

Bombay High Court Ramkrishna Urban Co-Operative ... vs Shri Rajendra Bhagchand Warma on 16 February, 2010 Bench: P. R. Borkar (1)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 898 OF 2009

Ramkrishna Urban Co-operative Credit .. Applicant  
Society Ltd., Maliwada, Ahmednagar,  
through Authorised Signatory,

Shri Chhagan Tukaram Raut,  
Age. 36 years, Occ. Service,

R/o. Mutha Chambers, Maliwada,  
Ahmednagar.

Versus

Shri Rajendra Bhagchand Warma .. Respondent  
Age 38 years, Occ. Business,

R/o. 2044, Daware Galli,  
Near Vithal Mandir, Ahmednagar.

Shri L.B. Pallod, Advocate for the applicant.

Shri J.M. Murkute, Advocate for sole respondent.

CORAM	:	P.R. BORKAR, J.
RESERVED ON	:	03.02.2010
PRONOUNCED ON	:	16.02.2010

**J U D G M E N T :-**

1. This is an application for leave to file appeal against the order of acquittal passed by the learned Judicial Magistrate, First Class, Court No.1, Ahmednagar in S.T.C. No. 960 of 2008, decided on 21.01.2009, whereby the respondent is acquitted of offence punishable under section 138 of the Negotiable Instruments Act.
2. Brief facts giving rise to this application may be stated as below:- . Present applicant has filed private complaint alleging that the complainant is a co-operative society registered under the Maharashtra Co-operative Societies Act, 1960. It is doing banking business. The respondent for his business had taken loan of Rs. 2,00,000/- (Rupees Two Lakhs Only) on 18.10.2000 and for satisfaction of the loan, he executed promissory note, mortgage deed, guarantee deed etc. The respondent has agreed to repay amount from time to time by installments. Accordingly, cheque No. 500276 of Rs. 87,209/- drawn on Ahmednagar Merchants Co-operative Bank Ltd., Branch - Dalmandai, Ahmednagar, was issued. The cheque was dated 24.01.2008. When the complainant/applicant presented the cheque, it was dishonoured on the ground of insufficiency of funds. Thereafter, on 11.02.2008 a notice was issued by the complainant/applicant, but in spite of the same, the amount was not paid by the respondent and therefore the complaint was filed.
3. The learned Magistrate after considering the evidence led by both sides,

passed the order of acquittal acquitting the respondent of offence punishable under section 138 of the Negotiable Instruments Act, mainly on three grounds. Firstly, it is held that as many as ten blank cheques were obtained by the applicant bank while sanctioning/disbursing loan as security and one of them was used in the present case; secondly, there is bar of limitation; and thirdly, amounts paid by the respondent, in respect of which he has produced receipts in defence, were not reflected in the extract of account produced on record and as such it is not proved that the amount of Rs. 89,209/- was due on the date of the cheque. As against said decision of acquittal, the applicant/complainant wishes to file the appeal and therefore he filed this application under section 378 (4) of the Code of Criminal Procedure for leave to file appeal.

4. Heard Adv. Shri L.B. Pallod for the applicant and Adv. Shri J.M. Murkute for the respondent.
5. The Trial Court in para 12 onwards has considered the evidence on record. The respondent/accused in his affidavit in lieu of examination-in-chief has stated that he had repaid the entire loan in the year 2005 and he possessed receipts thereof. He also stated that while granting loan, ten blank cheques signed by him were obtained. No cheque was issued by him of amount due towards loan. It is observed that in the cross-examination said evidence has remained unshaken and the suggestions put on behalf of the complainant were denied. The Court also came to a conclusion in para 13 that the evidence of the accused/respondent was reliable. It is proved that he had given 10 blank signed cheques to the complainant. In order to substantiate this, he has examined P.W.3-Ashok Jindam, who was officer of the Ahmednagar Merchants Co-operative Bank. Said witness has stated that cheque book containing cheque No. 500276 was given to the accused/respondent on 04.10.2000. He proved document Exh.46. He also produced account extract at Exh.47. This evidence was also unshaken in cross-examination. The witness was found reliable witness by the Trial Court. The document at Exh.46 shows that the cheque book bearing cheque in question was issued to the respondent/accused on 04.10.2000. It was cheque book contained cheque Nos. 500276 to 500300. Thereafter on 13.11.2001 another cheque book was issued. On 22.02.2005 third cheque book was issued to the respondent. The account extract at Exh.47 clearly shows that the cheques bearing Nos. 500288 to 500299 were used till 24.09.2001 and thereafter cheques issued in the second cheque book bearing cheque Nos. 783491 and 783498 were used till 28.02.2005. Thereafter, cheques from third cheque book bearing Nos. 823492 to 823500 were used till 07.03.2008. So, it was observed by the learned Magistrate that all this clearly indicated that the accused/respondent was not using cheques in the year 2008 from the cheque book in which cheque No. 500276 was included. So, all these circumstances supported the case of the respondent that the respondent had issued 10 blank cheques signed by him to the complainant in the year 2000 while sanctioning the loan.
6. The learned advocate Shri Pallod argued that even accepting that this to

