



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPA) NO.384 OF 2023

Janseva Urban Cooperative Bank Ltd., Itwari, Nagpur through its
authorised person Harish s/o Pamandas Metwani

Vs.

Ajman Ishtiyak Ahmed Khan

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. P. J. Vairagade, Counsel along with Ms. Sakshi A. Pathak, Counsel for
the applicant.

Mr. H. R. Gadhia, Counsel along with Aniket Sawal, Counsel for the
respondent.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 08/10/2024

1. The application is for leave to prefer an appeal against acquittal passed by the 15th Joint Civil Judge, Senior Division and Additional Chief Judicial Magistrate, Special Court of 138 N.I. Act, Nagpur in Summary Criminal Case No.6877/2019 by which the respondent (accused) is acquitted for the offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the N.I. Act').

2. The case of the applicant is that the complainant is banking institution registered under the Maharashtra Cooperative Societies Act, 1960 and carrying its banking business. The accused is running the business of sale of cars under the name and style of M/s Taj Motor Plaza. In the month of

June, 2011, accused approached the complainant and requested for financial assistance for purchase of four wheeler car. The accused agreed all the terms and conditions of the loan agreement. Accordingly, the loan of Rs.6,59,000/- was disbursed to the accused on 15.07.2011. As per the agreement, he agreed to repay the loan amount in 60 instalments along with the interest. Though the accused has obtained the loan and agreed to pay the instalments, he has not repaid the amount of loan as agreed. On repeated requests and reminders, the accused issued the cheques No.000031 of Rs.1,79,932/- dated 18.10.2018, cheque bearing No.000033 of Rs.1,79,931/- dated 03.11.2018, cheque bearing No.000032 of Rs.1,79,931/- dated 01.12.2018 and cheque No.000034 of Rs.1,79,931 dated 10.12.2018. The said cheques are deposited by the complainant in its account which returned back with an endorsement "funds insufficient" therefore, notice was issued by the complainant. After receipt of the notice also the accused has not repaid the amount and therefore, complainant constrained to file the complaint.

3. Learned trial Court after recording the evidence observed that in order to prove the dishonour of disputed cheques, the complainant has filed on record cheques return memos on which there is no stamp, signature or official logo of the concerned bank. The presumption as per Section 146 of the N. I. Act arises only when the bank slip of

memo has an official mark of the bank denoting that the cheque has been dishonoured. In the present case, the cheque memo does not bear any official mark of the bank. There is no stamp, seal or signature of the bank's official concern to show that the memo has been issued by the said bank. On the basis of the same, the trial Court comes to the conclusion that as the complainant has not produced on record the cheque return memo having the seal and signature of the bank and therefore, the presumption is not attracted. The learned trial Court has also considered that the complainant admitted in his cross-examination that the memo does bear seal of the bank and signature of the bank officials, in the present case and failed to examine the bank witnesses though the return memos are exhibited and thereby acquitted the accused.

4. Heard learned Counsel for the complainant who submitted that learned trial Court has not given a finding whether there was legally enforceable debt and whether the cheque was issued in discharge of legally enforceable debt. Only on the basis of the fact that there was no stamp, seal or signature of bank officials come to the conclusion that the presumption is not attracted and acquitted the accused which is an erroneous observation.

5. He invited my attention towards the evidence of bank witnesses namely Dhiraj Murlidhar

Sahare and Chandrashekhar Karmore and submitted that the evidence of these witnesses sufficiently shows that the cheques were deposited and which are returned back with an endorsement of "funds insufficient". Thus, the complainant has proved that there was legally enforceable debt and the cheques were issued in discharge of legally enforceable debt. Presumption under Section under Section 139 of the N.I. Act is attracted, but the learned trial Court without giving a finding whether the cheques were issued against the discharge of legally enforceable debt only on the basis of presumption under Section 146 of the N.I. Act acquitted the accused and therefore, the trial is to be remanded to the trial Court.

