

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

CRIMINAL APPEAL NO. 1311 OF 2006

Pravinkumar Vithaldas Ved

(since deceased)

1a. Smt. Tarla P. Ved

1b. Ms. Reena P. Ved,

1c. Mr. Kunal P. Ved

All adults of Mumbai,

Indian Inhabitants,

having their address at 16-B,

Dr. M. B. Velkar Street,

New Bhatia Mahajan Wadi,

04th Floor, Mumbai

...Appellants

vs.

1. Dr. Parmanand Shitalprasad Pandey

Age 49 years, Occupation Service

residing at C-201,

Nirman Vihar,

Pump House, Andheri (E),

Mumbai – 93

2. State of Maharashtra

...Respondents

Mr. Rajesh B. Jain a/w Adv. Rohit Jain i/by Legal Juris - Advocate for the Appellants

Mr. Ashish Raghuvanishi - Advocate for the Respondent No. 1.

Mr. H. J. Dedhia – APP for the Respondent No. 2-State

CORAM : S. M. MODAK, J.

RESERVED ON : 22nd DECEMBER, 2022

PRONOUNCED ON : 09th FEBRUARY, 2023.

JUDGMENT :-

1. Heard learned Advocate for the Appellant-Complainant and learned Advocate for the Respondent-Accused. Though

Respondent-Accused was convicted by the Court of Metropolitan Magistrate, Court No.33, Ballard Pier, Bombay for the offence punishable under Section 138 of the Negotiable Instruments Act, he was acquitted by City Civil Court. That is how present Appeal is filed by the Original Complainant.

2. The issue involved in this Appeal is whether the City Civil Court is justified in setting aside the conviction and whether it was justified in holding that the respondent has rebutted the presumption and hence there was no legally recoverable debt/liability. It is true that there is always a presumption of innocence in a criminal trial. This presumption of innocence is reinforced when the Accused is acquitted. However in a prosecution under Section 138 Of the Negotiable Instruments Act, there is burden on both the sides and it is not like any other criminal trial. So normal principle of least interference in the judgment of acquittal is not applied with full force in such acquittal. However, in this case, Accused was convicted but acquitted by the City Civil Court. So, we need to decide whether City Civil Court was justified in setting aside the findings by the trial Court in favour of the Complainant.

Case of the Complainant in short

3. The Complainant advanced money to the tune of Rs.6 lakhs to the Accused through his brother in law Dinesh Kapadia. He was a chartered accountant for the Accused. Accused was working as lecturer in Mitibai College and he was conducting tuition class in the name of M.P. tuition classes. The Accused executed a bill of exchange on 01.02.1997 in favour of the Complainant and his wife. He has agreed to pay interest at the rate of 2.75 per month. Through the intervention of said Kapadia, towards the principal and interest, accused issued a cheque for Rs.10,29,000/- in favour of the Complainant. On presenting, it got dishonoured for various reasons. Mandatory notice was issued and it was also replied too. Ultimately complaint was filed. Both the parties adduced oral and documentary evidence.

Evidence adduced by both the parties.

4. The complainant relied upon his evidence and the evidence of two witnesses. One is his brother-in-law, Chartered Accountant Shri Kapadiya through whom the money was lent to Respondent. The third one is the witness Shri Gaonkar from the banker of the accused. The complainant also relied upon

documentary evidence in the form of:---

- a. bill of exchange,
- b. cheque return memos issued by both the banks,
- c. mandatory notice,
- d. reply given by the Respondent and its rejoinder.

5. As against this Respondent-accused has also entered into witness box and examined his accountant Shri Satyawan Pawar. He also relied upon few of the documents. The above said evidence was appreciated by the trial Court and the Respondent was convicted. As against this the City Civil Court reversed the conviction.

Presumption and its rebuttal.

6. The appellant relied upon following judgments :

(i) *M/s. Kalamani Tex and Anr. Vs. P. Balasubramanian*¹

(ii) *T.P. Murugan (Dead) Thr. LRS. Vs. Bojan*²

(iii) *Hiten P. Dalal Vs. Bratindranath Banerjee*³

7. Whereas The Respondent relied upon the observations in case of **Rangappa Vs. Sri Mohan**⁴. There is discussion on drawing of presumption and rebuttal of presumption. There is also a

1 Decided on 10/02/2021 by the Supreme Court of India

2 AIR 2018 Supreme Court 3601

3 AIR 2001 Supreme Court 3897

4 2010 (11) Supreme Court Cases 441

discussion as to how the presumption can be rebutted. It can be also be rebutted by placing reliance on materials relied upon by the complainant. In *Krishna Janardan Bhatt V/s. Dattatraya G. Hegade*⁵ it was held that “*existence of legally recoverable debt is not a matter of presumption under Section 139 of the Negotiable Instruments Act. It merely raises presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability*”. In case of *Rangappa* it was held that the above said observations are in conflict with the statutory provisions as well as an established line of precedents of Hon’ble Supreme Court.(para no.22)