be so, still it will not affect the case of the complainant. He relied upon the case of Purushottam Maniklal Gandhi V/s. Manohar K. Deshmukh, 2007 (2) Bom.C.R. (Cri) 38. In that case Single Bench of this Court has observed in para 18 that it is open to a person to sign and deliver a blank or incomplete cheque and it is equally open for the holder to fill up blanks and specify the amount therein. This does not amount to any alteration in the cheque, since the cheque was not initially issued for any different specified sum which was changed. In para 19 of the said case it is observed that when a drawer of a cheque delivers a signed cheque, he obviously gives an authority to the holder to put a date of his choice. So, it is argued that merely because blank cheques were given by the respondent to the complainant, that does not mean that said cheques are not valid. Moreover, so far as limitation is concerned, in the same case it is observed that limitation would start from the date which is (put) on the cheque. The learned advocate also referred to para 22 of the said case and argued that even for the time barred debt when there is fresh promise to pay, it would be legally enforceable debt.

7. Another case cited is the case of Single Bench of this Court in Balagi Agencies Pvt. Ltd, V/s. Vilas Bagi of Bagi Packers Ltd., and Anr., 2008 ALL MR (CRI) 2230. Therein the drawer of cheque delivered a signed cheque. It is held that thereby he gave authority to the holder to put a date of his choice. As per Section 20 of the Negotiable Instruments Act, the holder had authority to fill in the date and limitation had to be reckoned from that date and therefore it cannot be said that the instrument had become time barred being presented beyond the period of six months from the date when it was given. However, in both these cases of Purushottam and Balagi Agencies Pvt. Ltd., amounts had become due before cheques were issued. So, there was existing liability to pay when the cheques were issued.
8. Section 138 of the Negotiable Instruments Act is as follows:- “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 provision 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."
9. It is argued that the cheque drawn must be for the discharge, in whole or in part, of any debt or other liability. So the debt or other liability must be in existence when the cheque, whether blank or post dated was issued. In this case the accused-respondent issued the cheque in question as security for loan before loan amount was disbursed. So, cheque was not towards any existing debt or liability. In case of loan transaction, borrower is in need of money and therefore he borrows loan amount from some one with understanding that the loan amount would be repaid in lumpsum on a future date or in installments from particular future date onwards periodically, with or without interest. It is not transaction of loan, if the amount is to be repaid the moment it is paid to borrower. So, provisions of Section 138 of the Negotiable Instruments Act are not attracted.
  10. We may consider object and purpose for introducing amendment to the Negotiable Instruments Act, 1981 by Amendment Act, 1988, as stated in the Amendment Act and various authorities to facilitate correct interpretation of ( 10 ) the provisions. The object and reasons clause of the bill which introduced the Amending Act of 1988 would show that the new Chapter XVII was incorporated specifically to "enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.
  11. In Vinod Shivappa V/s. Nanda Beledappa, AIR 2008 S.C.2279, it is observed that Section 138 of the Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the proviso to S. 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. Cl. (c) of proviso to S. ( 11 ) 138 provides that the section shall not apply unless the drawer of the cheque

fails to make the payment within 15 days of the receipt of the said notice. The proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period.

