2025:BHC-NAG:11216

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

CRIMINAL APPEAL No. 122/2010.

Dhanraj Shankarrao Sonkusare,
Aged about 401 years, Occupation
Business, resident of Timki,
Paunikar Mohalla, Near the house
of Yadav Pandit, Ward No.53,
Nagpur. ... **APPELLANT.**

VERSUS

Sou. Maya Chandrakant Dubbalwar,
Aged 32 years, Occupation Business,
resident of Juni Mangalwari, Hira Plaza,
Mataghare Mohalla, Near House of
Madhukar Navlakhe, Nagpur. ... **RESPONDENT.**

Mr. N.J. Patil, Advocate for the Appellant.
Mr. S.A. Banik, Advocate for the Respondent.

CORAM : M.M. NERLIKAR, J.

JUDGMENT RESERVED ON : 08.10.2025.

JUDGMENT PRONOUNCED ON : 17.10.2025.

Rgd.

JUDGMENT :

The appellant by way of this appeal is challenging the judgment and order dated 26.06.2009 passed by the 22nd Judicial Magistrate First Class and Special Court, Nagpur in Criminal Case No.22452/2007, whereby the learned trial Court was pleased to acquit the respondent herein of the offence punishable under Section 138 of the Negotiable Instruments Act.

2. The brief facts of the case are as under.

The appellant has filed a complaint alleging that he and respondent are good friends, and as the respondent was in need of Rs.50,000/- , accordingly she requested the appellant to pay Rs.50,000/- as a hand loan. The respondent assured the appellant that the said amount will be repaid within 4-5 months, and therefore, the appellant gave the said amount of Rs.50,000/- as a hand loan to the respondent in cash. On demand made by the appellant for refund of the said amount, the respondent handed over a cheque of

Rs.50,000/- bearing No.640666 dated 18.07.2007 drawn on ICICI Bank, Nagpur Branch, Nagpur. The said cheque was presented by the appellant for encashment on 13.09.2007, however, the said cheque was returned with an endorsement "Insufficient Funds". A memo dated 20.07.2007 was also received by the appellant to that effect. Thereafter, the appellant issued a legal notice on 21.09.2007 by RPAD, which was received by the respondent on 27.09.2007, however, the respondent failed to repay the said amount, and therefore, the appellant filed a complaint on 18.10.2007 for the offence punishable under Section 138 of the Negotiable Instruments Act.

3. Process was issued to the respondent, and she appeared in the matter. Thereafter the appellant examined himself and respondent cross-examined the appellant. Witness no.2 was the Branch Manager, who was examined by the appellant/ complainant, and even he was cross examined by the respondent and after closure of evidence, the learned trial Court on considering the entire evidence,

documentary, as well as oral, acquitted the respondent. The appellant has approached this Court challenging the said acquittal of the respondent by filing this appeal.

4. I have heard the learned Counsel for the parties. The learned Counsel for the appellant submits that the findings recorded by the learned trial Court are perverse and against the settled position of law. The appellant has proved his case beyond reasonable doubt. He further submits that it is a matter of record that the cheque of Rs.50,000/- was given towards repayment of hand loan by the respondent to the appellant. The said cheque was dishonoured, and therefore, the appellant was required to issued a legal notice, and despite service of legal notice, the respondent failed to repay the amount, therefore, a complaint was filed. He further submits that the appellant has duly discharged his burden showing that the cheque was issued by the respondent for repayment of amount due and payable by the respondent to him, and therefore, after discharging the burden, the presumption to rebut the same is shifted on the respondent. He further submits that it is a matter of record that the burden was not

discharged by the respondent, and therefore, the trial Court ought to have accepted the case of the appellant. He further submits that the respondent has not entered the witness box and, therefore, also the trial Court ought to have considered the case of the appellant. Merely not disclosing the date on which the amount of Rs.50,000/- was paid to the respondent, and the date on which the cheque was issued by the respondent for repayment of loan, would not be fatal, as it was duly proved by the appellant that the cheque was issued by the respondent towards repayment of hand loan. He further submits that the trial Court has given much weightage to the issuance of notice, as the notice was issued on 21.09.2007, whereas it was served on the respondent on 27.09.2007. However, the trial Court while appreciating this fact has observed that "*if the notice is ready on 21.09.2007, then there was no reason for sending the same on 26.09.2007".* He further submits that merely because notice was not issued 4-5 days after it was ready, cannot be a ground for suspicion and this fact cannot form the basis for acquittal.

