

Digitally signed by
HEMANT
CHANDERSEN SHIV
Date: 2025.02.18
20:16:21 +0300

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

CRIMINAL APPEAL NO.1224 OF 2004

Abdul Gani Ishaq Palkar
Aged 53 years, Occ. Business
Residing at 65, Malhar Peth
Satara City,
District Satara

...Appellant

vs.

1. M/s. Roop Construction Co.
Through Proprietor
Shri Mushraf M. Khan
Occ. Business, Residing at 198,
Somwar Peth, Satara City
District Satara 415 002

...

2. State of Maharashtra

...Respondent

Mr. Chandrakant Chavan for the Appellant.

Mr. Jatin Karia (Shah), Advocate appointed for the Respondent No.1.

Ms. Rashmi Tendulkar APP for the Respondent No.2-State.

CORAM : SHYAM C. CHANDAK, J.

RESERVED ON : 7th FEBRUARY, 2025

PRONOUNCED ON : 14th FEBRUARY, 2025

JUDGMENT :

1) Present Appeal is filed by the Appellant/Original Complainant under Section 378 (4) of the Criminal Procedure Code challenging the Judgment and Order dated 21st September 2002, in

Summary Criminal Case No.1002 of 2000, passed by the learned Judicial Magistrate, First Class, Court at Satara thereby the Respondent No.1/Original accused has been acquitted of the charge of the offence punishable under Section 138 of the Negotiable Instruments Act (“*the Act*”, for short).

1.1) Hereinafter, the parties are being referred to by their original status before the trial Court.

2) Heard Mr. Chavan, the learned Advocate for the Complainant, Mr. Karia, the learned appointed Advocate for the accused and Ms. Tendulkar, the learned A.P.P. for the Respondent No.2-State.

3) Record indicates that the Appeal was admitted *vide* Order dated 5th October 2004. When the Appeal came up for hearing, none appeared for Respondent No.1. Therefore, Mr.Karia was appointed to represent and espouse the cause of the Respondent No.1.

4) Facts giving rise to this Appeal are that the Complainant filed the said S.C.C. No.1002 of 2000 against the accused. The Complainant’s case was that, the Complainant and the accused were friends. The accused was doing a construction business. In the month of May 1999, on the demand of the accused the Complainant gave Rs.10,000/- as a hand loan to the accused. The accused assured that, he would return the loan amount in the month of September, 1999.

However, the accused did not refund the loan amount in time. Hence, the Complainant demanded for the loan amount. In turn, the accused drew a cheque (at Exh.26) bearing No.55760 dated 22nd November 1999, for the sum of Rs.10,000/- in favour of the Complainant. The Complainant presented the cheque with his banker on 11th December 1999. However, the cheque returned dishonoured for the reason “Not arranged for” (*vide* bank memos at Exhs.27 & 28). It was followed by a legal notice dated 21st December 1999 (at Exh.29), issued to the accused by the Advocate for the Complainant thereby demanded the dishonoured cheque amount. The accused received that notice and gave his reply dated 5th January 2000 (at Exh.33) thereby the accused denied the alleged loan transaction and contended that the cheque was issued as a security towards a transaction of his friend. The Complainant misused the cheque. However, the accused did not pay the said cheque amount. Thus, the accused committed the offence of 138 of the said Act.

5) On appearance of the accused, the trial Court explained the particulars of the offence to which the accused pleaded not guilty and claimed to be tried.

6) The Complainant adduced his evidence at Exh.23. He examined PW2 Pramod D. Krishnakumar, a Banker of the complainant and PW3 Mahesh. K. Gaikwad, a banker of the accused.

Thereafter, the complainant closed his evidence. It was followed by recording of the statement of the accused under Section 313 of Cr.P.C. therein the accused denied all the incriminating evidence. The accused examined DW1 Harish Prananath Bhatia in his defence.

7) After considering the oral and documentary evidence, the trial Court held that there was no documentary evidence or receipt in respect of the loan transaction. The complainant and the accused had different business and they had no business relation. The trial Court held that, the bank account statement of the accused shows that the accused had sufficient money at the relevant time of the transaction i.e., between 2nd May, 1999 to 31st May, 1999. Said fact indicated that the accused was not in need of money. It is probable that the accused had given the dishonoured cheque as security towards a monetary transaction between the accused and one Allauddin Ansari ('Ansari', for short). However, the Complainant took undue advantage of the cheque and filed the false complaint. Hence, Appeal.

8) Learned Advocate Mr.Chavan for the Complainant vehemently submitted that at the relevant time, the accused was in need of money. The Complainant and the accused were friends. Therefore, the accused demanded the loan amount which the Complainant gave him. Therefore only the accused issued the dishonoured cheque to discharge the said legal liability. The accused

failed to explain as to why he gave the said cheque to the Complainant. Even though there were no business relations between the parties and the loan amount being small, the Complainant was in a position to give the said amount as loan. Therefore, the case of the Complainant was probable. As against this, the accused has taken inconsistent versions of the defence. Said versions were not acceptable. However, the trial Court rejected the case of the Complainant. Hence, the impugned Judgment and Order is illegal and it may be set aside.

