IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 984 OF 2012

Deshpande Wedding Hall
Through Prop. Sau. Pratiobha
Shriniwas Deshpande
Age:Adult, Occ.Business,
R/o. Deshpande Wedding Hall,
Pradhannagar, Jayabai Colony
Road, Nashik Raod, Nashik. ...**Appellant**
(Orig. Complainant)

Versus

1. **Swami Samrath Krishi Agaency**
through Prop. Shri Shantaram Balkrishna Gade
Age: Adult, Occ: Business
R/o. At & Post Shiwada,
Taluka Sinnar, District Nashik.
2. **The State of Maharashtra.** ...**Respondents**

Mr. Nikhil M. Pujari i/by Shri P. N. Joshi Advocate for Appellant.
Ms.Aishwarya Sharma Appointed Advocate for Respondent No.1.
Mr. Arfan Sait, APP for Respondent-State.

CORAM : PRAKASH D. NAIK, J.
DATE : 12th JANUARY, 2024

JUDGMENT:-

1. This appeal is preferred by the original complainant under Section 378(4) of Cr.P.C.. Complaint was filed for offence under Section 138 of the Negotiable Instruments Act. Vide order dated 12th October 2009, passed by learned Judicial Magistrate, First Class, Nashik-Road (II Joint Court) in S.C.C. No.1958 of 2004, the respondent was acquitted.

2. The brief facts of the complaint filed by respondent are as follows:-

(i) The complainants husband and the accused were known to each other. The accused had obtained term loan from State Bank of India at Nashik. The accused was required to pay the installment of loan. The accused was also required money for agricultural purpose.

(ii) The accused requested the complainant to pay loan amount of Rs.1,65,000/- to the complainant. Request was accepted and amount of Rs.1,65,000/- as loan to the accused. Assurance was given that the amount would be returned.

(iii) The accused returned the amount by way of cheques bearing No.726560 dated 7th June 2004 for an amount of Rs.15,000/-. Cheque No.726552 dated 9th June 2004 for an amount of Rs.50,000/- and Cheque No.726551 dated 9th June 2004 for amount of Rs.1 lakhs.

(iv) Cheques were deposited by the complainant with the bankers. The cheques were dishonoured on 26th July 2004. Demand notice dated 5th August 2004 was issued to the accused. Payment was not made. Complaint was filed on 13th September 2004.

3. Verification statement of the complainant was recorded. Process was issued for offence under Section 138 of the Negotiable Instrument Act.

4. Plea of the accused was recorded. The affidavit in evidence of the complainant was filed. The complainant examined herself as CW-1 and other witnesses i.e. CW-2 Suhas Rajaram Bhudar is the bank employee and CW-3 Smt. S. A. Pandit is an Advocate, who has forwarded demand notice to the accused.

5. Learned Magistrate vide judgment and order dated 12th October 2009, acquitted the accused for offence under Section 138 of the Negotiable Instrument Act.

6. Learned Advocate for the Appellant submitted as under:-

(i) The Judgment of the trial Court is contrary to law. The complainant has proved all the requisite ingredients to constitute the offence under Section 138 of the Negotiable Instrument Act.

(ii) The procedural safeguards for initiating prosecution under Section 138 of the N.I. Act was fully complied.

(iii) Cheques were issued in discharge of liability. Cheques were dishonoured on account of insufficient funds. Demand notice was issued to the complainant. It was proved during the trial that the cheques were issued for legally enforceable debt.

(iv) The trial Court has committed an error in acquitting the accused. The trial Court has held that the amount which was parted to the accused was not reflected in the income tax returns filed by complainant. The trial Court has held that for not furnishing income tax returns, the liability is not legally enforceable and on that ground the accused was acquitted. The trial Court had relied upon the decision in the case of **Sanjay Mishra Vs.Ms. Kanishka Kapoor @ Nikkki and another**[1] The said decision was overruled by the Division Bench of this Court in Criminal Appeal No. 795 of 2018.

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1 2009 ALL MR.(Cri.) 1080

(v) The complainant had examined herself and brought on record the transactions and established that cheques were issued in respect to the loan which was parted to the accused. The complainant had examined the bank official (CW-2). The factum of issuance of demand notice to the accused is also established from the evidence of CW-3. There is patent error in the judgment of the trial Court.

7. Learned Advocate for Respondent/accused submitted that, there no infirmity in the judgment of the trial Court. The complainant has failed to prove that cheques were issued in discharge enforceable liability. The evidence discloses that the cheques were misused by the complainant. The writing on the cheques is in different inks. The complainant has misused the cheques which were in possession of the complainant and handed over by accused by way of security. The trial Court has considered the said aspects while acquitting the accused. There were discrepancies in the receipt produced by complainant with regard to the acknowledgment of loan. Demand notice was vague. Apart from the fact that the amount parted to the accused was not reflected in the Income Tax Return, the trial Court has also considered other aspects to draw the conclusion that the complainant failed to establish that the cheques were issued in discharge of liability. The judgment of acquittal does not require interference.

