Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.764 OF 2009

Arti Rajesh Karangutkar Adult, Aged about 33 years, R/o 117/3402, Kannamwar Nagar – 2, Vikhroli [E], Mumbai 400 083.	]]]]	Appellant/Original Complainant
Vs.		
1. Anna Rocky Fernandes 116/3365, 2nd Floor, Kannamwar Nagar, Vikhroli (E), Mumbai – 400 083.	]]]]	Respondent/Original Accused
2. State of Maharashtra (Formal Party)	]]	Respondents

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Mr. Abhijeet A. Desai a/w Mr. Karan Gajra a/w Ms. Daksha Punghera a/w Mr. Vijay Singh, for Appellant.

Mr. Dinesh Jain, for Respondent No.1.

Ms. G.P. Mulekar, , A.P.P, for Respondent No.2-State.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 7th DECEMBER, 2023.
PRONOUNCED ON : 19th DECEMBER, 2023.

JUDGMENT:

1. This appeal is directed against a judgment and order of acquittal rendered by the Metropolitan Magistrate 50th Court,

Vikroli, Mumbai on 1st September, 2008 in C.C No.1578/SS of 2007, thereby acquitting respondent No.1-accused of an offence punishable under section 138 of the Negotiable Instruments Act, 1881 (for short "N.I Act").

2. Appellant and respondent No.1 were friends and neighbours. In the month of January, 2007, the appellant had advanced a friendly loan of Rs.3,00,000/- to respondent No.1, pursuant to respondent No.1's request as she was in financial need due to the ailment of her husband who was suffering from blood cancer as well as daughter of respondent No.1 was also in need of financial help as she was undergoing a training as an Air Hostess.

3. The appellant, on humanitarian grounds, lent an amount of Rs.3,00,000/- to respondent No.1 by way of loan, which she promised to refund by the end of June, 2007. It is the contention of the appellant that in lieu of the said amount, respondent No.1 had issued four cheques, details of which are as under;

(a) Cheque No.445883 dated 24th July, 2007 for Rs.1,25,000/-;

(b) Cheque No.445881 dated 24th May, 2007 for Rs.1,25,000/-;

(c) Cheque No.445260 dated 24th July, 2007 for Rs.25,000/- and

(d) Cheque No.445882 dated 23th June, 2007 for Rs.25,000/-.

The cheques were drawn on UTI Bank Limited Ghatkopar which was subsequently known as Axis Bank. Upon instructions of respondent No.1, the appellant had deposited the cheques in the Bank as respondent No.1 could not repay the amount till June, 2007.

4. The appellant had initially deposited two cheques of Rs.1,25,000/- each in the Axis Bank on 3rd October, 2007 at it's Mulund Branch. On 5th October, 2007, she received a memo from the Axis Bank informing her that cheques deposited by her were dishonoured for insufficiency of funds.

5. A legal notice dated 8th October, 2007 was issued to respondent No.1 calling upon her to repay the amount of Rs.3,00,000/- within a period of 15 days. It was duly received by

respondent No.1 on 11th October, 2007. The notice was not replied by respondent No.1 which resulted in filing of the complaint against her by the appellant-complainant in the Court of Metropolitan Magistrate, Vikhroli bearing Complaint No.1578/SS/2007 under section 138 of the N.I Act in order to enforce the legal liability.

6. The learned Metropolitan Magistrate, after recording the evidence of the complainant as well as respondent No.1 acquitted respondent No.1 of the offence punishable under section 138 of the N.I. Act.

7. At the outset, Mr. Desai, learned Counsel for the appellant contended that the trial Court has committed grave error in both law and facts in acquitting respondent No.1 since findings returned by the Magistrate are *sans* considering the vital admissions given by respondent No.1 in her cross-examination as well as certain aspects which were surfaced even during the cross-examination of the appellant substantiating the appellant's case. Mr. Desai would argue that the Court below had emphasized more on the source of income of the complainant which is immaterial in view of the ratio laid down by this Court in case of **Krishna P. Morajkar, S/o Late**

Paras Morajkar Vs. Mr. Joe Ferrao S/o Domnic Ferrao and State of Goa, 2013 SCC Online Bom 862. He submits that the Court below wrongly relied upon the provisions of Section 269-SS of the Income Tax Act which had absolutely no bearing in the given set of facts and circumstances. The Counsel would argue that in view of the facts, circumstances and evidence on record, the appeal needs to be allowed.

