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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.709 OF 2007**

Mrs. Usha Hiralal Kanojia
Age 45 years,
Residing at Room No.5,
Kamawadi, Panjrapole,
Chembur, Mumbai

... Appellant

Vs.

1. Mrs. Jayshree Mangesh Chauhan
Residing at Chopra Compound,
Heera Baug, Kamawadi,
Panjrapole, Chembur,
Mumbai

...

2. The State of Maharashtra

... Respondents

**WITH
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2. The State of Maharashtra

... Respondents

Mr. Ashok T. Gade with Ms. Riya John for the Appellant.

Mr. Makarand Bakore for Respondent No.1.

Mr. H. T. Dedhia APP for Respondent No.2-State.

CORAM : S. M. MODAK, J.

RESERVED ON : 28TH APRIL 2023

PRONOUNCED ON : 13TH JUNE 2023

JUDGMENT :

1. Heard learned Advocate for the Appellant, learned Advocate for Respondent No.1 and learned APP for Respondent No.2-State.

2. The Court of Metropolitan Magistrate, 33rd Court, Kurla, Mumbai as per the common judgment convicted Respondent No.1-accused for the offence punishable under section 138 of the Negotiable Instruments Act. It is in respect of two different cheques, one cheque is for Rs.2,00,000/- and another is for Rs.1,00,000/-. Respondent No.1 is sentenced to suffer simple imprisonment for one year and to pay fine of Rs.3,50,000/-. Rs.3,40,000/- was to be paid to the Appellant-complainant. However, when Respondent No.1-accused preferred two separate Appeals, the Additional Sessions Judge, Bombay set aside those conviction vide judgment dated 6th February 2006 (Appeal

No.672 of 2006 and 673 of 2006). The correctness of this common judgment is challenged by way of these two Appeals by the original complainant. The parties will be referred to by their original status.

3. I have heard learned Advocate Shri Ashok Gade for the Appellant-complainant and learned Advocate Shri Makrand Bakore for Respondent No.1-accused and learned APP Shri Dedhia for the State.

4. Their main crux of argument is that once issuance of cheques are admitted, the presumption will come into picture and rebuttal evidence given by the accused in present case is insufficient. Another limb of the argument is about service of notice on proper address and drawing of presumption under Section 27 of the General Clauses Act. Apart from these specific grounds taken by the complainant, there is objection taken by the accused to interfere in the judgment of acquittal. So these Appeals need to be decided on following main points : -

Points involved

- (a) Whether presumption is rebutted by the accused directly or indirectly ?
- (b) Whether that rebuttal evidence is only by way of denial or whether in fact it is sufficient to rebut the presumption ?
- (c) Whether notice is served on the accused and whether this fact can be proved either by drawing presumption or on the basis of available evidence ?
- (d) Whether it can be said that findings by the Appellate Court are perverse so that it can be interfered in the Appeal ?

Job of the Court

5. It is true that the complainant/payee of the cheque can rely upon presumption incorporated by way of section 139 of the Negotiable Instrument Act. It deals with existence of legally recoverable debt or liability. Many a time accused only takes a defence of denial, that's to say denying existence of liability, issuance of cheque and further procedural compliance. In this contingency the job of the Court is only restricted to scrutinise whether presumption is rebutted simply on the basis of denial

and cross examination. But some time it happens that accused also gives evidence either through himself or by examining witnesses. In such contingency, the Court will have to appreciate evidence of both parties on the basis of accepted principles of appreciation of evidence and then to arrive at a conclusion. In this case, similar thing has happened and the accused herself has given evidence and also examined witness from the banker, Central Bank of India. It is on the point of when did the cheque book containing these two cheques were in fact issued by the bank. So the issue is whether the learned Additional Sessions Judge was right in reversing the findings given by the trial Court. The law on the point of interference by the Appellate Court is well settled.

