

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/CRIMINAL MISC.APPLICATION (FOR LEAVE TO APPEAL) NO. 14460
of 2023**

In F/CRIMINAL APPEAL NO. 23348 of 2023

**With
F/CRIMINAL APPEAL NO. 23348 of 2023**

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VIRENDRA DINANATH PANDEY
Versus
SERON NEBET MACKWAN & ANR.
=====

Appearance:

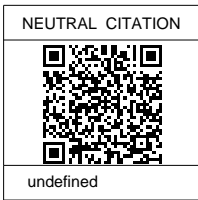
AAKASH D MODI(7449) for the Applicant(s) No. 1
KRUPABEN S LIMBACHIYA(7851) for the Respondent(s) No. 1
MR.CHIRAG B UPADHYAY(6735) for the Respondent(s) No. 1
MR.JAY MEHTA, APP for the Respondent(s) No. 2
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CORAM:HONOURABLE MRS. JUSTICE M. K. THAKKER

Date : 20/06/2024

ORAL ORDER

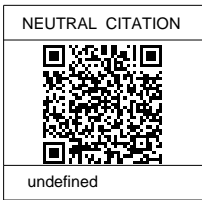
1. This application is filed under section 378(4) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Cr.P.C") seeking leave to prefer an appeal against the judgment and order of acquittal passed by the learned Additional Chief Metropolitan Magistrate, N.I. Act Court No.28, Ahmedabad dated 01.05.2023 in Criminal Case No. 36673 of 2021.
2. The case of the complainant is that complainant and accused are known to each other and as the respondent-



accused was in financial needs, amount of Rs.3,75,000/- was lent during the year 2014 to 2018 in parts. Thereafter, the deed was executed admitting the amount which was borrowed in the year 2019. On raising the demands the cheque bearing no.299854 dated 25.02.2021 was issued for the amount of Rs.3,75,000/- in favour of the complainant for repayment of the dues.

2.1. On depositing the aforesaid cheque, it was returned with an endorsement of "funds insufficient" therefore, after following due procedure under the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I Act") private complaint came to be filed before the learned competent Court being Criminal Case No. 36673 of 2021.

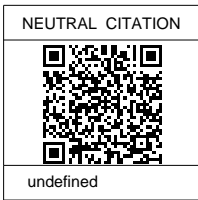
2.2. To substantiate the case of the complainant, he has produced his evidence below Exh.3 and has produced eight documentary evidences including the *kararnama* which was produced below Exh.14 and 15. On filing the closing pursis, further statement under section 313 of the Code of Criminal Procedure, 1973, came to be recorded wherein, the accused had pleaded that they were working together during 2014 to 2016 and the



complainant has opened the account in the bank. The cheques were lying in the drawer of the office wherein, the wrong details were filled up and while creating false declaration to grab the money, this complaint is filed. There was no legally enforceable debt which was to be discharged by the respondent-accused. After considering the arguments and the evidence which was laid, learned trial court has passed the judgment and order of acquittal which is the subject matter of challenge before this Court.

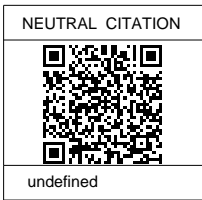
3. Heard the learned advocate Mr.Akash Modi for the applicant. Learned advocate Mr.Modi has submitted that though the complainant has proved the debt against the respondent-accused by producing the *kararnama* below Exh.14 and 15 which states that the respondent-accused had borrowed the amount of Rs.3,75,000/- and for payment of the aforesaid debt the cheque was issued which was dishonoured, learned trial court has acquitted the respondent-accused from the charges.

3.1. Learned advocate Mr.Modi submits that though demand notice was not replied the afterthought defence which was agitated in the statement recorded under



section 313 was believed by the learned trial court and has acquitted the respondent-accused from the charges. Learned advocate submits that learned trial court has committed grave error in holding that complainant has no source of fund to lend the amount to respondent-accused.

