

(2018) 07 BOM CK 0055

In the Bombay High Court

Case No : Criminal Appeal No.441 of 2018

Sau. Sunanda W/O. Narendra Rithe

APPELLANT

Vs

Madhav S/O. Bhimrao Rajurkar

RESPONDENT

Date of Decision : 16-07-2018

Acts Referred:

Negotiable Instruments Act, 1881 — Section 118, 138, 139
Code of Criminal Procedure, 1973 — Section 357(3)

Citation : (2018) 07 BOM CK 0055

Hon'ble Judges : MANISH PITALE, J

Bench : Single Bench

Advocate : P. A. Kadu, Apurva Kolhe, A. S. Kilor

Final Decision : Allowed

Judgement

1. Admit.Â Heard finally by consent of the learned counsel for parties.

2. Appellant herein is original complainant, who has filed this appeal challenging judgment and order dated 07.08.2017 passed by the Chief Judicial Magistrate (trial Court) in Summary Criminal Case No.610/2012, whereby the trial Court has acquitted the respondent (original accused) of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.Â The case of the complainant herein is that the respondent (her brother) was in need of money and that she had advanced an amount of Rs.2,50,000/Â to him, in respect of which a document titled as â??Usanwar Paotiâ??. (Exh.Â?28) was executed.Â As per the said documentÂ?Exh.Â?28, dated 29.01.2011, the said amount had been given to the respondent and he had given a cheque to the appellant for repayment of the said amount.Â The said amount was to be repaid by 31.12.2011.Â It was also recorded in the said documentÂ?Exh.Â?28, that if the cheque was not honored, the

respondent would be liable to pay interest as per the bank rates to the appellant, on the said amount.Â

3. According to the complainant, the cheque was dated 31.12.2011 for an amount of Rs.2,50,000/Â.Â It was deposited by her, but it was dishonoured, pursuant to which she was constrained to issue notice dated 25.01.2012 to the respondent. In response thereto, on 09.02.2012, a reply was sent on behalf of the respondent, wherein a defence was taken that the respondent had given cash amount of Rs.2,50,000/Â in DecemberÂ2010 to the appellant and that additionally, the respondent had given a cheque for an additional sum of Rs.2,50,000/Â with a nominal â??Usanwar Paotiâ?, because the appellant wanted to show her creditors the said document for getting money in the future.Â The respondent denied having received any amount from the appellant or her husband.

4. In this situation, the appellant was constrained to file a complaint before the Court of Judicial Magistrate First Class, Amravati, under Section 138 of the aforesaid Act.Â In this complaint, the appellant relied upon the said document at Exh.Â28 dated 29.01.2011 and the cheque at Exh.Â27 dated 31.12.2011. She stated that an amount of Rs.2,50,000/Â was advanced to the respondent as loan and the said amount was arranged by her with the help of her husband, who contributed Rs.50,000/Â and one Nitin Rithe (cousin of her husband) who arranged Rs.2,00,000/Â. It was stated in the complaint that although the aforesaid amount was arranged by her on 12.01.2011, it was actually given to the respondent on 29.01.2011 when the document at Exh.Â28 was executed, because the respondent himself failed to receive the amount earlier because of some technical difficulties on his part.

5. In support of her complaint, the appellant examined four witnesses, while the respondent failed to examine any witness in support of his defence.

The appellantÂSunanda examined herself as PW1.Â She examined her husbandÂNarendra Rithe as PW2, cousin of her husbandÂNitin Rithe as

PW3 and one of the witness to the document Exh.Â28ÂAjabrao Bhojane as PW4.Â The appellant also brought on record and proved account

statements of her husbandÂNarendra (PW2) and cousin of her husbandÂNitin (PW3), to demonstrate that they had indeed withdrawn cash amounts

from their bank accounts to arrange for the amount of Rs.2,50,000/Â, which

was given as loan to the respondent on 29.01.2011.

6. The respondent failed to examine any witness on his behalf and he did not adduce any evidence to support his defence. The respondent cross-

examined the witnesses of the complainant and claimed that sufficient material was brought on record to discredit the witnesses and thereby he sought acquittal in the case.

7. By the impugned judgment and order, the trial Court found that there was no denial of signature of the respondent on the said document at Exh. 28

and the cheque at Exh. 27 and that, therefore, the presumption under Sections 118 and 139 of the said Act operated against the respondent in the

present case. The trial Court also found that the contention of the respondent that the cheque was issued by way of security, was also not

acceptable. But, the trial Court came to the conclusion that the evidence of the appellant (complainant) demonstrated that, at the relevant time,

relations between the appellant and the respondent were strained and that, therefore, it was unbelievable that the respondent would have asked and

the appellant would have given loan to the respondent. It was further concluded by the trial Court that the entries in the account statements of

husband of the complainant Narendra (PW2) and his cousin Nitin (PW3) did not conclusively show that the amounts were arranged at the relevant

time for payment to the respondent, as recorded in the document at Exh. 28. On this basis, the trial Court acquitted the respondent by the impugned

judgment and order.

