

Hitendra s/o. Vinayakrao Upadhyay Vs Shankar s/o. Rajaram Gaud

Court: Bombay High Court (Aurangabad Bench)

Date of Decision: Jan. 8, 2025

Acts Referred: Code of Criminal Procedure, 1973 " Section 313

Negotiable Instruments Act, 1881 " Section 138, 139

Evidence Act, 1872 " Section 114(g)

Hon'ble Judges: Sanjay A. Deshmukh, J

Bench: Single Bench

Advocate: V.D. Hon, Mayur Subhedar

Final Decision: Allowed

Judgement

Sanjay A. Deshmukh, J

1. Heard learned advocate for appellant.

2. This appeal is preferred by the complainant against the judgment delivered by the learned Judicial Magistrate First Class, Parbhani, Tq. and Dist.

Parbhani (hereinafter referred to as "the learned Trial Court") in Summons Criminal Case No. 930 of 2017 dated 03.03.2022. It was a complaint

against the accused/respondent under the Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act" for short). It was

dismissed.

3. The complainant/appellant contended that, he was a partner in a firm named and styled as a Country Liquor Shop No. CL-III-13 situated at Zari,

Tq. and Dist. Parbhani, having license in the name of Vinayakrao Narmadashankar Upadhyay, who is his father and partner of firm. The complainant

used to supervise the said shop as a partner. The accused and his sons were appointed as a Manager to look after the day to day affairs of the shop

and conduct of that business. The complainant was not interested in that business. The accused made request to him to transfer the license of said

Country Liquor Shop in his name. The complainant agreed to transfer license of CL-III-13 of the said shop and its good will in favour of accused. As

there was goodwill of shop, it was agreed to sell it for consideration of Rs.25,00,000/- (rupees Twenty Five Lacs only). Subsequently the consent of

complainant and his father for transferring license was obtained and on the basis of that a liquor shop license was transferred in the name of

respondent/accused. For that the application was forwarded by the complainant to the Collector, Parbhani. The accused had agreed to pay that

amount of Rs.25,00,000/- through the cheques. The agreement was executed before the Notary. The accused issued five cheques bearing Nos.4011,

4012, 4013, 4014 and 4015 of amount of Rs.5,00,000/- each dated 05.04.2017, 10.04.2017, 15.04.2017, 20.04.2017 and 25.04.2017 respectively in

favour of the complainant.

4. The cheques were deposited in the bank account of complainant but those were dishonoured. A statutory notice was sent to the accused dated

27.04.2017 through advocate of complainant. It was served on the accused. On 08.05.2017 the accused replied to the said notice and denied to pay

that amount of Rs.25,00,000/- of cheques. Therefore, the complaint was filed.

5. The process was issued against the accused. The oral and documentary evidences were adduced by the complainant. The accused did not adduce

any oral evidence. He submitted documents of civil suit, etc. at Exhibit 76. The learned Judicial Magistrate First Class dismissed the complaint and

acquitted the accused on the ground that, there was no legal liability of accused to pay that amount to the complainant.

6. The grounds of objections of this appeal are that, the learned Trial Court did not consider the presumption under Section 138 of the N.I. Act. The

evidence was not properly appreciated. The reasons and findings were neither legal nor correct. It is lastly prayed that the appeal be allowed, the

impugned judgment be set aside, the complaint be allowed and accused be sentenced.

7. The learned advocate for complainant/appellant argued that, the learned Trial Court failed to consider admitted fact that agreement to sale of said

shop in its proper perspective. He pointed out that, the reasoning given by the learned Trial Court are not legal and correct. He is relying upon the

precedental law of Sri Sujies Benefit Funds Limited Vs. M. Jaganathua in Criminal Appeal No.3369 of 2024 [Special Leave Petition (CRL.) No.

4022 of 2022] decided by the Hon'ble Supreme Court on 13.08.2024. Paragraph No.15 of it reads as under :

15. This Court in Dashrath Rupsingh Rathod V. State of Maharashtra, (2014) 9 SCC 129 held that, "An offence under Section 138 of the Negotiable

Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank of discharge of debt/liability is

returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank. The fact that the cheque was issued as

a consequence of failure to repay the loan taken by the respondent from the appellant to which the interest was added would more or less settle the issue.

