

(2019) 07 BOM CK 0163
In the Bombay High Court
Case No : Writ Petition No. 2154 Of 2018

Nilesh Triyambak Pasarkar

APPELLANT

Vs

State Of Maharashtra & Ors

RESPONDENT

Date of Decision : 30-07-2019

Acts Referred:

Maharashtra Dowry Prohibition Rules, 2003 — Section 3(4)(I)
Maharashtra Civil Service (Small Family Declaration) Rules, 2005 — Section 4
Bombay High Court (Conduct) Rules, 1989 — Section 23A

Citation : (2019) 07 BOM CK 0163

Hon'ble Judges : Akil Kureshi, J;S.J. Kathawalla, J

Bench : Division Bench

Advocate : S.B. Talekar, Amit Shastri, Rahul Nerlekar, N.C. Walimbe, Pavan S. Patil

Final Decision : Disposed Off

Judgement

1. The applicant/original accused has preferred this Criminal Revision Application against the Judgment and order of conviction passed by the 7th Judicial Magistrate First Class, Aurangabad under section 138 of the Negotiable Instruments Act and confirmed by the Ad-hoc Additional Sessions Judge, Aurangabad in Criminal Appeal No.65 of 2003.

2. Brief facts of the case are as follows :-

a] According to the complainant, he is having cordial relations with the accused as both of them are dealing in the same business. At the request of the accused, complainant had advanced him a hand loan of Rs.50,000/- for expansion of his business in the month of July, 2001 and the amount was to be repaid within a month. Thus, for repayment of the said amount, the applicant/accused had issued a cheque bearing No.098100 dated 24.8.2001 for the amount of Rs.50,000/-. The complainant had presented the said cheque in his bank on 9.11.2001 and the complainant received an intimation from his bank on 12.11.2001 that the said cheque has been dishonoured for insufficiency of funds.

The complainant has accordingly brought this fact to the notice of the applicant/accused, and the applicant/accused assured to make the arrangement of funds and accordingly the complainant has presented the said cheque again on 22.12.2001. Said cheque was even dishonoured on the second time for insufficient funds. Lastly, the complainant issued a legal notice dated 31.12.2001 to the applicant/accused for repayment of the amount and though notice was served on accused on 10.01.2002, the same was neither replied nor complied with by the accused. Therefore, the complaint came to be filed.

b] The learned Judicial Magistrate First Class, Aurangabad has recorded the plea of the applicant/accused. The applicant/accused pleaded not guilty and claimed to be tried. The complainant has examined himself. Statement of the accused u/s 313 of Cr.P.C. came to be recorded. According to the defence of the accused he has not secured any loan from the complainant. The applicant/accused is a Director of Shyona Pulp Mills Pvt Ltd, which deals in Scrap papers and said company was to pay some amount to the complainant. The complainant was insisting for the payment. Therefore, accused had issued a cheque in question in favour of the complainant for Rs.50,000/- and later on the company has paid Rs.50,000/- to the complainant by demand draft, but the cheque had remained with the complainant, who had misused the same for filing the present case against the accused.

C] The learned 7th Judicial Magistrate First Class, Aurangabad by judgment and order dated 22.5.2003 vide SCC No.768/2002 convicted the accused under section 138 of the Negotiable Instruments Act and sentenced to suffer S.I. till rising of the Court and to pay fine of Rs.1,000/- (Rs. One Thousand) in default to suffer S.I. for 7 days. Aggrieved by the same, the applicant/accused preferred Criminal appeal No.65/2003 and the learned Adhoc Additional Sessions Judge, Aurangabad by judgment and order dated 3.12.2004 dismissed the said appeal. Hence, this Criminal Revision Application.