8. Mr. P. A. Kadu, learned counsel appearing on behalf of the appellant, submitted that the trial Court committed a grave error by acquitting the

respondent, despite the fact that detailed documentary and oral evidence was placed on record on behalf of the complainant to prove her case. It

was submitted that when the document at Exh. 28 and the cheque at Exh. 27 were found to have been signed by the respondent and when the said

documents were proved, presumption under the said Act operated against the respondent, which he had failed to rebut even on the touchstone of

preponderance of probabilities. It was submitted that the respondent had given reply to the notice issued by the appellant in which he had taken a

specific defence, but, in the proceedings before the trial Court, the respondent failed to adduce any evidence in respect of the said defence, thereby

showing that the presumption in favour of the appellant stood un rebutted. It was submitted that when the trial Court rejected the contention of the respondent that the cheque had been issued by way of security, it could not have acquitted the respondent only on the ground that the relations between the parties were strained and that the theory of loan could not be accepted. This was clearly erroneous when the document at Exh. 28 had been proved, particularly because one of the witnesses to the said document had, indeed, deposed as a witness before the trial Court.

9. Per contra, Ms Apurva Kolhe, Advocate holding for Mr. A. S. Kilor, counsel for the respondent, submitted that the trial Court was justified in acquitting the respondent because the complainant had failed to prove her case beyond reasonable doubt and that the respondent had demonstrated, on the basis of material on record, that his evidence was probable. It was submitted that the respondent was not required to enter the witness box or to adduce defence evidence to rebut the presumption under the said Act. According to the learned counsel for the respondent, there was insufficient material on record to prove the theory of hand loan given by the appellant to the respondent, in the present case. Consequently, when the basis of the case of the complainant was not proved, the order of acquittal passed by the trial Court could not be interfered with.

10. Heard counsel for the parties. A perusal of the evidence and material on record, in the present case, shows that the appellant placed on record documentary evidence in the form of the aforesaid document at Exh. 28 and the cheque in question at Exh. 27 and that she examined four witnesses in support of her case. On the other hand, the respondent sent reply only to the notice issued by the appellant after dishonour of the cheque in question and that, thereafter, there was no evidence adduced by the respondent to support his defence. There was no witness examined by the respondent in his defence. In this situation, it needs to be examined firstly; whether the appellant had been able to place on record sufficient material for presumption under Sections 118 and 139 of the aforesaid Act to operate against the respondent. And secondly; whether the respondent had been able to rebut the said presumption by discrediting the witnesses and evidence placed on record by the appellant, even in the absence of examining any witness in support of his case.

11. The document at Exh.Â28 dated 29.01.2011 records the fact that the respondent received amount of Rs.2,50,000/Â from the appellant and that he was supposed to repay the said amount by 31.12.2011.Â It was also recorded that if the respondent failed to repay the said amount by 31.12.2011, he would have to pay interest on bank rates on the said amount from 29.01.2011.Â The said document at Exh.Â28 also recorded that the cheque in question was given by the respondent to the appellant.Â It is significant that the said document, Exh.Â28, records that if the cheque is dishonoured, the interest at the aforesaid rate would be charged.Â The said document, Exh.Â28, was signed by both the parties, as also by two witnesses.Â The appellant deposed in favour of the execution of the said document and one of the witnessesAjabrao (PW4) also deposed regarding execution of the same.Â The signature of the respondent on the said document was not disputed.Â In this backdrop, the trial Court correctly found that the said document, Exh.Â28, stood proved.Â It was also found by the trial Court that the signature of the respondent on the cheque in question at Exh.Â27 was also not disputed.Â In the face of the aforesaid documentary evidence, the presumption under Sections 118 and 139 of the aforesaid Act operated in full force against the respondent.

