

**HIGH COURT OF GUJARAT****Bench: M. K. Thakker, J.****Date of Decision: 27-02-2024**

R/Criminal Appeal (Against Acquittal) No. 2348 of 2022

**NARENDRABHAI KANTILAL JOSHI****Vs.****ILABEN JITENDRABHAI TILAVAT AND ANOTHER****Legislation:**

Code of Criminal Procedure, 1973 - Section 378

Negotiable Instruments Act, 1881 - Sections 118, 138, 139

**Subject:** Appeal against the acquittal in a case involving a dishonored cheque under Section 138 of the Negotiable Instruments Act, 1881, dealing with issues of presumption under Sections 118 and 139 of the same Act and evaluating the evidence and defense presented in the trial court.

**Headnotes:**

Appeal Against Acquittal – Appellant challenging acquittal in cheque dishonor case – Cheque issued by respondent-accused returned with 'account closed' – Legal notice issued to accused remained unanswered leading to the filing of a complaint. [Paras 2, 2.1]

Evidence Evaluation – Complainant examined as a witness, along with other witnesses and documentary evidence including the disputed cheque, return memo, and bank account statements. [Paras 2.3, 2.4]

Application of NI Act Provisions – Examination of Sections 118, 138, and 139 of the Negotiable Instruments Act – Presumption in favor of the holder of the cheque – Burden on accused to rebut presumption. [Para 6]

Accused's Defense – Accused's denial of signature on the cheque and claim of account closure before cheque issuance – Defense supported by bank officer's testimony – Evidence suggesting a personal dispute and possible misuse of the cheque by the complainant. [Paras 9, 10]

Trial Court's Acquittal – Based on evidence and defense, the trial court found the respondent-accused not guilty, citing improbabilities in the complainant's case and a probable defense raised by the accused. [Para 11]

High Court's Decision – Upholding the trial court's judgment – No interference deemed necessary as the trial court's decision was found just and proper after

a thorough examination of evidence and applicable legal principles. [Paras 13, 14]

#### **Referred Cases:**

- M.S. Narayana Menon vs State of Kerala (2006) 6 SCC 39
- Chandrappa and others vs. State of Karnataka (2007) 4 SCC 415

#### **Representing Advocates:**

**Ajay Kumar for the petitioner**

**Vijay Kumar for the respondents**

#### **ORAL JUDGMENT**

**M. K. Thakker, J.** - This appeal is filed under Section 378 of the Code of Criminal Procedure, 1973 against the judgment and order of acquittal dated 17.09.2022 passed in Criminal Case No.2729 of 2016 by the learned 7th Additional Chief Judicial Magistrate (Negotiable Instruments Court), Rajkot.

2. The case of the complainant is that the complainant has purchased the residential quarter, i.e. block No.1620 from the accused and the consideration amount of Rs.1,70,000/-was paid. Subsequently, the respondent No.2 i.e. the accused had dropped an idea of selling the said quarter and on demanding the money back evasive reply was given.

Thereafter, cheque No.255654 of State Bank of India, Ashok Gondhia, Hostel Road Branch, Rajkot was issued in favour of the complainant dated 23.12.2015 of the amount of Rs.7,70,000/-. On depositing the said cheque, it was dishonored with an endorsement of 'account closed' vide return memo dated 19.01.2016.

2.1. On receiving the same, legal notice dated 27.01.2016 was issued to the accused, which was served on 29.01.2016. However, the respondent-accused neither replied to the notice nor complied with. Therefore, private complaint came to be filed before the competent court.

2.2. On filing the complaint, learned trial Court has issued warrant after recording the verification on 24.02.2016, making it returnable on 07.04.2016. Thereafter, the accused appeared and her plea was recorded below Exhibit 6 along with the further statement wherein the respondent-accused claimed to be innocent, pleaded not guilty and claimed to be tried. In addition to the same, it was stated by the respondent-accused that the accused is innocent. Since last many years they were staying separately, complainant had lodged around 10 cases and the complainant is a history sitter as they were staying in the same roof, the cheque was in possession of the complainant and the account was also operated by the complainant and by misusing the cheque which was lying with him, false complaint is filed.

