

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

Criminal Application No. 03992 of 2016

District : Jalgaon

Sau. Sonal w/o. Arvind Khandar,
Age : 47 years,
Occupation : Business,
R/o. Subhash Chowk, Amalner,
Taluka Amalner,
District Jalgaon.

.. Appellant
(Original
complainant)

versus

Dipak s/o. Pralhad Bhavsar,
Age : 59 years,
Occupation : Business,
R/o. Tambapura, Amalner,
Taluka Amalner,
District Jalgaon.

.. Respondent
(Original
accused)

With

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.. Respondent
(Original
accused)

.....

Mr. C.R. Deshpande, Advocate, for the applicant.

Mr. Girish Rane, Advocate, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 30TH JULY 2018

JUDGMENT :

01. Both the proceedings are filed by the applicant - original complainant seeking leave to appeal under Section 378(4) of the Code of Criminal Procedure, 1973, to challenge the acquittal of the respondent - accused on 02.09.2014, by the Judicial Magistrate (First Class), Amalner, District Jalgaon, in Summary Criminal Case No. 0463 of 2007 and Summary Criminal Case No. 0727 of 2007, respectively. Since both the matters are arising between the same parties, the basic transaction is said to be one and same, both these applications are disposed of by this common judgment.

02. The original complainant has come with a case that she was knowing accused. Accused was in need of money for domestic purpose as well as for his business and, therefore, he has approximately taken hand loan of Rs. 16,50,000/- from her. When she demanded repayment of the said amount, accused had issued cheque bearing no. 044152 for Rs. 9,59,000/- on 12.02.2007 drawn on Amalner Urban Co-operative

Bank. The second cheque was issued bearing no. 741165 for Rs. 6,91,000/- on 20.03.2007 drawn on State Bank of India, Amalner Branch. The first cheque was deposited by the complainant with her Bank on 17.02.2007 which came to be returned on the ground of insufficient funds. She issued legal notice to the accused but in spite of receipt of the same, he failed to comply with the notice and, therefore, the complainant filed S.C.C. No. 463 of 2007 on 26.03.2007 against the accused. The second cheque was deposited by the complainant with her Bank on 23.03.2007. It was also returned dishonoured. For the same reason, she had issued statutory notice. In spite of receipt of the said notice, he did not comply with the same and, therefore, she filed S.C.C. No. 727 of 2007 on 16.05.2007.

03. In both the matters, after verification and perusal of the documents, process came to be issued against the accused. He appeared. Particulars of the offence were framed and explained to him. He pleaded not guilty. In both the matters, trial has been conducted. After hearing both sides, the learned trial court has acquitted the accused from both the cases on 02.09.2014 by separate judgments. Thus, applications before this Court seek leave to appeal challenging the said respective acquittals.

04. Heard learned Advocate Mr. C.R. Deshpande

for the applicant - original complainant in both the matters, as well as learned Advocate Mr. Girish Rane for the respondent - accused in both the matters.

05. The learned Advocate appearing for the complainant has submitted that the learned trial court has not taken into consideration the evidence that was adduced by the complainant in proper perspective. Without any proper evidence, in defence, learned trial court has found substance in the defence taken. Accused has not disputed both the cheques. Therefore, the presumption under Section 139 of the Negotiable Instruments Act, 1881, ought to have been invoked and then it was not necessary for the complainant to lead evidence as to how she was having amount of Rs. 16,50,000/- with her. He, therefore, prayed for leave to appeal in both the cases.

06. Per contra, learned Advocate appearing for the respondent - accused supported the reasons given by the learned trial court while acquitting the accused.

07. The first and foremost fact that is required to be noted is that in both the cases, almost same evidence has been led by the complainant. She has stated that the accused has taken hand loan from time to time on the ground of business as well as domestic

reason. The outstanding amount of the accused was to the tune of Rs. 16,50,000/-. However, she has not given details as to since when she was giving amount to the accused and how much amount was given at what time. In her cross examination, she has stated that she has not kept any amount. Under such circumstance, there is absolutely no proof that she was holding either collectively or at any such point of time, equivalent amount, which she says that it was extended to the accused. Merely because the accused is not disputing his signature on the disputed cheques, that does not mean that there would be automatic presumption under Section 139 of the N.I. Act. The basic burden, which is definitely prima facie, at least, is on the complainant to show that she had extended such amount from time to time to the accused. Only vague statement is not enough.

08. The complainant has thereafter come with a case that when she demanded the amount back, at that time, two different cheques were given by the accused. She has not explained as to when she had demanded the amount and why two different cheques were given by the accused to her.

