

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

CRIMINAL APPEAL NO. 311 OF 2005

Umakant S/o Girdharrao Shirure
Age : 36 years, Occu. Agri.,
R/o. Nalegaon, Tq. Chakur,
Dist. Latur.

... Appellant
(Orig. Complainant)

VERSUS

Balasaheb S/o Gyanoba Gaikwad,
Age : 50 years, Occu. Agri.,
R/o. Ashta, Tq. Chakur,
Dist. Latur.

... Respondent

.....
Mr G. D. Kale, Advocate for the appellant
Mr R. K. Ashtekar, APP for respondent/State (Absent)
.....

CORAM : A. M. DHAVAL, J.
DATE : 3RD FEBRUARY, 2018

ORAL JUDGMENT:

1. This is an appeal against acquittal of the respondent for offence u/s 138 of the Negotiable Instruments Act (hereinafter referred to as 'NI Act') by learned Judicial Magistrate First Class, Chakur, in Summary Criminal Case No. 1070 of 2002.

2. As per the complaint, the complainant/ appellant is resident of Nalegaon, Tq. Chakur. He was agriculturist by profession.

He was knowing the accused/respondent r/o Ashta, Tq. Chakur, for 10 years. On 01.03.2001, the accused demanded from him a sum of Rs. 75,000/- as a hand loan for household expenses. He had agreed to refund the amount within three months. The complainant paid the amount to him and the accused issued to him a post-dated cheque dt. 01.06.2001. The accused did not make repayment. Hence on 22.06.2001, the complainant presented the cheque in his bank. The said cheque was returned alongwith memo of dishonour dt.22.06.2001 for insufficient funds. The complainant issued notice dt.02.07.2001. the accused received it on 03.07.2001 but did not reply or comply. Hence, the complaint was filed on 13.08.2001.

3. The complainant examined himself only and produced documents. The ld. trial Judge held that the cheque was issued towards security. He relied on **Shaku Concretes (P) Ltd. v. State of Gujarat 2000 Cr.L.J. 1988 (Gujarat)** to hold that the cheque issued at the time of payment for security is not towards discharge of legally enforceable debt. Therefore, the presumptions u/s 118 and 139 Negotiable Instruments Act are not applicable. There was no other evidence of existence of legally enforceable debt. Hence, the accused was acquitted.

4. Ld. Advocate Shri. G. D. Kale for appellant (complainant) argued that, the fact that the cheque was issued as a security is not material for consideration of a case u/s 138 NI Act. The amount of Rs.75,000/- was paid along with the cheque and was outstanding on the date of presentation of the cheque in the bank. The complainant has issued a notice which was not replied by the accused. The complainant has led his evidence which shows that, the complainant had very good relations with the accused over 10 years and he had previous hand loan transactions of small amounts. The complainant was reluctant to pay Rs. 75,000/- as it was a big amount and therefore the accused issued a cheque of Rs. 75,000/-. The complainant had received money by selling jaggery. the accused has not produced any material to substantiate his defence that he had issued blank cheque to cousin of the complainant by name Keshav. The complainant has proved following documents.

- (i) A dishonoured cheque of Rs. 75,000/- dt. 01.06.2001 Exh.23.
- (ii) Memo of dishonour dt. 22.06.2001 Exh. 24 & 25.
- (iii) OC of the notice dt. 02.07.2001 Exh.26.
- (iv) The postal receipt Exh. 27 and acknowledgement of RPAD Exh. 28.

5. The ld. trial Judge erred in disbelieving the prosecution case only on the ground that the cheque was received as security. Hence the complainant should be believed and the appeal should be allowed.

6. None present for the respondent.

7. The points for my consideration with my findings thereon are as follows :

Sr. No.	Points	Findings
1	Whether the accused had issued a cheque of Rs. 75,000/- towards discharge of legal liability and he failed to make payment of the same on service of notice when it was dishonoured?	Not proved.
2	Whether the accused is guilty u/s 138 NI Act and whether any interference is called for?	No.
3	What order?	The appeal is dismissed.

REASONS

8. The complainant has led his evidence as per his complaint and has placed strong reliance on the presumption u/s 139 and 118 of NI Act. Sections 139 and 118 NI Act read as follows.

S. 118. Presumptions as to negotiable instruments. Until the contrary is proved, the following presumptions shall be made:

(a) of consideration —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date —that every negotiable instrument bearing a date was made or drawn on such date;

(c) to (g) - Not Applicable.

S. 139. Presumption in favour of holder. — *It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.]*

9. The law regarding presumption u/s 139 is well settled. The burden is on the accused to rebut the presumption but the same can be rebutted either by leading oral evidence or by bringing on record the circumstances through the cross-examination of the complainant and his witnesses. In **Bhaskaran v Radhakrishnan 1998(4) Crimes 156** it has been held that, the said presumption can also stand rebutted by the presumption u/s 114 of Evidence Act.

10. It is common knowledge that, whenever there is a transaction between the parties and the cheques are issued for securing repayment, the cheque normally is for discharge of the debt only. If the cheque is postdated cheque, it is not a cheque till the

date of cheque. What is necessary is that, on the date of cheque, there should be existing liability to pay legally enforceable debt. The presumption u/s 139 NI Act is very much diluted when a blank signed cheque is obtained from the borrower. It is simply because the holder of the cheque can put any amount and any date of his choice and therefore the court should be cautious while considering the presumption u/s 139 NI Act.

