

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL NO.54 OF 2020

SHRI VYANKATESH MULTISTATE COOPERATIVE CREDIT SOCIETY
LTD., THROUGH MR. SACHIN BHAGWAN NATKAR
VERSUS
SIDDHARTH BHAGWAN GANGAWANE

.....
Mr. J. K. Bansod, Advocate for the applicant.
.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 17th March, 2021

ORDER :-

- . Heard learned Advocate appearing for the applicant - appellant.
2. Applicant seeks leave to appeal under Section 378(4) of the Code of Criminal Procedure, 1973 to challenge the judgment and order passed by the learned Additional Chief Judicial Magistrate, Ahmednagar in Summary Criminal Case No.2456 of 2018 on 13.02.2020. Respondent is the original accused and the present applicant is the original complainant. Complainant had filed the said Summary Criminal Case alleging that the respondent – accused has committed offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as ‘N.I. Act’). By the said judgment and order, learned Additional Chief Judicial Magistrate, Ahmednagar has acquitted

the respondent.

3. It has been vehemently submitted on behalf of the applicant that the applicant – original complainant is a Cooperative Society, registered under the Multistate Cooperative Societies Act, 2002. It carries on the business of providing financial assistance to the needy members of the society by way of credit facilities like cash credit, term loan etc.. Respondent – accused was temporarily appointed as Pigmy agent by the Bidkin Branch of the applicant – Society on 01.12.2015. It was on the commission basis to collect daily deposits from the account holders of the Society. The respondent used to collect daily deposits from the account holders residing in Bidkin, Dhorkin, Kodgaon, Balanagar, etc. Thereafter, respondent had made application to the Chief Executive Officer of the Society to employ him as an officer in the service of the applicant - Society on 22.06.2017. Thereafter, he came to be appointed as Credit Officer by letter dated 22.07.2017. It is stated that the applicant after collecting the amount used to make an endorsement about collection of the amount and balance in the account of the concerned account holder in the passbook. The branch maintains the account and records every transaction pertaining to account holder in electronic form. It has been contended that certain amounts were collected by the accused from account holders, but certain amount was

outstanding from account holder. As per the account holders, they had given the said amount to the accused, but he has not made any entry in the account statement. After it was seen that there is huge difference in the passbook and the account statement, an undertaking was given by the respondent on 05.02.2018. It was contended that he had acknowledged that he has misappropriated amount of Rs.2,12,000/-. He undertook to repay the same and in spite of that undertaking, it is stated that he had not made the payments, but issued cheque for Rs.2,50,000/- on 03.03.2018 drawn on State Bank of India, Bidkin Branch. On presentation of the said cheque, it was dishonored on the ground "funds insufficient" and, therefore, the complainant had issued statutory legal demand notice on 31.03.2018. Accused was called upon to make the payment under the cheque, which he failed and, therefore, the complaint was lodged.

4. It has been further submitted on behalf of the applicant that after the process was issued, accused appeared. His plea was recorded. Thereafter, trial was conducted. Complainant has led the evidence. Statement of accused under Section 313 of the Code of Criminal Procedure has been recorded. After hearing both sides, the learned Magistrate has acquitted the accused on the ground that the complainant has failed to prove that there was any legally enforceable

debt or liability to pay any amount to the complainant. This finding is wrong, when it is admitted that the cheque was issued by the accused and there was outstanding amount from him. The presumption under Section 139 of the N. I. Act was attracted. Accused has not led any evidence to rebut the same and, therefore, he ought to have been convicted. There is strong case in favour of the complainant to grant leave to appeal.

5. Learned Advocate for the applicant has relied on the decision in ***APS Forex Services Pvt. Ltd. Vs. Shakti International Fashion Linkers and others, (2020 (4) Mh.L.J. (Cri.) (S.C.) 384)***, wherein it has been held :-

“Section 139 of the Negotiable Instruments Act is an example of reverse onus clause and therefore once the issuance of the cheque has been admitted and even the signature on the cheque has been admitted, there is always a presumption in favour of the complainant that there exists legally enforceable debt or liability and thereafter it is for the accused to rebut such presumption by leading evidence. The accused has admitted the issuance of the cheques and his signature on the cheque and that the cheque in question was issued for the second time, after the earlier cheques were dishonoured and that even according to the accused some amount was due and payable, there is a presumption under Section 139 of the N.I. Act that there exists a legally enforceable debt or liability. Of course such presumption is rebuttable in nature. However, to rebut the presumption the accused is required to lead the evidence that full amount due and payable to the complainant has been paid.

In the present case, no such evidence has been led by the accused. The story put forward by the accused that the cheques were given by way of security is not believable in absence of further evidence to rebut the presumption and more particularly the cheque in question was issued for the second time, after the earlier cheques were dishonoured.”

