

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1227 OF 2006

The State of Maharashtra

Appellant
(Org.Complainant)

versus

Kalpak Bhaskar Gadhave,
R/o.Ushkal Bungalow, Shivaji Nagar,
Alipur Road, Deshmukh Plot,
Barshi.

Respondent
(Org.Accused)

Mr.S.R.Agarkar, APP, for State-Appellant.
Mr.S.A.Kumbhakoni, Advocate, for Respondent.

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Judgment : 9th September 2021

Date of Pronouncing the Judgment : 31st January 2022

JUDGMENT :

1. This appeal is preferred by the State of Maharashtra at the instance of Dairy Manager, Government Milk Scheme, Solapur under Section 378(3) of the Code of Criminal Procedure challenging the judgment and order dated 18th May 2006 passed by the Judicial Magistrate, First Class, Solapur in Summary Trial Case No.4999 of 2003.

2. The respondent was tried for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 ('N.I.Act' for short). Learned Magistrate acquitted the respondent. The appellant is aggrieved by the judgment of acquittal.

3. The case of the complainant is as follows :

The complainant is in the business of supplying milk to the customers through its agents. The accused is agent of complainant i.e. Government Milk Dairy and he was collecting milk from the said dairy for the purposes of selling it. There were dues of Rs.1,00,000/- from the accused. He was informed about the dues by the dairy manager. The accused gave cheque bearing No.118039 dated 10th March 2003 for Rs.1,00,000/- drawn on Janata Sahakari Bank Limited, Solapur. The complainant deposited the cheque for clearance with State Bank of India, Treasury Branch, Solapur. The cheque was returned unpaid due to insufficiency of funds in the account of accused. On 10th April 2003 notice was issued to the accused by complainant demanding amount of cheque. Since there was a failure by accused to make the payment within stipulated time, complaint was filed under Section 138 of N.I.Act.

4. Learned Magistrate issued process against accused for the offence under Section 138 of N.I.Act. The summons was received by accused. Plea of the accused was recorded. The accused pleaded not guilty.

5. Vide judgment and order dated 18th May 2006 the Trial Court acquitted the respondent of the offence under Section 138 of N.I.Act.

6. The learned APP appearing for the appellant-State submitted that the Trial Court has committed an error in acquitting the accused. The offence was proved. The liability was proved, issuance of

demand notice was proved. Notice was served on accused. The Trial Court has not appreciated the evidence in proper perspective. The presumption under Section 139 of N.I.Act was overlooked. The Court has committed an error in holding that prosecution has failed to prove that accused had issued cheque dated 10th March 2003 for amount of Rs.1,00,000/- towards discharge of liability. Documents were exhibited in evidence. It was established that cheque was issued in discharge of legally enforceable debt. The Trial Court has committed an error while acquitting the accused. The witnesses examined by the complainant had established all the required ingredients to constitute offence under Section 138 of N.I.Act.

7. Learned counsel for respondent Mr.S.A.Kumbhakoni submitted that basic requirement to establish commission of offence u/s.138 of N.I.Act was not established. The demand notice was not proved. There is no reason to set aside the order of acquittal.

8. He relied upon decision of this Court in case of **State of Maharashtra Vs. Kalpak Bhaskar Gadhave¹ and Vandana Akhilesh Pandey Vs. Abhilasha Anil Pande²**.

9. I have perused the impugned judgment of Trial Court, the oral and documentary evidence. On scrutiny of evidence and the reasons assigned by the Trial Court, I do not find any reason to disturb the findings of Trial Court and the order of acquittal. The judgment is supported by cogent reasons which indicate that the Court has appreciated the evidence.

1 2009-ALL M.R. (Cri.)-714

2 2018(4)-Bom.C.R. (Cri.)-774

10. PW-1 Prakash Ramchandra Sontakke has deposed that he is the Dairy Manager, Government Milk Scheme, Solapur. The complainant is dairy manager of government milk scheme. The accused is an agent of complainant. He was collecting about 200-300 ltrs of milk for sale purpose. There were dues of Rs.1,00,000/-. The accused gave cheque of Rs.1,00,000/- dated 10th March 2003 drawn on Janata Sahakari Bank Limited bearing cheque No.118039. The said cheque was deposited with State Bank of India, Treasury Branch, Solapur on 21st March 2003. Intimation was given by the bank on 25th March 2003 that the cheque was dishonoured for want of sufficient fund in the account of the accused. Notice was issued to the accused on 10th April 2003 demanding the amount. In spite of notice, the accused had not paid the dues. Hence complaint was filed before the Court of Magistrate for the offence u/s.138 of N.I.Act. Cheque dated 10th March 2003 was submitted to the bank on 21st March 2003. The manager replied about the dishonour of cheque on 25th March 2003 and the complainant issued notice on 10th April 2003 within 15 days. The accused did not make payment. Hence complaint was filed on 5th May 2003.

