IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 137 OF 2016

Ramesh Murlidharrao Dhabadkar
Age; 69 years, Occu.: Retd.,
R/o Jadhavwadi, Aurangabad ..APPELLANT

VERSUS

1. Bharat Vankatesh Kendre
   Age: 43 years, Occu.: Service,
   as City Bus Driver,
   R/o CIDCO Bus Depot, Aurangabad
   and also at Plot No.6, Harne Nagar,
   Near Mohan Residency, Opp. S.B.O.A. School,
   Jalgaon Road, HUDCO, Aurangabad

2. State of Maharashtra ..RESPONDENT

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Mr. A.M. Gholap, Advocate for appellant
Mr. Swapnil Patunkar-Joshi, Advocate i/b J.P. Legal Associates for Respondent No.1
Mr. S.P. Sonpawale, A.P.P. for respondent no.2

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CORAM : R.G. AVACHAT, J.
RESERVED ON : 29th APRIL, 2022
PRONOUNCED ON : 15th NOVEMBER, 2022

JUDGMENT :

1. This is an appeal against acquittal. The appellant herein is the original complainant in Summary Criminal Case (S.C.C.) No.1255 of 2013 instituted by him against Respondent No.1 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ("N.I. Act"). The Judicial Magistrate First Class, Aurangabad ("trial Court"), on appreciation of

evidence in the case, acquitted the respondent vide its judgment and order dated 25th January, 2016.

2. The facts giving rise to the present appeal are as follows :-

The appellant (complainant) was serving as a Senior Operator with the Maharashtra State Electricity Board ("M.S.E.B."). He superannuated in January 2005. The complainant is the resident of Jadhavwadi, Aurangabad. Respondent No.2 ("respondent") too would reside nearby of Jadhavwadi. He was serving with Maharashtra State Road Transport Corporation ("M.S.R.T.C.") at Aurangabad. There was an acquaintance between the complainant and the respondent. The complainant, on the request of the respondent, advanced him a sum of Rs.3 lakhs as a hand loan. The amount was paid in cash. The respondent promised to repay the same within a few days. Since he failed to repay the money within stipulated period, the complainant asked the respondent to pay back the amount. He then issued a cheque dated 12th December, 2012 drawn on the State Transport Co-operative Bank Ltd., Aurangabad ("S.T.C.B."). The cheuqe was issued in the name of the complainant. The cheque came to be presented for encashment with Deogiri Nagari Sahakari Bank Ltd., Aurangabad. The cheuqe returned unpaid for the reason, "Funds Insufficient". The complainant received the intimation from his bank in that regard on 01st January, 2013. He, therefore, issued a statutory demand notice dated 09th

January, 2013 to the respondent. Inspite of service of notice, the respondent neither paid back the amount nor replied the same. The complainant, therefore, lodged the complaint.

3. The trial Court took cognisance of the offence. The respondent appeared in response to the summons. He pleaded not guilty.

4. The complainant examined himself on oath and produced in evidence the relevant documents. The respondent did not lead any evidence in his defence. It was a case of the respondent that he had no acquaintance with the complainant. He denied to have issued a cheque in complainant's favour. The receipt of the statutory notice has also been denied.

5. The trial Court acquitted the respondent mainly for the reason that the complainant did not have financial capacity to pay the respondent such a huge amount. The complainant claim to have had withdrawn the amount from his fixed deposit in the bank. He also placed on record his bank pass book (Exh.39) to show that a sum of Rs.5,94,000/- was withdrawn. The trial Court inspected the bank pass book to find on which date such amount was withdrawn. The complainant also placed on record statement of his bank account (Exh.40). The trial Court refused to read the same in evidence for want of certificate indicating the entries in the statement of account to be true and correct. According to trial Court, the complainant has conveniently

suppressed the date on which he allegedly paid the respondent sum of Rs.3 lakhs. The trial Court also found the postal acknowledge receipt appears in different signatures of the addressee (respondent), since his signature on the *Vakalatnama* and on the cheque in question were quite different than one on the acknowledge receipt. The trial Court held the complainant ought to have examined competent person to prove the factum of receipt of notice by the respondent. The trial Court held the respondent to have made out his defence during cross-examination of the complainant.

