

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 268 OF 2011

Dilip Virumal Ahuja	]	
Adult, Aged 42 yrs., Occ.Service,	]	
Residing at Room No.8, 2 nd floor,	]	
Building No.38, Nityanand Baug Society,	]	
Mahul Road, Chembur, Mumbai – 400 074	]	... Appellant
		(Org. Complainant)

V/s.

1.	Rekha Vithal Patil	]	
	Adult, Age 41 yrs., Occ. Business	]	
	Having her shop address as Ratna Tailor,	]	
	at Indira Market Shop No.91,	]	
	Opp. Sion Post Office & Sion Bus Depot,	]	
	Sion (West), Mumbai – 400 022.	]	
		]	
2.	The State of Maharashtra	]	
	In the Ld. M.M. 30 th Court,	]	
	Kurla, Mumbai (CC No.4825/SS/2006)	]	... Respondents
			(Resp.No.1 – Org. Accused)

Mr.B.S. Nayak for Appellant.

Mr.Prabhanjay R. Dave a/w. Mr.Pradeep P. Kumawat for Respondent No.1.

Mr.S.S. Hulke, A.P.P. for Respondent No.2-State.

CORAM : A.S. GADKARI, J.

RESERVED ON : 27th June 2022.

PRONOUNCED ON : 8th July 2022.

JUDGMENT :

1. This is an appeal under Section 378 (4) of the Code of Criminal Procedure by the complainant against Judgment and Order dated 11th January

2010 passed by the learned Additional Sessions Judge, Greater Mumbai in Criminal Appeal No. 363 of 2007 preferred by Respondent No.1, allowing the said appeal and setting aside the Judgment and Order of conviction and sentence under Section 138 of The Negotiable Instruments Act, 1881 (for short, 'N.I. Act') of Respondent No.1 by the learned Metropolitan Magistrate, 30th Court, Kurla, Mumbai in C.C. No. 4825/SS/06 dated 3rd May 2007.

2. Heard Mr.Nayak, learned Advocate for Appellant, Mr.Dave, learned Advocate for Respondent No.1 and Mr.Hulke, learned A.P.P for Respondent No.2-State. Perused entire record.

3. It is the case of Appellant that, he knew Respondent No.1 about six years prior to lodgment of the present complaint. That, Respondent No.1 was in need of money and therefore she approached Appellant and requested for grant of friendly loan of Rs.5,00,000/- (Rupees Five Lakh Only). Accordingly, Appellant advanced friendly loan of Rs.5,00,000/- to Respondent No.1. That, Respondent No.1 in discharge of her legal liability towards repayment of said loan issued a cheque in favour of Appellant, bearing No.515582 dated 23rd March 2006 for a sum of Rs.5,00,000/- drawn on Central Bank of India, Sion Branch, Mumbai. Appellant deposited the said cheque with his banker for encashment, when the said instrument was dishonoured and returned to Appellant unpaid with a Bank Memo dated 24th March 2006 (Exh.P-4) for the reason 'A/C CLOSED'. After receipt of intimation

from his bank, Appellant issued statutory demand notice on 10th April 2006 (Exh.P-5) through his Advocate calling upon Respondent No.1 to pay the amount due under the subject cheque within 15 days from the date of receipt of demand notice. The said notice was sent to Respondent No.1 by R.P.A.D. as well as U.C.P. Despite receipt of notice, Respondent No.1 neither complied with the demand made therein, nor replied the notice and therefore Appellant filed present complaint under Section 138 of N.I. Act.

4. The defence of Respondent No.1 was of total denial. It was her further defence that, her signed blank cheques were stolen or misplaced from her shop and the said fact was intimated by her to her bank by letter dated 24th August 2005 and thereafter closed her account. That, Appellant thereafter misused the said blank cheque and filed present complaint to harass her. It is also her defence that, her husband expired on 1st August 2006 and after his demise her in-laws harassed her and drove her out of house. Her in-laws also snatched important documents and belongings lying in her house. That, as her husband was seriously ill and subsequently expired on 1st August 2006, she could not reply notice issued by Appellant. She has also stated that, immediately after loss/misplacement of her signed cheques / cheque-book, she immediately lodged a complaint (Exh.D-3) with Sion Police Station on 23rd August 2005 and therefore there was no question of issuing any cheque to Appellant on 23rd March 2006.