In the cross-examination PW-1 stated that there was agreement between milk dairy and accused. The said agreement is in their custody. The copy of agreement is not filed in the proceedings. The complainant had stopped supply of milk to the accused since March-2003 with prior intimation to the accused. The intimation is not filed on record.

Suresh Dabhade is the employee of milk dairy. The accused was informed that he has to pay the outstanding amount. The record

is not filed in the present proceedings. The total outstanding amount due from the accused is not mentioned in the notice. The statement of account of the accused is not filed. The record of outstanding amount is not filed in the proceedings. In the notice as well as in the complaint, the reason for terminating the agency of the accused is not mentioned. Documentary proof is not filed to prove that the amount was demanded from the accused from time to time. The office of milk dairy is situated at Solapur. He does not understand the difference between the ink or handwriting. He do not know the contents of the cheque are not written by the accused in his handwriting. There is difference in the handwriting in respect of contents of Account Officer and Government Milk Scheme, Solapur. The accused had deposited the money in milk dairy. He has deposited Rs.60,100/- up to January-2005. The matter was referred to Loknayaalaya. Suit is filed by complainant for recovery of amount against the accused. The cheque was not presented in the bank on the date appearing on the cheque.

11. The cheque dated 10th March 2003 for Rs.1,00,000/- was marked as Exhibit-38. The intimation letter dated 24th March 2003 was marked as Exhibit-39. The intimation was addressed to Government Milk Scheme, Solapur. The document mentions that being unable to obtain payment of cheque for Rs.1,00,000/- on Osmanabad Janata Sahakari Bank Limited for the reason given in the memo attached thereto, the amount has been debited to the account. The said document refers to the memo indicating the reasons for dishonour of the cheque, however, the memo has not been produced in the evidence.

12. PW-2 Suresh Dabhade filed affidavit-of-evidence (examination-in-chief) on 3rd February 2006. It is stated that milk was supplied to the accused. Bond was executed by him on 13th August 2002 stating that the dues towards milk supply would be paid regularly. The bond was signed by accused in his presence. He is the signatory to the bond. In the cross-examination he stated that he has worked as Supervisor in the Milk Dairy for Taluka Barshi. The correspondence is required to be given with inward number. On the letter Exhibit-45 there is no inward number. It is not mentioned in the affidavit where and on which date the accused gave letter Exhibit-45. It is mentioned in his affidavit that he has signed letter Exhibit-45 as a witness. Mr.M.M.Gaikwad was serving in milk daily.

13. PW-3 Pratap Patil in his affidavit-of-evidence stated that he is working as clerk in Government Milk Scheme. The accused issued cheque bearing No.118038, dated 5th March 2003 and cheque bearing No.118039, dated 10th March 2003 for amount of Rs.1,00,000/- each. Letter dated 17th March 2003 towards dues was signed by him. It was sent to the accused by registered post acknowledgment due. It was received by the accused. In the said letter accused was informed that dues towards milk shall be paid by him by 25th February 2003. The letter dated 28th February 2003 was sent to the accused by registered post acknowledgment due. It is received by the accused.

In the cross-examination he stated that he was working as clerk in the government milk dairy. He is looking after the work relating to milk supply. He has no personal knowledge about the details of the accounts of agents. There is overwriting in respect of

dates on Exhibit-47. In Exhibit-46 after the cheque number, the amount is not mentioned. The receipt is not given on which date he has received the cheque from accused. He cannot tell the exact date on which he has received the cheque from the accused. The receipt is required to be given after receiving payment. The cheques were not in his custody when he issued letter Exhibit-47. As per order of his superior he gave letter and he has no personal knowledge about the same. Three cheques are mentioned in Exhibit-47. Out of three cheques mentioned in Exhibit-47, one cheque of Rs.1,00,000/- was encashed. Amount of Rs.3,85,311/- is mentioned in letter Exhibit-47. Out of the said amount Rs.1,00,000/- was received by cheque. In February-2003 accused deposited amount of Rs.92,019/-. The accused also paid Rs.1,30,000/- in March-2003. Cases were filed against accused for amount of Rs.3,89,096/-.

