IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 234 OF 2001

Pratik K. Ashar &
Rinku R. Vora,
on behalf of M/s. Siddhi Securities,
8, Shalibhadra Building,
Hingwala Lane, Ghatkopar (E),
Bombay-400 077. .. Appellant
(original complainant)

...VERSUS...

(1) Piyush P. Daftary,
Kasambhangarwala Chawl,
Chamunda Circle, Ganjawala Lane,
Borivli (W), Mumbai-400 092. .. Respondent No.1.
(original accused)

or have another address at :
A/2, Saidham Sodawala Lane,
Borivli (W), Mumbai-400 092.

(2) State of Maharashtra. .. Respondent No.2.

…........

None for the Appellant,

None for the Respondent No.1-Accused,

Mr. D.P. Adsule, APP for the Respondent No.2-State.

…........

CORAM : S.B. SHUKRE, J.
DATED : 30th JULY, 2015.

ORAL JUDGMENT :

This is an appeal preferred against the judgment and order dated 26.9.2000 passed by the learned Metropolitan Magistrate, 34th Court, Vikhroli, Mumbai in Criminal Case No.379/S/1997, thereby acquitting the respondent no.1 of the offence punishable under Section 138 of the Negotiable Instrument Act.

2. Briefly stated facts of the case are as under :

The appellant-firm was carrying on share trading business. Respondent no.1 had some dealings in shares with the appellant, the complainant between the period from April, 1996 to July, 1996 and as such a sum of Rs.3,39,895/- was due and payable from the respondent no.1 to the appellant. By way of part payment of the same, the respondent no.1 issued a cheque bearing No.627484, dated 28.3.1997, for Rs.1,25,000/-. This cheque was dishonoured for the reason 'fund insufficient'.

3. The appellant was informed of the dishonour and, therefore, the appellant issued a notice dated 2.5.1997 to the respondent no.1 demanding payment of the cheque amount. It appears that the appellant did not receive acknowledgement of the notice sent to the respondent no.1 by registered post and, therefore, contending that the respondent no.1 was presumed to have received the notice, the appellant filed a complaint on 28.5.1997 under Section 138 of the Negotiable Instrument Act against the respondent no.1.

4. The substance of accusation was explained to the respondent no.1 for an offence punishable under Section 138 of the Negotiable Instrument Act, to which he pleaded not guilty and claimed to be tried.

5. On merits of the case, the learned Magistrate found that the respondent no.1 could prove the fact that the cheque was issued towards discharge of debt not enforceable at law and, therefore, the learned Magistrate held that cognizance of the complaint could not be taken and accordingly acquitted the respondent no.1 of the offence punishable under Section 138 of the

Negotiable Instrument Act by his judgment and order dated 26.9.2000. Being aggrieved by the said judgment, the complainant is before this court in the present appeal.

6. This appeal has been listed on final hearing board for quite sometime. It is an appeal which has been filed almost 14 years ago. Yet, nobody is appearing on behalf of the appellant before this court to prosecute this appeal. Section 386 of the Code of Criminal Procedure requires the appellate court to decide the appeal on merits of the case and the requirement of hearing the appellant or the respondent comes into picture only when the appellant or the respondent appears before the court. If both of them do not appear or either of them remains absent, Section 386 of the Code of Criminal Procedure mandates that the appellate court must decide the appeal on considering the record of the case. Accordingly, this court has found it necessary to proceed in the matter and decide the appeal on its own merits.

7. I have heard the learned APP for the respondent no.2-State, who has stated that appropriate orders may be passed in the present appeal.

8. It is seen from the impugned judgment and order that the learned Magistrate has found that the cheque in question was in respect of some dealings regarding trading in the shares between the respondent no.1 and the appellant and that these dealings of respondent no.1 had taken place with the appellant in his capacity as sub-broker. The learned Magistrate further found that in the case of Shri Damodar Maganlal Bagdai .vs. