

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPA) NO.292 OF 2020

IN

CRIMINAL APPEAL NO. _____ OF 2020

(BULDANA URBAN COOP. CREDIT SOCIETY LTD., BULDANA....VS.. VIJAY RAMLAL JAISWAL)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri Sonali Saware, Advocate for Applicant/Appellant.
Shri S.A. Sahu, Advocate for Respondent.

CORAM : ANIL S. KILOR, J.

DATED : APRIL 19, 2022.

1. Heard.
2. This is an appeal filed under Section 378(4) of the Code of Criminal Procedure (Cr.P.C.) against the acquittal of the respondent for the offence punishable under Section 138 of the Negotiable Instruments Act vide judgment and order dated 07/01/2020 passed by learned Judicial Magistrate First Class, Ner in Summary Case No. 638 of 2012.
3. Brief facts of the present case are as under:

The complainant is a Credit Co-operative Society having its Branch Office at Ner. The complaint was filed through Branch Manager Shri Sandip Chavhan. It is the case of the complainant that the complainant is doing business of advancing loan to needy persons. The respondent is a businessman and he was in need of some

amount, so he obtained loan of Rs.25,41,500/- from the complainant on 29/03/2010. An agreement to that effect was also executed by the respondent. However, the respondent did not pay the loan regularly and as such the amount of Rs.10,88,000/- was outstanding. When the outstanding amount was demanded, the respondent issued a cheque bearing No.124932, dated 24/09/2012, drawn on The Yavatmal Urban Cooperative Bank, Ner Branch towards payment of the said outstanding amount. On presentation of the said cheque it was dishonoured on the ground of 'insufficient funds' and accordingly demand notice was issued to the respondent on 16/10/2012. However, it was not accepted and it was received back with an endorsement of the postman "Intimation Given". As the respondent did not pay the amount within fifteen days from the date of intimation of demand, the complaint was filed.

4. To substantiate the case, the complainant examined himself at Exh.28. The respondent also examined himself below Exh.62. The respondent also examined previous Branch Manager Shri Swapnil Shukla below Exh.58.

5. The learned trial Court, after scrutiny of the evidence, oral as well as documentary, acquitted the respondent vide impugned judgment dated 07/01/2020, the same is under challenge in this appeal.

6. I have heard the learned counsel for the respective parties.

7. Ms Sonali Saware, learned counsel for the appellant submits that the learned trial Court has committed error in acquitting the respondent. It is submitted that the learned trial Court has given erroneous findings while holding that the complainant failed to prove that the respondent has committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

8. It is submitted that the trial Court has not taken into consideration that once the respondent has admitted his signature on the cheque, there is a presumption against the accused/respondent. However, the said factor has not been taken into consideration.

9. She has further drawn attention of this Court to the cross-examination of DW-1, the respondent, who has admitted that the cheque was issued by him towards the interest amount. It is therefore, submitted that this admission is sufficient for conviction of the respondent. For this purpose, she has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *Kalamani Tex and another ..vs.. P. Balasubramanian*¹.

10. It is further argued that the Court has held that the notice was not served upon the respondent. It is submitted that even if it is accepted that in case when notices were not claimed even though sent by Registered Post A.D. drawer of the cheque may be called upon to rebut the presumption which arises on service of the notice.

11. It is further submitted that any drawer who claims that he did not receive notice sent by post, can within 15 days from receipt of summons from the Court in respect of the complaint under Section 138 of the Negotiable Instruments Act, make payment of cheque amount and submit report that he had made payment within 15 days on receipt of the summons.

12. She has argued that, in this case, the respondent has not paid the said amount within 15 days on receipt of the same in the complaint. Thus, she submits that the judgment of the learned trial Court needs to be quashed and set aside by convicting the respondent for the offence punishable under Section 138 of the Negotiable Instruments Act, accordingly, she prays for grant of leave in this appeal.

13. Shri Sahu, learned counsel for the respondent submits that sufficient facts were stated in the complaint which ought to have been stated to fulfill the requirement

of bringing foundational facts on record. It is submitted that unless the complainant brings foundational facts on record the question of rebuttal does not arise.

14. It is submitted in the complaint that there was no mention that the loan was sanctioned in favour of the respondent on pledging 782 quintal Toor. It is submitted that even there is no mention in the complaint that the Toor was sold out to recover the amount of loan or there is no mention that how much amount was received on selling the said agricultural produce (Toor) pledged by the respondent. He, therefore, submits that the learned trial Court has rightly observed that in absence of necessary facts stated in the complaint, the complainant failed to prove that the respondent has committed offence punishable under Section 138 of the Negotiable Instruments Act.

15. To consider the rival contentions of the parties, I have perused the oral evidence and also the impugned judgment and order.

16. The P.W.-1-complainant in the cross-examination had admitted that the respondent pledged 782 quintal Toor with the Bank while obtaining loan. He has further admitted that the Bank has received Rs.25,70,000/- after selling the said agricultural produce. He, further admits that as per the agreement, on failure to pay the loan amount it was agreed that after one year the

Bank can sell the aforesaid agricultural produce. However, it was not sold out for 36 months and for that he has admitted that no explanation can be offered. He further admits that before filing of the complaint the respondent demanded back the two cheques submitted with the Bank at the time of obtaining loan. He further admits that in the notice issued to the respondent it was not mentioned that the cheque was given towards interest amount. He, further admits that the respondent resides at Shivaji Nagar, Ner, whereas the notice was issued at the address of Dnyaneshwar Nagar, Ner. He further admits in the cross-examination that in the notice it was not mentioned that how much amount was paid by the respondent towards loan amount, how much amount was recovered after selling Toor and how much amount was remained to be recovered.

17. In the light of the above admissions given by P.W.1 in the cross-examination and in view of the fact that in absence of necessary foundational facts which need to be stated in the complaint and evidence in support of the same the learned trial Court has rightly held that the complainant has failed to prove that the respondent has committed offence punishable under Section 138 of the Negotiable Instruments Act.

18. It is settled law that unless foundational facts are established and brought on record there would be no question of rebuttal.

19. In the present matter, as the complainant failed to bring on record foundational facts necessary to attract the provisions of Section 138 of the Negotiable Instruments Act, the question of rebuttal by the respondent would not arise.

20. In the circumstances, in view of the findings recorded above and in view of the fact that there is no perversity committed by the trial Court in acquitting the respondent, the leave is **refused**, consequently, the appeal is **dismissed**.

JUDGE

RRaut..