However, in the present case, a discrepancy apropos the rate of interest, whether it be 1.8%, 2.4% or 3% per month was not sufficient to disbelieve the claim of the

appellant. Though the respondent before the learned Trial Court had contended that there was no loan transaction between the parties, but still, before the

Appellate Court, by way of additional evidence, he marked receipts to show the re-payment of loan. Even there, the respondent did not produce all the receipts

showing total discharge of the loan amount, as was noted by the Appellate Court, and only the difference in the rates of interest as well as the finding that

substantial amount has been repaid led to the acquittal of the respondent.

8. Following points emerged for consideration :-

(i) Was it proved by the complainant that those five cheques of an amount of Rs.25,00,000/- were issued for legally enforceable liability of the accused?

(ii) Is the impugned judgment illegal and require interference?

9. It is case of the accused that, he gave those cheques to his brother when the construction of the liquor shop was completed. Those cheques were

given for security. The complainant denied that those cheques were accepted by him as security.

10. The agreement for the sale of good will of that shop is at Exhibit "A" 28. The disputed cheques are at Exhibit 29 to 33. The cheques written

memos are at Exhibit 34 to 38. The statutory notice issued to the accused is at Exhibit "B" 39. The reply to the notice is at Exhibit "C" 41. The copy of

the form CL "III" is at Exhibit 42 to 44. The accused had not adduced the evidence. The agreement to transfer shop between the complainant and

accused is at Exhibit "D" 28. The admitted fact is that, the disputed cheques were issued by the accused. Now the question before this Court is whether

those cheques were issued as per the agreement executed by him for transferring the said license in his name or it were given as security.

11. The evidence of complainant (C.W.-1) at Exhibit "E" 22 is mostly in accordance with the complaint. During his cross-examination, he had

admitted that, the country liquor partnership firm is registered but has not yet been dissolved. However, he could not recall its registration. He admitted

that, all the partners made an applications before the Collector, Parbhani for transferring the license. In his further cross-examination, he had

admitted that, he had not made any complaint to the Collector or Excise Department against the accused regarding the transfer of license. He also

admitted that, the original agreement is in the custody of the accused. It was also lastly suggested that the bank cheques were misused to harass the

accused.

12. The defence of the accused is that, an agreement at Exhibit "F" 28 was executed between the brother of complainant and him. The land was

purchased by the wife of accused and in that transaction the brother of complainant obtained the blank cheques from the accused, which were

subsequently misused by the complainant.

13. The learned Trial Court held in para No.44 of impugned judgment that an agreement at Exhibit "28" was executed and in view of that post dated

cheques were issued in favour of the complainant. In para No. 49 of the impugned judgment, the learned Trial Court held that, written agreement is a

basic document and original of it was not produced on record. In para No.54 of the reasons of the judgment of the learned Trial Court, the learned

Trial Court erred in holding that, the fact of amount of Rs.25,00,000/- was not stated by the complainant before the Collector when his statement was

recorded for transferring the license in the name of accused. Particularly when the fact of issuance of cheques of Rs.25,00,000/- is proved.

14. It is admitted fact that an agreement (Exhibit "28") was executed. In para No. 58 of the impugned judgment, the learned Trial Court erred in

holding that Navalkishor was not present at the time of finalising that amount. However, the learned Trial Court erred in not believing the evidences of

complainant and Navalkishor (C.W. 3), which are not disproved by the accused.

15. In view of the admitted fact of issuance of five cheques and proved evidence of complainant the burden of proof of issuance of cheque has been

discharged by the complainant and therefore presumption under Section 139 of the N.I. Act is applicable to this case to dispense with the partial proof

of issuance of the cheque for legal liability. Therefore, the onus to disprove that accused had not issued those cheques for his legal liability lies on him

to prove his defence that, the cheques were given for security purposes to the complainant. But for that the accused did not enter into the witness box.

Therefore adverse inference can be certainly drawn against him under Illustration (g) of Section 114 of the Indian Evidence Act, 1872 that if he would

have entered into the witness box and adduced his evidence that must go against him. The accused did not enter into witness box to prove his defence

by facing the cross-examination and disprove the evidence of complainant and rebut presumption against him as per Section 139 of the N.I. Act.