8. On the other hand, Mr. Jain, learned Counsel for respondent No.1 vehemently argued the appellant has failed in making out any case under section 138 of the N.I Act as the evidence on record is quite insufficient to hold respondent No.1 guilty for the said offence. Mr. Jain, at the outset, would argue that the cheques in question were stolen by the appellant and even signatures over the same are forged. He also submits that there was no transaction of any kind between the appellant and respondent No.1, in the sense, no amount as contended by the appellant was lent to respondent No.1 by her. Learned Counsel further argued that there is a violation of the provisions of Section 269-SS of the Income Tax Act as the amount in question which exceeds Rs.20,000/- is stated to have been advanced to respondent No.1 in cash and not by cheque.

9. Learned Counsel for the appellant has placed reliance on certain precedents, which shall be referred hereinafter.

10. The appellant in her affidavit in lieu of examination-in-chief before the Magistrate testified that she lent Rs.3,00,000/- to the respondent No.1 upon her request on 29th January, 2007 as she was in dire need in view of the fact that her husband was suffering from blood cancer and her daughter had to undergo training for the post of an Air Hostess. She testified that respondent No.1 promised to repay the said hand loan by June, 2007 and, therefore, issued four cheques of following description as enumerated below in favour of the appellant which were drawn on UTI Bank Limited Ghatkopar (East) Branch;

(a) Cheque No.445883 dated 24th July, 2007 for Rs.1,25,000/-;

(b) Cheque No.445881 dated 24th May, 2007 for Rs.1,25,000/-;

(c) Cheque No.445260 dated 24th April, 2007 for Rs.25,000/- and

(d) Cheque No.445882 dated 23rd June, 2007 for Rs.25,000/-.

According to the appellant, all the cheques were signed by respondent No.1 in her presence and were issued in discharge of the aforesaid debt. She further testified that two cheques bearing No.445883 dated 24th July, 2007 and bearing No.445881 dated 24th May, 2007 for an amount of Rs.1,25,000/- were deposited by her in her account with UTI Bank Limited, Mulund Branch on 3rd October, 2007. However, the cheques were dishonoured with a remark "funds insufficient" and were returned to the appellant on 5th October, 2007. The appellant had produced both original dishonoured cheques before the trial Court which are marked as "Exhibit A and Exhibit B" respectively. The memo of the Bank is at 'Exhibit C'.

11. A legal notice dated 8th October, 2007 was served upon respondent No.1 calling upon her to repay the amount in question within 15 days from the date of receipt of the notice. The notice is proved at "Exhibit D". The evidence reveals that the notice was dispatched by Registered Post Acknowledgment Due as well as Under Certificate of Posting bearing Receipt No.5540 dated 9th October, 2007. The notice returned as "unserved" as per postal remark "U/C". Another envelope of "Under Certificate of Posting"

did not return and, therefore, there was due service of notice. Respondent No.1 in her cross-examination admits receipt of notice which was sent "Under Certificate of Posting". Respondent No.1 has, thus, not disputed the fact of receipt of notice. Since respondent No.1 neither replied the notice nor complied with the same, the appellant had filed a complaint under the provisions of the N.I. Act.

12. It would be interesting to go through the cross-examination of the appellant by the learned Counsel for respondent No.1 as well as cross-examination of respondent No.1 herself who stood into the witness box in order to rebut the presumption which is in favour of the appellant.

13. The first defence raised by respondent No.1 is that she did not issue cheques towards repayment of loan inasmuch as she did not borrow amount from the appellant. Another defence is that her cheques were stolen from her custody and misused by the appellant. Admittedly, neither any report of theft was lodged by respondent No.1 with any Police Station nor any intimation was given by her to the Banker to stop payment of alleged stolen cheques which is

evident from the substantive evidence of Bank Officer examined on behalf of respondent No.1.

