

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

CRIMINAL APPEAL NO. 37 OF 2012

Shobha Pundlik Gosavi

...Appellant

Versus

Bharat Ravaji Kashid And Anr.

...Respondents

....

Mr. C.T. Chandratre, Advocate for the Appellant.

Ms. Ilsa Shaikh, Advocate for Respondent No.1.

Mr. Arfan Sait, APP for the Respondent No.2 – State.

....

CORAM : PRAKASH D. NAIK, J.

DATE : 30th JANUARY, 2024.

P.C.:

1. The appellant is the original complainant. The complaint was filed for an offence under Section 138 of the Negotiable Instruments Act. It was alleged that the accused had demanded the amount of Rs.2 Lakhs by way of hand-loan for the purpose of business. The accused agreed to return the amount within short span of time. The complainant parted an amount of Rs.2 Lakhs in cash on 21.04.2005 which was agreed to be returned by the accused on 21.07.2005. The accused thereafter issued a cheque bearing No.099857 for an amount of Rs.2 Lakhs. The cheque was dishonoured on 22.07.2005 with remarks 'not arranged for'

Demand notice was sent to the accused. Since the payment was not made complaint was filed. Vide order dated 24.04.2008 process was issued by the trial Court for an offence under Section 138 of the NI Act.

2. Plea of the accused was recorded. Affidavit of evidence of the complainant was filed on 08.12.2008. The complainant was cross examined on 14.05.2009 and 13.07.2009. Pursuant to that the accused filed pursis on 14.05.2009 stating that none of the documents filed on record have been proved on account of the affidavit in chief filed on record taking into consideration the Indian Evidence Act. The learned Magistrate called for say from the other side. The Advocate for the complainant filed say stating that the affidavit of complainant filed along with the original cheque, Memo, office copies notice on 08.12.2008 and xerox copy of the said documents and the affidavit at the same time. On 14.05.2009, the learned Magistrate recorded that the documents are not proved as per the Evidence Act, by keeping the point of evidentiary value open for argument at final stage, documents are to be exhibited as administrative act and for identification purpose. Subsequently the statement of the accused is recorded under Section 313 of Cr.P.C. The evidence was closed.

3. Vide Judgment and order dated 25.09.2009, the learned Magistrate dismissed the complaint and the accused was acquitted for an offence under Section 138 of the NI Act.

4. The learned Magistrate had observed that the defence of the accused is that the complainant's husband assured help for obtaining loan to the accused and therefore he obtained all the documents from the accused including shop act license of the accused's wife, income tax returns as well as blank cheques of the accused. The accused has not laid any documentary or oral evidence. The learned Magistrate had observed that the complainant has not proved the documents in accordance with law of evidence. The defence of the accused was that blank cheques were issued and therefore it was incumbent upon the complainant to state as to who has written the contents of the cheques. Since the requisite documents were not proved in accordance with law, the accused is entitled to be acquitted.

5. Learned Advocate for the appellant submitted that the trial Court has passed the Judgment contrary to well established principles of law. The trial Court has ignored Section 139 of the NI Act. The trial Court has also not taken into consideration Section 139 of the NI Act. The accused had filed pursis contending that the

documents are not proved. The trial Court had left the issue open to be decided at the time of conclusion of the trial. However, the Court failed to decide the said issue and accepted the contention of the accused that the documents are not proved. Considering the nature of objections urged by the defence, the trial Court ought to have decided the issue at the inception. The complainant had filed an affidavit of evidence and proved the documents, it cannot be said that the documents were proved.

6. Learned Advocate for the applicant has relied upon the decision of the Apex Court in the case of **Bir Singh Vs. Mukesh Kumar**¹.

7. Learned Advocate for the Respondent No.1/accused submitted that there is no infirmity in the impugned judgment of the trial Court. Mere production of documents does not amount to proof of the document. The trial Court had indicated that the appellant had not proved the documents in accordance with the Evidence Act. However, the issue was kept open. The complainant failed to prove the contents of the documents. The documents were marked for administrative purpose. It cannot be said that the documents were proved in evidence by producing them along with affidavit of evidence.

1 AIR 2019 SC 2446.

8. Learned Advocate for Respondent has relied upon the following decisions:

- i) **Bharat R. Desai & Anr. Vs. Naina Mohanlal Bhal².**
- ii) **Bama Kathari Patil Vs. Rohidas Arjun Madhavi & Anr³.**
- iii) **Mahendra Gulabchand Kochar Vs. Sakharam Ramdas Patil⁴.**

9. From the record it is apparent that the complainant had examined himself. The affidavit of evidence was filed along with the documents. The Judgment of the trial Court indicate that the cheque return memo produced vide Exhibits-30 & 31 were having presumptive value, hence need not be proved. The office copy of the notice was exhibited but it was a xerox copy, it cannot be read as evidence. The complainant has not stated whether she has received the said notice from the accused. The examination in chief is silent. Since the cheques were blanks, the complainant to have furnished details as to who has written the contents.

10. It is pertinent to note that all the requisite documents were produced along with the affidavit of evidence. The signature on the cheque was not disputed. The fact that the cheque was dishonoured on account of insufficient funds was not in dispute.

² 2004(2) ALL MR 291.

³ 2004(2) ALL MR 290.

⁴ 2009 ALL MR (Cri) 1995.

Apparently the trial Court has not looked into Section 118 as well as Section 139 of the NI Act. The trial Court proceeded with the fact that the defence of the accused is that the cheques were blank. However, on perusal of the statement under Section 313 of Cr.P.C. or the Cross examination conducted at the instance of the accused does not appear that it was the defence of the accused, the cheques were blank. Although the issue with regards to admissibility, probative value of the documents was kept open at the time when the pursis was filed by the accused. It appears that the trial Court has not dealt with that issue at the final stage.

11. Considering the aforesaid circumstances the matter can be remanded back to the trial Court considering the circumstances the aspects afresh. The complainant will be at liberty to adduce additional evidence. Opportunity be given to the accused as provided under law.

ORDER

- i. The complainant is at liberty to examine himself and adduce evidence.
- ii. The accused is entitled for all the rights provided to him under the law.
- iii. Judgment and order dated 25.09.2009 passed by the learned J.M.F.C. Nashik in SC No.87 of 2008 is set aside.

- iv.** Case is remanded back to the trial Court to decide it in accordance with law.
- v.** The trial Court is requested to complete the trial within a period of six months from the date of receipt of this order.

(PRAKASH D. NAIK, J.)