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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.187 OF 2009

Dr. Ajit Genbapu Kadam … Appellant
Vs.
Pravin Shriram Gholap & Anr. … Respondents

Mr. S. A. Sawant for the Appellant.
Ms. Lalita H. Panchakshari for Respondent No.1.
Mr. H. J. Dedhia APP for Respondent No.2-State.

CORAM : S. M. MODAK, J.

DATED : 19TH DECEMBER 2022.

P.C:-

1. Heard learned Advocate Shri Sawant for the Appellant, learned Advocate Ms. Panchakshari for Respondent No.1-accused and learned APP for Respondent No.2-State.

2. Respondent No.1 was acquitted by the order dated 30th September 2008 by the Court of 21st Joint Judicial Magistrate, First Class, Pune, in Criminal Case No.48321 of 2005 for the offences punishable under section 138 of the Negotiable Instruments Act. The correctness of said judgment is challenged by way of this Appeal.

3. Both learned Advocates have taken me through record of the trial Court which consists of oral testimony of the complainant, documentary evidence relied upon by them and oral evidence given

by accused and other four witnesses. Learned Magistrate has concluded that two cheques in question were not issued for discharge of debt or liability. Learned Advocate Shri Sawant also pointed out that only one point is framed by learned Magistrate in the judgment, whereas separate points ought to have been framed and it could have laid to clarity of findings.

4. On one hand the complainant has put up case that two cheques in question for Rs.3,50,000/- each were issued by Respondent No.1-accused to discharge liability and said liability has occasioned due to giving up financial assistance by him to accused. Whereas accused has not only taken defence of denial but he has also entered into witness box and denied receipt of any financial assistance of Rs.7,00,000/- and, in fact, pleaded that these two cheques and another cheque of Rs.15,000/- (in respect of which there is separate Criminal Case No.22188/2005 which resulted into acquittal and there is no Appeal) were issued for incurring process fees. It is for the reason that Respondent No.1-accused wants to avail of loan from financial institution and the complainant is in touch with several financial institutions and that's why these three cheques were issued.

5. Learned Magistrate has accepted the stand taken by accused persons. Learned Advocate Shri Sawant invited my attention to the following facts :-

(i) The stand taken before the trial Court was after thought and there is no reply to mandatory notice.

(ii) Issuance of cheque and signature is admitted by accused and as such the presumption under section 139 of the

Negotiable Instruments Act will come to his assistance.

(iii) Accused has not rebutted the presumption as permissible under section 139 of the Negotiable Instruments Act.

(iv) He also criticized conduct of Respondent No.1, in not co-operating with the Court by remaining absent and efforts which the complainant was required to undergo for securing his presence.

6. In support of his contention, he relied upon the following judgments :

(a) *APS Forex Services Private Limited Vs. Shakti International Fashion Linkers and Others, AIR 220 SC 945*

(b) Kalamani Tex and Anr. Vs. P. Balasubramanian, 2021 (5) SCC 283

(c) Kusum Ingots and Alloyes Limited Vs. Pennar Peterson Securities Limited, 2000 AIR (SC) 954.

7. Learned Advocate Ms. Panchakshari made the following submissions :-

(a) The complainant has not proved advancing of loan of Rs.7,00,000/-. There is no supporting document.

(b) Though the complainant issued four bearer cheques in name of accused, they were not encashed by accused but in fact accused encash it.

(c) The original of these four cheques were not produced on record.

(d) The mandatory notice was not received by accused.

(e) That notice was sent at Pashan address, whereas accused was residing at Dhankavdi address. In order to prove this, he has examined his banker Ravindra Bhambare and also examined staff from electricity board, one Gaikwad Dhondiba Pandurang.

According to her, accused has also examined two more witnesses.

8. There cannot be any dispute about proposition of law about drawing presumption under section 139 of the said Act. Once issuance of cheques and signatures are admitted, our courts have not accepted the plea that it was issued for security. In such case benefit of presumption under section 139 of the said Act is drawn if the accused fails to rebut that presumption, then certainly it goes against accused, that is sum and substance of the law laid down in these judgments. In this case, the accused has admitted about issuance of cheques and signatures, what is not admitted is filling other details and existence of legally recoverable debt and liability. The trial Court had placed burden on the complainant to prove that there was existing debt and liability. This approach of the trial Court is criticized by learned Advocate Mr. Sawant for the Appellant.

PRESUMPTION AND REBUTTAL

9. So we have to see whether these findings are correct. Now it is also true that presumption can be rebutted by adducing evidence or by way of bringing on record certain facts through cross examination and while doing that accused can also point out lacunae in the case of the complainant. In this case, accused has not only cross examined the complainant but he himself has entered into witness box. Both the learned Advocates have read the facts stated by them in examination in chief as well as cross examination.

EVIDENCE OF ACCUSED

10. It will be material to see what accused has stated in his examination in chief. He has said the following facts :-

(a) He has not received notice sent at Pashan address.