Scope of an Appeal

6. The Hon'ble Supreme Court in case of ***K. Prakashan Vs. P.K. Surendaran***¹ has reiterated the law on this point. When two views possible, the Appellate Court shall not reverse the judgment of acquittal only because another view is possible. It is

¹ 2008 (1) SCC 258

not sufficient to merely observe that burden is not discharged by the accused, it is also necessary to observe how that burden can be discharged. Furthermore, the test of proof beyond reasonable doubt and per-ponderence of probabilities are different (para 22). Furthermore, it is observed in case of ***C. Antony Vs. K. G. Raghavan Nair***² that the Appellate Court cannot substitute its own view in place of view taken by the trial Court unless those findings are perverse. The emphasis is on carrying out exercise to ascertain whether the findings are perverse or not. If they are perverse certainly the Appellate Court can interfere in the judgment of acquittal.

7. The finding is said to be perverse when it is arrived at by including particular piece of inadmissible evidence or by overlooking the provisions of Codified law. On this background the findings recorded by the Court below needs to be considered.

Case in nutshell and the findings

8. The complainant is a teacher working in Municipal School and earning salary of Rs.14,000/- per month. She knows

2 2003 CLJ 411

accused. There are two rival claims so far as advancement of money is concerned. **According to the complainant**, she gave hand loan of Rs.1,00,000/- in April 2005, and hand loan of Rs.2,00,000/- in May 2005. The two cheques in question drawn on Central Bank of India were issued by Respondent No.1-accused in favour of the complainant towards discharge of those amounts. **Whereas accused pleaded** that the complainant herself and one Mr. Kamble were running chit fund, and the cheques in question were issued towards the chit fund in order to show to the members. This story was put up when she gave evidence before the trial Court. Furthermore, the accused took defence that they were blank cheques issued in the year 2003-2004, but were deposited subsequently by putting dates. In addition to these grounds, accused also took defence about non service of statutory notice.

9. Both learned Advocates have relied upon various judgments by Appellants :

Judgments by Appellant

- (a) *Bir Singh Vs. Mukesh Kumar*³
- ((b) *T. Vasanthakumar Vs Vijaykumari*⁴
- (c) *Noble T. Francis Vs. Seleena Jos*⁵
- (d) *Nikhil Gandhi Vs State of Gujarat & Anr*⁶
- (e) *M/s. Kalamani Tex & Anr. Vs. P.Balasubramaniam*⁷

Judgments relied upon by Respondents

- (a) *V. Raja Kumari Vs P.Subbarama Naidu & Anr.*⁸
- (b) *Rajat Ram Khullar Vs. Battu Mal*⁹
- (c) *Pinak Bharat & Company V. Anil Ramrak Naik*¹⁰
- (d) *Basalingappa V. Mudibasappa*¹¹
- (e) *K. Prakashan Vs. P.K. Surendaran*¹²
- (f) *C. Antony Vs. K. G. Raghavan Nair 2003*¹³

3 (2019) 4 SCC 197

4 (2015) 8 SCC 378

5 2005 Cri. L.J. 993

6 2016 Cri. L.J.4338

7 (2021) 5 SCC 283

8 (2004) 8 SCC 774

9 AIR 1976 Del 111

10 AIR Online 2022 Bom 624

11 (2019) 5 SCC 418

12 (2008) 1 SCC 258

13 Cri.L.J.411

10. I have perused all the judgments relied upon by both sides.

It is true that Hon'ble Supreme Court and other High Courts have dealt with issue about importance of drawing presumption under section 139 of the Negotiable Instruments Act and when it can be rebutted.

11. The principles can be culled out as follows :-

- (a) Mere denial of case of the complainant is not accepted as rebuttal of presumption.
- (b) Even if positive evidence is given by the accused through himself or other witness, still the Court is justified in scrutinising that rebuttal evidence and in a given case is justified in discarding it and giving finding in favour of the complainant.
- (c) The Court is supposed to decide the matter on the basis of available evidence at the same time either of the parties can request the Court to draw inference against party who has withheld particular piece of evidence.
- (d) If the evidence is withheld, there can be inference that this evidence will go against him, if produced. This is

observation in case of ***M. S. Narayana Menon Vs. State of Kerala.***

- (e) It is also true that even if blank cheque with signature is given by drawer/accused, in a given case it can be considered as a perfect negotiable instrument so as to pass on consideration. The provisions of Negotiable Instrument give authority to the payee to make it complete.
- (f) After taking overview of the decisions it was held in case of Nikhil P. Gandhi (supra) that payee may on the basis of implied or express consent fill up the details at the subsequent point of time and present it for payment.

