

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

Criminal Appeal No.91 of 2012

M/s. IVY Jewellery Pvt Ltd
Through its authorised representative
Shri Arnab Roy, having its office
At Royal Star Arcade, Plot No 8,
Western Industrial estate,
Opposite SEEPZ gate No 1, MIDC,
Andheri (E) Mumbai 400 93

...Applicants/Appellants
(Original complainant)

Versus

1. Shri Chandresh Sampat
Residing at Flat No 116,
Jai Ambe co-operative Hsg;
Society Ltd, carter Road No 5,
Borivale (E) Mumbai 400 066

...Respondents
(Original Accused)

2. The State of Maharashtra

...Respondents

Coram: R. N. Laddha, J.

Reserved on: 8 September 2023

Pronounced on : 10 November 2023.

Mr Rishi Ashok i/by M/s. Bekay Legal, for the Appellant.
Mr Vinay Bhanushali a/w Mr Sanmit Vaze i/by J.G. Bhanushali,
for Respondent No.1.
Mr HJ Dedhia, APP for respondent No.2-State.

Judgment :-

The legality, propriety and correctness of the Judgment
and Order dated 25 August 2011 passed by the learned

Metropolitan Magistrate, 48th Court, Andheri, Mumbai, in Criminal Case No.512/SS/2010, whereby respondent No.1/accused came to be acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'NI Act'), is assailed in this Appeal.

2. The appellant/complainant is a private limited company dealing in the trade of diamonds. M/s D. B. Diamonds, a proprietorship of Mr Dhaval Bhatt, placed an order with the complainant for purchasing diamond jewellery for Rs.22,74,240/-. The complainant supplied diamond jewellery to M/s. D. B. Diamonds and raised nine invoices totalling Rs.22,74,240/- out of which Mr Dhaval Bhatt paid Rs.12,71,260/-; and Rs.10,02,980/- remained to be paid to the complainant.

3. It is alleged that respondent No.1/ accused, the brother-in-law of Mr Dhaval Bhatt, took over the liability of Mr Dhaval Bhatt to pay the outstanding amount of Rs.10,02,980/- to the complainant. In pursuance of this arrangement, the accused issued a post-dated cheque bearing No.015847 ('said cheque') dated 18 November 2009, drawn on HDFC Bank Ltd., Malad (West) Branch, Mumbai, for Rs.10,02,980/-.

4. The complainant deposited the said cheque with his banker for realisation; however, the same was returned to the appellant on 18 November 2009 with the remark 'stop payment'. Subsequently, the complainant, through its Advocate, addressed a notice dated 9 December 2009 to the accused, calling upon him to pay the cheque amount of Rs.10,02,980/- within 15 days from the receipt of the notice, failing which proceedings would be initiated under section 138 of the NI Act. The accused personally accepted the service of this notice on 11 December 2009. On non-receipt of any reply from the accused and his failure to pay the cheque amount, the complainant was constrained to file a complaint bearing No.512/SS/2010 before the learned Metropolitan Magistrate, 48th Court, Andheri, Mumbai, under section 138 of the NI Act.

5. The learned Magistrate took cognisance of the offence and summoned the accused. On entering appearance, the particulars of the offence were read over and explained to the accused. The accused abjured guilt and claimed trial.

6. During the course of the trial, the learned Magistrate recorded the evidence of Arnab Roy (PW-1), the authorised representative of the complainant, and Kamlesh Singh (PW-2),

the erstwhile Assistant Manager of the complainant. Various documents were tendered on behalf of the complainant. The statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 ('CrPC') came to be recorded. In his defence, the accused examined a witness, Habib Zaidi (DW-1), the operation Manager of HDFC Bank, Malad Branch, Mumbai.

7. After appraisal of the evidence and perusal of the documents tendered, the learned Magistrate acquitted the accused. Being aggrieved thereby, the complainant filed the present Appeal.

