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

**CRIMINAL APPEAL NO.544/2009**

Suresh S/o. Totaram Nathani,
aged about 55 yrs.,
R/o.70, Sindhu Nagar, Jaripatka,
Nagpur 440014.
[Complainant in the original complaint]

...**APPELLANT**

**VERSUS**

Shri Mohammad Usman Khatri,
aged about (Major), R/o. 628,
H.S. Khatri House, 2nd Floor, 13th
Road, Khar (West), Mumbai.
[accused in the original complaint]

...**RESPONDENT**

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None for the parties.

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**CORAM : M. M. NERLIKAR, J.**
**DATE : 02.12.2025**

**ORAL JUDGMENT :**

None appears for the parties.

2. The present appeal is preferred against the judgment and order passed on 28.04.2009 by the learned Judicial Magistrate First Class, Nagpur in Summary Criminal Case

No.19951/2006, wherein the accused was acquitted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ("NI Act"). This Court by an order dated 31.03.2010, admitted this appeal. However, since many dates neither the counsel for the appellant nor the counsel for the respondent has appeared to work out the appeal. The appeal is of 2009, therefore this Court decided to go through the entire record and the judgment and order passed by the Judicial Magistrate First Class, Nagpur, thereafter this Court proceeded to dictate the order in open Court.

3. Brief facts.

It appears from the record that the respondent is having some business relation with the complainant/appellant and as the respondent/accused was in need of money, the appellant paid cash amount of Rs.30,000/- to the respondent on the assurance that it would be repaid after some time. Accordingly, respondent issued a cheque bearing No.686387 dated 20.03.2006 in lieu of repayment of amount. However when the complainant was about to present the cheque, respondent requested that due to a financial crunche, he should not deposit the cheque on due date and assured to pay compensation amount for delay. However, in the month of June 2006, the complainant again contacted with the respondent and accordingly respondent informed that he should present the cheque after third week of July 2006. Accordingly, the cheque was presented for encashment, however it dishonoured due to insufficiency of fund in the account of the respondent, therefore memo was issued by the Bank. On 29.08.2006, notice was sent by the appellant, however on 09.09.2006, it was returned with an endormsement, “not claimed”. Even thereafter, the respondent failed to repay the amount, therefore, complaint under Section 138 of the NI Act was filed.

The Trial Court after considering the evidence on record, was pleased to acquit the accused/respondent for the offence punishable under Section 138 of the NI Act. Being aggrieved and dissatisfied by the said judgment and order, the appellant preferred this appeal.

4. As none appears for the parties, this Court has gone through the appeal memo, wherein some grounds are set out. The First ground is in respect of discharging the legal liability of hand loan of Rs.30,000/-. The accused issued a cheque in favour of the appellant, accordingly the cheque was presented and it was dishonoured for insufficiency of funds. After issuing the legal notice, even thereafter, the accused failed to pay the amount. It is averred that the Trial Court failed to appreciate the evidence given by the appellant in his affidavit and the reasons assigned are on the basis of surmises and conjectures. The Trial Court failed to take into consideration Sections 118 and 139 of the NI Act and the onus which is on the respondent who has failed to discharge the burden as he has not led the evidence.

5. After perusal of the entire record, it appears that in order to prove the case the complainant/appellant examined himself at Exh.35 and also relied on the documentary evidence, however respondent has not examined himself or any other witness and neither placed any documentary evidence on

record. However, he set out his defence by relying on the evidence of appellant/complaint. The defence appears to be that there is no legally enforceable debt, demand notice was issued beyond limitation as provided under Section 138(b) of the NI Act and complaint was also lodged beyond limitation period.

6. Upon perusal of the record, it appears that cheque was issued by the respondent bearing his signature. From the evidence of complainant, it appears that in the month of October 2005, respondent sought friendly help from the complainant in the form of cash assistance of a sum of Rs.30,000/- on the assurance that it would be repaid within short period. The Cheque bearing No. 686387 drawn on ICICI Bank, Bandra Branch, Mumbai on 20.03.2006 was issued by the respondent for repayment of hand loan amount. When the said cheque was about to be presented, respondent requested to withhold the said cheque saying that, he is in a financial crunche, however it was assured that the debt would be cleared within three months. Till the month of June 2006, the

appellant waited, thereafter he contacted with the accused in the last week of June 2006, however respondent told him that he may present the cheque in the third week of July 2006. Accordingly, the appellant presented the cheque to his Bank i.e. the Bank of Maharashtra, Nagpur, however the said cheque was dishonoured with the remark “insufficient funds”. Accordingly, memo was served on him on 10.08.2006. Notice dated 29.08.2006 was sent and dispatched on the same day, however it was received with an endorsement “not claimed”. As the notice sent was not claimed by the respondent, the appellant was constrained to file complaint on 20.10.2006.