9) In contrast, Mr. Karia, the learned appointed Advocate for the accused submitted that, there is material discrepancy in the evidence as to the month when the Complainant allegedly gave Rs.10,000/- as loan. There is no documentary to show that the Complainant really gave the said loan to the accused. On the overleaf of the counterfoil of the dishonoured cheque, there is specific mention that nothing was due against the accused in respect of the dishonoured cheque. This statement is jointly signed by the Complainant alongwith said Ansari. The Complainant identified the said signatures. The Complainant admitted that he and said Ansari were friends. However, the Complainant did not explain as to why he signed under the matter written on the overleaf of the counterfoil. Therefore, an adverse inference may be drawn. In this background,

according to Mr. Karia the trial Court has rightly held that, there was no legal liability against the accused. As such, the impugned Judgment and Order is lawful.

10) Before advertng to the controversy involved in the case, first, it is necessary to refer the admitted facts. It is admitted by the accused that the cheque was issued in the name of the Complainant; that, it bears his signature; that, the cheque was dishonoured by the banker of the accused; that, it was followed by issuance of the statutory notice; that the accused replied the notice; and that, the accused did not pay the dishonoured cheque amount within the stipulated period.

11) Now turning to the evidence adduced by the parties. It is the evidence of the Complainant that on demand of the accused, he gave the accused Rs.10,000/- as loan and that, the accused had agreed that he would repay the loan within four months. He often demanded the said amount from the accused. However, the accused did not repay the amount. Finally, the accused issued the cheque, which dishonoured. Despite statutory notice, the accused did not pay the said cheque amount. Thus, the accused committed the offence.

11.1) In the cross-examination, the Complainant admitted that, he did not obtain any receipt of payment from the accused. He did not produce any documentary evidence to show that he had paid

Rs.10,000/- to the accused. He admitted that, Allauddin Ansari was his friend; that, Ansari was in construction line; and that, they were having financial transactions between them. He has denied that in the year 1998 he had given some amount to Ansari. He has denied that the accused had issued the dishonoured cheque only as a security of the amount of Ansari. He has admitted that, the counterfoil of the cheque (Exh.39) bears his signature and signature of Ansari.

12) The evidence of DW1 Haresh Bhatia is that he was working as a Contractor. He knew the Complainant. He knew the accused because the accused was also a contractor. DW1 deposed that there was a labour contract in between the accused and the Complainant in respect of a work going on in M.I.D.C., Satara. DW1 deposed that at the relevant time the Complainant and Ansari were together. They were talking about labour and their payments and security towards the payment. Ansari told the accused that he should give the cheque in the name of his friend i.e., the complainant. DW1 deposed that the Complainant had no business with the accused. DW1 deposed that the accused had issued the cheque for the security of Ansari. All this talk had taken place in his presence. He deposed that Complainant and Ansari had signed the counterfoil (Exh.39) in his presence. In the cross-examination of DW1 it has come that, DW1 and the accused were doing the same type of business. DW1 admitted

that the cheque was given in the house of the accused. The matter appearing on the overleaf of the cheque counterfoil was written by the accused. He admits that first the Complainant had signed the counterfoil. He has denied that said matter on the counterfoil was written subsequently.

13) On a careful consideration of the rival evidence, I found that as stated in the statutory demand notice and the complaint, the loan transaction took place in the month of May 1999. However, the evidence of the complainant is that the said transaction took place in the month of September, 1999. The complainant has not explained this discrepancy in the documentary and his oral evidence. That apart, in the cross-examination the Complainant admitted that, he does not remember the exact date when he gave the loan to accused. He has no documentary evidence of giving the loan to the accused.

14) On the overleaf of the counterfoil (Exh.39) of the dishonoured cheque, it is specifically written that, "This cheque issued by Allauddin Ansari on behalf of A.I. Palkar. No dues of Ambika Works Factory in MIDC". At the end of this matter there are signatures of Alluiddin Ansari and A.I. Palkar, the Complainant. Considering the evidence of DW1, it appears that the Complainant conceded that the cheque was handed over at the house of the accused after discussing about the intended transaction.

14.1) From the aforesaid fact and considering the evidence as a whole, it appears that Ansari and the accused intended to enter into some monetary transaction. But, there was a trust issue about that transaction. The Complainant and Ansari were friends. There were monetary transactions in between them. The Complainant stated that he and the accused were friends. Therefore, it is probable that, instead of giving an advance to Ansari, the accused gave the cheque to the Complainant, he being common friend of Ansari and the accused. Therefore, they all had gathered at the house of the accused and after discussion about the transaction, the accused gave the subject cheque to the Complainant. However, there is no evidence that either the Complainant or Ansari did some contractual or other work for the accused as a consideration towards the dishonoured cheque.

14.2) In view of the above discussion, there is a reasonable doubt about truthfulness of the version of the Complainant that the accused demanded the loan amount of Rs.10,000/- and the Complainant gave the said amount to the accused. On the contrary, from the evidence it appears that, the accused gave the subject cheque to the Complainant as security for Ansari as they both were friends. Thus, the Complainant failed to prove the legal liability.

15) To attract the offences of Section 138 of the Act, existence and proof of debt or liability is necessary. In absence of such a proof,

the said penal provision cannot be invoked against the accused. No doubt, Section 118 of the Act allows the Court to presume that the dishonoured cheque was drawn for consideration. Similarly, in view of Section 139 of the Act, it shall be presumed that, the holder of the cheque received the cheque, of the nature referred to in Section 138 of the Act, for the discharge of certain debt or liability. In the case in hand, since the debt or liability has not been proved, the aforestated presumptions will not come to the aid of the Complainant.

16) In view thereof the Appeal fails and is liable to be dismissed. Appeal is dismissed, accordingly.

(SHYAM C. CHANDAK, J.)