6. Heard. Both the learned counsel for the complainant and the respondent have placed on record their written notes of arguments. It has been submitted by learned counsel for the complainant that questions put to the complainant in cross-examination indicate acquaintance between the complainant and the respondent. The respondent admitted his signature in the cheque in question. Presumption under Section 139 of the N.I. Act comes into play. The suggestions given to the complainant indicate that the respondent admitted the complainant to be financially well off. The bank pass book was produced in evidence. Entries therein indicate withdrawal of a sum of Rs.5,94,000/-. Extract of the complainant's bank account was also placed on record. Discarding such evidence would nothing but perversity in the findings recorded based on the same. By virtue of Section 27 of the General Clauses Act, there shall be presumption of due service of notice. It

was for the respondent to offer some more explanation than mere denial of receipt of notice. Learned counsel, therefore, urged for allowing the appeal.

7. Learned counsel for the respondent would, on the other hand, submit that it is a judgment of acquittal. The appellate Court has, therefore, little scope to interfere therewith. Since when two views are possible, the one which favours the respondent – accused has to be adopted. The complainant did not lead evidence as to when he had advanced the amount. Learned counsel reiterated the reasons given by the trial Court for acquittal of the respondent. He has also relied on the judgment of this Court in Anil ***Narayan Jadhav Vs. Shifa Construction Pvt. Ltd., AIR Online 2019 2736***, wherein it has been observed thus :-

> *"Negotiable Instrument Act (26 of 1881), S.139 – Dishonour of cheque – Proof – Allegations that accused issued cheque to complainant which was returned dischonoured on ground of insufficiency of fund – Stand taken by accused is that complainant had business relationship and accused used to leave his letter head and rubber stamp and cheque book with complainant and signature in subject cheque is not his – Documentary evidence showing that signature of accused in subject cheque did not tally with signature of accused in another cheque – Complainant has not proved that this cheque was issued by accused – Accused effectively rebutted presumption u/s 139 of Act – Order of acquittal proper."*

8. Reliance is also placed on Apex Court judgment in case of ***K. Subramani Vs. K. Damodara Naidu, 2015 ALL MR(Cri.) 789 (S.C.)***, wherein it has been observed as under :-

"Negotiable Instruments Act (1881), Ss.138, 139 – Dishonour of cheque – Capacity of complainant to lend money – Appreciation of evidence – Loan of Rs.14 lakhs allegedly given in cash – Both parties working as lecturers in Govt. college in 1997 – Complainant claimed that he sold a site for Rs.5 lakh and rest was his saving from salary – However, sale deed was not produced – It was not even shown in income-tax return – On the contrary, evidence reveal that complainant had obtained a loan of Rs.1.49 lakh in 1997 – Complainant had no source of income to lend a sum of Rs.14 lakhs in 1997 – He failed to prove legally recoverable debt – Acquittal of accused, proper."

9. Considered the submissions advanced. Perused the evidence relied on. Gone through the authorities placed on record.

10. Relevant sections of the N.I. Act applied in this case read thus :-

138. Dishonour of cheque for insufficiency, etc., of funds in the account. — Where any cheque drawn by a person on an account maintained by him with a ban ker 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 be cause 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.

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.

142. Cognizance of offences.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), —
(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:
[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;
(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.
(2) The offence under section 138 shall be inquired into and tried only by a court within whose local local jurisdiction,—
(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or
(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

11. The complainant examined himself on oath. It is in his evidence that there was acquaintance between him and the respondent. Both of them were residing at or around Jadhavwadi, Aurangabad. He (complainant) has retired on superannuation from M.S.E.B. It is further in his evidence that he had ample funds with him. On request of the respondent, he paid him a sum of Rs.3 lakhs as advance. The respondent assured to pay back the money within some days. Since he failed to repay the amount within the time frame, on complainant's demand, he issued a cheque (Exh.18). The cheque has admittedly been issued on S.T.C.B, Aurangabad. Admittedly, the respondent was serving with M.S.R.T.C. at Aurangabad itself. He did not dispute to have a bank account with the S.T.C.B., Aurangabad. It was suggested to the complainant during his cross-examination that the complainant would advance money to various persons. It was also suggested that he had advanced a sum of Rs.76,000/- to one Rafiq Siddiquie. A sum of Rs.11,000/- was also advanced to one Jitendra Rathod. Reading between the lines would suggest that the respondent propose to make out a case that the complainant would do money lending. It was further suggested that he had paid a sum of Rs.3 lakhs to his brother-in-law – Rajesh Bhave and the cheque in question was received as security. Since the brother-in-law failed to pay back the amount, the cheque was sought to be enforced against the respondent. This suggestion goes a long way to indicate the respondent to have admitted his signature in the cheque. It is, therefore, for him to make out his defence with

some material more than mere suggestions. The respondent did not do such exercise. Once the respondent's signature in the cheque is proved or admitted, it is for him to rebut presumption under Section 139 of the N.I. Act. True, he may discharge his burden by leading evidence or making out his case from the cross-examination of the complainant or his witness. Nothing of that sort has however been done except suggesting his case.