It is, not even disproved by any of the documentary evidence filed with list (Exhibit "76") filed while recording his statement under Section 313 of

the Code of Criminal Procedure, 1973.

16. From this conduct of complainant and accused with the entire evidence discussed above, it is undoubtedly proved that, the accused intentionally

issued the cheques in favour of the complainant for legally enforceable liability as per an agreement at Exhibit "28", which are undoubtedly proved

facts. The learned Trial Court erred in considering all these aspects in its proper perspective and on the basis of admissions of the complainant and

Navalkishor (C.W. 3) it came to the wrong conclusion that, the accused is not liable to pay that amount of Rs.25,00,000/- of cheques and it is not his

legal liability to pay that amount to complainant.

17. The admitted fact is that the said transaction was acted upon and its benefits were received by the accused. The good will of the partnership of

plaintiff is also property. The respondent/accused cannot approbate and reprobate about that transaction by denying his liability after taking benefit

from the agreement at Exhibit "A" 28. It is against the principle of qui approbat non reprobatur which is held by Hon'ble Supreme Court in the

following precedential laws :

(a) Shyam Telelink Limited Vs. Union of India reported in (2010) 10 Supreme Court Cases 165. Paragraph No.23 it held as follows :

23. The maxim qui approbat non reprobatur (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by

courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an

instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and

reprobate or accept and reject the same instrument.

(b) Harshad Kumar Natwarlal Dalal and Ors. Vs. State of Bihar in Writ Petition No.47 of 1975. In paragraph No.48 it is held as follows :

48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the

contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the

other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobatur (one who approbates cannot

reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an

instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and

reject the same instrument or transaction.

18. From the matter before this court and the fact that substantial benefit is taken by the accused. He cannot approbate and reprobate to take

advantage only as held in above case laws.

19. On re-appreciation of entire evidence, impugned judgment and the grounds of the objections raised in the appeal, this Court is of the view that all

the cheques of amount of Rs.25,00,000/-were issued by the accused for his legal liability to pay it to the complainant and therefore, the accused is

liable to pay it. He had not paid it even though the statutory notice under Section 138 of N.I. Act was served to him. His explanation under Section

313 of the Code of Criminal Procedure, 1973 is not acceptable. He failed to prove his defence that those five cheques were issued for security

purposes. Thus, from the entire evidence of complainant, presumption of innocence of accused is rebutted. It is both civil as well as criminal liability of

the accused to pay that amount. Therefore, the criminal liability of the accused is held to be proved by cogent and acceptable evidence beyond all

reasonable doubts. The impugned judgment therefore deserves to be set aside. The appeal and complaint deserves to be allowed. The accused

deserves to be convicted.

20. As far as quantum of sentence is concerned, the accused is not present before the Court. In view of the reasons stated above and considering the

matter before this Court, it would be proper to award three (3) months simple imprisonment to the accused alongwith double of the cheque amount as

a fine amount and in default of payment of fine, the accused shall undergo four (4) months rigorous imprisonment, which will meet the ends of justice.

The point Nos.1 and 2 are answered in affirmative. Hence following order :

ORDER

(i) The appeal is allowed.

(ii) The impugned judgment is set aside and the complaint is allowed as follows :-

(a) The accused is held liable under Section 138 of the Negotiable Instruments Act, 1881 and he is sentenced to suffer three (3) months simple

imprisonment with fine amount of Rs.50,00,000/-(rupees Fifty Lacs only) and in default of fine amount, the accused shall undergo rigorous

imprisonment for four (4) months.

(b) The accused is absent therefore the copy of this judgment be sent to the learned Judicial Magistrate First Class, Parbhani, Tq. and Dist. Parbhani

for execution of this judgment and sentence awarded to him.

(c) The registry is directed to sent copy of this judgment to the learned Judicial Magistrate First Class, Parbhani, Dist. Parbhani with the special letter

to ensure compliance with the above directions and to place the compliance report before this Court accordingly.

(d) Record and proceeding be sent back.