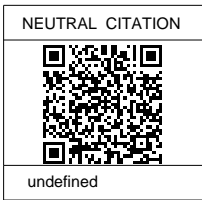
4. For rebutting the presumption which is in favour of the complainant by respondent-accused under section 118 and 139 of the N.I.Act learned trial court has relied on the decision rendered by the Apex Court in the case of **Tedhi Singh Vs Narayan Dass Mahant reported in 2022 (0) AIJEL-SC 68544** and has submitted that unless and until this defence was raised at the time of reply to the demand notice, the financial capacity cannot be challenged during the trial. Learned advocate submits that though the demand notice was not replied, learned trial court has accepted the bare words of the respondent-accused and acquitted him from the charges and therefore, the same is required to be interfered with and this application seeking leave to prefer an appeal is required to be allowed.
5. Considering the arguments advanced by the learned



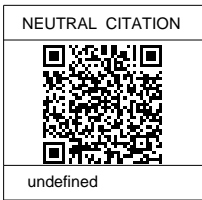
advocate and on examining the record and proceedings thoroughly, it transpires that the case of the complainant is that he lent an amount of Rs.3,75,000/- to the respondent-accused and the cheque which was issued for repayment was dishonoured. The documents in the nature of *kararnama* was produced before the learned trial court below Exh.14 and 15 wherein, the signature of the respondent-accused is made on the last page and the first page accepting that the amount of Rs.3,75,000/- was borrowed from the respondent-accused and for repayment of aforesaid amount disputed cheque was issued.

6. In order to rebut the presumption which is in favour of the complainant, respondent-accused has examined the complainant and following aspects comes from the cross-examination of the complainant that:

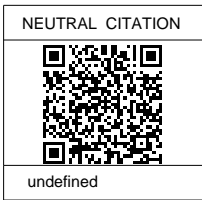
“Complainant and the respondent-accused were serving in the M.V. Om Project India Ltd. together. Complainant was site supervisor initially thereafter, he was appointed as Assistant Accountant working outside of the office. There were other employees working in the company. As



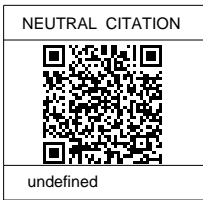
accountant, he was managing the affairs of the bank. The company's account was in the SBI, Drive In Road Branch and salary of all the employees were credited in their account directly by the Company. All the employees were maintaining their accounts in SBI, Drive-In Road Branch, Ahmedabad. To open the account the complainant used to do all formalities for the employees. The respondent-accused joined in the service in the year 2014 and she was serving as a receptionist. Her account was opened by the complainant in SBI, Drive-In Road Branch, Ahmedabad. All the formalities like to collect the form, to make signature was done by the complainant. The cheque book was also collected through the Company. The Director belongs to Uttar Pradesh and therefore, Director was having good relations with the complainant. When he joined in the service his salary was Rs.3,000/- in the year 2006 and when the accused joined in the service the salary of the complainant, after deducting Provident Fund, was around Rs.14,000/-. He had



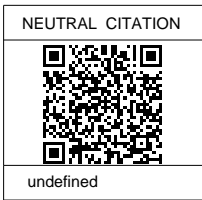
taken loan from the Company. The details are not available with the complainant. In the year 2015 the amount of Rs.10,000/- was borrowed by the accused from the complainant. There was no writings of borrowing Rs.10,000/- with the complainant. No statement is produced before the learned trial court as the amount was lent after collecting from the relatives. This fact is disclosed for the first time before the learned trial court but on which date and what amount was lent to the accused is not stated in the complaint, notice or examination-in-chief. There is no written evidence to show that amount of Rs.3,75,000/- is lent to the accused. The accused had left the job in the year 2016-17 because of her delivery. The complainant does not have any documents to show that amount is lent in the year 2016-17 to the accused. To lend the amount to the accused, the complainant took the amount of Rs.25,000/- from her superior officer namely Mr.Mukherjee. Thereafter, took loan in the name of other persons of Rs.25,000/- from the SBI and remaining amount was lent from the service of



