

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.19 OF 2005
WITH
CRIMINAL APPEAL NO.21 OF 2005**

Girdhari Parmanand Motiani .. Appellant
Versus
Vinayak Bhagwan Khavnekar
and others .. Respondents

Mr. Girdhari P. Motiani, Appellant in person present.
Mr.Kishore Bhatia with Mr.Sujit Jagtap, Advocate for respondent no.1.
Mr.Deepak Thakre, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.**DATED : 14th AUGUST, 2015**

COMMON JUDGMENT:-

1 These two Appeals can be conveniently disposed of by this common order as the parties are same, and the points needing determination are also the same.

2 The appellant is the original complainant. He had filed two complaints against the respondent nos.1 and 2 herein, alleging commission of an offence punishable under section 138 of the Negotiable Instruments Act by them. One of the complaints was numbered as C.C.No.2/S/2003 and the other as C.C.No.4/S/2003. The C.C.No.2/S/2003 related to a cheque in the sum of Rs.3,00,000/- while the other related to a cheque of Rs.96,000/-. According to the appellant, cheques in both these

cases had been given to him by the respondent no.1 herein towards the repayment of friendly loan advanced by the complainant to him. That, since both the cheques were dishonored, and that inspite of the notice of demand with respect to the dishonor of each cheque, the payments were not made, the aforesaid two separate complaints were filed by the appellant.

3 The learned Magistrate tried both the cases, and in both the cases passed an order of acquittal. The appellant is aggrieved by the said orders of acquittal, and has therefore, after obtaining special leave of this Court, filed the present two Appeals. According to the appellant, the orders of acquittal, as passed by the learned Metropolitan Magistrate, being not in accordance with law, are liable to be set aside, and the respondent nos.1 and 2 are liable to be convicted.

4 For the sake of convenience and clarity, the appellant shall be referred to as 'the complainant', and the respondent nos.1 and 2 as 'the accused nos.1 and 2' respectively.

5 Before proceeding further, it must be observed that in both the cases, the cheques had been signed by the accused no.1 – Vinayak Khavnekar. The accused no.2 – Vinayak Kheur had not signed the cheque, nor were the cheques drawn on an account maintained by him. He could not be called as the *drawer* of the cheques in question. As such, there was nothing even for proceeding against the said Accused no.2 Vinayak Kheur. His acquittal, therefore, is proper, and does not call for any examination or discussion.

6 The complainant who is a Senior citizen appeared before the Court in person. He had earlier engaged an Advocate, but as that Advocate did not remain present before the Court, the complainant had requested the Court to appoint an Advocate under the Free Legal Aid Scheme to prosecute these Appeals. On two occasions, therefore, Advocates were appointed to prosecute the Appeals filed by him, but the complainant was not happy with them, and the Advocates so appointed sought a discharge, which was given. Ms. Anamika Malhotra, the learned Additional Public Prosecutor, who was at the material time, attached to this Court, was appointed as *amicus curiae* to assist the Court as the complainant pleaded that due to old age, he had difficulty in hearing. Nevertheless, later the complainant stated that he would argue the Appeals in person and that he was ready to go on with the matter. Since the complainant was raising a grievance about delay in disposal of the Appeal, the same were taken up for final hearing, and since today the complainant expressed his readiness to go ahead with the final hearing of the Appeals without the assistance of any Advocate, the same were finally heard today.

7 I have heard the complainant. I have carefully gone through the complaint in both the cases. I have also carefully gone through the impugned judgments. The learned APP was asked to provide assistance to the complainant in arguing the Appeal which has been done by the learned APP.

8 The cheque which is the subject matter of Criminal Appeal No.19 of 2005 which arises out of C.C.No.2/SS/2003 is in

the sum of Rs.3,00,000/-. The cheque in the other Appeal i.e. Appeal No.21 of 2005 which arises out of C.C.No.4/SS/2003 is in the sum of Rs.96,000/-. According to the complainant, the cheque in the sum of Rs.3,00,000/- had been given by the accused no.1 towards the repayment of a temporary loan of equal amount given to him by the complainant. The other cheque which is in the sum of Rs.96,000/- was given to the complainant by the accused no.1 towards the repayment of a loan of Rs.80,000/- together with interest.

9 The record shows that according to the complainant, the loan of Rs.80,000/- was given to the accused no.1 on 4th June 1994. The loan of Rs.3,00,000/- was given on 11th August 1994. The cheque in the sum of Rs.96,000/- is bearing No.354161 and is dated 31/3/1995. The cheque in the sum of Rs.3,00,000/- is bearing 354162 and is dated 24/5/1996. The cheque in the sum of Rs.96,000/- was dishonored on 9/4/1995, whereas the cheque in the sum of Rs.3,00,000/- was dishonored on 25/5/1996. The complaint in respect of the cheque of Rs.96,000/- was filed on 9th August 1995 and the complaint in respect of the cheque in the sum of Rs.3,00,000/- was filed on 5th July 1996.