3. The learned counsel for the applicant/accused submits that, the applicant/accused is a Director of Shayona Paper Pulp Conversion Mills Pvt Ltd. The same is not disputed by the complainant. It is also not disputed that the complainant was supplying paper scrap to the above said company. Learned counsels submits that in such a business relations with the complainant, there was no reason for the applicant/accused to secure hand loan of huge amount of Rs.50,000/- from the complainant. The learned counsel submits that, the complainant has admitted in his cross-examination that he was transacting the business with the said company of which the applicant/accused is one of the Directors. The complainant has also admitted in his cross-examination that at about 20.8.2001 accused met him in the company and the complainant had asked the applicant/accused for the payment in respect of supplying of scrap papers. It is thus specific defence of the applicant/accused that since the complainant has insisted for his payment in respect of the transaction he entered for his company, the applicant/accused has given said cheque of his personal account till the official payment by the

company in respect of the said transaction of supply of scrap paper to the complainant. The complainant has also admitted in his cross-examination that on 25.8.2001, a DD of Rs.50,000/- was given to him by the company under the signature of Managing Director. Learned counsel submits that the presumption under section 118 read with section 139 of the Negotiable Instruments Act is rebuttable. The accused can rebut the said presumption on preponderance of probabilities and the same can be done on the basis of the cross-examination of the complainant and his witnesses, if any, and/or by leading independent defence evidence. The accused can very well do so that no such presumption can either be raised or would stand rebutted in as much as the basic requirement of the cheque having been issued in discharge of a legally enforceable debt or liability is not satisfied.

4. The learned counsel for the applicant, in order to substantiate his submissions, placed reliance on a judgment in the case of Domina De Souza Vs. Kamalkant Sawant reported in 2018 (6) Mh.L.J. 521 wherein this Court (Coram : C.V.Bhadang, J.) in paragraph no.11 by referring the observations of the Supreme Court in case of Indus Airways Pvt Ltd., observed about the same in paragraph no.17 of the judgment.

5. Learned counsel for the respondent no.2/complainant submits that, even though, the complainant was transacting the business with applicant/accused in respect of the scrap paper and, even though the complainant was supplying paper scrap to the said company of which the applicant/accused is one of the Directors, so far as said amount of Rs.50,000/- is concerned, the complainant has filed a complaint with the specific allegations that the applicant/accused had obtained the said amount as a hand loan with the assurance of repayment within a period of one month and in discharge of that liability, the applicant/accused has given that said cheque of an amount of Rs.50,000/-. Learned counsel submits that, the Courts below have thus rightly drawn the presumption under section 118 and 139 of the Negotiable Instruments Act and convicted the applicant/accused under section 138 of the N.I. Act. Both the Courts below have taken a very lenient view and the applicant/accused came to be convicted to suffer SI till rising of the Court and to pay a fine of Rs.1,000/-, in default to suffer SI for seven days. Learned counsel submits that, there is no substance in this Criminal Revision Application. Criminal Revision Application is thus liable to be dismissed.

6. It appears from the allegations made in the complaint and also from the admissions given by the complainant in his cross-examination that there were business relations between the complainant and the applicant/accused. The complainant was trading in scrap papers and he was supplying paper scrap to the company of which the applicant/accused is one of the Directors. It is difficult to accept that for expansion of the business, the complainant has given huge amount of Rs.50,000/- in cash to the applicant/accused as a hand loan when the applicant/accused was one of the Directors of the said company and not the sole Proprietor. The complainant has also admitted in his cross-examination that

many times he has received the payment from the said company by way of pay order, cheque or DD, but not in cash and the said payments were being made by the company in lumpsum. The complainant has also admitted in his cross-examination that at or about 22.8.2001 he was in transaction term with the company. At or about that period, he was daily going to company for demanding the payments. He has further shown his ignorance that at that time, Managing Director of the Company was on leave or out of Aurangabad, however, the complainant further admitted that on 20.8.2001 accused met him in the company and the complainant had asked him about the payment. Though, the complainant has further denied that, accused has given the disputed cheque in discharge of the said liability of the company, the complainant has further admitted in the cross-examination that on 25.8.2001 DD of Rs.50,000/- was given to him by the company under the signature of the Managing Director.

The complainant has not bothered to add on his own in the cross-examination that said transaction was a different transaction and it has no concern with the transaction entered by him with the accused in his personal capacity.