6. Per contra, learned Counsel for the respondent/accused submitted that as the complainant failed to adduce the evidence, whether there was a sufficient amount or not and the memo on which the complainant relied upon was not having seal and signature which is required, in view of Section 146 of the N.I. Act, learned trial Court has rightly considered this aspect and rightly acquitted the accused and therefore, no interference is called for. In support of his contention, he placed reliance on the decision of **Criminal Appeal No.360/2017 Smt. Vandana Akhilesh Pandey Vs. Smt. Abhilasha Anil Pande** wherein this Court has considered this aspect and observed that "when the

complainant asserted that the cheque was returned or dishonoured, it was for her to prove this basic fact. Section 146 of the said Act provides that if the complainant places on record a slip or memo issued by the bank having official mark of the bank thereon, denoting that the cheque was dishonoured, it would be presumed that such cheque was dishonoured until such fact was disproved. Thus, if such a document was placed on record by the appellant in the present case, it would constitute *prima facie* evidence of dishonour of cheque and burden would have been entirely on the respondent to disprove such a fact. But, when the memo produced in the present case by the appellant did not bear official mark of the bank, there was no document as contemplated under Section 146 of the said Act to presume that the fact of dishonour of cheque had been proved by the appellant. The burden continued to lie on the appellant to prove the basic fact of dishonour of cheque, in the facts and circumstances of the present case."

7. He further placed reliance on the decision of **Nasib Singh vs State of Punjab and another** reported in **(2022) 2 SCC 89** wherein the Hon'ble Apex Court dealt with the issue when the matter can be sent back for the retrial. It is observed by the Hon'ble Apex Court that in the case of **Ukha Kolhe Vs. State of Maharashtra** reported in **(1964) 1 SCR 926** wherein it is held that undoubtedly the trial

before the Magistrate suffered from irregularities and the evidence led was deficient on important aspects; that could by itself not be a sufficient ground for directing a retrial. If additional evidence was to be brought on the record, a retrial was not required and the procedure prescribed by Section 428(i) of the 1898 Code could have been resorted to.

8. Another feature which emerges from the above decision in Ukha Kolhe's case is that an order of retrial wipes out from the record the earlier proceeding and exposes the present accused to another trial. It is for that reason that the court has affirmed the principle that a retrial cannot be ordered merely on the ground that the prosecution did not produce proper evidence and did not know how prove their case.

9. On the basis of this decision, the learned Counsel for the respondent submitted that on perusal of the entire judgment as there was no seal and signature on the cheque return memo. The trial Court has considered that the presumption under Section 146 of the N. I. Act is attracted and in absence of the said seal and signature it cannot be presumed that the cheque was issued against the discharge of legally enforceable debt and in view of Section 146 of the N. I. Act it cannot be presumed that the fact of dishonour of such cheque is proved.

10. After hearing both sides and on perusal of the entire material on record it reveals that though the complainant has examined two witnesses Shri Chandrashekhar Vithal Karmore and the another witness namely Shri Dhiraj Murlidhar Sahare. On perusal of the complainant's evidence i.e. Chandrashekhar Vithal Karmore it only shows that the cheques were issued by the accused which were deposited in the account and returned with endorsement. As far as the dishonour of the cheque and presumption of under Section 146 of the N.I. Act is concerned, there is no whisper in his evidence to the extent that he has produced any document to show that on the day of the dishonour of cheque there was no insufficient amount in the account of accused. Thus, as far as Section 146 of the N.I. Act is concerned, the presumption will attract when in a proceeding on production of bank slip or memo having thereon the official mark denoting that the cheque has been dishonour, presume the fact of dishonour of such cheque unless and until such fact is disproved. Thus, for attracting the presumption under Section 146 of the N. I. Act it is the burden on the complainant to show that the cheque return memo bears the seal and signature of the concerned bank to presume that the fact of dishonour of such cheque is proved. In absence of such memo, it will be considered that such fact is disproved. Thus, the said provision states the manner in which a complainant can prove dishonour of cheque. The

complainant is required to produce slip or memo having an official mark on it, denoting that the cheque has been dishonoured. If such a document is placed on record by the complainant it constitutes a *prima facie* evidence of dishonour and a presumption operates about the fact of the dishonour of cheque, unless and until such fact is disproved. Thus, once such a memo or slip issued by the bank bearing its official mark concerning dishonour of cheque is placed on record by the complainant, the burden is clearly on the accused to disprove the fact of dishonour of cheque. But there is no doubt about the fact that Section 146 of the said Act provides for one of the modes of proving dishonour of cheques and it certainly cannot be the only mode of proving the same.