12. Apart from this, the appellant also placed on record and proved bank account statements of her husbandÂNarendra (PW2) and his cousinÂNitin (PW3) at Exhs.Â46,47 and 55, to show the manner in which the amount of Rs.2,50,000/Âwas arranged by her, in order to advance the same to the respondent.Â In the oral evidence adduced on behalf of the appellant, it came on record that the appellant had indeed advanced the said amount to the respondent and that the cheque in question at Exh.Â27, had been issued by the respondent for repayment of the said amount.Â It is significant that the respondent failed to enter the witness box or to examine any witness to support the defence taken by him in his reply dated 09.02.2012, Exh.Â35, sent to the appellant.Â The relevant portion of the said reply showing the defence taken by the respondent reads as follows:

â??3. As a matter of fact, you were in need of money for construction of your house and also for education of your daughters and therefore you asked my client to help you by providing money.Â Therefore, considering your urgent need, my client paid you Rs.2,50,000/Â in cash in December

2010 and since you requested that my client should deliver a post dated cheque for an additional sum of Rs.2,50,000/Â along with a nominal usanwar

Chitti in order to show your creditors that you will be getting more money in future, my client also executed a nominal usanwar Chitti in your favour.Â

You and your husband did not pay any amount to my client and hand loan and you did not have the capacity to pay such hand loan to him.Â??

But, no documentary evidence was produced by the respondent to prove that he had indeed advanced cash amount to the appellant in DecemberÂ?

2010 and he even failed to enter the witness box, in support of his defence.

13. As a result, the respondent relied upon the statements made in crossÂexamination by the witnesses of the appellant to claim that the appellant had

failed to make out a case in her favour and further that there was sufficient material on record whereby, the presumption against him stood rebutted

on preponderance of probabilities.Â The learned counsel appearing for the respondent relied on the statement made by the appellant in her crossÂ?

examination that the amount of Rs.2,50,000/Â was a big amount for her at the relevant time and further that the financial status of the respondent at

the time was sound.Â It was further pointed out that the appellant had stated about disputes between the parties in respect of the property and that

the relations between them were strained on that ground.Â On this basis, it was contended that it was highly unlikely that the respondent would have

taken loan from the appellant.

14. In this context, the trial Court did accept the fact that in the face of documentary evidence placed on record by the appellant, presumption under

the said Act operated against the respondent.Â The trial Court also found that theory of cheque having been issued by way of security, was not

acceptable.Â But, the trial Court held in favour of the respondent, mainly on the ground that the admissions made in the crossÂexamination by the

appellant demonstrated that the relations between the parties were strained and it was unbelievable that the respondent would have taken loan from

the appellant.Â Apart from this, the trial Court doubted the case of the complainant on the ground that there was no document executed between the

husband of the appellant and his cousin when huge amount of Rs.2,00,000/Â was allegedly given by the cousin, particularly when it had come on

record that the annual income of the said cousin was about Rs.4,00,000/-. It was also recorded by the trial Court that the account statement of the

husband of the appellant i.e. Exh.46, did not show withdrawal of any amount of Rs.50,000/- during the period of December 2010 to January

2011, which also created doubt about the case of the appellant. It was also held by the trial Court that the appellant ought to have proved as to what

was the difficulty of the respondent in failing to receive the said amount of Rs.2,50,000/-, immediately after it was arranged by the appellant on

12.01.2011.

15. The finding of the trial Court that it was unbelievable that the respondent could have taken loan from the appellant because their relations were

strained, flies in the face of the documentary evidence at Exh.28 and the cheque at Exh.27. The document at Exh.28 is not only signed by

the appellant but is proved by Ajabrao (PW4), who was one of the witness to the said document. The trial Court could not have ignored the said

clinching evidence only on the basis of certain statements made by the appellant in her cross-examination. The said finding of the trial Court is,

therefore, clearly erroneous.

16. As regards absence of document executed between the husband of the appellant and his cousin regarding the amount of Rs.2,00,000/?, all that the

appellant was required to prove was the source from which the amount of Rs.2,50,000/- was arranged by her to advance it as a loan to the

respondent. The bank account statement of the cousin of her husband at Exh.55, clearly shows withdrawal of the amount of Rs.2,00,000/- from

his account on 12.01.2011. The said cousin appeared as witness i.e. PW3 in support of the case of the appellant and he was also cross-examined on

behalf of the respondent. The said account statement at Exh.55, read with the evidence of the said witness Nitin (PW3), conclusively proved the

source from which the appellant had arranged for the amount in question. The trial Court erred in doubting the same on account of the fact that

there was absence of any document executed between the husband of the appellant and his cousin.

17. As regards absence of entry in Exh.46 i.e. bank account of husband of the appellant regarding withdrawal of Rs.50,000/- between December

2010 and January 2011, the trial Court failed to appreciate that the appellant

had relied upon the bank account statement of another bank in which her husband had an account at Exh.Â47, which records an entry of withdrawal of Rs.49,500/on 28.12.2010.Â It is this entry that the appellant relied upon to show how her husband had arranged for part of the amount advanced to the respondent.Â This nature of documentary evidence completely satisfied the requirement of law as laid down by Hon'ble Supreme Court in the case of John K. Abraham Vs. Simon C. Abraham and anr.; reported in (2014) 2 SCC 236, wherein it is held thus:

â??9. It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.â??