8. I have heard Mr Rishi Ashok, the learned Counsel appearing on behalf of the appellant; Mr Vinay Bhanushali, the learned Counsel appearing on behalf of respondent No.1; and Mr HJ Dedhia, the learned Counsel appearing on behalf of respondent No.2-State and perused the impugned judgment, grounds in the appeal memo, evidence and material on record.

9. Mr Rishi Ashok, the learned Counsel for the appellant/complainant, submitted that the learned trial Court committed a manifest error in acquitting respondent No.1/

accused. He further submitted that the learned trial Court failed to appreciate that on receiving no response to the legal notice, the case of the complainant stood unrebutted was proved beyond reasonable doubt. His main contention is that the learned trial Court ought to have concluded that the accused issued the cheque towards the discharge of his legal liability as a guarantor for Mr Dhaval Bhatt, as it is proved that said cheque was dishonoured due to 'stop payment' instructions of the accused and the legal notice was duly received by the accused, despite which the cheque amount remained unpaid. He further submitted that the learned trial Court failed to consider the presumption available to the complainant under section 139 of the NI Act, especially when the accused did not examine Mr Dhaval Bhatt to rebut that presumption. To buttress his contentions, he relied upon the following judgments:

*a. Jain P. Jose v. Santosh & Anr.*¹; and

*b. Maharashtra State Seeds Corpn. Ltd. v. Nagorao Raghunath Jibhkate*².

10. Mr Vinay Bhanushali, the learned Counsel for respondent No.1/accused, supported the line of reasoning

1 Decided by the Hon'ble Supreme Court in SLP (Cri) No.5241 of 2016 on 10 November 2022

2 2012 SCC OnLine Bom 2115

adopted by the trial Court to record the finding of acquittal. He made various submissions countering the arguments put forth on behalf of the appellant. He argued that there is no evidence on record to show that the accused took over the liability of his brother-in-law, Mr Dhaval Bhatt and that the trial Court rightly acquitted the accused. To bolster this argument and to contend that the accused had no role to play in the transaction between the complainant and Mr Dhaval Bhatt, the learned Counsel referred to the cross-examination of Mr Arnab Roy (PW-1), the authorised representative of the complainant, where he admitted that it was not the accused but Mr Dhaval Bhatt who informed the complainant that the payment of the outstanding amount of Rs.10,02,980/- would be made by the accused and handed over to the complainant five blank cheques signed by the accused, which included the said cheque. He submitted that the said cheque was lost, and the accused informed his banker to refuse its encashment. He further submitted that in the absence of a written agreement amongst Mr Dhaval Bhatt, the accused and the complainant to transfer and assign the liability of Mr Dhaval Bhatt unto the accused, the trial Court rightly found that the said cheque was not issued by the accused to discharge the liability of Mr Dhaval Bhatt which was allegedly assigned to the accused. To

buttress his submissions, he relied upon the judgment of the Hon'ble Supreme Court in *Rangappa v. Sri Mohan*³.

11. It is not in dispute that the tax invoices (Exh.12 to Exh.20) were issued by the complainant on M/s D.B. Diamonds for the sale of jewellery worth Rs.22,74,240/- to Mr Dhaval Bhatt and that these invoices do not bear the signature of the accused. It is also not disputed that an amount of Rs.12,71,260/- was paid by Mr Dhaval Bhatt to the complainant towards the total consideration of Rs.22,74,240/- and an amount of Rs.10,02,980/- was outstanding. The crux of the dispute between the parties is with regard to the assignment of liability of Mr Dhaval Bhatt unto the accused to pay the complainant the outstanding amount of Rs.10,02,980/- and whether, in the absence of such an assignment, the complainant can avail the benefit of Section 139 of the NI Act.

12. On perusal of the cross-examination of Mr Arnab Roy (PW-1), it transpires that the entire transaction of the jewellery sale took place between the complainant and Mr Dhaval Bhatt. Mr Arnab Roy (PW-1) admits that the accused had no role to play till the delivery of the cheques to the

3 (2010) 11 SCC 441

complainant, and Mr Dhaval Bhatt handed over blank cheques with the signature of the accused to the complainant. It is further admitted that there is no written document to show that the accused had taken over the liability of Mr Dhaval Bhatt. He further admits that the contents of the cheque were filled at the instance of the complainant.