5. The Trial Court after recording evidence and hearing the learned Advocates appearing for the respective parties was pleased to convict Respondent No.1 by its Judgment and Order dated 3rd May 2007.

Feeling aggrieved by the said Judgment and Order passed by the Trial Court, Respondent No.1 preferred Criminal Appeal No. 363 of 2007 in the Court of Sessions at Greater Mumbai. The Appellate Court after re-appreciating entire evidence on record was pleased to allow the said Appeal by its Judgment and Order dated 11th January 2010 by setting aside the conviction and sentence recorded by the Trial Court.

In this brief premise Appellant/Org. Complainant has filed present Appeal.

6. Mr.Nayak, learned Advocate for Appellant submitted that, Respondent No.1 did not reply notice dated 10th April 2006 issued under Section 138 of N.I. Act and therefore it is an admission on the part of Respondent No.1 towards issuance of disputed cheque. He submitted that, in a case under Section 138 of N.I. Act, the Court has to presume that the cheque was issued for discharge of debt. That, once a cheque is issued by a person, there would be a presumption in favour of the holder of the cheque that the cheque was issued in discharge of a debt. He submitted that, in the present case, the cheque was issued towards repayment of friendly loan and therefore there is presumption in favour of Appellant who was holder of the said

negotiable instrument. That, the Respondent No.1 has failed to rebut the presumption which is in favour of Appellant and as contemplated under Section 139 of N.I. Act. He submitted that, the object of issuance of notice under Section 138 of N.I. Act is to give a chance to the drawer of the cheque to rectify his/her omission and also to protect an honest drawer. Silence on the part of Respondent No.1 in not replying to the statutory notice issued by Appellant is a strong circumstance, which reflects the falsity of the case of Respondent. He submitted that, an offence under Section 138 of N.I. Act is completed on failure by Respondent No.1 to make payment upon demand notice within prescribed period. In support of his contentions he relied on the following decisions.

- (i) Rakesh Cashew Industry Vs. Shri Damodar K. Ghadi, 2007 C.T.J. 847
- (ii) P. Venugopal Vs. Madan P. Sarathi, (2009) 1 SCC 492
- (iii) Chanchal Choudhary Vs. State of Maharashtra & Ors., 2010(1) All MR 181
- (iv) Smt.Kiran Yugalkishore Bhattad Vs. Smt.Sushila Ramcharan Kattamwar, 2010 Cri.L.J. 2705
- (v) Uttam Ram Vs. Devinder Singh Hudan & Anr., (2019) 10 SCC 287
- (vi) Hemant Pavel Gracias Vs. Socorro Santan Fernandes, 2008(1) Mh.L.J. 505

He therefore submitted that, the impugned Judgment and Order be quashed and the Order of conviction passed by the Trial Court be restored by allowing present Appeal.

7. Per contra, Mr.Dave, learned counsel appearing for Respondent No.1 opposed the Appeal and submitted that, the First Appellate Court has rightly re-appreciated entire evidence on record and has recorded a finding that, Respondent No.1 has legally rebutted presumption under Section 139 of N.I. Act, which was in favour of Appellant. He submitted that, Appellant has failed to prove that, he ever advanced any friendly loan to Respondent No.1 and towards the repayment of legally enforceable debt or liability the Respondent No.1 had issued the cheque in-question. He submitted that, there are no merits in the Appeal and the same may be dismissed.

8. The Hon'ble Supreme Court in the case of *Kumar Exports Vs. Sharma Carpets, reported in (2009) 2 SCC 513*, in para No.20 has held as under :-

“20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in

every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.”

