IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO.476 OF 2004

Kalidas Vishwanath Gore,
Age 31 years, Occu. Agri.,
R/o Bendkal, Tq. Lohara (Bk.),
District Osmanabad. … **Applicant.**

Versus … **Applicant.**

1. The State of Maharashtra.

2. Rajaram Kisanrao Potdar,
Age 41 years, Occu. Service as Teacher,
R/o Lohara (Bk.), Tq. Lohara (Bk.),
District Osmanabad. … **Respondents.**

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Advocate for Applicant : Mr. Santosh N. Patne.
APP for Respondent No.1-State : Mr. S. B. Narwade.
Advocate for Respondent No.2 : Mr. Akshay D. Kulkarni.

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CORAM : S. G. MEHARE, J.

RESERVED ON : 13.06.2023
PRONOUNCED ON : 11.07.2023

JUDGMENT :-

1. Heard the respective counsels.

2. The applicant/original complainant has preferred this criminal revision application against the acquittal of the respondent No.2/accused vide order dated 30.10.2004 passed by the learned Additional Sessions Judge, Omerga, in Criminal Appeal No.16 of 2004 (Old No.4 of 2003).

3. For convenience, the applicant would be referred to as the 'complainant' and 'respondent No.2' as 'accused'.

4. The brief facts of the case were that the complainant had filed a complaint against the accused under Section 138 of the Negotiable Instruments Act (N.I. Act for short). He had a case that the accused was in need of money. Hence, on 05.07.2001, he obtained a hand loan of Rs.10,000/- from him and against the repayment, a cheque in dispute was delivered to him. The cheque in dispute was drawn on District Central Co-operative Bank Ltd., Branch Lohara, District Osmanabad. It was a postdated cheque. After one month, the accused requested the complainant that he could not arrange for the money. Hence, he sought the additional time of one month. Thereafter, the accused sought time on two occasions. Lastly, the time was extended till 31.12.2001. However, the accused could not arrange for the money. Hence, on 31.12.2001, the cheque in dispute was presented to the bank for encashment. The cheque was returned with the reason "Funds Insufficient". The statutory notice was issued. Accused had replied to the notice.

5. The accused did not deny the issuance of the cheque in dispute. Only the dispute was that the cheque in dispute was

not delivered against the hand loan, as pleaded in the complaint.

6. The complainant, in his verification statement before the issue of process and evidence, came with a story that the cheque in dispute was issued for keeping Rs.10,000/- by the accused that was to be returned to him from the deposit given at the time of hiring the premises owned by the wife of accused. The time was given to the accused to make arrangements, but he did not. Hence, he presented the cheque for encashment.

7. In a nutshell, the accused did not deny the issuance of the cheque in dispute. However, the defence of the accused, as extracted from his cross-examination of the complainant, was that after issuing the cheque in dispute, his wife told him that the complainant had not paid the agreed rent for the whole period of his stay in the premises. Hence, they went to him and asked him to return the cheque in dispute and pay the remaining rent of Rs.4000/- and adjust Rs.10,000/- which was to be returned to him. However, the complainant did not return the cheque in dispute and misused it. A civil suit was also filed to recover the remaining rent of Rs.4000/-. The complainant admitted filing of the Civil suit.

8. On the facts discussed above, the learned Magistrate believed the complainant and held the accused guilty and convicted him. However, in his impugned judgment and order, the learned Additional Sessions Judge disbelieved the complainant as he came with a different story. He also held that the story put forth in the complaint is not at all supported by the evidence brought on record, but the learned Trial Court failed to attach adequate importance to this vital infirmity in the case of the complainant. There appears justification for the refusal of the complainant's case by the accused as absolutely no evidence came on record to substantiate the case of advancement of hand loan to the accused. Merely, the issuance of a cheque is not in dispute and dishonour of it is also beyond defect. Hence, the accused cannot be convicted.

9. Learned counsel for the complainant has vehemently argued that the accused admitted the issuance of the cheque in dispute. However, story of the accused of issuing cheque as security is improbable. He had no reason to issue the cheque in dispute as a security. The admission of the accused, issuing the cheque and issuing the receipt is the relevant material to believe the complainant that the cheque in dispute was issued against the legally enforceable debt. He would submit that the

story brought by the complainant in his evidence and complaint is not precisely inconsistent. Rather, it was narrated in detail how the transaction took place. Therefore, the legal presumptions under the N.I. Act would attract, and the criminal revision application is liable to be allowed.

10. Per contra, learned counsel for the accused has vehemently argued that the trial Court did not consider the factums and erroneously held the accused guilty. The complainant admitted in cross-examination that the cheque was entrusted as a security. Hence, the onus was shifted on the complainant to prove that there was legally enforceable debt. The complainant cannot play hot and cold at a time. The statutory notice was duly replied. Unless the legally enforceable debt is proved, the presumption contemplated under the N.I. Act would not apply. The defence of the accused was probable. The complainant never paid the hand loan to the accused. The complainant's case was false. The accused established preponderance of probability. The admissions of the complainant in cross-examination were correctly considered. Hence, the impugned judgment and order is legal, correct and proper. He relied on the case of ***M. S. Narayana Menon Vs. The State of Kerala and others ; (2006) 6 SCC 39***

and the case of ***Basalingappa Vs. Mudibasappa ; AIR 2019 Supreme Court 1983.*** Both these cases are on different facts. Hence, would not come to the aid of the accused.