10 The defence of the accused no.1 was that the complainant was illegally doing the business of money lending. It was submitted that the complainant had advanced loan with exorbitant rate of interest to some other persons who were also, like the accused no.1, working in Reserve Bank of India. It was submitted that at the time of advancing the loans, the complainant used to obtain the signatures on blank bills of exchange, and also

used to take blank signed cheques from the person to whom he would advance the loan. It is submitted that in this case, some loan transaction had indeed taken place between the complainant and the accused no.1, but the amount borrowed was only Rs.30,000/- which had been paid along with the interest. The defence was that the blank cheques and the blank bills of exchange taken by the complainant at the time of advancing the loan have been misused by him by filling the particulars, later. It is submitted that no amount as mentioned in the cheques was actually due and payable by the accused no.1 to the complainant. It was also submitted that the transaction essentially being of money lending, the amount advanced by the complainant was not legally recoverable by virtue of the provisions of Bombay Money Lenders Act, 1946.

11 A perusal of the impugned orders in both the cases indicates that the Magistrate doubted the truth of the complainant's version. The Magistrate considered the evidence adduced by the complainant by examining himself and an Officer from the Abhyudaya Co-operative Bank on which the cheques were drawn. The Magistrate also considered documentary evidence that was tendered by the complainant during the trial. The Magistrate observed that it was revealed in the cross-examination of the complainant that he had filed cases in respect of offences punishable under section 138 of the Negotiable Instruments Act not only against the accused in the present case, but also against some other persons with whom he claimed he had entered into transactions of similar nature.

12 During the trial, since the accused persons disputed and challenged the writings on the bills of exchange and the cheques, the documents in question were forwarded to an expert for examination of the writings and his opinion thereof. However, the expert could not give definite opinion on the identity of the hand-writing on the said documents. The learned Magistrate felt suspicious about the truth of the version of the complainant because of a number of factors, including the fact that the cheques in these two cases were of consecutive serial numbers, but one had been issued on 31st March 1995 and the other had been issued on 24th May 1996 i.e. after a period of more than one year.

13 When the cheque of Rs.96,000/- was dishonored on 5th April 1995, the complainant had given a notice demanding the payment thereof on 21st April 1995 in which he had not mentioned anything about the subsequent loan given by him to the accused in the sum of Rs.3,00,000/-. It is difficult to believe that the accused who had been in difficulties due to the dishonor of the earlier cheque, would create further difficulties for himself by giving one more cheque which was going to be dishonored. The case of the accused no.1, as aforesaid, was that blank cheques had been given to the complainant which was felt quite probable because of this aspect of the matter and because the cheques were having consecutive serial numbers, but still the difference in the date on which they were drawn was of more than one year.

14 The Magistrate came to the conclusion that the version of the complainant could not be relied upon, and that, the complainant had advanced a loan in contravention of the

provisions of Bombay Money Lenders Act. According to the Magistrate, therefore, the amount advanced by the complainant to the accused no.1 was not legally recoverable and as such, the accused no.1 could not be held guilty of an offence punishable under section 138 of the Negotiable Instruments Act.

15 On going through the complaints, the evidence adduced, I do not find that the view taken by the Magistrate was a reasonable one and based on the evidence adduced before him. There were a number of suspicious features about the case of the complainant which have been reflected in the judgments delivered by the learned Magistrate. On considering the facts of the case, even this Court feels that the possibility of the complainant having taken blank signed cheques from the accused, is apparent, and in any case, cannot be ruled out. Moreover, since the complainant has advanced a similar loan to a number of persons, the transactions in the present two cases are quite likely to be of the type which the provisions of the Bombay Money Lenders Act prohibit. The conclusion arrived at by the learned Magistrate that the cheques in question could not be said to have been issued for the discharge of a legally enforceable debt or other liability, does not appear to be suffering from any infirmity or illegality.

16 The complainant vehemently contended that the loan was advanced on the basis of a bill of exchange, and that therefore, in view of clause (f) of sub-section (9) of section 2 of the Bombay Money Lenders Act 1946, it could not be termed as a loan to which the provisions of the Bombay Money Lenders, 1946 would apply. However, on a careful consideration on the facts of

the case, it appears that in reality, there was no genuine transaction on the basis of any bill of exchange. The complainant simply had advanced some amounts to the accused no.1 on interest, and had in all probability, taken the blank hundies and blank signed cheques at that time itself. There is a reason to believe that the complainant was advancing money as and by way of a business of money lending without having a valid licence. This conclusion that was arrived at by the learned Magistrate cannot be said to be suffering from any infirmity or illegality.

17 Moreover, it ought to be kept in mind that these are Appeals against Acquittals. It is well settled that while dealing with Appeal from the order of acquittal, this Court would not interfere with the view taken by the trial Court, if the same would be a possible view. It is well settled that when two views of the matter are possible on the basis of the evidence adduced before the trial court, and the trial court has taken one of them leading to acquittal, then the appellate Court would not interfere with the order of acquittal.

17 The view of the matter as taken by the learned Magistrate in both the cases is certainly a possible view, warranting no interference.

18 The Appeals are dismissed.

(ABHAY M.THIPSAY, J)