

HIGH COURT OF GUJARAT**Before : M. K. Thakker, J.****Date of Decision: 13th December 2023**

R/Criminal Appeal (Against Acquittal) No. 1180 of 2023

HITESH MAHENDRABHAI PATEL**THRO POA MAHENDRABHAI KANTILAL PATEL****Vs.****STATE OF GUJARAT****Legislation and Rules:**

- Section 138 of the Negotiable Instruments Act
- Sections 118 and 139 of the Negotiable Instruments Act
- Section 204, 313 of the Code of Criminal Procedure

Subject:

Criminal appeal against acquittal in a case involving alleged dishonour of cheques under Section 138 of the Negotiable Instruments Act.

Headnotes:

Cheque Dishonour and Acquittal - Respondent acquitted in a case involving dishonour of cheques issued for Rs. 10 lakhs each - Cheques returned due to insufficient funds - Defence claimed misuse and forgery of signatures by a relative [Paras 3, 8-9]

Evidence and Defence - Respondent's defence of misusing cheques by a relative upheld based on Handwriting Expert Opinion - Evidence included KYC documents, account opening forms, and cash deposit receipts [Paras 8, 10]

Presumption under Negotiable Instruments Act - Court applied presumption under Sections 118 and 139 of the Act in favour of the complainant - Respondent successfully rebutted the presumption with handwriting expert's report [Paras 6-7, 10]

Appellate Review of Acquittal - Following principles of appellate review of acquittal, the Court held that the trial court's judgment was correct and did not warrant interference - Emphasized the reinforced presumption of innocence post-acquittal [Paras 11-12]

Referred Cases:

- M.S. Narayana Menon vs. State Of Kerala (2006) 6 SCC 39
- Basalingappa vs. Mudibasappa (2019) 5 SCC 418
- State of Gujarat vs. Jitendra C. Thakkar 2017 (4) GLR 3200

Representing Advocates:

- Appellant: Zubin F. Bharda

- Respondent: Not specified

ORAL JUDGMENT

1. This matter was considered and disposed of finally at the admission stage.
2. This appeal is filed challenging the judgment and order passed in Criminal Case No.54778 of 2016 by the learned Special Judge, Special Negotiable Instruments Act Court, Surat dated 8.4.2023 whereby respondent-accused was acquitted from the offence punishable under Section 138 of the Negotiable Instruments Act.
3. It is the case of the complainant that complainant, who is Power of Attorney holder, is having the knowledge with regard to the disputed transaction of the private complaint which is filed before the Competent Court being Criminal Case No.54778 of 2016. It is alleged in the complaint that complainant and accused were belonging to the same village and are the distant relatives. As the respondent-accused was in need of the money, in the year March, 2015, demand was raised with the complainant to lend the money. Complainant had given two cheques bearing Cheque No.058258 and 058259 dated 10th March, 2015 of Rs.10 lacs each of Associate Co.Op. Bank Ltd, Ring Road Branch, Surat. The assurance was given by the respondent-accused that the amount would be repaid within a period of 1 year. On completion of 1 year, money was demanded back where the accused had conveyed that he is in financial difficulty but within a 2 to 3 months, the amount would be repaid. Ultimately, cheque dated 14.6.2016 bearing Cheque No.434251 and 434252 of Rs.10 lacs each was drawn in the name of the complainant of Surat Mercantile Co.Op. Bank Ltd., Surat where respondent-accused has signed as authorized signatory of Shiv Enterprises. At that point of time assurance was given that on depositing with the Bank, the same would be honored and the amount would be credited in his account. The cheque was deposited and was returned on 15.6.2016 with an endorsement that 'fund insufficient' for which the 'Notice' was issued on 11.07.2016 which returned with an endorsement that 'not known'. Thereafter, aforesaid private complaint came to be filed. On being recorded the verification by the learned Court, the summons came to be issued under Section 204 of the Code of Criminal Procedure and on appearance of the accused, plea was recorded below Exh.7 wherein respondent-accused had denied the allegation and claimed to be tried. To prove the case, the complainant had examined himself below Exh.4 and witness, Gaurav Maheshbhai Patel, below Exh.30. Documentary evidence in the nature of Power of Attorney was produced below Exh.8. Registration of the firm below Exh.9. Xerox copies of the cheque by which the amount was lent below Exh.10 and 11. Copy of passbook Exh.12. Disputed cheques Exh.13 and Exh.15. Return Memo Exh.14 and 16. Demand Notice Exh.17. Registered AD Receipt Exh.18. Return cover Exh.19. Income-tax