8. I have read it. The law on the point of drawing of presumption and rebuttal of presumption is well settled. At the initial stage, presumption comes to the help of payee and the drawer is given liberty to rebut it. The issue is when it can be said that said presumption is rebutted. Though the burden is not heavy, accused has to probabalise the defense. Ultimately it is question of fact. In this case the accused has not only challenged the evidence of the Complainant but has also entered into witness box. On that

5 (2008) 4 SCC 54

evidence, the appellate Court concluded that the accused has rebutted the presumption. In this appeal, we have to test the correctness of those findings.

9. So the issue involved in this appeal is whether the City Civil Court was justified in setting aside the conviction and is right in concluding that the Respondent-accused has rebutted the presumption.

Role of Appellate Court

10. The Appellant relied upon the following judgments :-

(i) *Rohitbhai Jivanlal Patel Vs. State of Gujarat and Anr.*⁶

(ii) *Nitin s/o Baburao Mankar Vs. Vuamlatesh Housing Agency, Nagpur and Anr.*⁷

(iii) *K. N. Beena Vs. Muniyappan and Another*⁸

11. Whereas the Respondent relied upon the judgment in case of *Chandrappa and Others Vs. State of Karnataka*⁹.

12. Normally the Appellate Court are reluctant to interfere in the findings of the Court acquitting the accused. When there is

⁶ AIR 2019 Supreme Court 1876

⁷ 2010 (6) Mah. L. J.

⁸ AIR 2001 Supreme Court 2895

⁹ (2007) 4 Supreme Court Cases 415

prosecution under Section 138 of Negotiable Instruments Act, same rule does not apply with same rigour. Because burden rests on both the parties even accused undertakes the responsibility to rebut the presumption. In nut shell, the principle of innocence of accused generally applied in criminal trial does not apply with full force in such prosecution.

About impugned judgment

13. On reading the impugned judgment, it can be found out that the Appellate Court started with predetermined view that the Respondent-accused has rebutted the presumption. At the start of the judgment itself the Appellate Court has said that for the following reasons the evidence of the complainant and his witness Dinesh Kapadia does not inspire confidence. I am saying so that the view of the Appellate Court was predetermined not for the reason that at the start of the judgment itself he has started with this observation. I am saying so because in the entire judgment the Appellate Court has not dealt with the different stands taken by the Respondent-accused. That is to say in the notice reply dated 05/08/1999 given by him personally, the Respondent-accused has pleaded certain facts, whereas when he gave evidence, he has pleaded some different facts. This was not considered by the

Appellate Court. There is one more ancillary reason for my view. It is that the evidence of the bank witness and witness of Respondent was overlooked by the Appellate Court.

14. The Appellate Court could have been justified in not considering the evidence of Complainant as inspiring confidence after considering the evidence first and then making comment. In fact this is the normal way of appreciating the evidence. Instead of that the Appellate Court started the judgment with these observation that the evidence of the Complainant does not inspires confidence.

Evidence by both parties

15. On this background the evidence adduced on behalf of both the sides needs to be considered. If we read the evidence of Complainant and his witnesses Shri Kapadia, we will find that the money of Rs. 6 Lakhs was advanced by the Complainant to Respondent through his witness Shri Kapadia. We may find that the cheque in question was issued by the accused in favor of the Complainant through the witness Kapadia. It was a blank cheque. We may find that the Complainant has filled in all the details of the cheque. His conduct of filling those details was supported under the

provisions of the Negotiable Instruments Act and on the basis of interpretation given by the Hon'ble Supreme Court in certain referred judgments.

16. As against this, it is true that the Respondent has not disputed his relationship with Kapadia who is his Chartered Accountant. Even the Respondent has admitted about taking loan from said Kapadia on one or two occasions what is disputed by the Respondent issued bill of exchange and issued a cheque in the name of the Complainant. Even the Respondent-accused has said that he might have issued a blank bill of exchange and a blank cheque and given it to Kapadia. Though the witness Pawar for the Respondent has also denied issuance of a bill of exchange and cheque in favour of the complainant but he has admitted about obtaining loan from Kapadia and handing over blank hundis and cheques to Kapadia.

17. Learned Advocate for the Appellant submitted that the evidence of the Respondent needs to be appreciated in the light of a different stand taken in his reply dated 05th August 1999 to the mandatory notice dated 25th of June 1999 and in the affidavit.