5. On the other hand, the learned Counsel appearing for the

respondent submits that initially burden was not proved by the appellant. There are several deficiencies which goes to the root of the matter. There is no hand loan given by the appellant, however, the cheque was issued, as there were business transactions between the parties. He further submits that in cross examination of the appellant, it was brought on record that on 15.07.2007 the respondent has demanded Rs.50,000/- and it was paid on 16.07.2007. Therefore, this fact was not mentioned either in the complaint or in the evidence on affidavit filed by the appellant. He further submits that even if the complaint or evidence of appellant is considered, and even presuming for a moment that hand loan was given on 16.07.2007, in such circumstances, if the complaint is perused, it is stated in it that the respondent assured to refund the same within 4-5 months. He submits that therefore, there was no occasion to issue cheque by the respondent, and therefore, he ultimately submits that it is not hand loan, and cannot be said to be a legally enforceable debt. He further submits that as per Section 43 of the Negotiable Instruments Act, a negotiable instrument without consideration creates no obligation of payment between the parties to the transaction. He further submits that Exh.40 – memo in respect of 'insufficient funds' was issued on 20.07.2007, whereas the notice is shown to have been issued on 26.09.2007 and therefore, the notice was issued beyond the period of 30 days from the date of receipt of information by the appellant from the Bank regarding return of cheque for insufficient funds and therefore, in view of Section 138[b] of the NI Act, the notice itself was issued beyond the period of limitation. He further submits that in cross examination it was brought on record that repayment would be made within 2 days, however, in the complaint, it was mentioned that the refund amount would be made within 4-5 months. This fact itself is sufficient to discard the version of the appellant. He further submits that the postal receipt is dated 26.09.2007, whereas the appellant deposed that it was sent on 21.09.2007. So it is not clear whether the notice which was prepared on 21.09.2007, is the same notice which was sent on 26.09.2007. He has referred to the examination-in-chief of the appellant, wherein he states that the legal notice was issued on 21.09.2007, therefore, there is contradiction as to issuance of notice, as the documents placed on record shows otherwise. Lastly, he submits that there is no legally enforceable debt, and therefore, no case is made out warranting interference at appellate stage, and prayed for dismissal of the appeal.

6. After hearing the arguments of both sides at length and after considering the evidence on record, it appears that the appellant has failed to prove that the debt is legally enforceable debt. It can be gathered from the complaint, as well as the evidence placed on record that admittedly neither there was an act of giving hand loan, nor there was a date of repayment. Even there is no clarity when the cheque was issued by the respondent, and there is no evidence to the effect that the cheque was given to discharge a legally enforceable debt.

7. On one hand, the appellant deposed that the respondent demanded an amount of Rs.50,000/-, there is no date mentioned either in the complaint or in the examination in chief. However, on the other hand in cross-examination, he has stated the date on which the amount was given to the respondent. In cross-examination it was

brought on record that the respondent demanded money from the appellant on 15.07.2007 and accordingly on 16-07.2007 the appellant paid an amount of Rs.50,000/- to the respondent. However, in examination-in-chief/evidence on affidavit, he does not state anything about these dates. In examination-in-chief, he deposed that the respondent assured to him refund of the amount in 4-5 months, however, in cross examination he contradicts the same and states that the respondent obtained hand loan on condition of repayment within 2 weeks. In such circumstances, the veracity of the evidence of the appellant is said to be tainted and cannot be believed. Further from the above evidence, it is an admitted fact that the cheque was issued by the respondent and therefore, presumption under Section 139 of the N.I. Act, automatically arises. However, the contradictions in the evidence of the complainant, would be sufficient to rebut the presumption under Section 139 of the N.I. Act, and it is not necessary to enter into witness box by the respondent/accused. Therefore, it can be said that the accused can rebut presumption from contradictions in the evidence of complainant.

8. It is also necessary to mention at this juncture, that so far as notice is concerned, postal receipt which is placed on record at Exh.27 was dated 26.09.2007, whereas in cross-examination it was brought on record that notice was issued on 21.09.2007, even there is contradiction on this count. It is further to be noted that even if the notice issued to the respondent is presumed to have been issued on 26.09.2007, and it was shown to be served on 27.09.2007, in such circumstances, there is no explanation coming forward from the appellant as to what prompted him to send the notice on 26.09.2007.

9. It is to be noted that after receipt of the bank memo at Exh.40 dated 20.07.2007, with remark 'insufficient funds', from the date of Bank memo [Exh.40], till the issuance of notice i.e. 26.09.2007, almost after more than 2 months, the notice was issued. Section 138[b] of the NI Act mandates that within 30 days of the receipt of information from the Bank regarding return of cheque as unpaid, it should be necessary to give notice in writing to the drawer of the cheque, and therefore, there is no compliance of Section 138[b]

of the Act. This is a glaring defect in the entire proceeding. Therefore, considering the above facts and circumstances, and after scanning the entire evidence, it appears to me that there is no legal enforceable debt. A shadow of doubt is casted around the entire case of the complainant as regards to giving of hand loan to the respondent, about repayment and also in respect of issuance of cheque to the appellant. In such circumstances, the appellant has utterly failed to establish that an amount of Rs.50,000/- in cash was paid to the respondent. Further the notice issued by the complainant is beyond limitation, as contemplated under Section 138[b] of the Negotiable Instruments Act.

10. For all the above reasons, there is no merit in the appeal, and therefore, the same is dismissed.

JUDGE

Rgd.