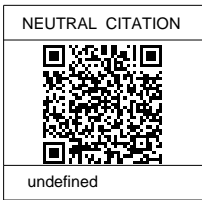
the complainant. Loan which was taken in the name of other person no interest was charged by the Bank. How much savings the complainant was having he cannot say. Complainant has agricultural income but she did not produce any evidence to show income from the agricultural activity.” It is true that the accused is not relative of the complainant neither any business was made with the complainant in partnership. No interest was charged at the time of lending the amount of Rs.3,75,000/-. The complainant took the loan in the year 2018 for the purpose of marriage of daughter of Rs.1,00,000/- from the Company. The respondent-accused was serving as a receptionist therefore, she was allotted one table, chair and drawer by the company. The complainant denied the fact that he is having the knowledge with regard to the documents which are lying in the drawer like identity card and cheque book. After leaving the job in the year 2017, the complainant disclosed that he is not sure in whose presence this amount was demanded back. The documents



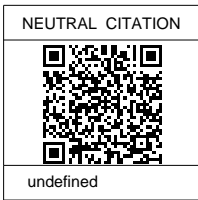
namely kararnama wherein, Rs.100/- non-judicial stamp was not taken by the accused. On 25.03.2019 the same was purchased by the complainant. He denied to the fact that the writings on the stamp and on page 2 the fonts are different. He denied that on page 3 there is half stamp on the photograph of the accused and the complainant. He denied that this photograph was taken from the other documents and has been attached on the kararnama. There was no stamp and signature of the notary on the said kararnama. It is admitted that on first page the signature of the complainant is there, however, the accused signature is not there. Stamp dated 25.03.2019 was attested on 09.04.2019. The complainant borrowed the money of Rs.10,000/- from Subhash Yadav, Rs.10,000/- from Vasudev Pandey. He could not say that on which date he borrowed the amount. He admitted the fact that after 1.5years of lending the amount these writings were executed. He admits that the accused did not come before the Notary at the time of executing the kararnama. He admitted



that there is no signature on the side of the accused witness. However, as the witness of the complainant his brother Avdhesh Pandey has signed. He admits that during 2015 to 2018 when the amount was lent there was no writing at the time of executing after 1.5 years these Exh.15 was executed. He admits that Exh.15 where the cheque number is mentioned is not disputed cheque. The cheque which was mentioned in Exh.15 No.299847 whether it was deposited and returned and any notice is issued that fact is not disclosed in the complaint. There are different hand writings in the body of the Exh.7 disputed cheque. There is a different pen used in filling up the column of the body of the page. Exh.7 cheque and Exh.15 documents were not matching with the signature of the pan card of the accused. The complainant is clarifying that previously the accused was Muslim thereafter, she married with Christian and therefore, her name is changed. Exh.15 document does not have the signature of the accused. Exh.15 documents and Exh.7 disputed cheque having



different signs. Complainant did not produce any document to show his amount which was borrowed from different persons. The complainant did not disclose the amount which was lent in the income tax return. The suggestion which was put was denied that the cheques of the accused was stolen by the complainant. The kararnama which is produced below Exh.14 where the cheque no.299847 is mentioned stated that the same was issued in favour of the complainant for making payment of the debt is not the same cheque as the disputed cheque number is 299854. What happened to this cheque is still a mystery. Exh.14 does not contain the signature of the accused on first and second page where on last page the signature of the accused is done however, no signature of the witness are made though on the other side, the signature of the witness of the complainant is made. The photograph which is attached with this document also bears half stamps which suggests that this photograph must have been taken from other documents and must have



been attached in Exh.14. Exh.15 is the document which also one of the kararnama having same fact as it is the original copy of Exh.14. Learned trial court while acquitting the respondent-accused has given detailed reasons for not believing the case of the complainant that though it is stated in the cross-examination that he borrowed the money from various persons but none of the persons stood as witness for the complainant.

7. At this stage, the presumption provided under section 118 and 139 of the N.I.Act is required to be re-looked which is reproduced herein below:

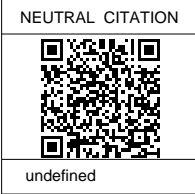
Section 118 – Presumptions as to negotiable instruments

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;*



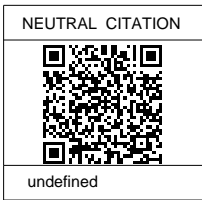
as to time of transfer; that every transfer of a negotiable instrument was made before its maturity;

as to order of indorsements; that the indorsements 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

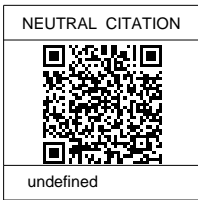
(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

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.