7. The complainant/appellant was cross-examined. It was admitted by the complainant that the complainant does not have any documentary evidence to show that the alleged amount was given to the accused except the cheque. He does not maintain account of his business. Even he admitted that he does not remember the exact date, on which the alleged amount was given to the accused/respondent and there is no documentary evidence to show that the amount of Rs.30,000/-

was available with him on the date on which he has paid said amount. It was suggested that the cheque was issued as an advance for work of 550 Police Line Takli and the said cheque was issued as a security for the said work. The said suggestion was denied. It was brought on record that the complainant does not have any documentary evidence to show why the cheque was not presented for four months from the date on which it was issued. He stated that the respondent/accused requested to withhold the cheque for three months, as he would clear the debt within three months. However, in cross-examination, he admits that there is nothing to prove the said fact. In the deposition, it is stated that the cheque was dishonoured and the return memo at Exh. 49 bears the date 25.07.2006, however he admits that he does not remember whether the Bank of Maharashtra has given covering letter along with Exh.48 and 49. Further, suggestion was given that at Exh.49 whatever is written in pencil, was not written at the time of issuance of the memo. However, he admits that he cannot state whethere that said portion was written by any officer of bank of the Maharashtra or not. He admits that there is no documentary evidence to show that Exh.49 was received by him on 10.08.2006. The suggestion was given that Exh.49 was received by the complainant within one or two days as it bears the date 25.07.2006. He further admits that notice was posted on 29.08.2006. He does not know whether Exh.6 bears signature of accused or not, but it bears signature of Iqbal. He admits that he is not interested to get the amount of cheque and even in the High Court he has refused to accept the compensation. He wants judgment of the Court and hence, he has refused to accept the amount from the accused. The suggestion was given that Demand Draft was sent by the accused on 09.06.2007, however the said suggestion was denied. He admits that from October 2005 till dishonour of cheque, he has not made any written communication with the accused. Except envelop, he has no evidence to show that notice was returned on 09.09.2006. He submits that there is no date and signature below the endorsement in red ink on envelope. He further admits that there is no evidence with him to show that endorsement put in red ink is written by postal authority. It is not written on envelope that it was received on 09.09.2006. He shows his ignorance in respect of whether the envelope was returned to Nagpur, why the date is not mentioned on it and why it does does not bear postal seal. He states that stamp of Khar post office is appearing on the said envelope dated 31.08.2006. He admits that he does not remember whether the bank has obtained his signature and date at the time of returning cheque along with return memo and whether the cheque was collected personally.

8. After considering the evidence of the complainant and further the documentary evidence in the nature of cheque at Exh.48 the return memo dated 25.07.2006 at Exh.49. Notice at Exh.50, so also post receipt at Exh.51 both dated 29.08.2006, it goes to show that it is not in dispute that the cheque was issued by the accused as it bears the signature of the accused. However, a probable defence which was raised in the cross-examination by the accused is whether the complainant has actully given Rs.30,000/- to the accused. Though it has come

in the evidence that complainant has given Rs.30,000/- to the accused, however it was admitted in the cross-examination that there is no documentary evidence about payment of Rs.30,000/-. Even it was admitted by the complainant that he does not remember exact date on which the alleged amount was given to the accused and there were business relation between the accused and the complainant. There is further a vital admission that there is no evidence to show that the cheque was issued by the accused in discharge of his legal liability. Under such circumstances, it would be very difficult to accept the case of the complainant/appellant that Rs. 30,000/- was given as hand loan and the cheque was issued in discharge of the said debt.

9. It appears from the record that neither the cheque deposit slip nor the intimation to the complainant of the Bank in respect of return of cheque were placed on record. Exh.49 is the cheque return memo by the Bank of accused. i.e. ICICI Bank. It has come in the evidence that the said memo is 25.07.2006. However, it was received on 10.08.2006. There is

nothing on record to show that it was received on 10.08.2006 by the complainant. Considering this fact, as notice was issued on 29.08.2006, the same is not within the limitation as the complainant has utterly failed to prove that intimation was received on 10.08.2006 and the notice was sent on 29.08.2006. Not only that, it was admitted by the complainant that he does not remember whether the cheque return memo was collected personally.

10. Considering the above facts and circumstances, it could be gathered that in order to bring the notice within limitation period the imaginary date was put as 10.08.2006 by the complainant on the return memo. It is further to be noted that admittedly except complainant, no other witnesses were examined by the complainant. Under such circumstances, it is very difficult to accept the case of the appellant except the bare words of the complainant that the accused has issued cheque in pursuance to the amount of Rs.30,000/- which was paid by the complainant to the accused, therefore under such circumstances, it can be said that there is no legally enforceable

debt. Further considering the findings of the Trial Court which are based on the factual background and after considering the entire evidence, the Trial Court has come to the conclusion that the appellant/complainant has failed to prove the case, therefore after perusal of the judgment and on reappreciating the evidence on record, I do not see any perversity or error committed by the Trial Court while acquitting the accused/respondent, hence the following order is passed:-

(i) Appeal stands dismissed.

**( M. M. NERLIKAR , J.)**

*Gohane*