IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 606 OF 2015

Uttamrao s/o Shankarrao Todekar,
Age : 57 years, Occu. Business
Proprietor of M/s Samarth Castings
c/o Hydro Power, Behind Garware
Polyster, K-8, M.I.D.C.,
Chikalthana, Aurangabad – 431003
and r/o N-12, ED-18/1,
Bharat Mata Nagar, Hudco, Aurangabad
through His Constituted Attorney
Harishchandra s/o Dhondibhau More,
Age : 43 years, Occu. Nil,
R/o N-12, ED-38/5, Bharat Mata Nagar,
Hudco, Aurangabad **APPELLANT**

VERSUS

1. Pushpabai w/o Ichchharam Patil,
Age : 67 years, Occu. Business
and Savings Society,
N-12, ED-5/9, Bharat Mata Nagar,
Hudco, Aurangabad

2. Sharda w/o Dnyaneshwar Shirsath,
Age : 33 years, Occu. Business
and Savings Society,
N-12, ED-6/4, Bharat Mata Nagar,
Hudco, Aurangabad

3. Durga SwayamSahayata Mahila
Bachat Gut,
A Women's Co-operative Savings Group,
having their address as
N-12, ED-6/4, Bharat Mata Nagar,
Hudco, Aurangabad, through their
Secretary, the accused No.2 above
Sharda Dnyaneshwar Shirsath,
Age : 30 years, Occu. Business
and Savings Society

4. The State of Maharashtra **RESPONDENTS**

Mr. Anand Chawre, Advocate for the appellant
Mr. A.R. Rathod, Advocate for respondents No. 1 to 3
Mr. A.R. Kale, A.P.P. for respondent No. 4/State

CORAM : M.T. JOSHI, J.

RESERVED ON : 25th JANUARY, 2016
PRONOUNCED ON : 29th JANUARY, 2016

ORDER :

1. Heard both sides.

2. Aggrieved by the recording of acquittal of respondents No. 1 and 2 from the offence punishable under section 138 of the Negotiable Instruments Act, by the learned Judicial Magistrate First Class, Aurangabad vide judgement and order dated 3rd March, 2014 passed in S.C.C. No. 917 of 2011, the appellant/original complainant has filed the present appeal.

3. The case of the appellant, in short, is as under:-

. That, he is a businessman and runs non-ferrous foundry, named and styled as M/s Samarth Castings at MIDC, Chikalthana, Aurangabad. The respondent No. 3 is a micro self-help group (Bachat Gut), aimed at betterment and empowerment of women by advancing them certain credit facilities. The respondent No. 1 is the Chairman and respondent No. 2 is the Secretary of the said institute. As these respondents are the neighbours of the appellant/complainant, due to the financial need, they made request for advancing hand-loan of Rs. Four lacs to him. He paid hand-loan of Rs. Three lacs to the respondents No. 1 and 2 about 4/5 months back. They promised to repay the same within a couple of months. However, when the complainant made demand of the money, the respondents No. 1 and 2 issued the cheque dated 3rd January, 2011 for a sum of Rs. Two lacs. The said cheque was placed before the banker of the respondents. The cheque was, however, returned unpaid with banker's endorsement as `not arranged for'. Therefore, upon receipt of the said intimation, the complainant issued demand notice by speed post acknowledgement due. The said demand notice was, however, refused by the respondents. They did not make any repayment and therefore, the complaint came to be filed.

4. The defence of the respondents was that of

total denial. They denied that any transaction was entered or they had issued any cheque. They also denied that any notice was sent to them or they refused to accept the same.

5. The complaint was filed through the appellant's Power of Attorney holder Mr. Harishchandra Dhondibhau More. Said Harishchandra entered the witness box and deposed of the pleading in the complaint. During cross-examination, he initially deposed that all the facts stated by him in examination-in-chief are based on the information received by him from the complainant. Thereafter, however, he deposed that the transaction also had taken place in his presence. He admitted that he did not have any knowledge as to whether the present transaction of hand-loan is entered into the income tax return of the complainant or not. He was not aware as to whether in any accounts book, the said transaction is entered into. It was also found that the service of notice was not refused by the respondents but the notice was returned as after giving intimation by the postal authorities, the respondents failed to collect the same from the post office.