2.3. To prove the guilty of the respondent-accused, the complainant has examined four witnesses being Narendrabhai Kantibhai Joshi-complainant himself below Exhibit 15, Jayeshbhai Labhshankar Dave below Exhibit 45, who was Sub-Engineer serving in the Gujarat Housing Board, Atulbhai Maganbhai Bhadja below Exhibit 51 Branch Manager of SBI and Saileshbhai Pranlal Kamdar Advocate & Notary.

2.4. In addition to the above witness, documentary evidence in the nature of disputed cheque below Exhibit 11, return memo below Exhibit 12, demand notice Exhibit 13, acknowledgment slip below Exhibit 14, the documents of the Gujarat Housing Board below Exhibit 46, deed dated 11.10.2021 of Gujarat Housing Board below Exhibit 49, Bank account statement of the respondent-accused below Exhibit 53, certificate issued under Section 65B below Exhibit 54, specimen signature card below Exhibit 55, Account statement of the respondent-accused below Exhibit 56, sale deed executed between the complainant and the respondent-accused dated 15.01.2013 below Exhibit 57, notary register Exhibit 63 and on filing the closing pursis below Exhibit 64 statement as earlier stated under Section 313 of the Code of Criminal Procedure, 1973 ('the Cr.P.C. referred hereinafter) was recorded.

3 .Learned trial Court after considering the evidence placed on record and the arguments advanced by the learned advocates for the respective parties acquitted the respondent-accused from the charges, which are impugned before this Court.

4 .Heard the learned advocate Ms.Falguni Trivedi for the appellant-original complainant. As noted earlier present appeal was heard finally at admission stage, no notice was issued to the respondent-accused.

5 .Learned advocate Ms.Falguni Trivedi for the appellant submits that the complainant had given the amount of Rs.1,70,000/- towards the sale consideration of block No.1620 and thereafter, it was conveyed that now she does not want to sale this quarter. On repetition demand of the money, which was paid towards the sale consideration, disputed cheque was issued, which was returned with an endorsement of 'account closed'.

5.1. Learned advocate Ms.Trivedi submits that complainant himself was examined below Exhibit 15 and though the presumption, which is in favour of the complainant was not rebutted by the respondent-accused either during the cross examination or by leading the evidence which may be in the standard of preponderance of the probability, learned trial Court has acquitted the respondent-accused.

5.2. Learned advocate Ms.Trivedi submits that though the complainant has proved the case of legally enforceable debt against the respondent-accused by leading the multiple evidence and though the respondent-accused failed to rebut the said evidence, the judgment and order of the acquittal was passed. Learned advocate Ms.Trivedi submits that the respondent-accused neither denied the signature nor the issuance of the cheque, however, without considering the same, the judgment and order of acquittal was passed.

5.3. Learned advocate Ms.Trivedi lastly submits that the judgment and order of the acquittal was passed without any cogent reason, therefore, the same is required to be interfered with and the appeal is required to be allowed.

6 .Considering the issue involved, it would be profitable to refer the below mentioned provisions of the N.I. Act. Sections 118, 138 and 139 are reproduced hereinbelow:-

"Section 118 - Presumptions as to negotiable instruments

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

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;

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

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

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

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

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

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 above provisions, what is the presumption that is elaborated in 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** and a discussion with regard to the same 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 settled position of law, if now merit is to examine, then it is the case of the complainant that the payment was made by the complainant of Rs.1,70,000/-towards the purchase of the quarter No. 1620 and for the repayment of the aforesaid amount as subsequently the respondent-accused denied for sale the same, the cheque in question was issued.

