

Ajitsinh Chehuji Rathod

v.

State of Gujarat & Anr.

(Criminal Appeal No. 478 of 2024)

29 January 2024

[B.R. Gavai and Sandeep Mehta*, JJ.]

Issue for Consideration

Appellant-accused convicted u/s.138, Negotiable Instruments Act, 1881, had claimed mismatch of signatures on the cheque in question. His application for comparison of the signature as appearing on the cheque through the handwriting expert was rejected by trial court. High Court whether justified in dismissing the application filed by the appellant u/s.391, CrPC for taking additional evidence at appellate stage and seeking a direction to obtain the opinion of the handwriting expert.

Headnotes

Negotiable Instruments Act, 1881 – ss.118, 138 – Code of Criminal Procedure, 1973 – s.391 – Presumptions under the NI Act though rebuttable, operate in favour of the complainant – Accused to rebut such presumptions by leading evidence – Cheque dishonoured – Appellant convicted for offence punishable u/s.138 – Claiming mismatch of signatures, during the trial, the appellant had filed application seeking comparison of the signature as appearing on the cheque through the handwriting expert – Rejected by trial court – Order not challenged – At appellate stage, the appellant filed application u/s.391, CrPC for taking additional evidence and seeking a direction to obtain the opinion of the handwriting expert – Dismissed:

Held: s.118 sub-clause (e) provides a clear presumption regarding indorsements made on the negotiable instrument being in order in which they appear thereupon – Thus, the presumption of the indorsements on the cheque being genuine operates in favour of the holder in due course of the cheque in question which would be the complainant herein – If the accused intends to rebut such presumption, he would be required to lead evidence to this effect – Certified copy of a document issued by a Bank is itself

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admissible under the Bankers' Books Evidence Act, 1891 without any formal proof thereof – Hence, in an appropriate case, the certified copy of the specimen signature maintained by the Bank can be procured with a request to the Court to compare the same with the signature appearing on the cheque by exercising powers u/s.73, Evidence Act, 1872 – However, in the present case, despite having opportunity, the appellant did not put any question to the bank official examined in defence for establishing his plea of purported mismatch of signature on the cheque in question – Hence, the appellate Court was not required to come to the aid and assistance of the appellant for collecting defence evidence at his behest – Power to record additional evidence u/s.391, CrPC should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence or the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and non-recording of such evidence may lead to failure of justice – Furthermore, the appellant also did not challenge the trial court's order rejecting his application for comparison of the signature as appearing on the cheque through the handwriting expert and thus, had attained finality – Impugned orders do not warrant interference. [Paras 14, 15, 17, 9, 18 and 20]

Code of Criminal Procedure, 1973 – s.391 – Power to record additional evidence – Exercise of – Discussed. [Para 9]

Code of Criminal Procedure, 1973 – s.391 – Negotiable Instruments Act, 1881 – s.138 – Appellant-accused alleged that he did not receive the notice u/s.138 of the NI Act and the concerned officer from the Post Office be summoned to prove the same:

Held: It would be for the appellate Court while deciding the appeal to examine such issue based on the evidence available on record – Thus, there was no requirement for the appellate Court to have exercised power u/s.391, CrPC for summoning the official from the Post Office and it rightly rejected the application u/s.391, CrPC. [Para 19]

List of Acts

Negotiable Instruments Act, 1881; Code of Criminal Procedure, 1973; Bankers' Books Evidence Act, 1891; Evidence Act, 1872.

Ajitsinh Chehuji Rathod v. State of Gujarat & Anr.**List of Keywords**

Cheque dishonour; Presumptions under Negotiable Instruments Act; Rebuttable; Indorsements made on negotiable instrument; Holder in due course; Mismatch of signatures; Comparison of the signature; Handwriting expert; Appellate stage, Additional evidence; Document issued by Bank; Certified copy; Specimen signature maintained by Bank; Bank official; Appellate Court; Failure of justice.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.478 of 2024.

From the Judgment and Order dated 25.10.2023 of the High Court of Gujarat at Ahmedabad in CRMA No.17933 of 2023.

Appearances for Parties

Shariq Ahmed, Sunil Kumar Verma, Vinay Vats, Tariq Ahmed for M/s. Ahmadi Law Offices, Advs. for the Appellant.

Judgment / Order of the Supreme Court**Judgment****Mehta, J.**

1. Leave granted.
2. The instant appeal by special leave filed at the behest of the appellant accused calls into question the order dated 25th October, 2023 passed by the High Court of Gujarat rejecting the Criminal Misc. Application No. 17933 of 2023 preferred by the appellant under Section 482 read with Section 391 of the Code of Criminal Procedure, 1973(hereinafter being referred to as 'CrPC').
3. The appellant was prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881(hereinafter being referred to as 'NI Act') before the learned trial Court with an allegation that the cheque to the tune of Rs. 10 lakhs issued by the appellant in favour of the complainant Shri Mahadevsinh Cahndaasinh Champavat upon being presented in the bank was dishonoured "for insufficient funds and account dormant".
4. During the course of trial, the appellant preferred an application dated 13th June, 2019 before learned trial Court with a prayer to send the cheque to the handwriting expert for comparison of the

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handwriting as well as signature appearing thereon with a plea that his signatures had been forged on the cheque in question. The learned trial Court rejected the application vide order dated 13th June, 2019 itself observing that the application was aimed at delaying the trial. The learned trial Court further observed that the matter was at the stage of defence and the accused could lead evidence to prove his claim pertaining to mismatch of signatures.

