IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.903 OF 2004

Ratilal Ganaji Solanki
residing at 589, Indraprastha,
Rasta Peth,
Pune ... Appellant

Vs.

1. Hansraj Ghisulal Parmar
residing at Royal Chambers,
Paud Road,
Pune ...

2. The State of Maharashtra ... Respondents

None for the Appellant.
Ms. Naiana Boraste i/b Mr. Girish Agrawal for Respondent No.1.
Mr. H. J. Dedhia APP for Respondent No.2-State.

CORAM : S. M. MODAK, J.

DATED : 23RD FEBRUARY 2023

JUDGMENT :

1. Heard learned Advocate for Respondent No.1-accused and learned APP for Respondent No.2-State.

2. The reason for dishonour of the cheque is the instructions given by Respondent No.1-accused to stop the payment. Even the banker of Respondent No.1-accused, PW 2-Amit Thorat working in Union Bank of India is examined by the complainant. PW 2-Amit Thorat has stated about giving up stop payment instructions by the drawee. Even

he has said that there was balance of Rs.2740/- in the account of accused. These facts were not disputed on behalf of Respondent No.1-accused.

3. Even though on the last date learned Advocate for the Appellant sought time to place on record certain judgments on the point of stop payment instructions, however today, he is absent. The Court has no alternative but to pronounce the judgment on the basis of submissions already made and on the basis of available record. On earlier dates, I have heard learned advocate for the appellant and learned advocate for the respondent accused.

4. The case pertains to dishonour of cheque for Rs.50,000/- and failure to make payment after receipt of notice. Notice is dated 10th September 1996. There is no dispute about receipt of notice because that is already replied by letter dated 20th September 1996. Perused the same. Respondent No.1 has pleaded that he borrowed Rs.1,50,000/- from the Appellant and issued three cheques for Rs.50,000/- each. One cheque was issued in the name of Appellant and other two cheques in name of his brother. In addition to that he pleaded that the amount of Rs.50,000/- was already paid along with interest and in fact he demanded back the cheque but it was not returned by the Appellant under dishonest intention to grab more money.

5. There was police complaint lodged by the complaint on 9th April 1995, to Samarth police station in respect of cheque in question. The accused was also called for enquiry. These facts are admitted by

the complainant during cross examination. After that Respondent No.1-accused gave instructions to the bank on 10th April 1996. Whereas the date of cheque is 27th August 1996. According to Respondent No.1, except signing, all other details of the cheques were not filled in by him.

6. This is background of the litigation. From the record, it appears that evidence was recorded prior to framing of charge and even after framing of charge, the reason is not known. In fact, the case is triable summarily. Probably, the learned Magistrate may not be having summary powers. The following are witnesses examined by the complainant :

(i) PW 1 - Ratilal Ganagi Solanki-complainant, prior to charge and after charge.
(ii) PW 2 – Amit Bhaskar Thorat from Union Bank of India i.e. banker of accused.
(iii) PW 3 – Padmakar Shantaram Bhalerao, banker of complainant.
(iv) PW 4 – Sanjay Kantilal Gandhi, Advocate of the complainant.

7. The trial Court acquitted the accused mainly for the following reasons :

(a) The liability is not proved. Even though in the notice reply, Respondent No.1-accused admitted of taking loan of Rs.1,50,000/- it does not amount to admission of liability of Rs.50,000/-.

(b) The complainant has not verified from where he has raised these funds.

(c) The liability is not legally recoverable liability.

(d) The handwriting on cheque and signature are different.

(e) The case of the complainant is concocted. Because cheque bears date of 27th August 1996, whereas police complaint was filed on 9th April 1995 in respect of same cheque. Therefore, it is clear that cheque was issued prior to 9th April 1995, and hence, the case of complainant that accused has written date 27th April 1996 on the cheque is not believable.

