



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

CRIMINAL APPEAL NO. 434 OF 2024

APPELLANT: Shantilal Ashokchand Tated
Age 45 years, Occu- Business,
R/o Dhamangaon Railway,
Tq. Dhamangaon Railway,
District – Amravati.

...V E R S U S...

RESPONDENT Dilip Laxman Tarone,
Aged about 54 years, Occu: Cultivator,
R/o Kasarkheda (Hingangaon),
Tq. Dhamangaon Railway,
District Amravati.

Mr. Amol G. Hunge, counsel (appointed) for appellant.
None for respondent.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : 09/09/2024

ORAL JUDGMENT :

1. By preferring this appeal, the appellant has challenged the order of acquittal passed by the Judicial Magistrate First Class Court No. 2, Dhamangaon Railway, in Summary Criminal Case No. 342/2016 dated 05/04/2022, by which the accused/respondent is acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as 'N. I. Act').

2. The brief facts are as follows;

The complainant has filed the complaint under Section 138 read with Section 142 of the N.I. Act, contending that he runs a business of selling construction materials such as cement, steel bars, etc., under the name and style "Shri Hari Traders." The complainant and the accused, who are residents of Dhamangaon Taluka, and the accused had purchased the items like steel bars and cement bags worth of Rs. 87,810.70/- from the complainant. Thus, the amount of Rs. 87,810.70/- was duped from the respondent, and the respondent promised the complainant that he would pay the said amount within six months, but he failed to pay the amount; therefore, the complainant demanded the balance payment from the accused, on which he had issued a cheque of Rs. 87,810.70/- bearing no. 520606 dated 29/06/2015 drawn on Amravati District Central Co-operative Bank Ltd., Tq. Dhamangaon Railway District Amravati towards part payment of the unpaid price of goods. The complainant deposited the said cheque for its realization. However, on 15/07/2015, it was returned for want of sufficient funds. Thereafter, the accused again requested the complainant to deposit the said cheque after 15 days. Accordingly, the complainant deposited the said cheque on 24/08/2015, but again it returned and a written endorsement, i.e. "Funds Insufficient" 24/08/2015 itself. Therefore, the complainant issued the notice on 04/09/2015 by registered post. The said notice was received by the accused on 19/09/2015. Despite the notice received by the accused, he has not paid the amount, and therefore, the complainant is constrained to file the complaint before the Chief Judicial Magistrate First Class, Dhamangaon Railway.

3. In response to the notice, the accused appeared, pleaded not guilty, and claimed to be tried. The defence of the accused is of total denial, and it is the defence that the cheque in question was not given towards existing debts. The cheque which was in the possession of the complainant was misused by him, and therefore, he has not committed any offence.

4. Undisputedly, the accused has not disputed the signature on the cheque Exhibit No. 40. The learned trial Court held that, as per Section 139 of the N.I. Act, it is to be presumed that the accused had issued the cheque to the complainant towards discharge of legal liability. The complainant examined himself vide Exhibit No. 27. He reiterated the entire contents of the complaint. He also filed on record the Cheque (Exhibit No. 40), Bank Memo (Exhibit Nos. 41 to 44), and Legal Notice (Exhibit No. 45), Postal Receipt (Exhibit No. 46), and RPAD acknowledgment (Exhibit No. 47).

5. After hearing, learned counsel for the applicant, perused the trial Court order. The learned trial Court observed in para-14 that the complainant categorically failed to file the documents, like cash credit transactions, though he had admitted that Chartered Accountant had maintained the business transactions. The complainant failed to produce a cash book account, a ledger statement, and bill receipts to prove that the amount was due and payable by the accused. Considering the statements made by the complainant in his cross-examination and as he failed to produce on record the documentary evidence, there was a legal enforceable debt, and in discharge of legally enforceable debt, he has issued the cheque. The trial Court

observes that the accused has sufficiently rebutted the presumption that he has not purchased the goods from the complainant on credit. Accordingly, the accused would not have issued the cheque towards discharge of legal liability and acquitted the accused.

6. Being aggrieved and dissatisfied with the said observation, the present appeal is preferred by the complainant. Learned counsel for the complainant submitted that the observation of the learned trial Court that the accused does not dispute the signature on the cheque and as per Section 139 of the N.A. Act, it is to be presumed that the accused has issued the cheque to the complainant towards discharge of legal liability, and the observation in para-14 that the complainant did not produce the cash book, account book, ledger statement, and bill receipts and therefore, he failed to prove legally enforceable debt on the accused itself are the contradictory observations.