14. Turning back to the cross-examination of the appellant by respondent No.1 wherein it has been elicited that the appellant and respondent No.1 were close friends who were working in a Company known as "Max Newyork Life". Relations between them were just like members of family and both were on visiting terms to one another's house. Cross-examination further reveals that respondent No.1 had demanded money from the appellant in the year 2007 which was paid by the appellant to her in cash. The cross further reveals that the appellant did not acknowledge receipt of the amount or executed any document after paying the amount since relations were very close and friendly, which appears to be quite obvious. Cross also reveals that after obtaining the cheques, the appellant advanced the amount to respondent No.1. The appellant had further stated in her cross-examination that she can prove the source of income from where she had paid an amount of Rs.3,00,000/- to respondent No.1. It is further surfaced in the cross-examination that all the aforesaid cheques were given by respondent No.1 to her on 29th January, 2007. The cross further

indicates that all cheques were in the handwriting of respondent No.1.

15. Having substantiated and reinforced the case of the appellant in cross-examination on behalf of respondent No.1, it is surprising as to how the Counsel in the state of bafflement attempted to falsify vital admissions already elicited hereinabove through the mouth of the appellant. Certain questions were put to the appellant again by the learned Counsel which were already denied by her. Once having substantiated the fact as regards demand and payment of Rs.3,00,000/- in cash as well as the signature of respondent No.1 over the subject cheques, respondent No.1 is estopped from putting those suggestions that neither the amount in question was lent by the appellant nor the cheques were signed by respondent No.1. It is pertinent to note that the cross-examination not only substantiated the material facts but also reveals that the appellant had deposited the cheques in question in the Bank as per the instructions given by respondent No.1.

16. Respondent No.1 in her affidavit in lieu of examination-in-chief testified that she never approached the complainant for any friendly loan nor issued any cheques as alleged. She had never informed the appellant that her husband was suffering from blood

cancer and her daughter wanted to undergo training for the post of an Air Hostess. Interestingly, in her evidence, respondent No.1 testified that cheques bearing No.445881 and 445883 of UTI Bank were lost by her about which she had informed the Bank. She testified that she had never issued the cheques in favour of the appellant and even signatures over the cheques were not made by her. When she was cross-examined on behalf of the appellant, she admitted of not filing any Police complaint as regards lost cheques, however, she maintains that she did inform her Bank about lost cheques. Evidence of respondent No.1 is to be accepted with a pinch of salt for a simple reason that bank employee examined by her in support of alleged lost cheques viz. D.W.2 – Moulik Shah testified that from the application form which was brought by the witness in the Court, it revealed that the signature over the application form *vis-a-vis* the cheque/s is not matching but, the cheques were not returned for that reason as it has been proved by the appellant and this witness that the cheques were returned for "Insufficient funds" and not on account of difference in the signatures. Admittedly, the concerned cheque book was issued in favour of respondent No.1. It is not the case of respondent No.1 that since the cheques were lost, she had informed the Bank to stop

payment of the cheques. This witness (D.W. 2 – Moulik Shah) also testified that he is not aware whether any application to that effect was given by respondent No.1 or informed the Bank about lost cheques. He testified that since he is not a handwriting expert, he cannot make a positive statement as to whether signatures over the cheques in question were made by respondent No.1. As such, even this witness has not supported respondent No.1-accused. It is surprising as to how Counsel for respondent No.1 argued before this Court that the cheques were stolen by the appellant which was not the defence taken during trial.

17. There is one more interesting fact surfaced during the cross-examination of the appellant wherein the appellant admits that before the cheques were dishonoured, respondent No.1 had filed a Non Cognizable Offence bearing No.725 of 2007 on 18th May, 2007 under section 504 of the I.P.C with the Police Station whereupon the concerned Police Inspector had summoned both of them. This is irrelevant in the given set of facts as it seems that due to an acrimony which arose after the transaction in question, respondent No.1 had lodged NC complaint against the appellant. Had the cheques in question were either stolen or lost,

respondent No.1 would have lodged a report, which she did not.

18. From the aforesaid discussion, it is apparent that the appellant had proved beyond doubt as regards advance of Rs.3,00,000/- to respondent No.1 as a hand loan against which respondent No.1 issued two subject cheques which came to be dishonoured for want of sufficient funds in her account.