The said view is followed by the Hon’ble Supreme Court in the case of *Uttam Ram Vs. Devinder Singh Hudan & Anr.*, reported in (2019) 10 SCC 287.

9. In the present case, perusal of evidence available on record clearly indicates that, there is not a whisper in the complaint so also in the examination-in-chief of Appellant that on which date or in month he advanced the alleged friendly loan to Respondent No.1. His evidence is also silent with respect to the fact that, as to how he advanced friendly loan of Rs.5,00,000/- to Respondent No.1, i.e. in cash or by way of bank transfer. There is no agreement in writing on record or any receipt executed by Respondent No.1 towards acceptance of the said friendly loan. It is to be noted here that, the Appellant in his evidence has admitted that, his annual income was Rs.2,00,000/- and he is a income tax payer. He has not produced any evidence on record even to remotely indicate that, he was having Rs.5,00,000/- as surplus amount to advance friendly loan to Respondent No.1. He has also not pleaded in the complaint nor deposed in his evidence that exactly on what date or in which month, Respondent No.1 requested him to advance friendly loan of Rs.5,00,000/-. Appellant in his cross-examination has admitted that, he did not know husband of Respondent No.1. This important admission given by Appellant clearly indicates that, the family of Appellant and family of Respondent No.1 were not having close relations. It therefore indicates that, the Appellant did not have any personal knowledge about the family of Respondent No.1 and therefore it is difficult to even presume that Respondent No.1 will seek friendly loan from Appellant. This is precisely in the backdrop

of the fact that, it is the contention of Appellant that, he advanced friendly loan of Rs.5,00,000/- to Respondent No.1 on her oral request. The said contention of Appellant appears to be not probable and rather doubtful and therefore difficult to accept. The Appellate Court therefore has rightly recorded a finding in para No.11 of the impugned Judgment that, without any writing or any agreement, nobody would advance friendly loan of a huge amount of Rs.5,00,000/- to anybody.

10. It is thus clear that, Appellant has failed to establish, as to when the cheque in-question was issued by Respondent No.1. As noted earlier, Appellant has failed to establish the fact that, when he actually advanced the alleged hand loan to Respondent No.1. In this context, it is to be noted here that, Respondent No.1 on 24th August 2005 itself had intimated the fact of loss or theft of her signed cheques/cheque book to the Manager of Central Bank of India, Sion Branch, Mumbai, by issuing a letter. She had also given intimation to the Manager of the said bank for closure of her bank account by a separate letter. By a complaint dated 23rd August 2005 (Exh.D-3), Respondent No.1 had also informed to Senior Police Inspector, Sion Police Station regarding loss or theft of her signed cheques/cheque book from her shop. By a separate letter dated 6th December 2005 (Exh.D-4), Respondent No.1 had complained to Senior Police Inspector of Sion Police Station that, the Appellant and his wife were causing harassment to her and were demanding amount by

blackmailing her. The said documents bear necessary seal of the concerned authorities. In view thereof, the presumptions as contemplated under Sections 118 & 139 of N.I. Act are not available to Appellant. A minute scrutiny of the evidence on record leads to draw a safe inference to hold that, the Respondent No.1 has rebutted the statutory presumptions by leading cogent evidence in that behalf. Taking into consideration the defence put forth by Respondent No.1, it can further be inferred that the Appellant might have misused the lost or stolen cheques while initially issuing the statutory notice and subsequently lodging the present complaint. At the cost of repetition, it is to be noted here that, Respondent No.1 has rebutted presumptions as contemplated under Sections 118 & 139 of N.I. Act. A corollary thereof is that, the Appellant has failed to establish the basic fact that, the cheque in question was issued by Respondent No.1 to discharge her legally enforceable liability and/or debt due and payable to the Appellant.

11. Perusal of entire record would clearly lead to a safe conclusion that, the Appellate Court has appreciated the evidence available on record in its proper perspective and has not committed any error either in law or on facts while passing the impugned Judgment and Order.

12. Appeal being *dehors* of merits is accordingly dismissed.

[A.S. GADKARI, J.]