8. Learned Advocate for the Appellant submitted that as in notice reply, Respondent No.1 has admitted borrowing of Rs.1,50,000/- and also repaying the same (without admitting theory of repayment) it amounts to admission of liability and the trial Court was wrong. On the point of drawing of presumption, Respondent No.1 relied upon the following judgments :

(i) Shankar Jaganath Mane Vs. Sikkandar Mohammed Bidiwala & Anr.[1]

(ii) Smt. Tasneem Murshedkar Mazhar Vs. Ramesh & Anr.[2]

(iii) Sachin Food Processor Vs. Shri Sanjay T. Pathak (Kulkarni) & Anr.[3]

(iv) Goa Plast Pvt. Ltd. Vs. Shri Chico Ursula D'Souza[4]

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1 2020 (5) Lawdigital.in 186
2 2020 (4) Civil Court Cases 406 (Bombay)
3 2016 ALL MR (Cri.) 1717
4 1996 Cri. L. J. 2344

9. So far the judgment in case of *Shankar Jaganath Mane* (supra) and in case of *Smt. Tasneem Murshedkar Mazhar* (supra) is referred above are on the point of proving legally recoverable liability and drawing of presumption whereas in case of *Sachin Food Processor* (supra) this Court has observed how presumption under section 138 of the Negotiable Instruments Act is rebuttable and in what manner it can be rebutted. These observations are in the facts of those cases but no one can deny that presumption under section 139 of the NI Act is rebuttable presumption and it can be rebutted either by adducing evidence or by cross examining the complainant. The finding given by the trial Court that '*there is no evidence of debt or liability till extent of Rs.50,000/-*' is not correct. The reason is that Respondent No.1-accused has admitted about accepting Rs.1,50,000/- and even admitted about repaying that amount along with interest. Thus, Rs.50,000/- is part of Rs.1,50,000/- and it is repaid. So it does not require separate payment for receipt of Rs.50,000/-.

10. The trial Court has not properly appreciated the evidence. I hold that the complainant has proved about advancing Rs.50,000/- to Respondent No.1-accused. Now it needs to be seen whether the findings of the trial Court are correct or not.

11. According to Respondent No.1-accused, the findings of the trial Court in judgment of acquittal cannot be interfered with lightly and they can be interfered with only when there is perversity. There cannot be dispute about this proposition. It is also true that reason for dishonour is giving instructions by Respondent No.1-accused for "stop payment". It is also clear that when cheque was presented for

encashment there were no sufficient funds. To see that the theory put by Respondent No.1 is proper or not, he has put up theory of repayment of amount along with interest. He has also attempted to take benefit of lodging of police complaint by the complainant to Samarth police station on 9th April 1995. The complainant has admitted about filing of the complaint at Samarth police station. This fact has come on record during his cross examination. From his evidence, it is clear that the complaint was lodged on 9th April 1995, and the cheque bears date as 27th August 1996. The complaint was in respect of present cheque only. It means that the complainant was possessing that cheque when he lodged the complaint.

12. So the question arises as to how date of 27th August 1996 was put on the cheque. He is not able to explain why cheque bears the date 27th August 1996. It is true that holder of the cheque is having authority to make the cheque complete. The only issue is that whether details are filled in order to carry out common intention of the parties. If it is so then the cheque becomes valiid instrument. The circumstances brought on record does not warrant that details are written in order to carry out common intention of the parties. When Respondent No.1 has pleaded that he has already repaid the amount along with interest, how he can permit the Appellant to put date on cheque as 27th August 1996.

13. For this reason the cheque cannot become valid negotiable instrument. If it is so then the Appellant is not entitled to get the amount on the basis of such cheque. The trial Court has not paid attention to this aspect.

14. It has come on record that the complainant and accused are relatives and accused came to Pune from Rajasthan. It seems that the relations were very cordial and the complainant was in dominating position because he helped Respondent No.1-accused to settle business in Pune. It has also come on record that the complainant was only operating the account of Respondent No.1-accused in Rupee bank and there are withdrawals by the complainant. It is admitted by him during cross examination. No doubt it is true that these withdrawals are not from Union of India but it throws light on the relationship between both parties.

15. This cordial relationship has not continued, it is evident from the fact that the complainant has lodged police complaint with Samarth police station on 9th April 1995. For these reasons the complainant was not justified in putting the date on cheque as 27th August 1996. So for this discussion, the complainant is not entitled to get amount on the basis of such Negotiable Instruments Act. The trial Court has rightly dismissed the complaint. I subscribe to that opinion though for different reasons. There is no merit in the Appeal. Hence, it is dismissed.

(S. M. MODAK, J.)