12. It is also true that the Hon'ble Supreme Court in case of ***Basalingappa*** (supra) has elaborately summarized the principles on the point of presumption. If the execution of the cheque is admitted, what can be the inferences is summarized in para 25.1.

For better understanding, they are reproduced as follows :

- (a) It is to be presumed that the cheque was issued for discharge of debt or their liability.
- (b) The presumption is not conclusive but it is rebuttal

presumption. The accused can raise probable defence.

- (c) The standard for rebutting presumption is that of preponderance of probabilities.
- (d) The accused can rely upon his own evidence or even can rely upon the materials submitted by the complainant to raise probable defence.

Findings of Appellate Court

13. On the basis of above principles, it will be relevant to consider the findings given by the Appellate Court. They are as follows :

- (a) There are certain observations about financial capacity of the complainant to advance loan. Money was not withdrawn by her from the bank. Even cash was not lying with the complainant. The complainant is not financially sound and she has borrowed money from fellow teachers. However, these details are not given. So also said teacher is not examined. (para 4)

- (b) Proof about advancing loan :-

No details are given as to when, at what time and in whose

presence the advance was made by the complainant. There is no writing to that effect (para 4)

(c) About evidence of the accused :-

The cheque book containing the cheques was issued to the accused in the year 2003. The cheques were given by way of security and not towards discharge of debt or liability. The blank cheques were given towards chit fund.

(d) About contents of the cheque :-

The contents were not filled by the accused. The amount filled by the complainant is admitted by her during cross examination (when she was cross examined in Case No.12725/SS/2005 she has answered that the contents are filled by her). It is written by her because accused has not brought specs. When she was cross examined in Case No.12726/SS/2005, she has answered that the accused wrote amount in figure and put signature. Whereas payee's name, date and amount in words were written by the complainant.

(e) Running of chit fund by the complainant along with her

maid servant and accused is admitted. (para 5 of the impugned judgment).

14. Inferences drawn by the Appellate Court :-

- (a) No evidence to show that the amount was advanced by way of loan and hence the liability is not proved, [as to when these directions were issued] (para 7 of the judgment).
- (b) Notice not served on the accused personally.
- (c) There is no cross examination by the complainant so far as theory of issuing cheques towards chit fund (para 8).
- (d) Reasons given by the trial Court were found not convincing. There is no reason to disbelieve version of the accused.

15. For the above reasons the judgments of conviction are set aside.

About trial Court Judgment

16. As against, this the trial Court in the judgment has concluded that mere denial on oath and defence taken by the accused is not sufficient, on facts of the case to rebut the presumption under section 139 of N.I. Act. Though the accused

has deposed about filing of complaint to police (about act of threatening by the complainant due to stopping of payment by accused), the trial Court observed that “the contents of that complaint are not proved through the concerned police officer (para 8). The trial Court further observed that “if the cheques are issued toward chit fund in the year 2003, but they were misused in the year 2005, the accused ought to have stopped payment which he has not done”. (para 9). The trial Court has not reposed confidence in evidence of the accused (para 10). For the above reasoning the trial Court accepted the case of the complainant and convicted the accused in both the complaints.

Consideration

17. When both these judgments are perused, we may find that the trial Court has laid emphasis on particular instances whereas the Appellate Court has put emphasis on other circumstances. It is true that when for the first time the Appellate Court is appreciating evidence, re-appraisal is permissible, whether it is an Appeal against judgment for conviction or against judgment of acquittal. Only difference is in Appeal against judgment of

acquittal, the Appellate Court should be slow in interfering the judgment. While dealing with this Appeal also, this Court, should also be slow in interfering the judgment of acquittal, whether it is passed by the trial Court or by the Appellate Court.