19. The cross-examination of the appellant as well as evidence of respondent No.1 substantiated all the material facts as stated by the appellant in her complaint. Respondent No.1 had failed to substantiate her defence and failed to rebut the statutory presumptions under sections 118 and 139 of the N.I. Act. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expressions necessarily means a legally enforceable debt or other liability. This section treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. Indeed, cheques came to be issued by respondent No.1 in discharge of the debt. The explanation leaves no manner of

doubt that to attract an offence under section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. It has been substantiated that on the date of drawal of the cheques, there was a legally enforceable debt in subsistence. Respondent No.1 had failed to rebut the aforesaid presumption in light of the aforesaid discussion of evidence and facts. Neither her own evidence nor evidence of the employee of the AXIS Bank is helpful in rebutting the presumption; rather, it had substantiated and buttressed the case of the appellant rendering the evidence of respondent No.1 otiose. Had there been some element of truth in the alleged loss of cheques, respondent No.1 would have definitely informed the Bank or lodged a report with the Police. It is also surprising to note as to how only four cheques alleged to have been stolen from the cheque book? It is equally surprising as to where the other two cheques are, if four cheques were lost. The silence of the respondent No.1 on this crucial aspect renders her testimony doubtful. It is also surprising to note as to why respondent No.1 did not make any attempt to prove the fact that the signatures over the cheques were forged. This is nothing short of subterfuge.

20. It would be apposite to place reliance on a judgment of the Supreme Court in case of **M/s Kumar Exports Vs. M/s. Sharma Carpets in Criminal Appeal No.2045 of 2008 (arising out of Special Leave Petition (Criminal) No.955 of 2007)** wherein the Hon'ble Supreme Court discussed the scope of Section 139 and 118 of the N.I. Act. Paragraph 11 and 12 are extracted below;

> "11. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond

reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under

Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.

12. The defence of the appellant was that he had agreed to purchase woolen carpets from the respondent and had issued the cheques by way of advance and that the respondent did not supply the carpets. It is the specific case of the respondent that he had sold woolen carpets to the appellant on 6.8.1994 and in discharge of the said liability the appellant had issued two cheques, which were ultimately dishonoured. In support of his case the respondent produced the carbon copy of the bill. A perusal of the bill makes it evident that there is no endorsement made by the respondent accepting the correctness of the contents of the bill. The bill is neither signed by the appellant. On the contrary, the appellant examined one official from the

Sales Tax Department, who positively asserted before the Court that the respondent had filed sales tax return for the Assessment Year 1994-95 indicating that no sale of woolen carpets had taken place during the said Assessment Year and, therefore, sales tax was not paid. The said witness also produced the affidavit sworn by the respondent indicating that during the year 1994-95 there was no sale of woolen carpets by the respondent. Though the complainant was given sufficient opportunity to cross-examine the said witness, nothing could be elicited during his cross-examination so as to create doubt about his assertion that no transaction of sale of woolen carpets was effected by the respondent during the year 1994-95. Once the testimony of the official of the Sales Tax Department is accepted, it becomes evident that no transaction of sale of woolen carpets had taken place between the respondent and the appellant, as alleged by the respondent. When sale of woolen carpets had not taken place, there was no existing debt in discharge of which, the appellant was expected to issue cheques to the respondent. Thus the accused has discharged the onus of proving that the cheques were not received by the holder for discharge of a debt or liability. Under the circumstances the defence of the appellant that blank cheques were obtained by the respondent as advance payment also becomes probable and the onus of burden would shift on the complainant. The complainant did not produce any books of account or stock register maintained by him in the course of

> his regular business or any acknowledgment for delivery of goods, to establish that as a matter of fact woolen carpets were sold by him to the appellant on August 6, 1994 for a sum of Rs.1,90,348.39. Having regard to the materials on record, this Court is of the opinion that the respondent failed to establish his case under Section 138 of the Act as required by law and, therefore, the impugned judgment of the High Court is liable to be set aside".