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

(i) Pinak Bharat and Company Vs. Anil Ramrao Naik and Ors.[2]

(ii) E. Dhanuskodi Vs. D. Sreedhar[3]

(iii) Basalingappa Vs. Mudibasappa[4]

9. Perused the judgment of the trial Court as well as oral and documentary evidence adduced before the trial Court. It is true that the decision in the case of **Sanjay Mishra Vs. Ms. Kanishka Kapoor @ Nikkki and Another** was overruled by the Division Bench of this Court.

10. However, apart from the said aspects the prosecution against the respondent/accused suffers from serious discrepancies which are taken into consideration by the trial Court while acquitting the accused.

11. The complainant (CW-1) deposed that, she is the proprietor of Deshpande Wedding Hall and looking after daily transactions of it. The husband of complainant and the accused were acquainted to each other. Marriage of son of accused was performed on 2nd June 2004 at above Wedding Hall. The accused took loan from State Bank of India and he had to pay installment of loan. He was in need of money for agricultural work. Accused demanded Rs.1,65,000/- with complainant. Complainant gave Rs.15,000/- on 25th March 2004 and Rs.1,50,000/- on 31st March 2004. Accused executed hand loan receipt. Accused issued cheques. On depositing cheques were dishnoured. In cross examination, she stated that

2 2023ALLMR(Cri)257
3 2018 SCC OnLine Mad 5124
4 (2019) 5 SCC 418

she got acquainted with accused on 2nd May 2004 at the marriage of his son. The said fact is not mentioned in the complaint. She used to file income tax return of Deshpande Wedding Hall but she had not shown the amount paid by her to the accused in the Income Tax Return. She did not mention the date on which she has paid the amount of the accused in the complaint. The complainant admitted that, she had given hand loan to the accused on 25th March 2004 and 31st March 2004. She used to see daily transactions of Wedding Hall. She did not state how long her husband was acquainted with accused. How could she pay amount to accused without close acquaintance.

12. CW-2 stated that, as per account extract of Shri Swami Samarth Agency, it seems that on 31st March 2004 amount of Rs.1,50,000/- was deposited in the said account. He has no personal knowledge about the fact that on 26th July 2007, the cheques in question were deposited for encashment and who has issued and signed the bank memo. The defense of the accused is that the cheques were issued blank signed as security and complainant fill up other particulars in the cheques. The cheque No.0726560 bears date 7th June 2004 and the cheques bearing No.0726551 and 0726552 are dated 9th June 2004. In cross examination, CW-2 stated that there is difference in ink so far as signatures and particulars in the cheques. He does not know whether the accused has taken term loan from

his bank. The cheques are not bearer cheques. While depositing the said cheques for encashment, the slip has to be prepared and then to deposit the cheques in the bank. Deposit slips are not on record. Unless and until he perused the extract of Deshpande Wedding Hall, he would be unable to say whether those cheques were deposited for encashment in the bank or not. The accused extract of Deshpande Wedding Hall is not on record.

13. The trial Court observed that, CW-2 has not corroborated or supported the contention of complainant that she has deposited the cheques in question for encashment in bank. Though, CW-2 stated that on 31st March 2004 amount of Rs.1,50,000/- has been credited into the account of Shri Swami Samarth Krishi Agency, it cannot be said that amount is given by complainant to the accused and the same was credited in the account of Shri Swami Samarth Agency. It is not the contention of the complainant that the accused has taken the said amount from her for the purpose of repayment of his loan which is taken on behalf of Shri Swami Samarth Krishi Agency. Therefore, the amount shown in the extract is not personal extract of the accused. Complainant has failed to prove that she has given the amount to the accused and it is legally enforceable debt.

14. In the light of evidence, no interference is warranted in judgment of acquittal.

15. Learned Advocate for appellant has relied upon another decision of Hon'ble Supreme Court in the case of **T. Vasanthakumar Vs. Vijayakumari**[5]. In the said decision it was observed that, since the cheque as well as signature has been accepted by the accused, the presumption under Section 139 would operate. The burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability.

16. The Hon'ble Supreme Court in the case of **Basalingappa Vs. Mudibasappa** (supra) the principles on Section 118(a) and 139 of N.I. Act. Paragraph 25 of the said decision is reproduced as follows:-

> "**25.** We having noticed the ratio laid down by this Court in the above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this court in following manner:
>
> **25.1.** Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.
>
> **25.2.** The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.
>
> **25.3.** To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.
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> **25.4.** That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.
>
> **25.5.** It is not necessary for the accused to come in the witness box to support his defence."

5 (2015) 8 SCC 378

17. In the **Pinak Bharat and Company Vs. Anil Ramrao Naik and Ors.** (supra) it is held that, complainant has failed to satisfy the requirement of valid cheque. In the case of **E. Dhanuskodi Vs. D. Sreedhar** (supra) it is observed that, there can be no doubt that Section 118 and 139 contemplate presumption to be drawn in favour of the complainant. However the said presumption will come into play on the Court satisfying that the cheque was duly executed.

ORDER

Criminal Appeal No.984 of 2012 stands dismissed.

(PRAKASH D. NAIK, J.)