

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO.154 OF 2022
WITH
CRIMINAL REVISION APPLICATION NO.155 OF 2022

Birmal S/o. Vasudev Bobade,
Age 68 years, Occu. Agri.,
R/o. At village Sirsav, Taluka Paranda,
District Osmanabad

.. Applicant
(Original accused)

Versus

1. The State of Maharashtra
2. Laxman s/o. Audumbar Baraskar,
Age 60 years, Occu. Agri & Ex-man,
R/o. Deogaon Road, Paranda,
Tq. Paranda, District Osmanabad .. (Original complainant)
Respondents

...

Mr. Shailendra S. Kulkarni, Advocate for Applicant;
Mr. K. S. Patil, A.P.P. for Respondent No.1/State;
Mr. Nikhil S. Tekale, Advocate for Respondent No.2

...

CORAM : S. G. MEHARE, J.

DATE : 30-01-2023

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. By consent of the parties, heard finally.
2. The parties would be referred to as their original positions i.e. complainant and accused hereafter.

3. The complainant and the accused were relatives. The daughter of the complainant was to marry the son of the accused. However, they could not marry. Therefore, their relations became strained. The complainant has a case that he had paid a hand loan of Rs 4 lacks to the accused for constructing his house. To repay the hand loan, the accused issued three cheques in dispute. Against the presumption of the existence of legally enforceable liability, the accused came with a defence that the complainant was working in a bank. He had to raise a loan from the financial institution to purchase a motorbike for his son. Therefore in the bank where the complainant was serving, a joint account was opened in the name of the applicant and his wife. To deliver the cheques as security for the loan, he had signed 20 cheques. The bike could not be delivered on time; hence, the loan transaction was cancelled. The complainant, collected the cheque book under his signature from the bank. Those cheques remained with the complainant for a month. Meantime, their relations became strained. One fine morning, some unknown person dropped the cheque book in his home. The first cheque of Rs.1,00,000/-, was dated 28.11.2008 and immediately on the next day i.e. on 29.11.2008, the accused intimated the bank to stop the payment. Therefore, both cheques could not be encashed.

4. Thereafter, on 04.02.2009, the accused lodged a report with the police alleging that when he was travelling in the bus with

three cheques, two in question were lost. The complainant found two cheques in dispute, and he misused those cheques to take revenge for breaking the marriage with his daughter.

5. The learned counsel for the accused has vehemently argued that both Courts below, i.e. trial court and the first appellate Court, did not consider his defence and believed the complainant and convicted him illegally for the offence punishable under Section 138 of the N.I.Act.

6. The learned counsel for the accused has taken the Court through the record and argued that there was no legally enforceable debt. Therefore, both judgments are erroneous on the face of the record. He has relied on the following case laws in support of his arguments :-

(i) *Kali Ram Versus State of Himachal Pradesh*, <http://judis.nic.in>, Supreme Court of India;

(ii) *Basalingappa vs Mudibasappa*, Criminal Appeal No. 636 of 2019 (arising out of SLP (Cri.) No.8641 of 2018, dated 09.04.2019 : (2019) 5 Scc 418;

(iii) *Veerayya Vs. G. K. Madivalar*, Karnataka High Court, (Criminal Revision Petition No. 1571 of 2010) November 30, 2011.

(iv) *K. Subramani Versus K. Damodara Naidu*, Criminal Appeal No. 2402 of 2014 (Arising out of SLP (Cri.) No. 6197 of 2014;

- (v) *John K. Abraham Versus Simon C. Abraham & Another, Criminal Appeal No.2043 of 2013 (@ SLP (Cri.) No. 9505 of 2011) dated 5 December, 2013;*
- (vi) *Sanjay Mishra Versus Ms. Kanishka Kapoor & Nikki and another, Criminal Application No.4694 of 2008, dated 24.02.2009;*
- (vii) *Smt. Lakshmi Subramanya w/o. C. P. Subramanya Versus Sri. B. V. Nagesh, Crl. A.No. 692/2006 (A) C/w Crl. A. No. 693/2006 (A), HC Karnataka at Bangalore, dated 05.10.2012;*
- (viii) *Senguttuvan vs Mahadevaswamy, ILR 2007 KAR 2709 : 2007(4) Kar LJ 334*