(b) He admitted the signatures on cheques in question at Exhibits-13 and 14.

(c) He has denied handwriting on cheques.

(d) He has issued three blank signed cheques to the complainant because the complainant has to avail loan for company's machinery and he may require the amount for process fees and other required expenses.

(e) He has denied owing amount of Rs.7,00,000/- to the complainant.

CROSS EXAMINATION

11. My attention is invited to cross examination of Respondent No.1-accused. An attempt is made to show antecedents of Respondent No.1-accused. It was put to him that he kidnapped one Vivek in October 2006, about auction of the property by Janta Sahakari Bank and filing of case by Tata Indicom. About filing complaint against accused by the complainant at the Chatursinghi police station in respect of cheating of Rs.7,00,000/-, he has admitted that there are also co-accused.

12. It is important to note that four cheques on which the complainant has relied upon in order to show that he has advanced loan of Rs.7,00,000/- to accused he has not produced the cheques

before the Court in original form. In fact true copies of these cheques were also shown to accused during cross examination. The accused has denied his signature on back side of the cheque. He has expressed ignorance in respect of payment on the basis of those cheques. It is not clear why these copies of cheques were not admitted in evidence.

EVIDENCE OF COMPLAINANT

13. Now, it is important to see what the complainant has said during his examination in chief. He has stated the following material facts :-

(a) Carrying on business by accused in the name of Gholap Knitting Pvt. Ltd. and inducing the complainant to part with Rs.7,00,000/- by way of four cheques ranging from 15th December 2004 to 5th January 2005.

(b) Returning amount by accused by issuing one cheque for Rs.15,000/- and two cheques for Rs.3,50,000/- each. The complaint pertains to dishonour of two cheques of Rs.3,50,000/- each.

(c) Reasons for dishonour of cheques is want of sufficient funds.

(d) Issuance of notice dated 9th September 2005 and receipt of notice.

CROSS EXAMINATION

14. The complainant was thoroughly cross examined. His attention was also invited to certain portion from private complaint and also to complaint made on 7/03/2005 at the Chatursinghi police station. I have perused cross examination very minutely. It can certainly be said

that the complainant has discharged initial onus of having issuance of cheques and signature on cheques by accused. So complainant is justified in taking benefit of presumption.

15. Now on the basis of above facts, it needs to be seen whether accused has rebutted the presumption. The accused has given two explanations, one is issuing four cheques in his name totalling to Rs.7,00,000/- but those cheques were not encashed by accused and in this way there is no payment of Rs.7,00,000/-. Secondly, issuance of three cheques to the complainant (not in discharge of debt or liability) but for assisting the complainant in incurring expenses of processing loan which was to be obtained in the name of company. It is true that so far as second aspect is concerned, except bare words of accused there is nothing on record to show that three cheques were issued for that reason.

16. Now the issue is whether it can be said that accused has successfully rebutted the presumption. After going through other cross examination, I find that conclusion drawn by the trial Court cannot be faulted with. Even though learned Magistrate has simply quoted number of judgments without observing whether they are applicable, the findings cannot be said to be erroneous. I will give reasons for that.

17. The complainant during cross examination has admitted that he is not having receipt for advancement loan of Rs.7,00,000/- to accused. Even he could not give explanation why he has not obtained receipt. When his attention is brought to certain averments in police

complaint lodged by him, he has disowned that portion. My attention is invited to certain portion from the FIR lodged by the complainant with the Chatursinghi police station. In that portion the complainant has admitted that in fact these four cheques were encashed on 15th December 2004 by him along with Zaheer Shaikh and even he has shown pancard. It pertains to cheque no.76924 for Rs.3,00,000/-. According to Respondent No.1-accused, similar modus operandi was also followed in respect of three cheques.

18. Apart from that during cross examination, the complainant has disowned certain portion from his police complaint made to the Commissioner of Police made on 7th March 2005. There he has stated that "Rs.7,00,000/- were paid by him towards capital investment being the newly added Director of the company". He has disowned that statement. During cross examination he has admitted that he has obtained loan from various financial institutions (Internal page No.10 of the cross examination). He has tried to give explanation that electricity was disconnected and that's why he is not aware about certain portion mentioned in the statement recorded by police. It is important to note that even he has admitted that he has not filed originals of bearer cheques totalling to Rs.7,00,000/-.

19. For the above reasons, I find that conclusion drawn by the trial Court about rebuttal of presumption by accused is not erroneous. There is no set of rules as to what kind of evidence is required in order to say that presumption is rebutted. It is question of fact. There is serious doubt as to whether really the complainant issued four cheques totalling to Rs.7,00,000/- to accused and accused encashed

them. This is version of the complainant.

20. In view of above, the evidence is not satisfactory. These observations are made on the basis of evidence adduced before the trial Court. Hence, I do not find any reason to interfere in the findings recorded by the trial Court and there is no merit in the Appeal and the Appeal is dismissed.

(S. M. MODAK, J.)