7. In a case *Domina De Souza* (supra) relied upon by the learned counsel for the applicant, this Court (Coram: C.V.Bhadang, J.) in paragraph no.11 has reproduced the observations of the Supreme Court in paragraph no.13 of *Indus Airways Pvt. Ltd.*, which is as under :-

"11. The Supreme Court in *Indus Airways Pvt. Ltd.* (supra) was concerned with a case where the post dated cheques were issued by the appellant/purchaser, as an advance payment in respect of purchase orders, in which case, the Hon'ble Supreme Court found that the cheques could not be said to have been issued in discharge of a legally enforceable debt or liability. This is what is held in para 13 of the judgment :

"13. The explanation appended to section 138 explains the meaning of the expression 'debt or other liability' for the purpose of section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. 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. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an exiting debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability." (Emphasis supplied).

8. In paragraph no.17 this Court has made following observations :-

"17. There cannot be any manner of dispute with the proposition that once the presumption arising under section 118 read with section 139 of the Act is raised, it can be rebutted by the accused on preponderance of probability at the trial. This can be done on the basis of cross-examination of the complainant and his witnesses, if any, and/ or by leading independent defence evidence. In a given case, the accused can also show on the basis of the allegations in the complaint and the notice themselves that no such presumption can either be raised or would stand rebutted in as much as the basic requirement of the cheque having been issued in discharge of a legally enforceable debt or liability is not satisfied. Here is a case, wherein on the say of the respondent himself and taking the contents of the notice and the complaint on their face value, it cannot be said that the cheque was issued for the discharge of any legally enforceable debt or liability, as on the date of issuance of the cheque."

9. Thus, it is clear that explanation to Section 138 leaves no manner of doubt that to attract an offence under section 138 of the NI Act, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. Thus, considering the admissions given by the complainant, it cannot be said positively that the said cheque has been issued by the applicant/accused for the discharge of any legally enforceable debt or liability as on the date of issuance of the cheque. It is well settled that presumption under section 118 read with section 139 of the N.I. Act is rebuttable presumption and the accused can do so on preponderance of probability and also on the basis of the cross-examination of the complainant and his witnesses, if any. In the instant case, the applicant/accused has discharged the said burden and rebutted the presumption drawn under section 118 read with section 139 of the Act. Thus, the evidence is short of proving that there exists a legally enforceable debt or liability for which the applicant/accused has given the said cheque. It is also to be noted here that said cheque exh.16 has been given as a Proprietor of Hindustan Traders. There was no reason for the applicant/accused to issue a cheque of his personal liability in the capacity as a Proprietor of Hindustan Traders. The complainant has not bothered to explain the same. Thus, the applicant/accused is entitled for the benefit of doubt.

10. At this stage, the learned counsel for the applicant/accused submits that, in order to show the bonafides, the applicant/accused has deposited Rs.50,000/- before the Trial Court. On perusal of the Record and Proceedings of the Trial Court, it appears that the learned Magistrate by passing an order below Exh.42 has rejected the application filed by the complainant for withdrawal of the said amount. It is not clear as to what happened during the pendency of the appeal and after the disposal of the appeal about said amount. If the said amount is not withdrawn by the complainant, the amount if any still lying in the Court the same shall be paid to the applicant/accused and in case, if the amount is withdrawn by the complainant on execution of the Bond, or otherwise/ (undertaking), then the

applicant/accused may execute the said bond/undertaking. The applicant/accused is entitled for the amount even if it is withdrawn by the complainant. The complainant is liable to pay the said amount to the applicant/accused. Thus, the applicant/accused may initiate appropriate proceedings in the Trial Court. Hence, following order.

O R D E R

1. Criminal Revision Application is hereby allowed.

2. The Judgment and order of conviction

passed by the 7th Judicial Magistrate First Class, Aurangabad dated 22.5.2003 in SCC No.768 of 2002 under section 138 of Negotiable Instruments Act sentencing thereby the applicant/accused to suffer S.I. till rising of the Court and to pay fine of Rs.1,000/- in default to suffer S.I. for seven

days, and said judgment and order of conviction confirmed by the Adhoc Additional Sessions Judge, Aurangabad dated 3.12.2004 in Criminal Appeal No.65/2003 are hereby quashed and set aside.

3. The applicant/original accused Vishnu Amthalal Patel is hereby acquitted for the offence under section 138 of the Negotiable Instruments Act vide SCC No.768/2002. Fine amount if paid, shall be refunded to the applicant/accused.

4. Criminal Revision Application is accordingly disposed off. Rule is made absolute in above terms.