7. No doubt, the law is well settled that the presumption of legally enforceable debt is rebuttable.

8. The learned counsel for the complainant would submit that no cogent and reliable evidence was brought on record to rely upon the defence or rebut the presumption of legally enforceable debt. The law is well settled that the defence is incorrect when there is no ground to disbelieve the complainant. The accused did not deny the signatures over the cheques in dispute. Though the cheques in question were not dishonoured for insufficient funds in the account, the cheques could not be encashed due to the stop payment notice of the accused. In that circumstances, the heavy burden was on the accused to prove that there was no legally

enforceable debt. Whatever the defence the accused has brought on record is improbable. The defence of the accused is inconsistent. On the one hand, he has a case that the chequebook was lying with the complainant; one fine morning, the unknown person dropped it at his house. The accused received a phone call from the unknown person making the inquiry that had he received the chequebook and told him that since the marriage was broken, the cheques were misused. On the other hand, he has a case that he was carrying three cheques with a chequebook and lost them while travelling to the village Paranda.

9. He has come up with the improbable defence that the complainant found two disputed cheques. The date of the first cheque was 28.11.2008, and exactly on the next day, the stop payment notice was issued to the bank that goes to show that the accused was well aware that the first cheque of Rs.1,00,000/- was likely to be presented. The case laws relied upon were on different facts. There are no errors on the face of the record.

10. Both impugned orders of the learned trial Court as well as the first Appellate Court are legal, proper and correct. This Court cannot re-appreciate the evidence under the revisional jurisdiction. The applicant has no ground to interfere with the impugned judgments and orders. Therefore, he prays to dismiss the revision applications.

11. Perused the impugned judgments and orders and also examined the facts of the case. The accused did not deny his signatures over the cheques in dispute. The accused can take as many defences as he can. However, if the defences are inconsistent and raise doubt, such defences should be scrutinized and examined compared with the preponderance of probability.

12. The Honourable Supreme Court, in **Basalingappa vs Mudibasappa** (supra), in paragraph No.17 discussed the principles laid down in **Kumar Exports v. Sharma Carpets, (2009) 2 SCC 513**, had held in paragraph 20 as follows:

"20. ... 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 that 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 presumption, 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. ..."

13. Reading the law laid down by the Honourable Supreme Court in the above-cited case, the Court is of the view that both Courts below have correctly discarded the defences as those were not probable. Therefore, the legally enforceable debt exists in favour of the complainant. The accused cannot ask the complainant about his source of income. It is not the case that the complainant was not able to pay such an amount. On the contrary, detailed evidence has been led to prove how the money was collected and paid to the accused.

14. The learned trial Court has correctly considered that the defence of the applicant is contradictory and inconsistent. That apart, whatever the defences raised by the applicant do not appear probable. It is surprising how the same person who lodged the complaint found the lost cheques. The applicant has no case that the complainant has stolen those cheques.

15. The accused has utterly failed to discharge his burden. Both judgments and orders of the learned Judicial Magistrate and the First Appellate Court are free from error and infirmity. Therefore, both revision applications are liable to be dismissed. Hence, the following order:-

ORDER

- (i) Revision Application Nos. 154 and 155 of 2022 stand dismissed.

- (ii) R & P be returned to the concerned trial Court.
- (iii) After receiving the R & P, the learned Judicial Magistrate, First Class, Paranda, shall execute the conviction warrant as per Section 418 of the Code of Criminal Procedure.
- (iv) The learned counsel for the applicant prays to suspend this order for six weeks as he wishes to seek legal remedy. His prayer is accepted, and this order has stayed for six weeks.
- (v) The complainant is at liberty to withdraw the amount deposited with the trial court and first appellate Court, if any, on undertaking to return the amount if the impugned judgments and orders are reversed.
- (vi) Rule stands discharged.

**(S. G. MEHARE)
JUDGE**

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