9 .To rebut the presumption which is in favour of the complainant, the respondent-accused had cross examined the complainant, wherein the following admissions come on record:

(i) It is true that the offence punishable under Section 406, 420 was registered against me, wherein I was released on anticipatory bail by the Hon'ble High Court. The said case was filed by Padmaben Chotai against me. I have also filed the case against said Padmaben with regard to the cheque return and the same is pending with the learned 11th Chief Judicial Magistrate First Class, Rajkot.

(ii) Against my step son Ketan Jitendrabhai also I have filed the cheque returned case, which is pending with the learned 12th Chief Judicial



Magistrate First Class, Rajkot and there case which is registered against me is also pending.

(iii) I know the respondent-accused since last 19-20 years. Before 19-20 years I and the accused was in a love relations, no love relations was there between us. The father of the accused had done Ghargharana. The accused is my wife since last 7-8 years we are staying separately. In the question which was put that you are signing differently in different document, he submits that I used to make short signature as 'N.K.Joshi' and if it is a long signature then I used to make 'Narendra Kantilal Joshi'. My wife had filed 4-5 cases against me. I filed 8-9 cases against my wife. My wife has filed only the case under Domestic Violence against me. I filed a Civil Suit against my wife wherein I filed as a capacity of pauper/insolvent as I don't have anything, everything is taken by my wife therefore, I filed application to declare my self as pauper/insolvent. We were staying together before 7-8 years. I don't have money to pay the installment of my scooter loan. It is not true that this quarter No.1620 is of earlier husband of my wife, namely, Jitendrabhai Tilawat. This quarter is in the name of Ilaben Jitendrabhai Tilawat and I will produce the documents regarding same.

(iv) I am staying separately since 7-8 years. Before 12 years we were staying together. When we were staying together, our relations were cordial. When we were separated, I have filed many cases against my wife. As on date also the dispute between husband and wife is continued. We were staying in the joint family and using the house hold articles jointly.

(v) I know the signature of my wife. Exhibit 14 RPAD slip where the signature is made is of my wife and that I identified. Exhibit 5 Vakalatpatra there signature I identified is of my wife. Except this signature mentioned in Exhibits 5 and 14, no other signature used to make by my wife. I cannot make the signature of my wife as I am illiterate person. I know the handwriting of my wife. Cheque which was given to me was prepared by my wife. I am not maintaining the account details. I do not have any document to show that I was having the funds mentioned in the cheque. The said fund was the last fund, which was given to my wife. When we were staying together as husband and wife, we were trusting on each other. I am doing the business of Karmakand. The same is not continued for whole year. There is no fixed rate in the said business, it depends on the client. I was only earning member in my family. Quarter No.1620 was ownership of my wife Ilaben before our marriage.

(vi) I have filed one case against the staff member of District Court regarding the financial transaction. The case, which was filed against my son resulted into the acquittal. He was not my real son, he was step son. Exhibit 14 acknowledgment slip containing the signature in the name and the address of one advocate Mr.Shamjibhai Chavda. I have not stated in my complaint notice and the chief examination that the accused herself had filled up the cheque details and handover to me.

(vii) Next witness which was cross examined by the respondent-accused is Jayeshbhai Laabhshankar Dave, who was the Sub-Engineer of Gujarat Housing Board. In the chief examination, one aspect comes on the record that the quarter being E-1620 was still continued in the name of respondent-accused and the same was not transferred to any one. In the cross examination of this witness, it comes on the record that there was an installments which were dues and as per the condition if there is an installments, unless it is repaid, it cannot be transfer. The amount, which is due is Rs.2,47,493/-. In support of his testimony, he produced the form stating

the ownership name of the owner was Ilaben Jitendrabhai Tilawat, wherein one condition which is mentioned being condition No.16 that 'the quarter cannot be transferred to other persons, it is allotted for the personal use' and for that undertaking is also filed, which was produced along with Form below Exhibit 46. Along with Exhibit 46, the notice is also produced dated 15.01.2021 calling upon the respondent to make the payment of the installments along with the penalty.

