IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO.34 OF 2008

APPELLANT: Shriram S/o Madhao Chaudhari
Aged about 62 yrs, Occu. - Retired,
R/o At Girola, Tah. and Distt. Bhandara.

... Versus ...

RESPONDENT: Dhanraj S/o Bajirao Patil
Aged about 42 yrs, Occ. - Business,
R/o Plot No.108, Swaraj Nagar,
Manewada Road, Nagpur.

Ms. Aastha Sharma, Advocate h/f Shri P.R. Agrawal, Advocate for the Appellant.
None for the Respondent.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATE OF JUDGMENT : 3rd FEBRUARY, 2021

ORAL JUDGMENT:-

This is an appeal under Section 378 of the Criminal Procedure Code, 1973 challenging the judgment dated 17/04/2007 in Criminal Case No.637/2005. By the impugned judgment, the learned Magistrate has acquitted the Respondent - Accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

02] The Appellant herein had filed a complaint under Section 138 of the Negotiable Instruments Act alleging that the Respondent – Accused, who was a Secretary in Ambedkar Institute of Social Work, had assured to secure the job for his son on payment of Rs.1,00,000/-. Accordingly, the Appellant paid Rs.1,00,000/- to the accused for securing a job for his son as a Junior Clerk. On receipt of the said amount, the Respondent issued a letter of appointment dated 28/10/2004. When the son of the Appellant went to Nagpur to join the duties, he learnt that the institution was closed. The Appellant, therefore, requested the Respondent to refund the amount of Rs.1,00,000/-. It is the case of the Appellant that the Respondent issued subject cheque dated 16/04/2005 towards return of the money paid by the Appellant for securing the job. The said cheque was dishonoured for insufficient fund. The Respondent having failed to pay the said amount despite receiving statutory notice, the Appellant filed a complaint under Section 138 of the Negotiable Instruments Act.

03] Learned Magistrate, after considering the evidence on record, dismissed the complaint and acquitted the Respondent - Accused mainly on the ground that an amount of Rs.1,00,000/- was given as bribe. Learned Magistrate held that the cheque was not issued towards repayment of legally enforceable debt and hence, did not constitute an offence under Section 138 of the said Act. Being aggrieved by the order of acquittal, the Appellant has filed this appeal under Section 378 of the Cr.P.C.

04] Learned Counsel for the Appellant has relied upon the decision of

Kerala High Court in the case of ***Francis Mathew Vs. State of Kerala*** reported in ***2005(2) DCR 734*** and Chhattisgarh High Court in the case of ***R.L. Sahu Vs. Moh. Tahir Shekh*** reported in ***2012(3) MPHT (C.G.) 69***, to contend that the payment made to secure his job could not be termed as unlawful and opposed to public policy. She further submits that the Respondent has admitted having issued the cheque and presumption is that, it was issued towards legally enforceable debt.

05] Section 138 of the Negotiable Instruments Act reads thus:-

Dishonour of cheque for insufficiency, etc., of funds in the account.

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Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque,

as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

06] Section 139 of the Act provides that 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.

07] The three key ingredients necessary to constitute offence under Section 138 of the Negotiable Instruments Act are:- (1) legally enforceable debt, (2) the drawer of the cheque issued the cheque to satisfy part or whole of the debt and (3) the cheque so issued has been returned due to insufficiency of funds.

08] Section 118(a) of the Negotiable Instruments Act raises a presumption that, until the contrary is proved, every negotiable instrument was made or drawn for consideration, and that it was accepted, negotiated or transferred for consideration. Section 139 of the said Act raises a presumption that the holder of a cheque received the cheque of the nature referred to in Section 138 of the said Act for discharge, in whole or in part, or any debt or other liability.

09] In the case of ***APS Forex Services Pvt. Ltd. Vs. Shakti International Fashion Linkers & Ors.*** reported in ***2020(1) Cri.CC 729***, the Hon'ble Apex Court has referred to the decision in the case of ***Kumar Exports Vs. Sharma Carpets***, reported in ***(2009)2 SCC 513***, wherein it was observed as under:

> ***15.*** *Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".*
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> ***18.*** *Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of*

any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. *The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."*

10] In the instant case, the Appellant has himself come up with a case, that the money was paid to the Respondent - Accused to secure the job and it was only on realising that the Respondent had issued false and fabricated appointment letter and that the Appellant had approached the Respondent to refund the Amount. Dishonour of cheque issued by the Respondent towards refund of the said amount has led to filing of the complaint under Section 138 of the said Act. The agreement between the Appellant and the Respondent is the type mentioned in illustration (f) to the Section 23 of the Contract Act, 1872. The object of the agreement being unlawful, the agreement is void and is, therefore, not enforceable by law. Since the agreement was void from inception, Section 65 of the Contract Act would not be applicable. The Appellant had voluntarily agreed to pay illegal gratification and hence the rule of pari delicto would apply. Consequently, therebeing no legally enforceable debt or liability, provisions of Section 138 of the Negotiable Instruments Act would not apply.

11] Under the circumstances, the view taken by the trial court is plausible and possible view and does not warrant interference.

12] Hence, the appeal is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)

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