6. Perusal of the entire record would show that the complainant intended to say that accused had accepted certain amount from the account holders of the Society, but he has not made payments of the same in their respective accounts and has not given that amount in the booty of the Society. Under this context, it is stated that there was legally enforceable debt or liability as against the accused to pay that amount to the complainant, however, it is to be noted from the contents of the complaint on the face of it, that it does not say anything about the alleged undertaking that was given by the accused. The particulars of amount of Rs.2,50,000/- i.e. how much was collected from which person and has not been deposited, was not given. The affidavit-in-chief of witness Mangesh Mukund Dehedkar examined on behalf of complainant would also show that there is absolutely no mention about the alleged undertaking given by the accused, however, reference of the same is made by the applicant in present application in paragraph No.8 of the present petition. At Exhibit-D, in the present application, at page No.60, photocopy of undertaking has been filed, which is dated

05.02.2018. It says that in his passbook, there is difference of Rs.2,12,000/- and amount of Rs.50,000/- is due from accused towards loan. He has stated that he would pay that amount in one month. It appears that this document was never produced before the learned Trial Judge as the examination-in-chief is totally silent on that point. If any evidence which can be said to be the best evidence to prove a party's case is withheld by that party for the reasons unknown, then benefit of the same cannot be given to such party. Accused had no opportunity to give any kind of explanation in respect of this document and, therefore, now, at this appellate stage, for the first time, the applicant cannot be allowed to rely upon this document to prove that there was legally enforceable debt or liability against the accused. Even if for the sake of arguments, it is taken that this document can be in any way inferred, yet, the total amount that was allegedly due, would come to Rs.2,62,000/- and then why the complainant could accept cheque for Rs.2,50,000/- only, would be a question. Complainant is not coming with the case that, that cheque was accepted towards any part payment of the amount outstanding. Further, the complaint as well as examination-in-chief is also silent on the point that anything was due towards loan amount, which accused had taken. How both the amounts could have been added at one time is a question. The entire transaction

that is reflected in the complaint as well as examination-in-chief is towards the amount that was allegedly collected by the accused and not deposited with the Society. As per the said undertaking, that amount comes to only Rs.2,12,000/-, whereas the cheque amount is Rs.2,50,000/-. Under this circumstance, there is no explanation by the complainant as to how such amount was due from accused.

7. The learned Additional Chief Judicial Magistrate has correctly held that there is absolutely nothing produced on record to show that the said amount was due from accused and in order to discharge that legally enforceable debt or liability, the disputed cheque was given. Every document was, in fact, available with the Society, but for the reasons best known, the complainant has not produced it.

8. Complainant cannot only rely on the cheque. Even though it is admitted that the disputed cheque bears the signature of the accused, yet, the basic or initial burden would always be on the shoulders of the complainant to atleast show that something was legally due from accused towards the complainant. The legal position that has been summarized in *APS Forex Services Pvt. Ltd. (Supra)* cannot be disputed. But in this case itself, note has been taken in respect of the decision in *Kumar Exports Vs. Sharma Carpets, (2009 (4) Mh.LJ (S.C.) 23)*, wherein Hon'ble Apex Court has elaborated on the use of presumptions under

the Act. So also, note of the decision in ***Basalingappa Vs. Mudibasappa [(2019) 5 SCC 418]*** has been taken and it is observed that, “when the proceedings were initiated under Section 138 of the N.I. Act the accused denied the debt liability and the accused raised the defence and questioned the financial capacity of the complainant. To that, the complainant failed to prove and establish his financial capacity. Therefore, this Court was satisfied that the accused had a probable defence and consequently in absence of complainant having failed to prove his financial capacity, this Court acquitted the accused.” After taking note of ***Basalingappa’s*** case (Supra), it was then held in ***APS Forex Services Pvt. Ltd. (Supra)*** that the facts are different and therefore, that legal position will not be applicable. However, though in this case, there is no question of financial capacity of the complainant, yet, when the accused had challenged the legally enforceable debt or liability and the complainant was having entire record, yet refrained itself from producing it on record, then adverse inference will have to be drawn and it will have to be held that the presumptions stood rebutted in view of non production of documents by the complainant itself. A suggestion was specifically given to the witness of the complainant in his cross on behalf of the accused that the complainant is not having documents regarding daily collection of the accused. To this, he has

answered in the negative. That means, he wanted to say that he has documents. But then, further he accepted that he has not produced those documents. Further, it was suggested that when they had given service to the accused, at that time, they had taken a blank cheque from accused and it was alleged that the said cheque has been misused. This appears to be a probable defence. It is to be noted that the complainant has not come with the case that after it was found that the accused has not deposited the amount which he had collected from the account holders of the society, any notice was given to the accused calling upon his explanation and in response to the same, the said alleged undertaking was given by the accused. Complainant has also not explained as to why complaint was not filed with the police regarding misappropriation. Therefore, on all these counts, the testimony of complainant's witness was untrustworthy. It has been rightly discarded by the learned Additional Chief Judicial Magistrate.

9. For the aforesaid reasons, no case is made out to grant leave to appeal as the learned Trial Judge has correctly appreciated the evidence and correctly dealt with the legal points involved. Application stands rejected.

[SMT. VIBHA KANKANWADI, J.]

scm