

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.331 OF 2018

Shashikant s/o Pandurang Giri
Age 37 years, Occu. Business,
R/o plot No.159, New S.T. Colony,
Meenatai Thakare Nagar,
N-2, CIDCO, Aurangabad
District Aurangabad

... APPELLANT

VERSUS

Narayan s/o Babasaheb Narwade,
Age major, Occu. Business,
R/o C/o Madhukar Vishwanath Hande,
"DHANAI", Plot No.367,
CIDCO Mahanagar-1, Aurangabad

... RESPONDENT

.....
Shri R.B. Ade, Advocate for appellant
Shri Ketan D. Pote, Advocate for respondent (appointed)
.....

CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 1st February, 2022

Date of pronouncing judgment : 12th July, 2022

J U D G M E N T :

This is an appeal against acquittal. The appellant herein is the original complainant in Summary Criminal Case, being S.C.C. No.954/2015 instituted for the offence punishable under Section 138 of the Negotiable Instruments Act. The respondent herein was the accused in the said case.

The trial Court, on appreciation of evidence in the case, acquitted the respondent simply on the ground that the statutory demand notice did not disclose what type of transaction it was between the appellant and the respondent. The trial Court held that the receiver of a notice must at least know his legal liability for which cheque was issued. Since such details were not in the demand notice, the notice was held to be not legal and proper.

2. This Court had admitted the appeal. On service of notice of this appeal, the respondent marked his appearance through an Advocate. When the appeal was taken up for final hearing, neither the respondent nor his Advocate were present. This Court, therefore, appointed Shri Ketan G. Pote, learned counsel to assist the Court in this matter by representing the respondent herein.

3. Learned counsel for the appellant would submit that, issuance of the cheque is the fact not in dispute. On receipt of the statutory demand notice, the respondent did not reply. A sum of Rs.3,05,000/- was paid to the respondent as a hand loan in the presence of witnesses. During trial, the respondent failed to make out his case or rebut a statutory

presumption. According to learned counsel, the statutory demand notice need not necessarily contain details of transaction. Learned counsel has relied on the judgment of the Apex Court in case of **Central Bank of India Vs. M/s Saxons Farms [2000(1) Mh.L.J. 366]**. He ultimately urged for allowing the appeal with grant of compensation amounting to twice the amount of cheque.

4. The learned counsel for the respondent would, on the other hand, submit that, the respondent examined himself on oath. It is in his evidence that he had paid the amount to the appellant time to time. The appellant torn a colour photo copy of the cheque. The respondent thought that the original cheque was destroyed. No monetary transaction did exist between the two post destroy of the cheque. According to learned counsel, the statutory demand notice is silent to disclose what kind of transaction it was. The learned counsel reiterated the reasons given by the trial Court in support of the judgment of acquittal.

5. Considered the submissions advanced. Perused the evidence relied on. Gone through the citation placed on record. 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.

.....

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.”

6. The respondent admitted issuance of a cheque in favour of the appellant/ complainant. Necessarily presumption under Section 139 of the Act does get attracted. The relations between the appellant and the respondent were friendly. The appellant was in construction business. The respondent was sand supplier. According to the respondent, he had made a bid in an auction of a sandspot. The Government had granted stay for some time. The stay was subsequently withdrawn. He had agreed to pay 3% of the

income from the business to the appellant. It is further his case that, whatever was due from him to the appellant had been paid. The appellant, in turn, torn the cheque in his presence. He then realised what was torn was a colour photo copy of the original cheque.

7. As against this, the appellant reiterated his case to have had paid a sum of Rs.3,05,000/- to the respondent as a hand loan. According to him, he had obtained the said amount from his father since he has retired from service on superannuation. From the evidence on record, a true nature of transaction between the two is not forthcoming. The fact, however, remains that the respondent had issued a cheque in favour of the appellant. It has, therefore, to be presumed that the cheque was issued in discharge of legally enforceable debt. When the statutory demand notice was issued to the respondent, and the same was received by him, he failed to respond to the notice. He had every opportunity to put forth his case in reply to the notice. Whatever he has deposed to in his defence evidence may be said to be afterthought. The trial Court has observed everything in favour of the appellant/complainant, but acquitted the respondent only on the ground that the statutory demand notice did not contain what kind of

transaction it was between the two. In view of this Court, the trial Court erred in so observing. In case of Central Bank of India (supra), the Apex Court observed :-

“Negotiable Instruments Act, Section 138(b) – Dishonour of cheque – Notice demanding amount of cheque – No form of notice is prescribed in Section 138(b) – The requirement is that notice shall be given in writing within fifteen days of receipt of information from the bank regarding return of cheque as unpaid and in the notice demand for payment of amount of cheque has to be made.”

8. The statutory demand notice (Exh.18) is on record. It has been specifically mentioned therein that the respondent was called upon to pay the appellant a sum of Rs.3,05,000/-, being the amount under the cheque. No fault with the demand notice (Exh.18), therefore, could be found. The order of acquittal passed by the trial Court, therefore, needs to be interfered with.

9. Since the amount was said to have been given to the respondent as a hand loan, and it was a friendly relationship between the two, this Court do not propose to saddle the respondent with either compensation or fine equal

to that of double the amount of cheque. Ends of justice would be met by sentencing the respondent to pay fine of Rs.4,25,000/- (Rupees Four Lakhs Twenty Five thousand) and to pay the same to the appellant as compensation. Since its a summary trial, he need not be heard on quantum of sentence, more so when he did not appear.

10. In the result, the appeal succeeds. Hence the order :-

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The judgment and order dated 4/1/2018, passed by learned Judicial Magistrate, First Class, Court No.1, Aurangabad in S.C.C. No.954/2015, acquitting the respondent of the offence punishable under Section 138 of the Negotiable Instruments Act 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.4,25,000/- (Rupees Four Lakhs Twenty Five thousand), to be deposited

before the trial Court within a period of three months from today. On realisation of the fine amount, same be paid to the appellant as compensation. In default of payment of fine, the respondent shall undergo simple imprisonment for a period of eight (8) months.

- (iv) Fees of Mr. Ketan D. Pote, Advocate is quantified at Rs.8000/- (Rupees eight thousand). The appointed Advocate shall intimate the respondent the decision of this appeal.

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

fmp/-