Therefore, the finding on the said aspect by the trial Court was completely erroneous.

18. The next finding of the trial Court against the appellant pertains to her failure in proving as to what was the reason why the respondent did not receive the loan amount till 29.01.2011, when the evidence on record demonstrated that the loan amount had been arranged by the appellant by 12.01.2011 itself.Â A perusal of the complaint and the evidence of the appellant shows that she specifically stated about the respondent having some technical difficulties in taking the said amount till 29.01.2011. The respondent failed to respond to the said contention of the appellant in her complaint and there was no crossÂexamination on behalf of the respondent on this aspect.Â Therefore, the trial Court was not justified in holding against the appellant on this count.

19. The trial Court also failed to appreciate that the presumption under Sections 118 and 139 of the said Act operated against the respondent. This presumption included the presumption of the cheque having been issued in discharge of legal debt or liability.Â The appellant as original complainant, having proved the source from which she had arranged for the amount of Rs.2,50,000/Â given as loan to the respondent and the same being recorded in written document at Exh.Â28, which stood duly proved against the

respondent, the trial Court could not have acquitted the respondent in the present case.Â The trial Court erred in disbelieving the case of the appellant, despite having held that the presumption in the present case fully operated against the respondent as Exhs.27 and 28 stood proved and when the theory of cheque having been issued by way of security, was itself rejected by the trial Court.

20. In this context, reliance placed by the learned counsel appearing on behalf of the respondent on the judgment of this Court in the case of Meera

S.Chiplunkar Vs. Ashalata Rawji Kondkar & anr.; reported in 2015 ALL MR (Cri) 4721 is misplaced because the said case is clearly distinguishable on facts.

In the said case, it was found by the Court that the view taken by the trial Court was a possible view and, therefore, interference was not

warranted.Â But, in the present case, the view taken by the trial Court is based on an erroneous appreciation of evidence and material on record.Â

It cannot be said in the present case that the appellant failed to prove her case beyond reasonable doubt.Â It could also not be concluded in the

present case that the respondent rebutted the presumption operating against him on the touchstone of preponderance of probabilities.

21. It is also important that when a complainant, like the appellant in the present case, has made out her case on the basis of cogent evidence and

material on record and the respondentaccused has failed to place any material on record to support his defence or to rebut the presumption operating

against him, conviction under Section 138 of the said Act must follow, so that the object of enactment of the said legislation, particularly Section 138

thereof, is satisfied.Â In the case of Goa Plast (P) Ltd vs Chico Ursula D'Souza reported in 2004 (2) SCC 235, the Hon'ble Supreme Court, while

referring to the object and purpose of the aforesaid Act, held as follows:

â??26. The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth

functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our

country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to

defraud the creditors. The sanctity and credibility of issuance of cheques in

commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the Bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious set back. The Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a Civil Court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.â??

In the very same judgment, the Hon'ble Supreme Court also held as follows:

â??13. The High Court, in our opinion, has failed to appreciate that on the facts of the instant case, the liability was a legally enforceable debt or

liability as per the explanation to Section 138 of the Act, therefore, the relationship between the appellant and the respondent was not at all a factor

germane to the proceedings for an offence under Section 138 of the Act.â??

22. In the said case before the Hon'ble Supreme Court, relation between the complainant and the accused was that of Master and Servant.Â Yet, the

Hon'ble Supreme Court found that when a case was made out by the complainant, the accused was liable to be convicted under Section 138 of the

said Act.Â In the present case, although the appellant (complainant) and the respondent (accused) are sister and brother, it would not affect the

outcome of the case because the appellant has clearly made out her case against the respondent for his conviction under Section 138 of the said

Act.Â Therefore, taking into consideration the object and purpose of the said Act, the only conclusion that can be drawn in the present case is that

the trial Court erred in acquitting the respondent.

23. In the light of the above, the present appeal is allowed. Impugned judgment and order passed by the trial Court is set aside.Â The respondent is

convicted for the offence under Section 138 of the aforesaid Act.Â Since the cheque in the present case was dated 31.12.2011, the appellant

deserves to be compensated for an amount more than the amount for which the cheque was issued by the respondent.Â Therefore, as the respondent

stands convicted under Section 138 of the said Act, he shall pay an amount of compensation of Rs.3,50,000/Â? to the appellant under Section 357 (3) of

the Code of Criminal Procedure within a period of two months from today, failing which he shall suffer simple imprisonment for a period of six

months.