18. On the background of the stand of denial of taking any loan from the complainant, I have perused the evidence of the complainant and his witness. The complainant has deposed about advancing a loan of Rs. 6 Lakhs to the Complainant on 01/02/1997 through Shri Kapadia. Even he relied upon the bills of exchange signed by the accused. Now the Respondent and his witness have nowhere denied the relationship with witness Kapadia. Even they have admitted about taking of loan on some occasions from him. Now a question is whether the Respondent has taken a loan from the Complainant.

19. Even the Respondent while giving evidence before the Court went to the extent of not knowing the Complainant. He saw the complainant for the first time in the Court. This statement is totally false. It is for the reason that he could have said this fact in his reply dated 5th August, 1999. In fact he has said about telephonic communication after receipt of notice and in fact he has sought the details of cheque for the huge amount. This stand taken in the notice reply falsifies the subsequent stand about denying relationship with the complainant.

20. If read evidence of these two witnesses, we may find that there is no receipt thereby admitting receipt of Rs.6 lakhs. So also money was not advanced by issuing cheque. Money was paid in cash. Complainant raised Rs.6 lakhs in following manner :-

- (a) Rs.50,000/- from his wife.
- (b) Rs.4,50,000/- from brother/family member.
- (c) Rs.1,00,000/- from Ambi Foundation Trust

21. It was also doubted how a pensioner getting meager pension of Rs.7,000/- can raise huge amount. Complainant was put several questions on the point of raising of this amount. Complainant also tried to give some answers. But I do not think that complainant need to prove the source of money. Appellant relied upon judgment in case of **Krishna P. Morajkar Vs. Joe Domnic Ferrao and Anr.**¹⁰. He is discharged once he will prove receipt of money by the accused. The Court observed as follows :-

“Unless the Courts start discouraging flimsy defences, acceptability of cheques would not increase. The problem of unaccounted money would be reduced if transactions take place by cheques. Even a cash advance when re-paid by cheque gets accounted. Making it unrecoverable, would only push the persons to extra judicial methods of recovery.”

¹⁰ 2014(2) Bom. C.R. (Cri.) 738

22. There is a bill of exchange issued by the accused dated 01/02/1997. Accused admits signature on it but denied contents. It is important to note that there is rubber stamp of 'M.P. Classes' on said bill of exchange. Now question is why accused signed on blank bill of exchange.

23. There are names of complainant and his wife on bill of exchange. Appellate Court doubted this conduct. If brother has also helped complainant financially then why not name of brother on bill of exchange. This inference is illogical. It is the choice of complainant in whose name bill of exchange be issued. During cross-examination he had given an explanation. By way of abundant precaution, wife's name is added in bill of exchange. She will be there to recover the amount in case of any mishap.

24. Accused tried to portray that witness Kapadia misused it. It was suggested that he had a dispute with Kapadia on account of some project. It is not admitted by Kapadia. That theory is not probablised. For the above reasons, there is reason to believe advancing of loan of Rs. 6 lakhs on 1/02/1997.

About the cheque

25. Accused admitted signature on the cheque but denied contents. Even complainant does not say that accused wrote the contents. In fact when cheque was handed over on 16.06.1999, accused was in haste, hence complainant filled the contents and accused signed it. It took place in office of Shri Kapadia. Appellate Court observed “*this stand is taken in evidence and it is not pleaded in notice and complaint*”. (para 14)

26. The purpose of notice is to give intimation to the drawer about dishonour and making demand. They must be clear. So long they are complied, notice cannot be defective. It is true that in the complaint P.W. 1 has explained under what circumstances cheque was issued. It is important to note that this has come in cross-examination (internal page 11 of cross examination). If it is there, complainant cannot be blamed. Because it is the accused who brought it on record. Appellate Court lost site of this fact.

27. The law on the point of efficacy of blank cheque duly filled by possessor is very clear. The complainant relied upon following judgment :-

(a) **Bir Singh Vs. Mukesh Kumar**¹¹ It is held –

“If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.”

28. Whereas respondent relied upon judgment delivered in case of **M/s. Pinak Bharat and Company Vs. Shri Anil Ramrao Naik and Anr.** decided by this Court (Coram : S. M. Modak, J.) on 02.12.2022.

29. Law on the point of efficacy of blank cheque is well settled. If drawer is issuing blank cheque duly signed, he is authorising the holder to make it complete by filling the details. Accused made an attempt to rebut the presumption. But accused forgot the fact that he has taken that defence which is not recognized by the Courts. Accused may succeed only if he will show that the complainant misused the authority by filling details. Facts of **M/s. Pinak Bharat and Company Vs. Shri Anil Ramrao Naik and Anr. (supra)** are different. There was a suit filed by the accused

11 AIR 2019 Supreme Court 2446

against the complainant and it was held that complainant has no authority to make the cheque complete. The accused has not brought on record any such circumstances.

