

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.510 OF 2008

Lokmanya Gramin Bigarsheti
Sahakari Patsanstha Ltd.,
Chinchondi-Patil,
By and on behalf of
Mr. Abasaheb Suryabhan Gore,
Aged 37 years, occ. Service.,
R/o Chinchodi-Patil,
Tq. & Dist. Ahmednagar

... APPELLANT

VERSUS

1. Mr. Sandeep Vasantrao Jawale,
Aged major, Occu. Business,
R/o C/o Mr. Revaji Dhondiba Dhage,
Plot No.10, Doctor Colony,
Burudgaon Road, Ahmednagar

2. The State of Maharashtra
(Copy to be served on Public
Prosecutor, High Court of
Judicature of Bombay,
Bench at Aurangabad)
(Formal Party)

... RESPONDENTS

.....
Mr. N.R. Shaikh, Advocate for appellant
Mr. Swapnil S. Patil, Advocate for respondent No.1.
Mr. S.P. Sonpawale, A.P.P. for respondent No.2.
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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 11th February, 2022

Date of pronouncing judgment : 13th July, 2022

J U D G M E N T :

This is an appeal against acquittal. The appellant is the original complainant in Summary Trial Case, being S.T.C. No.3749/2007, instituted for the offence punishable under Section 138 of the Negotiable Instruments Act (N.I. Act for short). The respondent No.1 herein was the accused in the said case.

2. The appellant is a Co-operative Credit Society. It is its case that, on the application of the respondent No.1 herein, he was sanctioned a loan of Rs.30,000/- for purchase of a motorbike. The respondent No.1 availed the loan. He, however, did not pay any amount due on the loan account. For repayment of the loan the respondent No.1 had issued a cheque dated 8/6/2007 for Rs.80,000/-. The cheque was presented for encashment. The cheque returned unpaid for the reason "funds insufficient". A statutory notice of demand was, therefore, issued by Registered Post A.D. The notice returned with an endorsement, "Intimation given". Since the

respondent No.1 did not pay the amount in response to the demand notice, the complaint was filed.

3. The trial Court, on appreciation of the evidence in the case, acquitted the respondent No.1 observing that the appellant/ complainant failed to prove the legal liability to the extent of the cheque amount as on the date of issuance of the disputed cheque. According to learned counsel, the cheque amount exceeds the legal liability at the relevant time. Hence, the present appeal.

4. Learned counsel for the appellant/ complainant would submit that, the respondent No.1/ accused admitted his signature in the cheque. There is, therefore, statutory presumption that the cheque was issued in discharge of legally enforceable debt. The respondent No.1 had availed a loan of Rs.30,000/- for purchase of a motorbike. The registration certificate of the motorbike bears the charge of loan. The respondent No.1 had shifted his residence. The summons of the case was served on him on the address on which the statutory notice of demand was issued. According to learned counsel, as per the extract of loan account, a sum

over Rs.93,000/- was outstanding. According to him, the trial Court ought not to have made the calculations to find the amount covered by the cheque was in excess of actual legal liability. He, therefore, urged for allowing the appeal.

5. The learned counsel for the respondent No.1/accused would, on the other hand, submit that, no loan was availed or applied for. The appellant had obtained certain cheques as a security. The cheque has been put to misuse. The statutory demand notice had not been duly served. The amount allegedly due was lesser than the amount covered by the cheque. According to learned counsel, the trial Court had, on appreciation of the entire evidence, acquitted the respondent No.1 herein. It is an appeal from acquittal. When two views are possible, the one that favours the accused must prevail. He, therefore, urged for dismissal of the appeal.

6. Considered the submissions advanced. Perused the evidence relied on. Before advertng to the factual matrix, reference to the relevant provisions of the Negotiable Instruments Act, 1881 is necessary. Sections 138, 139 and 142 of the Act are, therefore, reproduced below :-

“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 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 the 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 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.

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.

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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 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.

Explanation:- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.”

7. The appellant is a Co-operative Credit Society. Its Secretary was authorised to give evidence in the case. It is in his evidence that the respondent No.1 had availed a loan of Rs.30,000/- for purchase of a motorbike on 1/3/2002. The rate of interest was said to be little over 20.50 % p.a. All the loan related documents were executed by the respondent No.1. Those have all been placed on record. The respondent No.1 admits signature in the cheque. Moreover, the registration certificate of the motorbike bears a charge of the loan availed by him. According to him, a sum of Rs.88,360/-

was due from the respondent No.1 on his loan account. A statutory notice of demand was, therefore, issued. It returned with the remark, "Not claimed". According to learned counsel, the trial Court ought to have taken into consideration the extract of loan account prepared in the official course of business. The witness gave his evidence consistent with the averments in the plaint and documentary evidence on record. The respondent No.1 went to the extent of denying to have availed the loan facility when there is on record his loan application bearing his signature dated 1/3/2002, which is at Exh.20. He also executed a demand promissory note (Exh.21). The extract of his loan account, which has been prepared in official course of business finds place at Exh.22. The entries therein are presumed to be correct, as on the date of issuance of cheque a sum of little over Rs.88,000/- was due from the respondent No.1. The registration certificate of the motorbike stands in the name of the respondent No.1. In the said certificate, there is an entry of the charge of the loan availed for purchase of a motorbike. Admittedly, the cheque in question bears the signature of the respondent. As such, it has to be presumed that the amount noted in the cheque was due from him.

8. A statutory demand notice was issued in his name on the residential address of his father. The notice cover returned unserved with the remark, "Not claimed/ intimation given". The respondent was confronted with acknowledgment receipt (Exh.4) bearing his signature indicating him to have received the Court summons of this case on the address on which the demand notice (Exh.16) was issued. The trial Court has, therefore, rightly observed the notice to have been duly served in view of Section 27 of the General Clauses Act.

9. The only question is whether the amount covered by the cheque was in fact due from the respondent No.1 to the appellant Credit Society. The respondent No.1 had examined himself in defence. It is his case that, although he had applied for the loan, the loan amount was not disbursed in his favour. The said case of the respondent is found to be false and made with only to defraud the appellant Society. Nowhere in his examination-in-chief he came with a case that the amount due under his loan account was lesser than the amount covered by the cheque. The trial Court ought not to have made any observations in this regard. It is reiterated

that, as per the entries in the loan account of the respondent No.1, a sum more than Rs.80,000/- was due on the date the cheque was issued. It is a case of public funds. The trial Court ought not to have acquitted the respondent No.1 on flimsy grounds. Interference with the impugned order of acquittal is, therefore, warranted. The appellant/ complainant has duly proved that a sum of Rs.80,000/- was due from the respondent on the day the cheque was issued. As such, offence punishable under Section 138 of the Negotiable Instruments Act has been duly proved against the respondent. The appeal, therefore, succeeds. Hence the order :

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The judgment and order dated 15/3/2008, passed by learned Judicial Magistrate, First Class, Ahmednagar in S.T.C. No.3749/2007 is set aside.
- (iii) The respondent No.1 is convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and sentenced to pay fine of Rs.1,20,000/- (Rupees One Lakh Twenty Thousand),

to be deposited before the trial Court within a period of three months from today. In default of payment of fine, the respondent No.1 shall suffer simple imprisonment for eight (8) months. The fine amount, on realisation, be paid to the appellant as compensation. Due set-off be given in recovery proceedings, if any.

**(R. G. AVACHAT)
JUDGE**

fmp/-