12. The cheque in question is dated 12th December, 2012. The same was presented for encashment. Same is returned unpaid for the reason insufficiency of funds. Communication in that regard finds place at Exh.19 and 20. There is no dispute that the cheque was presented for encashment within the period of its validity. A statutory demand notice (Exh.22) was issued on 07th January, 2013. The postal acknowledgment receipt indicate that the notice was sent on the address of the respondent's service place. The respondent did not dispute that he was serving as a bus driver with CIDCO Bus Depot, CIDCO Bus Stand, Aurangabad. The postal acknowledgment receipt appears signature of the addressee. True, the signature appears to be different than one on the cheque and *Vakalatnama* as well. Learned counsel for the complainant was justified in contending that the respondent may have intentionally put somewhat different signature.

13. Section 27 of the General Clauses Act, 1897 reads thus :-

> *"27. Meaning of service by post.- Where any Central Act or Regulation made after the commencement of this Act authorizes*

or requires any document to be served by post, whether the expression “serve” or either of the expressions “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

14. In view of Section 27 of the General Clauses Act, it shall have to be presumed that the notice was duly served. In the facts and circumstances of the case, it was for the respondent to show that either he was not serving with CIDCO Bus Depot during the relevant time or he was not present at his office when the postman had come to deliver the envelope containing the statutory demand notice or the postman had, in fact, delivered the same to someone else.

15. Exhibit 40 is a statement of bank account of the complainant. Entries therein appear to have made in the regular course of business. The same indicate the complainant to have had sufficient funds in his account in the year 2009. It is true that there is nothing to indicate that when he really advanced the money. The fact, however remains that the complainant had retired on superannuation. He was suggested to have had advanced the money to various persons. The same suggests his financial status. Moreover, the respondent admits his signature in the cheque in question.

16. Each case has to be decided on the facts and circumstances obtainable therein. The facts of the judgments relied on by the respondent were altogether different. In Anil Jadhav's case (supra), there was difference in signatures in two cheques. The facts in case of K. Subramani (supra) indicate that the complainant claim to have advanced a sum of Rs.14 lakhs, a big amount. There was evidence to indicate that the complainant himself had obtained a loan of Rs.14 lakhs at the relevant time. As such, there was no evidence to indicate the complainant to have had sufficient funds.

17. It is reiterated that from the evidence on record it can reasonably be inferred that the complainant was a man of means. He had advanced money to some persons in those days. The respondent did not come with the case of it being an unauthorisedly money lending. The respondent admits his signature in the cheque. Presumption under Section 139 of the N.I. Act, therefore, comes into play. Besides mere suggestion in the complainant's cross-examination, there is nothing in the rebuttal of statutory presumption of the cheque, having been issued in discharge of legally enforceable debt. The statutory demand notice was issued by R.P.A.D. on the address of the respondent's service place. By virtue of Section 27 of the General Clauses Act, a notice shall be deemed to have been duly served. The trial Court has wrongly observed that the complainant failed to discharge his burden of proof of factum of having advanced the amount. The said observation is

inconsistent with the statutory presumption under Section 139 of the N.I. Act. Relying on Section 27 of the General Clauses Act, the trial Court ought to have held the statutory demand notice to have been duly served. This Court is, therefore, not at one with the findings recorded by the trial Court. Interference therewith is, therefore, warranted.

18. In the result the appeal succeeds. Hence, the following order :-

ORDER

(I) Criminal appeal is allowed.

(II) Impugned order dated 25th January, 2016 acquitting the respondent is hereby set aside.

(III) The respondent is convicted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

(IV) The respondent is, therefore, directed to pay the complainant a sum of Rs.3,25,000/- as compensation within a period of six months. In case of failure to pay the amount of compensation within stipulated period, he shall undergo simple imprisonment for one year.

(R.G. AVACHAT, J.)

SSD