Amount of cheque

30. There was an issue raised how the amount of Rs.10,29,000/- was arrived at. Complainant deposed that it was consisting of Rs.6 lakhs principal amount and Rs.4,29,000/- towards interest (upto the month of 31st March 1999). The complainant and his witness Kapadia clarified the circumstances under which the cheque in question was issued. First there was a meeting held in 1st week of April 1999, then cheque was delivered on 16/06/1999. That is how the amount of Rs.10,29,000/- was arrived at. There is emphasis on behalf of learned Advocate for Respondent that the complainant has not taken action for recovery of amount for two years. It cannot be accepted. Complainant advanced loan to accused through witness Kapadia and Kapadia acted as Chartered Accountant for accused. There is reason to believe that accused owe an amount of Rs.10,29,000/- to the complainant.

31. Signature on the cheque is admitted. Complainant was

proper custodian of the cheque. There is proof that bill of exchange is signed by the complainant. The liability to the extent of Rs.10,29,000/- is proved. Presumption has to be drawn in favour of the complainant.

Theory of loss of cheque

32. The accused through his evidence proved intimation dated 17/05/1999 (page 97) given to Vile Parle Police station about loss of brief case containing articles including blank and signed cheques. Whether this theory can be believed? But it is undisputed fact that complainant has not informed his banker that cheques are lost and instructed to stop the payment. Why such intimation is not given. There is no explanation. Appellant places reliance on **Gaurav Omprakash Jaju Vs. Shri Shakti Fabrics**¹². There was no police complaint filed and there were no details as to when the accused was away from his shop during which the cheque was stolen and hence that theory was not believed. (para 11). In this case though there is police complaint, instructions were not given to Bank to stop the payment. Merely, lodging the police complaint will not suffice. Even banker of the accused has said that there are not stop

¹² Cri. Appeal No. 268 of 2009 decided on 03/03/2010 (Nagpur)

payment instructions. So theory of loss of cheque is half hearted attempt. This theory is not probablised.

Falsity in defence

33. Accused gave reply dated 5/08/1999 to the complainant to the statutory notice. Accused pleaded following facts :-

- (a) There was telephonic talk with the complainant.*
- (b) Accused demanded details of cheque but complainant has not given.*
- (c) Accused informed to police about loss of cheque.*

Additionally he pleaded :-

- (a) He never handed over the cheque and there are no dealings.*

Whereas before the Court, he pleaded :-

- (a) Relationship with Chartered Accountant Shri Kapadia and obtaining loan from him.*
- (b) Blank cheque issued to him.*
- (c) Misuse of cheque.*

34. As said above theory of loss of cheque cannot be believed. The theory of loss of cheque and theory of misuse of

cheque are self contradictory. When accused has pleaded that complainant Kapadia misused the blank cheque he admits that they are proper possessor of cheque. It suggests that accused tried to put emphasis on both the theories at the same time. But I have already concluded that the complainant was justified in making the cheque complete and hence there is no misuse. For these reasons, both the theories cannot be accepted. The Appellate Court has not made any comment on this issue.

Theory of money lending

35. During cross-examination, Complainant said he does not possess money lending license. He further said, except accused, he has not advanced loan to any person. On this single advancing, the appellate Court held that it is money lending transaction and license under Section 10 of the Maharashtra Money Lenders Act is required. There cannot be any dispute about the proposition of law. The lender must continuously advanced the money. There must be more than one transaction. This is observed in case of **Ganesh Madhavrao Hawaldar Vs. Mithalal Keshal Dave**¹³. Furthermore if money is advanced against a bill of exchange the transaction does not fall

13 1999 (1) Mh. L.J.

within money lending. Where is the discussion about the provisions of said Act in the judgment of the appellate court. In fact it is not there.

36. Merely because, Complainant does not know accused directly, it does not make any difference. They were knowing each other through Shri Kapadia. The observation in para no. 23 is erroneous and need to be set aside.