return of the year 2014-15 and 2015-16 below Exh.20 and 21. On filing closing pursis, further statement under Section 313 of the Code of Criminal Procedure was recorded wherein the accused had pleaded that there was a partnership firm where her husband and uncle in-law were partner, thereafter, dispute occurred between the partners, the cheques which were lying in the office were misused by the uncle in-law by forging the signature and given to the complainant. In fact, accused never met to the complainant nor made any transaction and pleaded to be innocent. However, cheques in the name of Shiv Enterprises where she is Proprietor were misused and she further in order to prove her defence, in addition to cross examination, she examined the witness, namely, Dharmesh Ramchandra Mohite, below Exh.39, Bank Officer of Associate Co. Op. Bank Ltd and she herself was examined below Exh.73. She also produced the document like authority letter for the bank witness at Exh.40, certificate under Section 65B of the Evidence Act at Exh.41. Joint account opening form of the accused and her husband at Exh.42, Account statement for the period of 25.3.2015 to 15.6.2016 at Exh.43, Pay slip showing amount deposited in the accounts of the complainant vide Exh.44 to Exh.55 for the period of 30.4.2015 to 1.1.2016 and Hand Writing Expert Opinion below Exh.70. Learned trial Court after considering the evidence led and the submissions advanced by the respective parties, acquitted the respondent-accused from the charges, which is impugned before this Court.

4. Heard Mr.Zubin F. Bharda, learned advocate for the appellant.

5. Learned advocate, Mr.Bharda, for the appellant submits that though the presumption, which is in favour of the complainant, was not rebutted by the respondent-accused by leading the probable defence, learned trial Court had acquitted the respondent- accused only on relying the report of Hand Writing Expert, which was produced below Exh.70. Learned advocate, Mr.Bharda, further submits that in the cases like present one, there was no any need to have the opinion of Hand Writing Expert, in - fact, it is the duty of the respondent-accused to lead the evidence, which may be in the nature of preponderance of the probability but that may be either through the circumstances or through the witnesses, which is required to be proved. However, learned trial Court committed grave error in not considering the same. Learned advocate, Mr.Bharda, vehemently submits that report of the Hand Writing Expert was accepted without having examined the officer and relies on the evidence of the respondent-accused. The Report was blindly accepted and believed by the learned Court. Learned advocate further submits that, in - fact, the Bank officer had not returned the cheque on the ground of signature differ but cheque was returned with the endorsement of the insufficient fund. If the defence which was tried to be projected by the learned advocate for the respondent is accepted then Bank officer could have returned the cheque on the ground of signature differ. However, bank officer is not in dipsute with regard to the signature but as respondent-accused was not having sufficient balance in her account, therefore, the cheque was returned with said endorsement. Learned advocate further submits that if bank officer is not in dispute with regard to the signature differ, the subsequent defence cannot be raised by the respondent-accused that she did not sign on the cheuqe as the said signature was not mismatched when it was sent for the encashment. Learned advocate further submits that the amount was lent by complainant to the accused through the Bank, therefore, denial on the part of the respondent-accused that she is not knowing about the transaction is absolutely baseless and improbable as there is entry in the passbook, which is showing that amount is credited in the account of M/s. Shiv Enterprises where the respondent-accused is the authorized signatory, therefore, it can

be averred that subsequently false defence created by the respondent-accused.