18. So this Court has only to ascertain as to whether the evidence has been properly appreciated and while accepting or discarding particular piece of evidence, whether the principles of Evidence Act have been applied properly or not. So to say when the witness is a writer of particular document, the said document can be proved through himself also and for proving the contents it does not require third person.

19. Many a time the trial Court or Appellate Court does not consider the principles laid down by the Constitutional Courts properly.

20. As stated above, these cases do not involve the plain defence of denial but apart from denial, the specific defence is

taken by the accused. It is cardinal principle of the Evidence Act that a person who alleges particular fact has to prove the said fact. He can be relieved from proving particular fact by taking recourse to the principles of presumption laid down as per the Indian Evidence Act, 1872. In this case there are three presumptions which are relevant. They are as follows :

- (a) Presumption under Section 118 of N.I. Act.
- (b) Presumption as per Section 139 of N.I. Act.
- (c) Presumption under Section 27 of the General Clauses Act.

21. It is true that all these presumptions are not conclusive presumptions but they are rebuttal presumptions. When we have considered the evidence given by the complainant in both the cases and common evidence given by the accused in both complaints, we may find that both the parties have taken upon themselves the burden to prove the fact pleaded by them. No doubt the complainant in this case can certainly rely upon the presumption under sections 118 and 139 of N.I. Act. The signature on both cheques is not disputed by the accused. What is

disputed is the contents of cheques.

22. According to the complainant from these contents of both cheques, the accused wrote the amount in figures on cheque and signed himself (as per cross examination in Case No.12726/SS/05). It means the date, name of the payee and amount in words are put by the complainant whereas during cross examination in Case No.12725/SS/05, his attention is brought to last digit of date on the cheque. It is corrected from the **figure 3 to 5**. It is denied by the complainant.

23. When the accused has admitted his signature, he has given authority to the complainant to make cheques complete in all respect. It is true that if there is material alteration that is to say any alteration carried out without consent of the parties, it affects the validity of negotiable instrument as contemplated under section 87 of the N.I. Act. As stated above, the signatures and amount in figures are of accused. So filling other details cannot be said to be material alteration.

24. The facts of *Pinak Bharat & Company V Anil Ramrao Naik* reported in *AIR Online 2022 Bom 614* are different. There was civil dispute in between parties about entitlement to amount. On the set of said facts, filling in details in the cheques was considered as material alteration and the Hon'ble Supreme Court has categorically observed about authority of the payee to make blank cheque complete in case of *Bir Singh* (supra). Similar are observations in case of *Nikhil P Gandhi* (supra).

25. On the basis of above facts it can certainly be said that the complainant is entitled to rely upon presumption under sections 118 and 139 of the N.I. Act. In nutshell it has to be presumed that the cheque was issued towards discharge of debt or liability.

26. The Appellate Court has laid emphasis on not leading any evidence by the complainant on the point of his financial capacity. The complainant is teacher working in Municipal School and earning Rs.14,000/- per month as salary. Even she

has stated that she has borrowed money from fellow teacher.

The said teacher is not examined. At this juncture, the Appellate Court has failed to apply the law, correctly, because when the conditions for drawing presumption under section 139 of N.I. Act are satisfied, the Court cannot go back and say that the complainant has not proved from where the money is raised.

The Respondent relied upon the observations in case of ***Sanjay Yadhavraoji Makode V. Suhas Prakashji Dhote*** reported in ***2018 (4) BCR (Cri.) 198*** (para 19). There was emphasis on two factual aspects. One is absence of evidence to show advancing of money and the second, absence of evidence as to how the money is raised.

27. It is not disputed that except two cheques, the complainant has not filed any document to show that she advanced loan of Rs.1,00,000/- and Rs.2,00,000/- to the accused. Now absence of such evidence whether has any bearing on the case ? Whether it can be made an issue by the accused ?

28. The accused can rebut the presumption in two ways, One by pointing out lacunae in the case of the complainant and the second by giving positive evidence. These are principles reiterated in case of *Basalingappa* (supra). However, when particular evidence is withheld from the Court, even that is considered as one of the factor for concluding whether the presumption is rebutted or not. These are observations in case of *M.S. Narayana Menon* (supra).