13. Further, the cross-examination of PW-1 reveals that it was Mr Dhaval Bhatt who informed the complainant that the outstanding amount of Rs.10,02,980/- would be paid by the accused, pursuant to which Mr Dhaval Bhatt handed over the cheques (including the cheque in question) to the complainant. The record does not reveal that the accused at any point in time had informed the complainant that he would repay the debt of Mr Dhaval Bhatt for the purchase of the jewellery from the complainant. In addition to the deposition of PW-1, there is no documentary evidence on record to indicate that the accused took over the liability of Mr Dhaval Bhatt and issued the cheque for discharging his liability towards the trade of jewellery with the complainant.

14. It is a settled position in law that for the purpose of the prosecution under section 138 of the NI Act, an instrument must be entered into by the person who owes a legally

enforceable debt to another and such person who takes over the liability of the former to discharge such debt in favour of the latter. The party to whom such debt is owed must either be made a party to such instrument or must be informed of such assignment/transfer of liability. A mere statement that the cheque was issued by a person to discharge the liability of another is not sufficient to set the wheels of criminal prosecution under section 138 of the NI Act in motion. A reference in this regard can be made to the decisions of this Court in *Hiten Sagar v. IMC Ltd.*⁴ and *Nandkishore Mehra v. Sudhir Transport Ltd*⁵. Given the foregoing, the learned trial Court rightly held that the accused did not take over the liability of Mr Dhaval Bhatt.

15. Coming to the issue of whether Section 139 of the NI Act would aid the complainant in the absence of an instrument of assignment of debt, it would be necessary to reproduce the said section. The section reads as follows :

“139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”

16. The record reveals that the liability to pay the

4 2001 SCC OnLine Bom 432

5 2008 SCC OnLine Bom 1598

outstanding dues of the complainant was on Mr Dhaval Bhatt. He did not assign this liability unto the accused, as evidenced by the non-existence of a written instrument between the parties for such assignment or transfer of debt and the testimony of PW-1. Further, PW-1, in his evidence, admitted that the contents of the blank cheque handed over by Mr Dhaval Bhatt to the complainant were filled not by the accused but by the complainant. The evidence of DW-1 reveals that the accused, using the telebanking services on 4 April 2009, informed his banker to stop the payment of the said cheque. Accordingly, the accused's banker issued a confirmation certificate dated 6 April 2009 (Exh.28) and a letter dated 18 January 2011 (Ex.29) stating that the payment of the said cheque was stopped on the telephonic instructions of the accused.

17. The presumption under section 139 of the NI Act is rebuttable. The benefit under this section cannot be availed if the accused raises a plausible defence, which creates doubts about the existence of a legally enforceable debt or liability. To create such doubt, the accused can rely on the materials submitted by the complainant in order to raise such a defence, and it is conceivable that in some cases, the accused may not

need to adduce evidence of his/her own. This is highlighted in the decision of ***Rangappa*** (supra).

18. In the present case, the cheque was not issued by the accused towards the discharge of liability of the debt of Mr Dhaval Bhatt owed by him to the complainant. If the cheque had been issued by Mr Dhaval Bhatt for the outstanding amount of Rs.10,02,980/-, the accused could have availed the benefit of section 139 of the NI Act. However, in the absence of the assignment of liability of Mr Dhaval Bhatt unto the accused and there being no nexus between the issuance of the said cheque and the liability of the accused to repay the outstanding amount to the complainant, the trial Court rightly concluded that the complainant failed to prove that the dishonoured cheque was issued by the accused for discharge of liability.

19. In such circumstances, in the considered opinion of this Court, the trial Court has rightly acquitted the accused for the offence punishable under section 138 of the NI Act.

20. As a result, this appeal fails and is hereby dismissed.

[R. N. Laddha, J.]