21. In order to rebut the presumption, it was incumbent upon the accused to bring on record such facts and circumstances, upon consideration of which, the Court may either believe that consideration and debt did not exist or their non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that they did not exist. As already stated, nothing has been brought on record to rebut the presumption by the respondent No.1. There is absolutely nothing in the evidence of respondent No.1 to infer, even remotely, that neither the amount in question was lent by the appellant nor had she issued any cheques in discharge of the said debt. The reason for which respondent No.1 is said to have borrowed the amount from the appellant viz. ailment of her husband (blood cancer) and the training of her daughter as an Air Hostess, she could have adduced some evidence in order to

bolster the said aspect, which she did not. Respondent No.1 also could have relied on the presumption of fact, for instance, those mentioned in section 114 of the Indian Evidence Act to rebut the presumptions under section 118 and 139 of the N.I. Act.

22. The statutory notice, complaint and evidence of the respective parties, if juxtaposed, would unerringly point out the fact that the respondent No.1 did borrow an amount of Rs.3,00,000/- from the appellant and issued cheques in question in discharge of a debt. Defences as raised by respondent No.1 are unacceptable and unbelievable. Respondent No.1 had failed to discharge the said onus. The ratio laid down by the Supreme Court would be squarely applicable to the present set of facts.

23. Mr. Desai, learned Counsel for the appellant while assailing the impugned judgment contended that the Court below patently erred in applying the provisions of Section 269-SS of the Income Tax Act to the facts of the present case inasmuch as section 269-SS of the Income Tax Act clearly envisages that any amount above Rs.20,000/- ought to be accepted by payee by way of cheque or draft in contrary to which the same shall be barred and/or penalized

under Section 271 of the Income Tax Act. Mr. Desai submits that bar under section 271 should not prejudice the merits of case and shall, therefore, not be applicable.

24. A bare look at Section 269-SS of the Income Tax Act would reveal that the said bar is applicable to a person who accepts deposit by way of cash and not to a person who makes or offers any money to the payee and, therefore, even if the said bar is made applicable to the present case, the same shall apply to respondent No.1 who had accepted the amount of Rs.3,00,000/- from the appellant by way of cash for which punishment is contemplated under Section 271 of the Income Tax Act. Learned Magistrate has, indeed, committed a grave error of law by misreading the provisions of Section 269-SS of the Income Tax Act by holding that the appellant had failed to prove the source of her income who appears to have been influenced by the submissions made on behalf of respondent No.1 as regards bar under Section 269-SS of the Income Tax Act. The learned Magistrate had, therefore, committed illegality and grave error. Mr. Desai has, therefore, rightly placed reliance on a judgment of this Court in the case of **Krishna P. Morajkar, S/o Late Paras Morajkar** (supra). Relevant portion of the judgment is

extracted below;

> "19. There is another aspect of the matter. The learned Counsel for the respondent pointed out that in Krishna Janardhan Bhat (supra) attention of the Supreme Court was possibly not drawn to the actual wording of Section 269SS of the Income Tax Act. He submitted that Section 269SS of the Income Tax Act, in fact, does not cast any burden upon a person making advance in cash to record it in his returns and does not prevent any such cash advance from being made. It may be useful to quote provisions of Section 269SS and 271D of the Income Tax Act as under:
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> **Section 269SS** : No person shall, after the 30th day of June, 1984, take or accept from any other person (hereafter in this section referred to as the depositor), any loan or deposit otherwise than by an account payee cheque or account payee bank draft, if, -
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> (a) the amount of such loan or deposit or the aggregate amount of such loan and deposit; or
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> (b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or
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> (c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in

clause (b), is twenty thousand rupees or more:

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by -

(a) Government;

(b) any banking company, post office savings bank or co-operative bank;

(c) any corporation established by a Central, State or Provincial Act;

(d) any Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:

[Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and neither of them had any income chargeable to tax under this Act.]

Section 271D – (1) If a person takes or accepts any loan or deposit in contravention of the

provisions of section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) any penalty imposable under sub-section (1) shall be imposed by the joint Commissioner.