5.1 Learned advocate further submits that there was no any complaint before the police officer or any application given to the bank officer with regard to misappropriating the cheque books by the uncle in-law. However, only to get away from the liability, this improbable defence was created by the respondent-accused which may not be accepted by any prudent man. Learned advocate further submits that though complainant had proved the case and accused fails to rebut the presumption, learned trial Court had acquitted the respondent-accused and therefore, it is prayed to admit the appeal and convict the respondent-accused for the alleged offences.

6. Considering the aforesaid submissions made by learned advocate for the appellant, before entering into the merits of the case, this Court deems it fit to re-look the relevant provisions of law, which are reproduced herein below:

Section 118 - Presumptions as to negotiable instruments

Until the contrary is proved, the following presumptions shall be made:

1. of consideration; that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

2 .as to date; that every negotiable instrument bearing a date was made or drawn on such date;

3 .as to time of acceptance; that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

4 . as to time of transfer; that every transfer of a negotiable instrument was made before its maturity;

5 .as to order of indorsements; that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

6 .as to stamp; that a lost promissory note, bill of exchange or cheque was duly stamped;

7 . that holder is a holder in due course; that the holder of a negotiable instrument is a holder in due course: Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an SP offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him.

138 Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended

to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.- For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability.]

Section 139 in The Negotiable Instruments Act, 1881

139. Presumption in favour of holder.-It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

7. Considering the aforesaid provisions first of all what is a presumption that is to be taken into consideration by this Court, as per the judgment rendered by the Hon'ble Apex Court in the case of **M.S.Narayana Menon vs . State Of Kerala reported in (2006) 6 SCC 39**, a discussion with regard to the presumption is provided in para-40, which is reproduced herein below.

40. 'In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, at page 3697, the term 'presumption' has been defined as under:

"A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known.

A presumption is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof.

A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof. It follows, therefore that a presumption of any fact is an inference of that fact from others that are known". (per ABBOTT, C.J., R. v. Burdett, 4 B. & Ald,

161) The word 'Presumption' inherently imports an act of reasoning a conclusion of the judgment; and it is applied to denote such facts or moral phenomena, as from experience we known to be invariably, or commonly, connected with some other related facts. (Wills on Circumstantial Evidence) A presumption is a probable inference which common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made."

Having noticed the effect of presumption which was required to be raised in terms of Section 118(a) of the Act, we may also notice a decision of this Court in regard to 'presumption' under Section 139 thereof'.

8. Keeping in mind the above provision and submissions made by learned advocate for the appellant as well as considering the record and proceedings of the trial Court, it is not in dispute that at the first opportunity i.e. the stage of the statement under Section 313 of the Code of Criminal Procedure, defence was put by the respondent-accused with regard to the misusing the cheque by the uncle in-law. She from the beginning submitting that signature on the cheque is not of her. To rebut the presumption which is in favour of the complainant under Section 118 and 139 of the Negotiable Instruments Act, she examined Bank Officer of Associate Co.Op. Bank Ltd. below Exh.37 and produced the KYC which was given to opening the bank account and also produced the account opening form and produced the pay-slip, which shows that on different dates, cash amount was deposited in the account of the complainant. The complainant herself was examined below Exh.73 and submitted that there was a partnership firm in the name of Anmol Marble where the husband and the uncle in-law, namely, Kanaiyalal is the partner. Complainant had lent the money to the uncle in-law and one of the partner is of her husband, therefore, amount was lent in the name of the husband. Dispute was arisen between the husband and uncle in-law, therefore, the cheques which are lying with the uncle in-law were misused and given to the complainant. It is further contended that to repay the amount in the account of the complainant, every month, the amount was deposited in cash and for that receipts were produced. She said that the signature on the cheque is not belonging to the respondent-accused and therefore, she is not liable for making the payment of the cheque amount. On persual of the record, it further comes on record that applicant has preferred the application immediately on appearance below Exh.56 to send the cheques for the Hand Writing Expert Opinion. The order was passed by the learned Court below Exh.56 allowing the said application and on condition to pay the cost of Rs.10,000/- to the expert. Thereafter, the Hand Writing Expert had called the specimen signature as well as specimen signature card from with the Surat Mercantile Co. Op. Bank Ltd. and the old cheques and the applications filed before the learned Court, were also called for, for making comparison with the disputed cheques . At the end, Hand Writing Expert had opined as under:

