 along with postal certificate at Exh.10, a perusal of which reveals that way back in the year 1992, the Respondent no.2-accused had called upon the Appellant-complainant to return the subject cheque. Though the witness was cross-examined there was absolutely no challenge to the said statement or the letter at Ex.11. Hence there is no merit in the contention that the Appellant had not received the said letter.

15. The evidence of DW-1 vis-à-vis the letter dated 19.10.1992 at Ex.11 also reveal that the said cheque was issued in the year 1992 and this fact belies the case of the Appellant-complainant that the subject cheque was issued towards repayment of the loan advanced in the year 1995. The respondent having rebutted the presumption by preponderance of probability, the learned Magistrate was perfectly justified in holding that the subject cheque was not issued towards discharge of legally enforceable debt or liability. The findings of the

learned Trial judge are based on the evidence on record. The said findings are neither illegal nor perverse and do not warrant any interference.

16. Under the circumstances, there is no merit in the appeal and the same is hereby dismissed.

(ANUJA PRABHUDESSAI, J.)