6. The learned Judicial Magistrate First Class observed that admittedly, the power of attorney holder of the appellant had no knowledge as to whether the transaction entered into is recorded in the income tax return. Further, there is no contemporaneous evidence to show that any amount was paid. Therefore, it was held that the presumption that has been arisen due to passing of the cheque of existence of legally enforceable liability, is rebutted. Therefore, the respondents came to be acquitted.

7. Mr. Anand Chawre, learned counsel for the appellant strenuously submitted before me that it is not necessary that the transaction should be entered into the income tax return. He further submitted that it was for the respondents to rebut the presumption that has arisen due to the passing of cheque. According to him, the respondents utterly failed to rebut the presumption. Therefore, relying on the ratio laid down in the cases of ***"Mr. Krishna P. Morajkar Vs. Mr. Joe Ferrao and another"*** reported in ***2013 ALL MR (Cri) 4129*** and ***"Rangappa Vs. Sri Mohan",*** reported in ***(2010) 11 S.C.C.***

441, he submits that the appeal be allowed.

8. On the other hand, Mr. A.R. Rathod, learned counsel for the respondents No. 1 to 3 supported the reasons forwarded by the learned Judicial Magistrate First Class.

9. On the basis of above material, following points arise for my determination :

(I) Whether the cheque in question was issued by the respondents/accused towards the discharge of any legal liability ?

(II) Whether the notice was served upon the respondents/accused ?

My finding to the above point No. (I) is in the negative and to point No. (II) is in the affirmative. The appeal is, therefore, dismissed for the reasons to follow.

R E A S O N S

10. The Power of Attorney Holder of the appellant/ complainant, in the cross-examination, initially deposed

that he had no personal knowledge of the transaction and the statements made in examination-in-chief regarding the transactions are as per the knowledge he got about the matter from the complainant. He also further deposed that the complainant has informed him about the filing of the present complaint at the time of filing of the same and at that time, he also informed about the transaction pertaining to the present complainant. Lateron, however, he deposed that the amount was paid in his presence.

11. It is to be noted that according to the complainant, he is the proprietor of a foundry, named and styled as M/s Samarth Castings. Its turnover, according to the Power of Attorney Holder of the complainant, was around Rs. 10 lacs to Rs. 12 lacs per annum during the relevant period. Yet, no contemporaneous documents of passing of the substantial amount of Rs. Three lacs by the complainant to the respondent No. 3 organization are coming forward. There is no receipt either demanded by the complainant nor any account books are filed to show that the amount was debited to the respondent No. 3 institution. The self-

help group (Bachat Gut) is Government registered institution. In the circumstances, any amount obtained as handloan would require documentary evidence. The same is, however, absent in the present case.

. In view of these facts, though certain observations of the learned Judicial Magistrate First Class that entry in the income tax return is not found, are not required to be considered to be significant one, the material facts, as detailed supra, would show that the respondents/accused have successfully rebutted the presumption.

12. As regards service of notice to the respondents, since the returned envelope would show that the intimation of receipt of notice in the post office was given by the postal authorities to the respondents/accused and the respondents lateron failed to collect the same from postal authority, the same would amount to service of notice on the respondents.

13. As discussed in the foregoing paragraphs, the learned Judicial Magistrate First Class has taken into consideration the material on record. The findings of the learned Judicial Magistrate First Class cannot be

called as unreasonable or perverse. In the circumstances, the following order :-

14. The criminal appeal is hereby dismissed. The bail bonds of the respondents No. 1 and 2, if any, shall stand cancelled.

[M.T. JOSHI]
JUDGE

npj/criapl606-2015