Opinion

'The person who wrote the encircled standard signatures marked S1 to S36 (The blue encircled specimen signatures on loose sheets stated to be of Pinaben K. Patel), N1 (The blue encircled Natural signature on Jubani dated 17.7.2017 stated to be of Pinaben K. Patel) and N2 (The blue encircled Natural signature on specimen card of the Surat Mercantile Co. Op. Bank Ltd. dated 4.10.2011 stated to be of Pinaben K. Patel) did not write the encircled disputed signatures marked D1 (Red encircled disputed signature on cheque No. 434251 of the Surat Mercantile Co. Op. Bank Ltd. dated 14.6.2016 for Rs.10,00,000/- and D2 (Red encircled disputed signature on cheque No.434252 of Surat Mercantile Co.Op. Bank Ltd. dated 14.6.2016 for Rs.10,00,000/-).

and relying on the said opinion, the learned trial Court rightly acquitted the respondent-accused from the charges.

9. This Court is also considered the decision rendered by the Hon'ble Apex Court in the case of **Basalingappa V/s. Mudibasappa reported in (2019) 5 SCC 418** where summarize the principle enumerated in paragraph No.25, which reads as under:

25. We having noticed the ratio laid down by this Court in the above cases on Section 118(a) and 139, we now summarise the principles enumerated by this Court in the following manner:

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence. Section 139 imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come in the witness box to support his defence."

10. Considering the said judgment, this Court is of the view that report of the Hand Writing Expert which is placed on record to show that cheque in question has not been signed by the respondent-accused and by producing the report, the accused had successfully rebutted the presumption which is in favour of the complainant. The complainant in turn was not in a position to rebut the report neither had tried to examine the witnesses to prove his case. It is settled law that if any alteration is found in the cheque, no relief can be given and cheque itself becomes void instrument even if liability exists towards the accused.

11. This being an acquittal appeal, as per the judgment rendered by the Hon'ble High Court of Gujarat in the case of **State of Gujarat V/s. Jitendra C. Thakkar reported in 2017 (4) GLR 3200** wherein it is held that when two views are possible, the view which is in favour of the accused is to be considered.

6.10 That in an appeal against acquittal filed under Section 378 of the Code, 1973, as such there is no limitation on the Appellate Court to review the evidence. But at the same time, if on fact as well as on law, conclusion drawn by the trial Court based on appreciation of evidence unless compelling, cogent and substantial reasons appear for interference and when findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable, acquittal is not to be reversed or disturbed. When acquittal is based on the surmises and conjectures and not substantiated by law and evidence on record, an Appellate Court may re-appreciate and review the entire evidence to see that undue benefit is not given to the accused. Now, it is well settled that even if two views are possible, the Appellate Court shall not ordinarily interfere with the judgment of acquittal in a routine manner unless the judgment of the trial Court is per se wrong on facts and on law or perverse, substituting its own views by the High Court is not permissible. That in case of acquittal, it is to be borne into mind by the Appellate Court that there is double presumption in favour of the accused that firstly, presumption of innocence in favour of a guilty on the premise that every person should be

presumed to be innocent unless he is proved to be guilty by the Court of Law, and secondly, when accused secures an acquittal, such presumption of innocence is reinforced and reaffirmed by the trial Court.

12. In view of above discussion, I find that the judgment and order passed in Criminal Case No.54778 of 2016 by the learned Special Judge, Special Negotiable Instruments Act Court, Surat dated 8.4.2023 is correct and as per law and evidence and it is not required to be interfered from this Court. Hence, this appeal is rejected.

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