

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

Criminal Appeal No.1187 of 2006

Niketan Finance Limited,
A Public Limited Company,
Registered Under Companies
Act, 1956.

Registered Office at:
Dr. C.G. Road, Opp. Jhama
Sweet, Chembur, Camp,
Mumbai – 400 074.
Through Miss Madhavi M.Pitre
Authorised Agent

... Appellant.
(Original complainant)

Versus

1. Mrs. Ayeshabi Abbas Mamtuley
Room No. 102, Simla Park,
IC Wing, Mumbra, Kausa,
District: Thane.

2. The State of Maharashtra

... Respondents.

Mr Ketan Dabke Advocate for the appellant.
Ms Aishwarya Sharma, appointed Advocate for the first respondent
No.1.
Mr RM Pethe, APP for the second respondent No.2-State.

Coram : R.N.Laddha, J.

**Reserved on : 15 December 2023.
Pronounced on : 15 January 2024.**

Judgment:

I have heard Mr Ketan Dabake, the learned Counsel for the appellant; Ms Aishwarya Sharma, the learned Counsel appearing on behalf of respondent No.1; and Mr RM Pethe, learned Additional Public Prosecutor for respondent/State.

2. The legality, propriety and correctness of the Judgment and Order dated 03.08.2006, passed by the learned Metropolitan Magistrate, 50th Court, Vikhroli, Mumbai, in C.C. No. 1489/SS/2005 whereby the respondent No.1/accused came to be acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1981 (for short 'the NI Act'), is assailed in this Appeal.

3. The appellant (original complainant) has stated that it is a Public Limited Company that is engaged in the business of finance, and during the course of its regular business, it granted a loan of Rs. 30,000/- to the respondent No.1 (original Accused). In furtherance of the same, it stated that the accused executed a pro-note and a receipt towards having received the money.

4. For the payment of the loan amount, respondent no.1 issued a cheque bearing No.666148 dated 02.09.1998 for Rs.30,000/- drawn on Abhyudaya Co-op. Bank Ltd., Mumbra Branch, in favour of the complainant. On presentation of the cheque, it was returned

unpaid for the reason “not arranged for”. The complainant issued a statutory notice, which the accused received. However, the respondent No.1/accused did not pay the cheque amount.

5. On 13.10.1998, the complainant/appellant filed a criminal complaint against the accused/first respondent for the offence punishable under Section 138 of the NI Act. The learned Magistrate took cognizance of the offence and summoned the accused. On the appearance of the accused, the particulars of the offence were read over and explained to her. The plea of the accused was recorded, and the accused abjured the guilt and claimed for trial.

6. During the course of the trial, the learned Magistrate recorded the evidence of Ms Madhavi M. Pitre, an administrative officer working at Niketan Finance (the appellant company), who deposed that the accused had obtained a loan of Rs. 30,000/- along with her husband, Yunus Abdul Rehman Mamtuley, on 23.07.1996. Subsequently, in order to discharge their legal liability and debts in favour of the appellant company, a cheque bearing No. 666148 dated 02.09.1998 was issued, which was subsequently returned for the reason “Not arranged for”. A number of documents were also tendered on behalf of the complainant. The statement of the accused under Section 313 of the Cr.P.C. came to

be recorded, wherein she denied the charge. The accused, in her defence, examined herself (DW1) and stated that she had not taken any loan from the appellant company and never executed any loan agreement or receipt. She claimed that she did not sign any document or execute any pro-note and that the appellant company had fabricated various letters, receipts and reminders in order to file a false case against her. She stated that the cheque was issued by her for security purposes against giving a loan of Rs. 1,00,000/- and denied her liability to pay any amount under the cheque.

7. By an impugned judgment dated 3.8.2006, the learned trial Court acquitted the first respondent of the offence punishable u/s 138 of the NI Act on the ground that there are certain infirmities in the complainant's case which cannot warrant the conviction of the first respondent. Being aggrieved and dissatisfied by the impugned judgment and order, the appellant has preferred this appeal.