29. This issue is connected to defence raised on behalf of the accused. Absence of written evidence to show advancing of money will gain importance, only if, defence of accused is probable one. The accused raised two points. **They are as follows :-**

- (a) Cheques were issued in the year 2003-2004, whereas they were deposited in the year October 2005. There is grievance of misuse of cheques. On the point of issuance of two cheque books containing those two cheques, the accused has examined a witness, Gopinathan from Central

Bank of India. According to him, relevant cheque books were issued on 10th September 2003, and on 16th December 2003. So the year of issuance of these cheque books cannot be disputed. In this case, the complainant had deposed that date is filled in by the complainant himself. In one case, she has given explanation that as accused has not brought specs, she has filled in those details. I do not think that time gap in between issuance of the cheque book and dates written on these two cheques has got any material bearing on the case. Because unless and until, all the details are not filled in, it does not become complete negotiable instrument.

- (b) (i) Cheques were not issued towards repayment of loan taken by her but they were issued towards chit fund.

Even the complainant has admitted that there was chit fund consisting herself, accused and one Kamble. Out of these two cheques, one cheque was issued to show the members. In fact, accused owes an amount of Rs.50,000/- only. The accused also paid interest till October 2005 and

when she stopped interest, the complainant threatened her to teach a lesson on the basis of cheque. It is matter of record that the accused has filed the complaint with RCF police station. Its extract is on record. It is true that the said extract contains information recorded on the basis of the complaint given by the accused. No doubt she is not writer of that document but she has not disowned that complaint.

(ii) The complainant was also cross examined by the accused. The Appellate Court observed that theory put up by the accused was not seriously challenged. I do find that there are certain lacunae in this theory of chit fund put up by the accused. So to say how many members are there, when the accused has withdrawn money from chit fund and as to how she has discharged her liability. This theory of chit fund was also put to the complainant also during cross examination. She has denied those suggestions. At this stage what I gather is that when specific theory of chit fund is put up to the complainant

as against theory of advancing of loan and cheques issued towards its discharge, the complainant ought to have adduced some more evidence either in the form of a witness, who is aware about advancing loan to the accused or by giving details as to when money of Rs.1,00,000/- and Rs.2,00,000/- were advanced. This has not happened. Furthermore, the complainant by way of rebuttal could have examined witness to show that inspite of running of chit fund still the accused owes an amount of Rs.3,00,000/- to her. The complainant has not done this but she has simply closed her case by examining herself and by relying upon presumption under section 139 of the Act.

30. The burden on accused is not heavy as that of the complainant. The Court has to see whether probable case so as to create dent in case of the complainant has been made out or not.

31. For the above discussion, I agree with the conclusion drawn by the Appellate Court. I agree that Respondent No.1 for above

discussion has succeeded in rebutting that presumption. So ingredients of offence under section 138 of the N.I. Act are not satisfied. After making out probable case, the case reverts back to the stage of scrutinising complainant's evidence. The law does not provides for contingency of adducing evidence by the complainant, after accused has adduced evidence. From the cross examination, the complainant has to foresee what type of case is pleaded by the accused. The complainant has failed to anticipate that contingency. So the beneficiary is none other than accused.

Service of notice

32. For the above discussion, I feel that the issue of service of notice is only of academic importance. It is true that the complainant could not state that the signature on acknowledgment belongs to accused. If the accused is available at the time of delivery and if she has signed, the complainant/sender of notice will be in position to identify the signature and not otherwise. But the address on the envelope is

not disputed by the accused. So the presumption under section 27 of the General Clauses Act will certainly help the complainant. Both the sides have relied upon certain judgments on the point of manner of discharge of burden to prove service of notice. I am not going into facts of these judgments. It is for the reason that I have already concluded that the complainant has not satisfied the material ingredients for the offence under section 138 of the N.I. Act.

33. For the above discussion, it cannot be said that the findings given by the Appellate Court are perverse. Only on one aspect about proving financial capacity, I am not with the Appellate Court, however, for the rest of issues, I agree with the conclusion drawn by the Appellate Court. So no case for interference is made out. Both the Appeals are dismissed.

(S. M. MODAK, J.)