09. In her cross examination, a different relationship between her and the accused has come up. She has admitted that she was married to one Arvind Khandar. She has daughter by name Amee, who was then

taking education in boarding school at Gujarat. In clear terms, she admits that on the documents of her daughter, she has signed in the capacity as aunt (though she is, in fact, her mother) and accused as signed as *Mavasa* (aunt's husband). She further admits that her son was admitted in the school at Shirpur and at that time, accused was with her. She has taken accused with her 2 - 3 times in the school of her son and time to time, accused has signed on the fee receipt of the school. She has undergone an operation in the hospital of Dr. Joshi at Amalner and at that time, accused has signed on the consent form. In clear terms, she admits that she was in relationship with accused since 7 - 8 years. Even on certain occasions, accused has addressed her as his wife. Thus, it is to be noted that the complainant has suppressed all these facts in her complaint and tried to give a picture that there was only the relationship as creditor and debtor between her and accused in her complaint.

10. Defence has been taken by the accused, that when complainant used to be in his company, at that time, on certain occasion, she has taken possession of the cheque book and then she has misused it. It is to be noted that the accused has entered the witness box and filed his affidavit stating reason as to how the disputed cheques went into the possession of the complainant. He in clear terms admits that

there was illicit relation between him and the complainant and the children of the complainant and his relatives were also knowing about their relationship. His cross was on a very different point regarding his financial status, etc. However, we do not find anything contrary to his statement that there was illicit relationship between him and the complainant. When that relationship is admitted by the complainant, there is substance in the defence that has been taken by the accused.

11. Another aspect is required to be taken into consideration which has emerged in the cross of the complainant, that till 2000, she was residing in a rented premises. She thereafter purchased a flat for Rs. 1,75,000/-. According to the complainant, she had sole shop nos.11 and 12 from Saraf Bazar, belonging to her father-in-law. She has also stated that she had also purchased flat from Kapadia Commercial Complex. If we consider all the details, it emerges that the shops belonging to her father-in-law fetched her Rs. 14,95,000/-, but she says that the consideration was shown at Rs. 4,50,000/- only. She also admits that after selling those two shops, she had purchased shop from Kapadia Commercial Complex. All these transactions do not support that at any point of time, she was holding amount to the tune of Rs. 16,50,000/-. On the contrary, further she has admitted that she had taken loan of Rs.

1,50,000/- from Mahavir Bank on two occasions and amount of Rs. 3,00,000/- was taken on two occasions. If she herself was taking loan, then the question arises whether she was in a position to extend hand loan to any other person.

12. The third fact that is required to be taken into consideration is that, in S.C.C. No. 463 of 2007, the statutory notice was replied by the accused on 20.02.2007. The said reply is at Exhibit 53 and in that notice reply, he has denied all the allegations. Therefore, it is impossible that he would have issued another cheque on 20.03.2007 in favour of complainant which is the subject matter of S.C.C. No. 727 of 2007.

13. The complainant is relying on certain entries in the account extract of the accused. In order to prove those transactions, she has examined witnesses. Even if for the sake of argument, we accept those entries, yet, the total of the same will not be to the tune of Rs. 16,50,000/-. The testimony of CW 02 Balkrushan and CW 03 Bhaskar would give a picture that she had extended amount of Rs. 5,20,500/-. However, in S.C.C. No. 727 of 2007, the cheque amount is Rs. 6,91,000/-. How it could be more than what is extended, is a question which has not been answered by the complainant. In other matter also, i.e. S.C.C. No. 463 of 2007, if the

amount which has been told by CW 02 Balkrushan and CW 03 Bhaskar is tallied, it would be to the extent of Rs. 6,98,500/-, whereas the cheque amount is Rs. 9,59,000/-.

14. The learned trial court has rightly relied on the decision of this Court in the case of *State of Maharashtra Vs. Kalpana Bhaskar* [2009(1) Bom.C.R.(Cri.) 184], wherein the cheque amount was of more amount than the outstanding and, therefore, this Court had come to the conclusion that there cannot be said to be a legally enforceable debt or liability against the accused.

15. A well reasoned order and judgment has been given by the trial court. All the angles involved in the matter have been properly discussed. The law is properly applied. Under such circumstance, there is no necessity to interfere in the order of acquittal. No case is made out to grant leave.

16. In the result, both applications fail and same are hereby rejected.

(Smt. Vibha Kankanwadi)

JUDGE

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Bhagwan
Govindrao
Puranik

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by Bhagwan
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