7. He submitted that, in view of the decision of the Hon'ble Apex Court in the case of *D.K. Chandel vs M/s Wockhardt Ltd. and another [in Criminal Appeal No(S). 132 of 2020 (arising out of SLP (CRL.) No. 1621 of 2018 decided on 20/01/2020]*, wherein the Hon'ble Apex Court dealt with this issue and held that, as rightly observed by the High Court, production of the account books/cash books may be relevant in the Civil Court but cannot be so in the criminal case filed under Section 138 of the N.I. Act. This is because of the presumption raised in favour of the holder of the cheque. In view of the concurrent findings recorded by the Trial Court as well as by the High Court, we do not see any ground warranting inference with the conviction of the appellant

under Section 138 of the N.I. Act.

8. He submitted that, merely because the cash book and the other documents were not produced before the learned trial Court, the trial Court came to the conclusion that there was no legal and enforceable debt, which is a contrary finding to the earlier finding that as the accused has not disputed the signature and in view of Section 139 of the N.I. Act, hence it is to be presumed that the accused had issued the cheque to the complainant towards discharge of legal and enforceable liability.

9. After hearing learned counsel for the appellant, none appears on behalf of the respondent, after sufficient opportunity is granted. Perused the impugned judgment from para-14 of the impugned judgment, it reveals that the accused is acquitted only on the ground that the complainant did not produce a cash book, account book, ledger statement, or bill receipts to prove that the amount was due and payable by the accused. Admittedly, the accused has not adduced the evidence to rebut the presumption, even though he has not entered the witness box. The observation of the trial Court in para-5 that the accused does not dispute his signature on the cheque i.e. Exhibit No. 40, and in view of Section 139 of the N.I. Act, it is to be presumed that accused had issued the cheque towards the complainant towards about discharge of legal liability.

10. In the light of the above observations, the learned trial Court ought to have considered that the accused has not adduced any evidence or has not cross-examined the complainant on this aspect to establish that there was no legal and enforceable

debt, but the cheque was issued towards security. The observation made by the learned trial Court is contrary to the observation of the Hon'ble Apex Court in the case of *D.K. Chandel* referred (supra), wherein the Hon'ble Apex Court had considered that trial Court as well as by the High Court, the cheque was issued towards the amount due and payable by the appellant for the purchase of pesticides. As rightly observed by the High Court, production of the account book, cash book may be relevant in the civil Court but may not be so in the criminal case filed under Section 138 of the N.I. Act. This is because of the presumption raised in favour of the holder of this cheque. In view of that, concurrent findings recorded by the Trial Court as well as by the High Court, we do not see any ground warranting interference with the conviction of the appellant under Section 138 of the N.I. Act and dismissed the appeal against the conviction.

11. It is well settled that, while considering the appeal against acquittal, the Appellate Court should be slow in interfering with the findings of the learned trial Court, but when there is apparent illegality committed by the trial Court, then the Appellate Court can consider the appeal against acquittal and re-appreciate the evidence. Considering the observations of the learned trial Court, which only on the basis of the fact that the complainant has not produced the cash book, ledger statement, and bill receipts and come to the conclusion that there was no legal and enforceable debt. As observed earlier, it is a contrary finding to the decision of the Hon'ble Apex Court, and therefore, opportunities are to be granted to the accused to adduce sufficient evidence to rebut the presumption, and therefore, the matter requires to be

remanded back to the trial Court.

12. Moreover, it is also well settled that under Section 386 of the Cr.P.C. power to remand are to be used in exceptional cases. However, considering the apparent illegality committed by the trial Court, the appeal deserves to be allowed and to be remanded back to the trial Court to consider the issue in the light of the judgment of the Hon'ble Apex Court. In view of that, appeal deserves to be allowed. Accordingly, I proceed to pass the following order.

- a] The criminal appeal is **allowed**.
- b] The judgment and order of acquittal passed by the learned Judicial Magistrate First Class, Court No.2, Dhamangaon Railway, District Amravati dated 5/4/2024 is hereby quashed and set aside.
- c] The matter is remanded back to the learned trial Court for fresh disposal to consider the aspect of whether there was a legal and enforceable debt by giving sufficient opportunities to both parties to adduce the evidence on that account.
- d] The parties to appear before the learned trial Court on 19/9/2024 at 11.00 a.m. The parties are to cooperate with the Court to dispose of the matter at the earliest.

The criminal appeal is **disposed of** accordingly.

[URMILA JOSHI-PHALKE, J.]