IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.404 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

Mr. Sachin s/o Mahadeo Thombre,
Aged major, Occu. Business,
R/o Chinchodi-Patil,
Tq. & Dist. Ahmednagar. … RESPONDENT

....
Mr. N.R. Shaikh, Advocate for appellant
Mr. Swapnil S. Patil, Advocate for respondent
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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 a Co-operative Credit Society. It filed a Summary Trial Case, being S.T.C. No.3564/2007, for the offence punishable under Section 138 of the Negotiable Instruments Act (N.I. Act for short). The respondent herein was the accused in the said case.

2. In short, it is the case of the appellant/ complainant that, on the request of the respondent/ accused, he was granted business loan of Rs.49,000/- on 8/3/2003. The respondent had preferred Loan Demand Application, executed demand promissory note. He also submitted documents duly executed by the guarantors. The debenture was also issued in favour of the appellant. Since he did not repay the loan within time-frame, he was issued a demand notice dated 28/5/2007. He thereafter issued a cheque on 7/6/2007 for Rs.90,000/-. He, however, replied the notice with false contentions.

3. The appellant presented the cheque for encashment. The cheque returned unpaid for the reasons, "funds insufficient". A statutory notice was, therefore, served on the respondent on 19/6/2007. He gave a false and evasive reply to the said notice. The appellant, therefore, instituted the criminal prosecution.

4. On appreciation of evidence in the case, the trial

Court acquitted the respondent for the reason that the appellant Society failed to prove that the loan amount had in fact been disbursed in favour of the respondent. The evidence of the complainant's witnesses did not inspire confidence.

5. Heard. The learned counsel for the appellant/ complainant would submit that, the respondent/ accused admitted his signature in the cheque. All the loan related documents under his signature have been admitted in evidence. How can the respondent come with the case of having not received or availed the loan. Had really a signed blank cheque issued by the respondent remained with the appellant, it would have been a natural conduct on his part to immediately ask for return of the cheque. The statutory presumption under Section 139 of the N.I. Act could not be discharged by the respondent. According to learned counsel, the impugned order of acquittal deserves to be set aside.

6. The learned counsel for the respondent would, on the other hand, submit that, there is no evidence to indicate amount of loan to have been disbursed by Account Payee cheque. There is no evidence to suggest the loan amount was

availed by the respondent under a bearer cheque. In such a case, the person who receives the amount acknowledges receipt thereof by signing overleaf the cheque. The same has not been proved. When two views are possible, the one that favours the accused must prevail. He, therefore, urged for dismissal of the appeal. According to learned counsel, it takes not less than 20 to 25 days for sanction of the loan. In the case in hand, the dates appearing on loan related papers are inconsistent with the case propounded in the complaint. Every year audit of Co-operative Credit Society takes place. In none of such audit reports, the respondent is shown to have owed any amount to the appellant Credit Society. Had really the loan been disbursed, the appellant Society would not have kept quiet for the period from 2003 to 2007. The loan sanction papers do not bear signature of the Directors of the appellant Society. According to learned counsel, all in all it was a case of acquittal of the respondent. The trial Court has rightly acquitted him. No interference therewith is, therefore, warranted.

7. Considered the submissions advanced. Perused the evidence relied on. Before adverting 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.

. . . .
. . . .

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."

8. The trial Court, in paragraph No.6 of its judgment, has observed :-

> "6. Before we go to the merits of case, I may mention here, the admitted facts. It has been not disputed that, the disputed cheque is drawn on an account maintained by accused with his banker. It has been also not disputed that, the disputed cheque was presented in banker for encashment within a period of its validity. There is also no dispute with regard to the fact that, the disputed cheque was dishonoured for the reason "funds insufficient". There is also no controversy over the

> aspect that, the complainant credit society had issued the statutory notice to the accused within thirty days from the date of receipt of information from the bank regarding return of said cheque as unpaid. It is also not in dispute that, the accused had received the said statutory notice. It has been also not disputed that, despite the receipt of said notice, no payment of amount under the disputed cheque was made by accused to the complainant credit society. It has been also not disputed that, the present complaint is filed within the period of limitation. It has been however, disputed that, there exists legal liability/ debt to the tune of amount covered by disputed cheque and the accused issued the disputed cheque to the complainant credit society towards discharge of said legal liability/ debt."