12. It is observed in *Mosaraf Hossain Khan V/s. Bhagheeratha Engg. Ltd.*, AIR 2006 SC 128 : (2006) 3 SCC 658 : 2006 Cr.L.J.1683 that the object of the provision of S. 138 of the Negotiable Instruments Act is that for proper and smooth functioning of business transaction in particular, use of cheques as negotiable instruments would primarily depend upon the integrity and honesty of the parties. It was noticed that cheques used to be issued as a device inter alia for defrauding the creditors and stalling the payments. Dishonour of cheque by the bank causes incalculable loss, ( 12 ) injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious set back. Remedy available in a Civil Court is a long drawn process and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.
13. In *Electronics Trade & Technology Development Corpn. Ltd. V/s. Indian Technologists & Engineers (Electronics) (P) Ltd.*, (1996) 2 SCC 739 it is observed that if we consider the provisions of Sections 138 to 147 and their object, it is clear that object of section 138 is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, section 138 intended to prevent dishonesty on the part of drawer of negotiable instrument to draw cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Same view is taken in the case of *Goa Plast (P) Ltd. V/s. Chico Ursula D'Souza* (2003) 3 SCC 232. ( 13 )
14. Thus the object of the amendment and introduction of Chapter XVII in the Negotiable Instruments Act by Act of 1988 was mainly to encourage all major transactions including commercial or business transactions through cheques and to enforce credibility and acceptability of cheques in settlement of liability in general. Encouragement of payment by cheques/credit cards/debit cards rather than by cash is necessary for healthy economy. That also brings in transparency in transactions and discourages creation of black or unaccounted money through evasion of taxes or other malpractices. So, provisions like Section 138 of Negotiable Instruments Act are salutary to give reliability, credibility and acceptability of negotiable instruments like cheques in daily life. However, the object was not to provide effective and speedy remedy for recovery of loans. Law makers must not have intended or imagined that money lenders or banks would obtain blank or post dated cheques while sanctioning/disbursing loans as

securities and would use them to make debtors/borrowers to repay loan under threat of prosecution and punishment under Section 138 of the Negotiable Instruments Act. So, it is doubtful if provisions of Section 138 of the Negotiable Instruments Act would be ( 14 ) attracted to a case in which a blank or post dated cheque is obtained by a bank or money lender before or while sanctioning or disbursing loan amount as security for the loan.

15. In following cases bouncing of cheques which were given as security for loan amounts were held not to attract provisions of Section 138 of the Negotiable Instruments Act :-
  - 1) Anand Urban Co-operative Credit Society V/s. Vipin Lalchand Mehta & Anr., 2008 (2) Bom.C.R. (Cri.) 65 : 2008 ALL M.R. (Cri) 2266.
  - 2) Goa Handicrafts, Rural & Small Scale Industries Development Corporation Ltd., V/s. Samudra Ropes Pvt. Ltd. & Anr., 2005 ALL MR (Cri) 2643 : 2006 (1) Bom.C.R. (Cri) 157.
  - 3) Hanumant R. Naik V/s. Ajit Harmalkar, 2008 (1) Bom.C.R. (Cri) 432 : 2008 ALL MR (Cri) 486.
  - 4) M.S. Narayana Menon Alias Mani V/s. State of Kerala and Anr., (2006) 6 S.C.C.39.
  - 5) Karekar Finance Pvt. Ltd., V/s. Shri M.N. Bashyam & Anr., 2007 ALL MR (Cri) 3073 : 2008 (3) B.C. 98.
  - 6) Jayantilal Parmar V/s. Vaishali Farne (2007) 2 Bom.C.R. (Cri) 403.
  - 7) Om Shri Finance & Investment Corporation V/s. Mohemmed Sheikh (2007) 11 LJSOFT (URC) 24. ( 15 )
16. In Anand Urban Co-operative Credit Society V/s. Vipin Mehta, 2008 (2) Bom.C.R. (Cri) 65, trial court held that 5 blank cheques were obtained towards security for repayment of loan as in this case. This Court refused to interfere with the order of acquittal.
17. In Karekar Finance Pvt. Ltd. V/s. Shri M.N. Bashyam & Anr., 2007 ALL MR (Cri) 3073, it is held that though the accused had taken loan from the complainant, he proved that the blank cheque was issued by him towards collateral security for loan and interest. It is held that the cheque cannot be said to be issued towards discharge of a debt and same would not come under purview of Section 138 of the Negotiable Instruments Act.
18. Similarly, in the case of Jayantilal Parmar V/s. Vaishali Farne (2007) 2 Bom.C.R. (Cri) 403, three blank cheques were given as security for loan amount. Two cheques were encashed and third was bounced. The Single Bench of this Court refused to interfere with the order of acquittal. Facts of said case are similar to the facts in case before us. ( 16 )
19. The facts involved in Om Shri Finance & Investment Corporation V/s. Mohemmed Sheikh (2007) 11 LJSOFT (URC) 24, are also similar to facts of our case. The Court declined to interfere with the order of acquittal.
20. The Trial Court considered that though cheque was issued on or before 18.10.2000, the date put thereon is 24.01.2008. No doubt there is author-