(emphasis supplied)

A plain reading of Section 269SS shows that no person can accept any loan or deposit of a sum of Rs.20,000/- or more otherwise than by an account payee cheque or account payee bank draft. It does not say that a person cannot advance more than Rs.20,000/- in cash to another person. It is clear that the restriction on cash advances was in fact on the taker and not the person who makes the advance. The penalty for taking such advance or deposit in contravention of provisions of Section 269SS was to be suffered by one who takes the advance. Therefore, it was obviously impermissible to invoke these provisions for preventing a person from recovering the advance which he has made".

25. It is thus clear that no person should accept any loan or deposit of a sum of Rs.20,000/- or more otherwise than by an account payee cheque or account payee bank draft. The provision does not say that a person cannot advance more than Rs.20,000/- in cash to another person. Restriction on cash advances was, in fact,

on the taker and not on the person who makes an advance. The penalty for taking such advance or deposit in contravention of provisions of Section 269-SS was to be suffered by the taker who accepts the advance. The learned Magistrate has wrongly invoked the aforesaid provisions while dismissing the complaint. As such, the provisions of Section 269-SS and 271D of the Income Tax Act have absolutely no bearing over the case in hand and, therefore, the impugned judgment and order of acquittal rendered by the Magistrate is unsustainable and, therefore, needs to be quashed and set aside.

26. The learned Magistrate had rendered the judgment in most cryptic and perfunctory manner, in the sense, neither the facts have been clearly stated nor the evidence has been properly discussed. The learned Magistrate has also misinterpreted and misread the legal position as envisaged not only under sections 138 and 139 of the N.I. Act but also the provisions of Section 269-SS of the Income Tax Act. The learned Magistrate has failed to appreciate vital admissions in the cross-examination of the appellant as well as D.W.2 – Moulik Shah in it's correct perspective which have been elicited at the time of recording evidence. Thus, the findings

arrived at by the Court below are patently illegal and perverse and, therefore, need to be set aside.

27. Corollary of the aforesaid discussion is that the appeal needs to be allowed and as such, it is allowed. The impugned judgment and order rendered by the learned Metropolitan Magistrate in C.C. No.1578/SS of 2007 is reversed.

28. Respondent No.1 – original accused is found guilty and, therefore, is convicted of an offence punishable under section 138 of the N.I. Act.

29. Before awarding sentence, respondent No.1 needs to be heard and, therefore, list the matter on **19th December, 2023.**

30. Today, Appellant - original complainant is present alongwith her Advocate.

31. Respondent No.1-accused, despite specific instructions to the Counsel appearing on her behalf is absent. Even the Counsel appearing for respondent No.1 - accused is absent.

KEPT BACK AT 2.30 P.M

32. Despite keeping the matter back in the morning session, respondent No.1-original accused is absent, so also the Advocate representing her.

33. Due to absence of the respondent No.1-accused, there is no occasion to hear her on the point of sentence. Nevertheless, absence of the respondent No.1-accused will not detain this Court from pronouncing the judgment of conviction and awarding the sentence.

34. Considering the overall facts, circumstance and evidence on record, following sentence would meet the ends of justice. As such, following order is expedient;

: **O R D E R** :

[a] Appeal is allowed.

[b] The judgment and order of acquittal rendered by the Metropolitan Magistrate 50th Court, Vikhroli, Mumbai on 1st September, 2008 in C.C No.1578/SS of 2007 is quashed and set aside.

[c] Respondent No.1-accused is convicted of an offence punishable under Section 138 of the N.I. Act.

[d] Respondent No.1-accused is sentenced to undergo simple imprisonment of one year and shall pay fine of Rs.5,00,000/-.

[e] In default of payment of fine, respondent No.1-accused shall undergo simple imprisonment for four months.

[f] Upon recovery of fine, an amount of Rs.3,00,000/- be paid to the appellant.

[g] Since Respondent No.1-accused is absent, the judgment and order of this Court shall be certified to the concerned Court in view of Section 388 of the Criminal Procedure Code.

[h] The learned Magistrate shall thereafter proceed in accordance with section 388 (2) of the Criminal Procedure Code by taking appropriate steps of issuing conviction warrant.

[i] Record and Proceeding be remitted to Metropolitan Magistrate 50th Court, Vikhroli, Mumbai.

35. Appeal stands disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]