9. As such, it is a case of the respondent/ accused that although he had applied for business loan and executed certain documents in that regard, he did not avail the loan facility. It is his case that, the office bearers of the appellant Credit Society must have misappropriated the amount showing it to have been advanced as a loan to him. According to him, then signed blank cheques were obtained from him by the appellant Credit Society. It is true that, in response to first demand notice the respondent came with such a stand. The appellant/ complainant presented the cheque for encashment. Admittedly, it returned unpaid for the reasons,

"funds insufficient". The respondent took the very stand of not having availed the loan, in response to statutory demand notice.

10. Admittedly, the appellant is a small Credit Society, based in a small village. All its office bearers and the respondent hail from the very village. Had really signed blank cheques were given to the appellant/ Society, the respondent would have asked for return thereof immediately. For a loan advanced by Co-operative Credit Society, there is said to be no period of limitation for recovery thereof. The statement of loan account has been placed on record. The same indicates that, on the date of issuance of the cheque, a sum little over than covered by the cheque was due from the respondent. It is true that the respondent has a daily Current/ Saving Account with the appellant Credit Society. He would deposit money daily in his Account. It was, therefore, contended that, had he really owed any amount, the appellant Credit Society would have transferred the balance from his Saving Account to his Loan Account. During arguments before the trial Court, the appellant Credit Society relied on Section 31 of the Maharashtra Co-operative Societies Act to submit that, such a way the amount could not be recovered. The Society

may or may not be correct, but its contention cannot be doubted.

11. According to the appellant/ complainant, a bearer cheque was issued towards advance of loan. Witness No.2 Bhaskar Sasane was examined in proof of the same. The witness was an employee of the District Central Co-operative Bank. It is in his evidence that a cheque bearing No.950071 was presented for encashment. It was for Rs.49,000/-. According to the complainant/ Society, it was a bearer cheque issued to the respondent. In proof thereof, his signature was obtained on the counterfoil of the said cheque. The said counterfoil has been admitted in evidence vie Exh.28. The respondent thereafter, in his written arguments, changed his stand to contend that while 10 blank cheques were obtained from him, his signature was obtained on a counterfoil of one of the cheques. This contention is found to be afterthought and only with a view not to pay back the loan amount. The fact remains that, the cheque bearing signature of the respondent was with the appellant Credit Society. The same was presented for encashment. Since the respondent admitted signature in the cheque, statutory presumption of the cheque to have been issued in discharge of legal liability

comes into play. The attending circumstances, namely the respondent applied for loan and executed loan related documents such as letter of guarantee, letter of authority, demand promissory note etc., and his signature appearing on counterfoil of the cheque do lead this Court to conclude that the ingredients of offence punishable under Section 138 of the Negotiable Instruments Act have been duly made out.

12. The respondent could not make out his defence even on preponderance of probabilities. True, for the negligence of office bearers of the appellant Credit Society, public funds shall not go waste. This Court is not at one with the reasons given by the trial Court for acquitting the respondent/ accused. In the result, the appeal succeeds. Hence the order :-

O R D E R

(i) The Criminal Appeal is allowed.

(ii) The judgment and order dated 8/5/2008, passed by learned Judicial Magistrate, First Class, Ahmednagar in S.T.C. No.3564/2007 is set aside.

(iii) The respondent is convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and sentenced to pay fine of Rs.1,40,000/- (Rupees One Lakh Forty Thousand), to be deposited before the trial Court within a period of three months from today. In default of payment of fine, the respondent shall suffer simple imprisonment for one year. 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/-