5. The order dated 13th June, 2019 passed by learned trial Court was not challenged any further and thus the same attained finality. The trial Court, proceeded to convict the accused appellant vide judgment dated 7th November, 2019.
6. The appellant preferred an appeal before the Principal Sessions Judge, Gandhinagar and during pendency thereof, he filed an application under Section 391 CrPC for taking additional evidence at appellate stage and seeking a direction to obtain the opinion of the handwriting expert after comparing the admitted signature of the accused appellant and the signature as appearing on the disputed cheque. Another prayer made in the said application was that the concerned officer from the Post Office should be summoned so as to prove the defence theory that the notice under Section 138 of NI Act was never received by the accused appellant.
7. Such application preferred by the appellant was rejected by the learned Principal Sessions Judge, Gandhinagar vide detailed order dated 25th July, 2023, which was carried by the appellant to the High Court by filing the captioned Criminal Misc. Application No. 17933/2023 which came to be dismissed by order dated 25th October, 2023 which is under challenge in this appeal.
8. We have considered the submissions advanced by learned counsel for the appellant and have gone through the impugned order and the material placed on record.
9. At the outset, we may note that the law is well-settled by a catena of judgments rendered by this Court that power to record additional evidence under Section 391 CrPC should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non-recording of such evidence may lead to failure of justice.

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10. It is apposite to mention that the learned first appellate Court, i.e., the Principal Sessions Judge, Gandhinagar had taken note of the fact that during the trial, the appellant examined the witness of the Bank of Baroda in support of his defence but not a single question was put to the said witness regarding genuineness or otherwise of the signatures as appearing on the cheque in question.
11. Furthermore, as per the cheque return memo of the Bank dated 26th February, 2018, the reason for the cheque being returned unpaid is clearly recorded as “funds insufficient and account dormant”.
12. There is a specific column no. 10 in the said written memo which reads as follows:-

“Bank of Baroda
(HEAD OFFICE MANDVI, BARODA)

Infocity Branch	Date: 26.02.2018
Cheque No. <u>503273</u> for Rs. <u>10,00,000/-</u> returned unpaid for reason No. <u>22 3093010008596</u>	

1-9

10 Drawer's signature differs from specimen recorded with us.

11-22”

Manifestly, the cheque was not returned unpaid for the reason that the signature thereupon differed from the specimen signature recorded with the bank.

13. Section 118 of the NI Act has a bearing upon the controversy and is thus, reproduced hereinbelow:-

“118. Presumptions as to negotiable instruments.—

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

- (a) **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;

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- (b) **as to date:** that every negotiable instrument bearing a date was made or drawn on such date;
- (c) **as to time of acceptance:** that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;
- (d) **as to time of transfer:** that every transfer of a negotiable instrument was made before its maturity;
- (e) **as to order of indorsements:** that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;
- (f) **as to stamps:** that a lost promissory note, bill of exchange or cheque was duly stamped;
- (g) **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 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 burden of proving that the holder is a holder in due course lies upon him.”

14. Section 118 sub-clause (e) of the NI Act provides a clear presumption regarding indorsements made on the negotiable instrument being in order in which they appear thereupon. Thus, the presumption of the indorsements on the cheque being genuine operates in favour of the holder in due course of the cheque in question which would be the complainant herein. In case, the accused intends to rebut such presumption, he would be required to lead evidence to this effect.
15. Certified copy of a document issued by a Bank is itself admissible under the Bankers' Books Evidence Act, 1891 without any formal proof thereof. Hence, in an appropriate case, the certified copy of the specimen signature maintained by the Bank can be procured with a request to the Court to compare the same with the signature appearing on the cheque by exercising powers under Section 73 of the Indian Evidence Act, 1872.

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16. Thus, we are of the view that if at all, the appellant was desirous of proving that the signatures as appearing on the cheque issued from his account were not genuine, then he could have procured a certified copy of his specimen signatures from the Bank and a request could have been made to summon the concerned Bank official in defence for giving evidence regarding the genuineness or otherwise of the signature on the cheque.
17. However, despite having opportunity, the accused appellant did not put any question to the bank official examined in defence for establishing his plea of purported mismatch of signature on the cheque in question and hence, we are of the firm opinion that the appellate Court was not required to come to the aid and assistance of the appellant for collecting defence evidence at his behest. The presumptions under the NI Act albeit rebuttable operate in favour of the complainant. Hence, it is for the accused to rebut such presumptions by leading appropriate defence evidence and the Court cannot be expected to assist the accused to collect evidence on his behalf.
18. The appellant had sought for comparison of the signature as appearing on the cheque through the handwriting expert by filing an application before the trial Court which rejected the same vide order dated 13th June, 2019. The said order was never challenged and had thus attained finality.
19. So far as the allegation of the accused appellant that he did not receive the notice under Section 138 of the NI Act is concerned, it would be for the appellate Court while deciding the appeal to examine such issue based on the evidence available on record and thus, there was no requirement for the appellate Court to have exercised power under Section 391 CrPC for summoning the official from the Post Office and had rightly rejected the application under Section 391 CrPC.
20. As an upshot of the above discussion, we find no infirmity in the impugned orders warranting interference. The appeal lacks merit and is dismissed as such.
21. Pending application(s), if any, shall stand disposed of.