8. It is true in the case under section 138 of the N.I.Act section 139 provides that court shall presume that the holder of cheque receives the cheque of the nature referred to in section 138 for the discharge, in whole or in part of any debt or other liability. This presumption

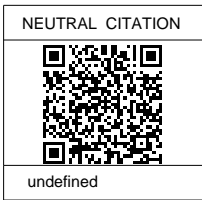


however is expressly made subject to the decision being proved contrary. In other words, it is open to the accused to establish that there is no consideration received it is in the context of these provisions that theory of probable defence has grown. In the judgment referred hereinbelow i.e in the case of **Basalingappa V/s. Mudibasappa** reported in **(2019) 5 SCC 418** the Apex court held that section 139 of the N.I.Act is an example of revers onus. It is also true that the accused is not expected to discharge an unduly high standard of proof. It is accordingly that the principle has developed that all which the accused needs to establish is a probable defence. The relevant portions of the case is reproduced hereinbelow:

“25. We having noticed the ratio laid down by this Court in the above cases on [Section 118\(a\)](#) and [139](#), we now summarise the principles enumerated by this Court in the following manner:

25.1. Once the execution of cheque is admitted [Section 139](#) of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under [Section 139](#) is a rebuttable presumption and the onus is on the accused to raise probable



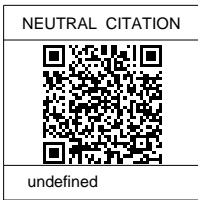
defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence. [Section 139](#) imposed an evidentiary burden and not a persuasive burden.”

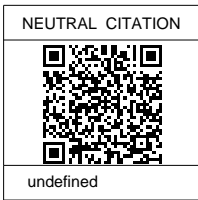
25.5. It is not necessary for the accused to come in the witness box to support his defence.”

9. In the instant case, the reply to the demand notice was not given however, the defence was raised that no such notice is received by the complainant. It is true that as per the settled principle of law if the notice was sent on the correct address the presumption would raise that notice has been served. In the present case to prove that notice is served, the complainant has produced the track report below Exh 12 wherein it is stated that ‘item is delivered’ but merely the demand notice was not replied would not be sufficient to establish that cheque was



issued by the accused for discharging the legally enforceable debt. That may be one more circumstance in the case where complainant has established his case by leading the evidence and the accused has not rebutted the same in his defence.

- 9.1. Learned advocate has relied on the decision rendered by the Apex Court in the case of **Tedhi Singh (supra)** however, the facts of that case is different from the facts of the instant case as in that case the accused defence that he lost the cheque and story which was put was highly improbable, more particularly, when no application was given to the bank or to the police. In the instant case during the cross-examination, accused is able to discharge his onus by creating the circumstance that the respondent-accused was serving as receptionist where the complainant was managing the affairs as an accountant and taking care of all banking transactions of the employees. It is admitted by the complainant that the account was opened by the company, cheque book was also collected through the company and she was allotted drawer wherein these documents were lying. It was further established that she left the job in the year



2017 due to her pregnancy and thereafter, the complainant fails to establish that how he lent the amount to the accused as it was case of the complainant that the amount was lent in the year 2019.

9.2. Learned trial court after examining thoroughly has assigned detailed reasons for holding that complainant has failed to establish the legally enforceable debt against the accused and therefore the complainant was dismissed.

10. This Court does not find any illegality or infirmity with the impugned judgment and order of acquittal passed by the learned trial court and therefore, this Court deems it fit to refuse to grant leave to prefer an appeal.

11. Resultantly, this application seeking leave to prefer an appeal is rejected.

ORDER in F/CRIMINAL APPEAL NO.23348 of 2023:

In view of the order passed in Criminal Miscellaneous Application No. 14460 of 2023, the registration of this criminal appeal is refused.

ARCHANA S. PILLAI

(M. K. THAKKER,J)