

Shiv

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.271 OF 2006**

Nisha I. Shukla ... Appellant
Vs.
Shri Laddudas & Anr. ... Respondents

None for the Appellant.
Mr. Satchit Bhogale for Respondent No.1-accused.
Ms. S. S. Kaushik APP for Respondent No.2-State.

CORAM : S. M. MODAK, J.

DATED : 8TH DECEMBER 2022.

P.C:-

1. Heard learned Advocate for Respondent No.1-accused who was appointed as the amicus curiae as per order dated 5th March 2020. The Appeal was already admitted on 2nd March 2006. Even notice is served on the Respondent No.1-accused on 3rd April 2006, but he could not appoint any Advocate due to poverty.

2. Learned amicus curiae has assisted the Court by reading the judgment and evidence. Considering variance in testimony of the complainant – Nisha Shukla and her husband, the Court of Metropolitan Magistrate, acquitted accused for the offence punishable under section 138 of the Negotiable Instruments Act as per the judgment dated 8th December 2005. The cheque was for Rs.1,70,000/- dated 8th July 2005. It was issued for repayment of the amount of hand loan taken by accused from the complainant.

There is a promissory note executed on 13th July 2004 by the accused. It was tendered in evidence of the Complainant's husband. It is in two parts, first part deals with details as to how money was paid to accused and promise by accused to repay it in two installments. It amounts to Rs.1,00,000/-. It also mentions about issuing cheques by accused at bottom of that note. There is one more endorsement which says about receipt of Rs.70,000/- in installment by the accused. It further mentions that accused has received in total Rs.1,70,000/-. This part does not say about promise to pay.

3. The cheque was returned for reason "funds insufficient". The cheque return memo was not tendered in evidence. The envelope containing notice returned back for reason "unclaimed" was tendered in evidence. It was also sent under a postal certificate. The accused tried to plead before the trial Court that during that period he had gone to his native place and also produced the railway tickets. Learned amicus curiae is right, if notice is sent on correct address and if it is not claimed by addressee, it amounts to service.

4. I have perused evidence of the complainant-wife and her husband. During examination in chief, the wife has not given details of amount advanced to accused. She is silent on money aspect and also expressed ignorance on money aspect in the cross examination. Whereas her husband made contrary statement as to when cheque was delivered. In the affidavit, he has stated that it was delivered in the year 2003, whereas in mandatory notice, she has said that it was delivered on 8th July 2005 (paragraph 2). Amongst them, delivery in the year 2003, is correct according to him. If we consider

this, then admittedly, an amount of Rs.1,70,000/- was not advanced initially. It was only Rs.1,00,000/- which was advanced and Rs.70,000/- was advanced in installment, in the year 2004. So admittedly, in the year 2003, there was no liability of Rs.1,70,000/-.

5. If the cheque is issued towards security, even the provisions of section 138 of the Negotiable Instruments Act can be invoked but only condition is that at that time liability must have occurred. Hence, the provisions of section 138 of the Negotiable Instruments Act cannot be invoked. For this reason and for the reasons mentioned in the judgment, I find no reason to interfere in the impugned judgment. Hence, the Appeal is dismissed.

6. The registry is directed to pay the fees of Rs.3000/- to amicus curiae Mr. Satchit Bhogale, who appeared for the Respondent No.1-accused.

(S. M. MODAK, J.)