11. As per Section 114 of Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The initial burden on the prosecution or the complainant to prove the charge beyond reasonable doubt is always there but in view of presumption u/s 139, it is substantially reduced. It is for the accused either to establish the necessary ingredients of offences are not made out in the light of the evidence brought on record or to create a reasonable doubt about the evidence led before the court.

12. When the transaction between the parties is totally unconscionable the presumption u/s 114 will come into picture and

the court will be at liberty to hold that the presumption u/s 139 of NI Act is nullified by the presumption u/s 114 of Evidence Act. While appreciating the presumption u/s 139, one must keep in mind the presumption u/s 114 of the Evidence Act and if the transaction is unconscionable, it is difficult to rely on the presumption u/s 139 NI Act alone. The complainant has to lead additional evidence about existence of legally enforceable debt otherwise if the evidence creates reasonable doubt in the mind of the Judge about the transaction, the presumption u/s 139 will not be sufficient.

13. In the present case, the Id. trial Judge held that as cheque was issued as a security and not for legally enforceable debt, the presumption cannot be drawn. In **Suresh Goyal v Anil Singhal** (Cri. L. P. 706/2014) decided by Delhi High Court on 14.05.2015, it is held that, merely because the cheque was issued as a security, it is not beyond the purview of provisions of Section 138 of the NI Act. If the cheque was issued at the time of handing over the money, the presumption u/s 139 NI Act will also be applicable. In the present case, the question is whether the complainant had paid Rs. 75,000/- to the accused at the time of receiving the cheque. In this regard, I find that though the complainant claimed that he was having very well acquaintance with the accused for 10 years, in cross-

examination, he admitted that he never visited the house of the accused for any occasion either good or bad. It is common knowledge that, close friends invariably go to each other at the time of moments of joy and sorrow like marriages, deaths etc. If the complainant has not gone to the house of the accused at any time for more than 10 years, it becomes doubtful whether he could have issued a huge amount of Rs.75,000/- to the accused to be used for a period of three months without interest.

14. The amount was much bigger in the year 2001 when the alleged transaction took place. The complainant is an agriculturist. If the accused demanded such huge amount, he would have certainly asked the purpose for which he was required the same. The complainant has disclosed that the accused told him that the amount was required for household expenses. There is no specific evidence what was the purpose for which the amount was required.

15. The complainant has stated that, he had sold jaggery in the month of January and he received its payment in the month of March. The accused was demanding amount for 15 days but the complainant was avoiding to make the payment as the amount was huge and when the accused assured that he would issue a cheque then only the amount was paid. This evidence suggests that, the

transaction must have taken place some days after receiving payment in March i.e. after 15th March, but the transaction has taken place on 1st March. the evidence of the complainant is contrary to the complaint that the accused came to him on 1st March and on the same day he issued the cheque. The complainant has not led proper evidence to show that he was having that much amount in his house at the relevant time for making the payment to the accused.

16. The complainant in cross-examination stated that, he was not remembering who has written his name on the cheque. If the cheque was issued in his presence by the accused, he should have been able to say that his name was written by the accused. If he was not remembering, the cheque must be blank in respect of name of the complainant. He stated that, the cheque was dt. 22.06.2001 but it was actually 01.06.2001. These admissions are required to be considered in the light of the defence raised by the accused. According to the accused, one Keshav Shirure, cousin of the complainant had floated a scheme of Lucky Draw and had given 500 tickets to him to work as a commission agent and that time he had obtained two blank signed cheques from him. The admissions by the complainant suggests that the cheque was not written in his presence as claimed by him.

17. As per the provisions of Income Tax At, payment of any amount above Rs. 20,000/- should have been made by bank transaction but in the present case, it is stated that the transaction was made in cash. As earlier discussed, there are doubts whether the complainant was having cash amount of Rs. 75,000/- on 01.06.2001 or not. In the light of the facts stated herein above, I find that the accused has brought on record the circumstances to draw presumption u/s 114 of Evidence Act that having regard to the common course of natural events and human conduct, the complainant could not have paid Rs. 75,000/- to the accused for a period of three months. It was therefore necessary for the complainant to lead additional evidence and he should not have merely relied on the presumption u/s 139 of the Negotiable Instruments Act.

18. The law regarding appreciation of evidence of by the appellate court in appeal against acquittal is well settled. If the view taken by the ld. trial Judge is reasonable and probable view, the appellate court cannot interfere with the same. Though the reason given by the trial Judge for acquittal may not be appealing, the facts and circumstances stated herein above disclose that his findings that presumption u/s 139 of NI Act would not be applicable is a reasonable and probable view.

19. Since the provisions of Section 138 of NI Act have been more abused than used, the court has to be very cautious while drawing presumption u/s 139 of the NI Act when the facts are unconscionable and require additional evidence apart from the presumption u/s 139 NI Act. In the light of the above facts, it is not possible to interfere with the finding of the ld. trial Judge. Hence, I answer the points in the negative and dismiss the appeal. Hence the order.

ORDER

[I] The appeal is dismissed.

[A. M. DHAVALE]
JUDGE

Punde