14. On scrutiny of evidence it is evident that the complainant has not established that the cheque was issued in discharge of legally enforceable debt. The cross-examination of witnesses show that from time to time the accused had deposited the amount. It is not proved beyond doubt that the applicant had liability of Rs.1,00,000/- towards complainant. There is overwriting in respect of dates in Exhibit-47. In Exhibit-46 after the cheque number, amount is not mentioned. There were discrepancies in the letter issued by the complainant and the evidence of witnesses about the liability of accused which creates doubt. The memorandum regarding dishonour of cheque and/or reason for which the cheque was dishonoured, is not part of proceedings. Several vital documents relating to the supply of milk or the dues were not part of proceedings. To invoke presumption u/s.139 of N.I.Act, at least

foundational facts about the liability have to be established by the complainant. The Trial Court has considered these aspects and by assigning reasons acquitted the accused.

15. The cheque was not deposited on the date reflected on the cheque. There was variation in the ink and the handwriting appearing on the cheque. Ingredients to constitute the offence u/s.138 of N.I.Act were not established. Defense of the accused is that the amount of Rs.1,00,000/- was not outstanding against him. While executing the agreement between the complainant and the accused, two blank cheques were obtained by the complainant as security. The accused was the agent of complainant. The judgment of Trial Court observes that Exhibit-39 refers to the fact that cheque return memo is attached thereto. However, there is no cheque return memo filed by the complainant. The complainant filed office copy of notice, but the RPAD receipt is not filed. Through out the evidence of complainant there is no reference of notice and it has not been proved by him in evidence. The Trial Court then observed that there is no evidence to prove complainant's case. The complainant failed to prove that cheque was dishonoured since cheque return memo is not filed. The complainant failed to prove that notice was issued to the accused. Thus, the requirements to convict the accused for the offence u/s.138 of N.I.Act were not established. In the circumstances, there is no reason to set aside the order of acquittal.

16. In the case of Vandana Akhilesh Pandey Vs. Abhilasha Anil Pande (supra), it was held that cognizance of offence could not have been taken by Court because basic fact of dishonour of cheque is not proved by the complainant. There was failure to prove the

dishonour of cheque by any mode other than provided u/s.146 of the Act. The memo of return of cheque do not appear official memo of bank due to which presumption in favour of complainant did not arise.

17. In the case of State of Maharashtra Vs. Kalpak Bhaskar Gadhave (supra), the respondent herein was prosecuted in another case for the offence under Section 138 of N.I.Act in respect to another cheque by same complainant. It was alleged that accused was collecting milk from complainant and amount of Rs.2,89,096/- was due from accused towards supply of milk. The case had resulted in acquittal. The appeal against the order of acquittal was preferred before this Court. The appeal was dismissed by this Court vide order dated 18th June 2008. Prakash Sontakke and Suresh Dabhade were examined by complainant as witnesses. It was alleged that the cheque was issued by the accused towards dues. In cross-examination Suresh Dabhade has stated that out of the amount of Rs.3,85,311/-, Rs.1,00,000/- was received by cheque, Rs.92,019/- was received in February-2003 and Rs.1,30,000/- was received in March-2003. This Court observed that from the evidence on record, it appears that by the end of March, amount of Rs.3,22,019/- was received from amount of Rs.3,85,311/-. Thus only amount of Rs.63,292/- was due to be received from the accused and the amount on cheque is Rs.2,89,096/-. The defense of the accused was that there was agreement between the complainant and the accused for supply of milk and cheques were handed over by way of security. Blank cheque is misused by the complainant by filling amount. The complainant therein had admitted that the ink in respect of the date and signature on the cheque is similar and the ink in which the

amount and name of payee was written in different ink. The Court observed that defense taken by accused is probable. There was no legal liability in respect of cheque. Thus, the evidence and the defense in that case is identical with present case.

18. Thus, the complainant has not proved that the cheque was issued in respect of the legally enforceable liability. Considering the evidence before the Trial Court in the form of depositions of the witnesses and the documentary evidence, I do not find any reason to take a different view other than Trial Court. Hence, I pass following order :

ORDER

(i) Criminal Appeal No.1227 of 2006 is dismissed and stands disposed of.

(PRAKASH D. NAIK, J.)

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