ity to put date so also the amount, as it was a blank cheque. But the question raised is whether provisions under Section 138 of the Negotiable Instruments Act should be made applicable to a blank cheque issued as security for loan after period of 7 to 8 years.

21. In the present case blank cheques were issued prior to disbursement of loan as a collateral security for loan which was sanctioned. In such case there was no existing debt or liability when the cheque is issued. So, in the facts and circumstances of the case, the case does not fall within four corners of offence punishable under section 138 of the Negotiable Instruments Act. Of course such defence is ( 17 ) available against payee and not holder in due course.
22. In this case, we cannot say that debt was time barred on the date appearing on cheque i.e. 24.01.2008 in view of various payments allegedly made by the respondent which renewed period of limitation under Section 19 of the Limitation Act from time to time. To that extent I differ from the Trial Court.
23. Lastly the Trial Court has observed that the respondent-accused in his evidence on record has produced receipts issued by the complainant bank at Exh. 61 to 75. It is case of the respondent/accused that he had repaid entire loan in the year 2005. In para 17 it is observed that the account extract produced by complainant bank at Exh.25 was produced up to 12.12.2003. In spite of sufficient opportunity, the accounts extract of subsequent period up to the date of cheque (which was 24.01.2008) was not produced. Obviously the payment made after 12.12.2003 did not appear in the account extract produced. In these circumstances, the Court held that it is not proved that on the date appearing on the cheque or the date on which the cheque was presented, ( 18 ) amount of Rs. 87,200/- was outstanding. There was omission to prove said fact in spite of record being available with the complainant and therefore adverse inference was drawn. It is held that it is not proved that on the date of cheque amount of Rs. 87,209/- was outstanding and therefore provisions of section 138 of the Negotiable Instruments Act are not attracted. We cannot find fault with this ground for acquittal.
24. Here I may rely on Pawan Enterprises V/s. Satish H. Verma, 2003 Bom.C.R. (Cri). 474, In that case a colour T.V. was purchased on 4th April, 1998 by the respondent from the applicant for total consideration of Rs. 22,760/-. Rs. 5000/- were paid in cash and post dated cheque of Rs. 17,745/- was issued on 08.01.1998. The respondent was supposed to pay balance amount in installment or in accordance with post dated cheque. When the cheque was presented on 19.01.1998 what was due was only Rs. 10,975/-, though on 08.01.1998, the date of issuing post dated cheque for Rs. 17,745/- was due. It was held that the cheque issued was for much higher amount than was actually due and therefore it cannot be said that the cheque was issued ( 19 ) towards debt or other liability within the meaning of Section 139, and offence under section 138 of the Negotiable Instruments Act is not committed. In said case



the Court distinguished between 'liability' and 'security' and observed that both cannot be mixed or acted upon simultaneously. In para 6 it is observed that if the act of a person in discharge of liability is not done, then security comes in picture and if the act in discharge of a liability is performed then security would not have any legal force.

25. After having considered all aspects, in my opinion, this is not a case where leave to file appeal against order of acquittal can be granted. Hence, the Criminal Application is dismissed. [P.R. BORKAR,J.]  
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