

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

CRIMINAL APPEAL NO. 793 OF 2006

Mr. Michael Abreo

Age Adult

Address – C/4, Parijat Patel Estate

Jogeshwari (W), Mumbai - 400102

...Appellant

vs.

1. Jayesh N. Dhavud

Age Adult Occ.: Service

Address :- Dattani Gram, Bldg. No. 4

Flat No. 23, Iraniwadi,

Road No. 3, Kandivali (W),

Mumbai – 400067

2. The State of Maharashtra

...Respondent

Ms. Ilsa Shaikh – Appointed as Amicus Curiae -Advocate for the Appellant

Mr. Bipin A. Vora - Advocate for the Respondent No. 1

Mr. Y. Y. Dabke – APP for the State

CORAM : S. M. MODAK, J.

RESERVED ON : 01st MARCH, 2023

PRONOUNCED ON : 13th MARCH, 2023

JUDGMENT :-

1. This appeal is listed after so many years. Even learned Advocates find it difficult to take instructions from the respective clients as they are not in touch with them.

2. They were handicapped. Earlier learned Advocate Shri M. S. Mohite used to represent the Appellant-Complainant. Now he is appointed as Senior Advocate. His colleague Ilsa Shaikh used to appear in the matter. I deem it to appropriate to appoint Ilsa Shaikh as amicus curiae and she is appointed. I have heard her. To the best of her experience and knowledge of law, she argued the matter and also filed a summary of evidence.

3. When the turn of the Respondent-accused came, he was also handicapped, in the sense that his client was not in touch in spite of communication. He also argued with best of his experience.

4. Court is also handicapped in the sense, a respective counsel argued the matter on the basis of the available record. If such is their position, the Court could not get fullest assistance. Hence on the basis of their arguments and on the basis of the records, the Court has decided the appeal.

5. There were three angles of the case:-

One is a relationship in between the Appellant and Complainant and the Respondent-accused.

Another is the relationship in between the accused and the witness-Ghanashyam Khanchandani and

third is relationship in between the Complainant and Witness Ghanashyam.

6. As per the Complainant, the cheque of Rs. 2,50,000/- was issued by the accused towards the discharge of amount of loan taken by him. It may be a hand loan or investment. The accused runs the business of dyes and the Chemicals. Whereas the Complainant is an employee of the Union Bank of India. Being an employee, he cannot carry on the business. There is a promissory note issued by the accused in favour of the Complainant. This promissory note was neither pleaded nor tendered in the evidence by the Complainant at the beginning. He produced it during cross-examination.

7. The cheque is dated 10/06/1995. It was dishonoured and the memo dated 21/06/1995. Date of notice is 25/06/1995. It was served by hand delivery. During evidence, accused tried to bring on record the involvement of Ghanashyam Khanchandani. He was examined as defense witness. The Complainant was cross-examined on the point of his relations with the said witness-Ghanashyam Khanchandani. Though initially the Complainant feigned ignorance about the said Ghanashyam Khanchandani, however later on he

admits about the same. He has also admitted about issuance of certain cheques by the said Ghanashyam Khanchandani and it is dishonoured. The Complainant denied a suggestion that in fact he had financial dealing with the Ghanashyam Khanchandani not with accused.

8. On this background the evidence of the Ghanashyam Khanchandani is material. The said witness has said about his acquaintance with accused. The accused used to supply him dyes and Chemicals for his textile processing in the name of Seeman Processors. Being friend of accused, he also knows the Complainant. In addition to that, he said two things :-

One is the Complainant visited his house with Anti Social elements and tried to recover amount from him and the witness lodged complaint against him to police.

Second is accused took two cheques for Rs. 30,000/- and 70,000/- from the witness and gave them to the Complainant.

9. In fact it is strange thing on the part of the trial court.
The trial Court has not offered the complainant an opportunity to

cross examine this witness, for the reason that his previous statement is not there. This is totally wrong notion on the part of the trial court. Be that it may, certain questions were also put to the Complainant during cross-examination on the line of the evidence given by the said Ghanashyam Khanchandani. Shyam Bhaddive is witness from Union Bank of India. He is examined by the Complainant and he issued the cheque memo.

10. On the basis of above evidence, it need to be seen whether either of the parties have succeeded. That is to say whether the Complainant or accused. To buttress her submission, she relied upon the following judgments :-

(i) Kalamani Tex and Anr. Vs. P. Balasubramanian¹

(ii) Kumar Exports Vs. Sharma Carpets²

(iii) Rohitbhai Jivanlal Patel Vs. State of Gujarat and Anr.³

11. There cannot be any dispute about proposition of the law laid down in those judgments. The presumption about certain facts is incorporated by way of Section 118 and Section 139 of the Negotiable Instruments Act in order to enhance the reliability of the

1 (2021) 5 Supreme Court Cases 283

2 (2009) 2 Supreme Court Cases 513

3 (2019) 18 Supreme Court Cases 106

negotiable instrument. These presumptions are not applicable in other transactions. On the other hand legislature has given an opportunity to the drawer of the cheque to adduce evidence so as to dispel that presumption. Law recognized the manner of the dispelling that presumption. It can either by giving the evidence or by challenging evidence of the Complainant. The burden is not heavy as that on the Complainant. Above are some of the principles which can be carved out from the above judgments.

12. If we apply them in case before us, it can be said that the Respondent had succeeded to make out the probable case. The Complainant has admitted about getting few cheques from the witness Ghanashyam Khanchandani. The accused is supplier of the dyes and chemicals to the said Ghanashyam Khanchandani. In that way, he owes an amount from Ghanashyam Khanchandani. Whereas the Complainant lend amount to the accused (invested in the business), the Complainant went to the house of the witness to recover that amount. And in fact the said witness has also issued cheque to the Complainant. The above facts are suggested from the entire evidence. So doubt arises whether the accused really owes an

amount to the Complainant though Complainant has not produced the promissory note within time and totally failed in pleading it.

13. For the above discussion, I do not find that the trial Court was wrong in acquitting the Respondent. There is no perversity. No merit in the appeal, hence appeal is dismissed.

14. Office to pay necessary fees to advocate appointed for the Appellant as per Rules.

[S. M. MODAK, J.]