Non-Affirmation by witness Kapadia

37. There is an objection taken on behalf of the respondent about wrongly considering the evidence of witness Kapadia. It is for the reason that his affidavit was not affirmed. The respondent relied upon the observation in the judgment in case of **Sayed Anwar Ahmed and Anr. Vs. The State of Maharashtra**¹⁴. Division bench of this Court had an occasion to make an observation about the contents of an affidavit filed in support of an application under Section 156 (3) of the Criminal Procedure Code. The format prescribed as per chapter VII of the Criminal Manual was reproduced. The observations of the Hon'ble Supreme Court in case of **Priyanka**

¹⁴ 2017 SCC Online Bom 3972

*Shrivastava Vs. State of Uttar Pradesh*¹⁵ insisting of filing an affidavit are also referred. According to learned Advocate for the Appellant that contingency is different from the contingency before us. He invited my attention to the relevant notings from the trial court record. It is true that in present case the grievance is made in respect of recording the evidence of witness Kapadia. He has filed his affidavit of examination-in-chief as per the provisions of Section 145 of the Negotiable Instruments Act. My attention is invited to last page of that affidavit dated 01/08/2003. In the Roznama dated 01/08/2003, the learned Judge has noted down about the affidavit of the complainant witness Shri Kapadia on evidence. So there is proper compliance. It is not the form but substance that matter. Hence the objection is turned down.

Reason for dishonour

38. The cheque was dishonoured for different reasons. There are two memos on record. One issued by complainant's banker Bank of Baroda dated 18/06/1999 (P-5) and one by accused banker City Co-operative Bank dated 17/06/1999. The cheque was returned with remark 'Refer to drawer' and 'Do not present again as the

15 (2015) 1 Mah. LJ 421 (FB)

matter is referred to recovery branch'. This was considered by the appellant court as one of the circumstance to believe that accused has not issued the cheque (para 15). This finding is seriously disputed by the appellant.

39. The reasoning is absurd. The accused is not disputing signature on the cheque. The theory of loss of cheque is not believed. In fact issuing cheque by the accused 'when there is outstanding in over draft' is highly objectionable. The reasons for dishonour are more specific in memo dated 17/06/1999. It is proved from the evidence of witness Gaokar. He is the banker of accused. Even he has clarified that there are no stop payment instructions. In fact the appellate Court has totally failed to consider this evidence. The finding is without any basis.

Conclusion

40. Though accused has undertaken the task of rebutting presumption for the reason stated above, he was not successful. In fact both the parties relied upon oral and documentary evidence. Oral evidence adduced by the complainant suggest of advancing loan to the accused. Whereas the accused has tried to portray that it was not by the complainant but by witness Kapadia. Even signature on

cheque is admitted. The accused undertaken half hatched attempt. The grievance of misuse of blank cheque by Kapadia has only remained on paper without there being any material. Even theory of stolen cheque is half hatched.

41. The appellate Court not only committed wrong in appreciating the evidence but even not considered certain evidence. The findings are perverse. It need to be set aside.

42. The Complainant has proved all the ingredients of :-

- a) issuance of cheque*
- b) discharge of debt /liability*
- c) presentment of cheque*
- d) dishnour of cheque*
- e) issuance and receipt of notice*
- f) failure to pay*
- g) filing complaint in time.*

43. Hence accused has committed an offence under Section 138 of the Negotiable Instruments Act. There was feeble attempt made to defer the hearing for the reason that Respondent is declared insolvent and official assignee is appointed. However there is no legal bar for prosecution under Section 138 of the Negotiable

Instruments Act. That is overturned.

Sentence

44. Trial Court inflicted three months Simple imprisonment and compensation of Rs. 10,50,000/-. Appellant's counsel urged that time spent be considered. No purpose will be served by sending the Respondent to jail. The punishment can be either sentence, fine/both. Section 357 (1) lays down the criteria for fixing the amount of fine. The original complainant has expired and he could not see the final outcome during his life time. The appeal is prosecuted by legal representative. So this Court feels that double the amount of cheque will be the proper sentence. Out of which the Appellant can be paid the compensation. Hence Order :-

ORDER

- (i) The appeal is allowed.
- (ii) The judgment dated 01/09/2006 passed by Additional Sessions Judge, Bombay City Sessions Court, Mumbai in Criminal Appeal No. 386 of 2005 is set aside.
- (iii) The Respondent Dr. Parmanand Shitalprasad Pandey is held guilty for the offence punishable under Section 138 of the Negotiable Instruments Act.
- (iv) The Respondent-accused is sentenced to fine of Rs.

20,59,000/- (Rs. Twenty Lakhs Fifty Nine thousand only)

- (v) Out of fine amount an amount of Rs. 20,25,000/- be paid to the Appellant towards compensation.
- (vi) The Respondent to deposit the amount before the trial Court within three months from today.
- (vii) In case of failure to pay fine amount, the Respondent is sentenced to Simple Imprisonment for 1 year.
- (viii) Appeal is accordingly disposed of.

[S. M. MODAK, J.]