11. Appreciating the facts and the arguments of the respective counsels, the fact in issue was whether there was no legally enforceable debt though the cheque in dispute was issued.

12. In a complaint under Section 138 of the Negotiable Instruments Act, the burden on the complainant is to prove the delivery of the cheque and that the legally enforceable debt exists. On the delivery of cheque either wholly blank or having written thereon an incomplete negotiable instrument, the person so signing shall be liable upon such instrument to holder in due course for such amount.

13. Section 139 of the N.I. Act speaks of the presumption in favour of the holder that the cheque received by the holder was for the discharge, in whole or in part, of any debt or other liability. As per Section 138 of the N.I.Act, the cheque shall be delivered to discharge the payment of the amount or debt. Such debt shall be legally enforceable. The holder, in due course, has to establish the liability of the drawer was legal and

that shall be enforceable under the law. The drawer shall owe the debt of the amount mentioned in the instrument.

14. Section 118 of the N.I.Act also provides for the presumption of consideration, as to date, the time of acceptance, the time of transfer, orders of endorsements and the stamp and also presumes that the holder of the N.I.Act is a holder in due course.

15. In the light of the admission of the accused that he had delivered the cheque in dispute to the complainant, however, the rent was due; hence the amount was to be adjusted towards the rent, and therefore the cheque in dispute was not issued for the legally enforceable debt, the burden to prove the rent was due was on the accused. In the cases under section 138 of the N.I. Act, the presumption as mentioned above shall either be rebutted by bringing the material in the cross-examination of the complainant and his witnesses or from the material available on record or by entering into the witness box or examining the independent witnesses.

16. The accused did not enter the witness box or examine any witness to prove his defence. He solely relied on what he had extracted from the cross-examination of the complainant and his witnesses. In cross-examination, the complainant

denied the suggestion that the agreed monthly rent of the premises was Rs.200/-. On the contrary, he referred to him one receipt (Exh.21). It was a receipt of settlement about the return of the deposit paid by the complainant. It bears the signature of the complainant. It was agreed that out of Rs.33,000/- (Thirty-three thousand), the accused would return Rs.30,000/- (Thirty thousand only). He paid Rs.20,000/- (Twenty thousand) and issued a cheque in dispute for Rs.10,000/- (Ten thousand). The said receipt was dated 14.07.2001. Nowhere it depicts from the record that anytime before the statutory notice of the complainant, the accused did something to prove that he and his wife went to him and requested to adjust the cheque amount towards the rent due and pay further rent of Rs.4000/-. This was the fact brought for the first time in the reply to the statutory notice of the complainant. The learned counsel for the accused did not point out material from the record that it establishes that the rent was agreed for Rs.200/- per month, and the complainant did not pay him the rent.

17. Without suggesting or bringing anything in cross-examination of the complainant about issuing the cheque in dispute as security the accused, in his statement under section

313 of Cr.P.C., had come up with a defence of issuing the cheque in dispute as a security. Issuing the cheque as security impliedly admits the debt. In the context of issuing a cheque as security, the term security means admitting debt and assurance to the drawee to secure the debt, if not repaid as promised in time and to get his debt recovered through the known negotiation. In a case of issuing a cheque as security, the accused must prove that he had discharged the debt and it was never intended to be to negotiated, or it has been misused. Such a burden would be on the accused. Nothing is on record that the cheque in dispute was issued as a security and was misused, even on repaying the debt.

18. Further, the learned counsel for the accused has vehemently argued that the defence of the accused is probable. In the cases under the N.I. Act, the accused has to bring the material on record that creates a reasonable doubt about the existence of a legally enforceable debt or liability. The learned counsel for the accused did not point out the circumstances that created a reasonable doubt that the legally enforceable debt did not exist.

19. Though the complainant has two stories about the debt, the common thread was that the accused had issued the

cheque in dispute towards the debt. In the facts of the case, it is to be answered whether it damaged the case of the complainant as contradictory statements and was a serious infirmity raising a reasonable doubt over the case of complainant.

20. Contrary statement is one that says two things that cannot both be true. A contradiction is a situation or idea in opposition to one another. The contrary statement should be like that the main contention or main fact in issue believes to be not true. The contradiction should be material that makes the case of the complainant completely false.

21. The fact in issue, in this case, is whether the cheque in dispute was issued towards a legally enforceable debt or liability. It has been proved that the legally enforceable debt existed on the day of delivering the cheque in dispute. The essential ingredient, attracting Section 138 of N.I. Act has also been proved, and the legal presumptions have not been rebutted. Therefore, this Court is of the view that two stories of the complainant would not damage his case of delivering the cheque for a legally enforceable debt.

22. In view of the above, it can safely be said that the learned Additional Sessions Judge erred in disbelieving the

complainant, for the sole reason, that he had two stories which was a serious infirmity.

23. The discussion above leads this Court to conclude that the impugned judgment and order is erroneous, illegal and improper and warrants interference at the hands of this Court. Hence, the following order :

O R D E R

(i) Criminal Revision Application stands allowed.

(ii) The Criminal Appeal No.16 of 2004 (Old number - 4 of 2003) is remitted back to the Court of learned Additional Sessions Judge, Omerga, for re-writing the judgment after hearing the respective counsels.

(iii) Record and Proceedings be returned to the learned Additional Sessions Judge, Omerga.

(iv) The bail and surety bonds stand restored until the decision of the learned additional sessions Judge if it was cancelled.

(vi) Rule made absolute

(vii) No order as to costs.

(S. G. MEHARE, J.)

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