11. In the present case, though the memo does not bear the seal and signature of the concerned bank but the complainant has also not adduced the evidence to show that there was sufficient reason for dishonour of cheque and there was insufficient amount in the account of the accused. Thus, the more specified Section 146 of the said Act is not adopted by the complainant as well as he has also not adduced any other evidence to show that there was no sufficient fees in the account of the accused and therefore, the cheque was dishonoured. Thus, neither the cheque return memo nor the oral evidence of the complainant shows that there was

insufficient amount in the account of the complainant.

12. While considering the appeal against the acquittal and especially while considering the grant of leave to appeal against the order of trial Court in catena of decisions the considerations while considering the applications are laid down. The principle which has been initiated is that the court must set forth its reasons indicating at least in brief, an application of mind to the nature of the evidence at the finding which have been arrived at. In other words the Court has to assign the reason why the leave is granted for the appeal against acquittal.

13. In the case of **Mallikarjun Kodagali vs State of Karnataka** reported in **(2019) 2 SCC 752**, wherein it is held that Chapter XXIX of the CrPC deals with appeals. Appeals against acquittal are governed by Section 378 of CrPC. Sub-section (4) deals with appeals filed by the complainant in case the order of acquittal is passed in a case instituted upon a complaint. In such cases if the appeal has to be filed in the High Court it cannot be entertained unless the High Court grants special leave to appeal from the order of acquittal. Sub-Section (5) provides that the limitation for filing the petition for grant of special leave to appeal in term of Sub-section (4).

14. Adverting to sub-section (4) of Section 378 of CrPC, if an order of acquittal is passed on a case instituted upon a complaint then the High Court before entertaining an appeal by the complainant must grant special leave to appeal. The expression "Special leave to appeal" has no different meaning than the expression "leave to appeal" and it appears that the word "special" has been added only to distinguish "leave to appeal sought by the complainant from the "leave to appeal" sought by the State. Thus, in a complaint case where the complainant has set the wheels of the Court in motion even if the complainant files the appeal he must obtain special leave to appeal.

15. In **Subhash Chand Vs. State (Delhi Administration)** reported in **(2013) 2 SCC 17** wherein the Hon'ble Apex Court has laid down the guidelines as to leave to file an appeal and it is observed that sub-Section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of 'special leave' as against sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The

complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for 'special leave' by the complainant. It states that if in any case complainant's application for 'special leave' under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub-section (2). Thus, if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Thus, for granting a permission the complainant has to made out a case for seeking the leave to file an appeal.

16. On perusal of the entire material on record it shows that the complainant failed to adduce the evidence to prove the cheque return memo. Besides the cheque return memo, the complainant has also not adduced the evidence to show that the presumption will attract as the complainant has proved that there was insufficient funds in the account of the accused and therefore, the complainant has made out a case to show that the cheque is dishonoured as there was no sufficient amount in his account. When the complainant asserted that the cheque was returned or dishonoured, it was for her to prove this basic fact. Section 146 of the said Act provides that if the complainant places on record a slip or memo issued by the bank having official mark of the bank thereon, denoting that the cheque was dishonoured, it would

be presumed that such cheque was dishonoured until such fact was disproved. Thus, if such a document was placed on record by the complainant in the present case, it would constitute *prima facie* evidence of dishonour of cheque and burden would have been entirely on the accused to disprove such a fact. But, when the memo produced in the present case by the complainant did not bear official mark of the bank, there was no document as contemplated under Section 146 of the said Act to presume that the fact of dishonour of cheque had been proved by the complainant. The burden continued to lie on the complainant to prove the basic fact of dishonour of cheque, in the facts and circumstances of the present case.

17. In such a situation, mere statement for the evidence made by the complainant either in the statutory notice or in the complaint filed before the Court would not constitute proof of dishonour of cheque, unless further evidence to corroborate the same was placed on record on behalf of the complainant. The complainant is not justified in claiming that such statements would suffice as proof of dishonour of cheque because the respondent failed to enter the witness box in support of his defence. As the complainant, failed to prove the fact of dishonour of cheque by cogent evidence, the learned trial Court has rightly acquitted the accused and therefore, no grounds are made out by the complainant to grant

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the leave to prefer an appeal. In view of that the application deserves to be rejected. Accordingly, I proceed to pass following order:

ORDER

The application for grant of leave is hereby rejected.

(URMILA JOSHI-PHALKE, J.)