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**(2024) 02 BOM CK 0079**

**Bombay High Court (Aurangabad Bench)**

**Case No:** Criminal Appeal No. 374 Of 2005

Narhari Vithalrao Dahe

APPELLANT

Vs

Sudam Gangaram Dahe

RESPONDENT

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**Date of Decision:** Feb. 27, 2024

**Acts Referred:**

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

**Hon'ble Judges:** Abhay S. Waghware, J

**Bench:** Single Bench

**Advocate:** J. R. Nawale, V. D. Salunke, K. S. Chavan

**Final Decision:** Dismissed

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### **Judgement**

Abhay S. Waghware, J

1. Dissatisfied by the judgment and order of acquittal passed by learned Judicial Magistrate First Class, Pathri, Dist. Parbhani dated 31.03.2005,

thereby, acquitting present respondent from offence punishable under section 138 of N.I. Act, original complainant has taken exception to the same by filing instant appeal.

#### **FACTUAL MATRIX**

2. S.C.C. No.1123 of 2001 was filed by present appellant setting up a case that, out of friendly relations and due to financial need he gave loan of

Rs.50,000/- to the accused. Accused undertook to repay the same. However, even on persistent demand, amount was not repaid. Finally, accused

issued cheque drawn on his banker, but on its representation it was dishonoured. Therefore, as required under law, legal notice was dispatched, the

same was received and even replied by accused, but he failed to repay the cheque amount within stipulated period, and therefore, proceedings under section 138 of NI Act were instituted.

## SUBMISSIONS

On behalf of Appellant : -

3. Learned counsel for appellant submitted that, learned trial court surprisingly acquitted the accused taking hyper technical view regarding non

mention of exact month in which loan was said to be borrowed and accepted. That, such hyper technical and pedantic view adopted by learned trial

Judge is not permissible, more particularly, when all necessary ingredients for attracting offence were made out.

4. Learned counsel pointed out that, false defence has been taken regarding handing over cheque as guarantors to some alleged loan between brother

of complainant and one finance company. That, such defence has not been cogently proved or rebutted as required by law.

5. Lastly, it is submitted that, there is improper appreciation of evidence, non application of mind and therefore it is submitted that, appeal deserves to be allowed.

On behalf of accused : -

6. Learned counsel for respondent accused pointed out that, it was incumbent upon complainant to establish all necessary ingredients for attracting

offence under section 138 of NI Act. It is pointed out that at the threshold complainant failed to prove very alleged loan transaction. That, both in

complaint as well as notice, when exactly loan was extended has not been proved, rendering the alleged transaction itself doubtful. It is pointed out

that, on the contrary defence has rebutted the presumption by adducing overwhelming documentary as well as oral evidence. Therefore, learned trial

court has correctly appreciated the same and for above reasons complaint has been dismissed. There is no merit in the appeal and hence it is prayed

that the same is dismissed.

7. After appreciating the above submissions, it seems that, here, complaint was filed alleging borrowing of loan by accused to the tune of Rs.50,000/-

on account of financial need.

Cheque issued towards repayment was dishonoured and hence the complaint.

8. On going through the evidence, it transpires that, in support of his case complainant has adduced his own evidence and placed on record cheque in question, bank memo, legal notice and postal acknowledgment etc.

9. While outrightly denying loan transaction, defence seems to have adduced evidence of one Raghunath Rasve (DW1) as well as one Dnyanoba

Gangaram Dahe (DW2). Apart from such oral evidence, accused seems to have placed on record documents, like at Exh.39 to 43 i.e. documents to

show that there was loan by brother of complainant and on request of complainant himself, accused stood guarantor and in that capacity issued blank cheque. Precise case is that, the said cheque has been misused.

10. On carefully sifting the evidence of complainant, complaint as well as legal notice, as pointed out and as is held by learned trial Judge that the

exact month in which said loan was extended is not finding place and only averment is that loan was given "in a month". There is admission to

this extent by complainant himself while under cross. Law is fairly settled that, it is imperative for complainant to establish his own case so as to

invoke initial presumption as available under sections 118 and 139 of NI Act. Here, this does not seem to have happened and the very month in which

loan was borrowed and given has not come on record. This has ramifications on subsequent procedure like requirement of demand notice within

stipulated period expecting repayment and there is limitation for filing complaint. Therefore, when exactly and at what point of time loan was given

does not seem to have been stated by the complainant in the demand notice.

11. Law is fairly settled that, once accused is shown to have received legal demand notice, then defence is expected to offer explanation and rebut the

presumption available under law. Here, while denying the borrowing of loan, accused has adduced evidence of not one but two witnesses who have

stepped into witness box to depose that there was loan transaction by brother of complainant, namely, Dyanoba i.e. for purchase of a truck and in said

transaction accused withstood as guarantor and issued signed but blank cheques by way of security. Accused has also placed on record documentary

evidence in that regard. Complainant has not denied loan by his brother nor there is specific denial that accused stood guarantor. Therefore, here,

accused has established his defence not merely by raising a plea, but has also substantiated the same by documentary evidence, heightening and successfully probabilizing the defence.

Therefore, when very essentials for attracting charge under section 138 of NI Act are missing and once doubt regarding loan transaction creeps in,

benefit goes to accused. Resultantly, it cannot be said that learned trial court has adopted hyper technical view. Proceedings like NI Act are distinct

than other proceedings. Each and every essential ingredients are required to be met for proving the complaint. Here, it has not so happened. Essence

of proving very transaction is patently missing. Though there is cheque under signature of accused, it is substantiated and demonstrated that it was

towards loan transaction between Dnyanoba and Kuber Finance. Apart from documents at Exh.39 to 43, particulars and agreement of loan are also

placed on record. DW1 is an independent witness. There is no reason for him to take side of accused. Complainant having failed to establish very

transaction of loan by adducing cogent and reliable evidence, no fault whatsoever can be found in the judgment and order of trial court. No legally

enforceable debt is proved at the end of accused. Therefore, there is no merit in the appeal. Hence, I proceed to pass the following order :-

ORDER

The criminal appeal stands dismissed.