(viii) From the evidence of the next witness, namely, Atulkumar Maganbhai Bhadja, who is the Branch Manager of State Bank of India. It comes on the record that the Exhibit 11 cheque is not containing the signature of the respondent-accused and signature is different. However, the account was already closed, therefore, it was returned with the reason of account closed. Account was closed because of non-furnishing the documents of KYC. In the cross examination, he testified that signature in the specimen signature card below Exhibit 55 and cheque below Exhibit 11 are different. The account is non-operative since 31.01.2014.

(ix) From the testimony of witness, namely, Shaileshbhai Pranlal Kaamdar, who was the Notary, the complainant had tried to prove the sale deed, which was notarized on 26.10.2017 produced below Exhibit 57. He testified that both the parties came for signature.

10. Considering the above evidence, it transpires from the record that the account was non-operative since the year 2014 because of non-furnishing the KYC documents, the sale deed which is claimed to have been executed in the year 2017 was a notarized document. The dispute between husband and wife is going since long. When they were staying together, there was a cordial relations between the parties and the quarter being quarter No.E-1620 was a non transferable. The case of the complainant is that the said quarter was purchased by him and for that the amount of Rs.1,70,000/- was paid to the complainant in the year 2017. In the cross examination of this complainant, it comes on the record that he is not having the capacity to make the payment of the scooter installment and he filed an application declaring him as a pauper/insolvent therefore the case which is projected in the complaint appears to be a got up and to take a revenge against the wife, this false case appears to have been filed. If intentions of the parties were to purchase the property then the document must have been registered before the Sub-Registrar as per the Rules. However, not doing the same and it was notarized with the notary advocate also creates suspicion in the case of the complainant. The defence of the respondent-accused that her signature was made by the complainant in the disputed cheque was proved through the evidence of the Bank officer, who deposed in his testimony that the signature on the cheque and on the specimen on the card is different signature and as the account was closed therefore, it was returned with an endorsement of 'closed account'. However, comparing the signature with the specimen card, he deposed that it was not the signature of the respondent. Therefore, also the probable defence which was led was appears to be true and correct. It would be sufficient to rebut the presumption raise under Section 139 of the N.I.Act if the accused raise probable defence, the standard of proof of accused to rebut the presumption under Section 139 of the N.I.Act is preponderance of the probability. The accused need not dispute the existence of the consideration by way of direct evidence. The standard of proof to discharge the burden shifted on the accused to rebut the presumption raised by the Court under Section 139 of the Act is not the same as upon the prosecution to prove the case.

11. From the material which is brought on record was consistent with the innocence of the accused, which may reasonably be true, even though it is not positively prove to be proved then also accused would be entitled for acquittal. That after, proving to have discharged the initial onus of proof by showing the existence of the consideration was so improbable or doubtful, the onus would shift on to the complainant and complainant would be obliged to prove it as a matter of fact and upon failure to prove, he would disentitle to grant any relief on the basis of the Negotiable Instruments.

12. This being a criminal appeal, as per the law laid down by the Apex Court in case of **Chandrappa and others vs. State of Karnataka, reported in (2007) 4 SCC 415** wherein the general principles were laid down regarding the powers of the Appellate Court while dealing with the appeal against an order of the acquittal, which are reproduced hereinbelow:

"(1 ) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court."

13. On careful reading of the above evidence and the law laid by the Apex Court in the above mentioned case, this Court has no any hesitation in concluding that the judgment and order of the acquittal was passed by the learned trial Court after appreciation of the evidence on record is a just and proper and therefore, no any interference is required.

14. Resultantly, this appeal is dismissed. The judgment and order of acquittal dated 17.09.2022 passed in Criminal Case No. 2729 of 2016 by the learned 7th Additional Chief Judicial Magistrate (Negotiable Instruments Court), Rajkot is hereby confirmed.

15. Record and Proceedings be sent back to the concerned learned trial Court.

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