8. Mr Ketan Dabake, the learned Counsel for the appellant, submitted that the complainant's evidence demonstrates that the appellant company had advanced a loan of Rs.30,000/- to the first respondent and her husband jointly on 30.7.1996. The couple signed the receipt and pro-note, taking responsibility for the loan amount. Despite repeated requests, the first respondent gave a

cheque of Rs.30,000/-, which was dishonoured upon presentation. The first respondent neither made the payment nor responded to the demand notice. Furthermore, she never disputed her signature on the cheque.

9. Learned Counsel relied upon the decision of this Court in *Prakash Datta Dessai (expired) LRs Mrs Prajoti Prakash Dessai Vs. Sil Verina w/o Serafiano Fermiano Gracias*.¹, to state that there is a statutory presumption that the sum drawn in the cheque is a debt or liability that is owned by the drawer of the cheque to the drawee.

10. On the contrary, Ms Aishwarya Sharma, the learned Counsel appearing for the first respondent, submitted that there was no record of any document, such as the loan application or the loan agreement and that the accused and/or husband never received the alleged loan amount from the appellant company. Additionally, the complainant's evidence suggests that no such agreement was executed. The appellant company failed to maintain the register of the resolution/authority letter. Ms Sharma pointed out that the resolution/authority letter does not bear the address and reference number of the appellant company. It was submitted that the name of the first respondent was not mentioned in the Minutes either. Furthermore, the learned Counsel submitted that the cheque had been tampered with by rubbing out the name of the earlier payee.

1. 2023 (3) Mh.L.J. 642.

11. In support of her contentions, the learned Counsel relied upon the following decisions : *i) E. Dhanuskodi Vs. D.Sreedhar*²; *ii) State of Gujrat Vs. Koli Arjan Samat Vadher and Ors.*³; and *iii) Pinak Bharat & Company, Mumbai vs. Anil Ramrao Naik & Anr.*⁴

12. The rival submissions fall for my determination.

13. The main contention of the first respondent is that the offence under Section 138 was not committed because the amount claimed by the appellant under the cheque was never paid to her or her husband. The evidence on record demonstrates that no loan application was placed on record, nor any loan agreement was ever executed. This is particularly important since the name of the first respondent was not mentioned in the resolution/authority letter. Additionally, the complainant (PW1) admitted that she personally does not know the loan transaction between the appellant and the first respondent. Her evidence is based on the record available with the appellant company. However, the record does not establish the alleged fact of the disbursement of the loan.

14. It is the claim of the appellant that the loan was granted to the first respondent and her husband upon their application. However, the complainant's sole witness (PW1) stated that the

2. 2018 SCC OnLine Mad 5124.

3. R/Cri Appeal No.506 of 2011 decided on 6.3.2023.

4. 2023(2) Mh.L.J. 547.

formalities about disbursing the loan were not followed in this case. The first respondent's defence is that she had handed over a signed blank cheque to her husband, who gave it to the appellant company as they had assured him a loan of Rs.1,00,000/-. The first respondent stated all these facts on oath, and her evidence has been corroborated by the defence witness, Fakir Shaikh. Another defence witness, Rashida Fakir, claimed that she was the collection agent of the appellant company and that the appellant company was in financial crisis in 1993 and thereafter. All these circumstances create doubt about issuing a cheque by the first respondent against a legally enforceable debt.

15. The presumption u/s 139 of the NI Act is rebuttable. The benefit under this Section cannot be availed if the accused raises a plausible defence, which creates doubts about the existence of a legally enforceable debt or liability. To create such doubt, the accused can rely on the materials submitted by the complainant in order to raise such a defence, and it is conceivable that in some cases, the accused may not need to adduce evidence of his own. A reference in this regard can be made to the decision of the Hon'ble Supreme Court in ***Rangappa Vs. Sri Mohan***⁵.

16. In such a situation, the learned trial Court rightly found the

5. 2010(11) SCC 441.

accused/first respondent not guilty of the offence.

17. As a result, the appeal fails and is hereby dismissed.

[R. N. Laddha, J.]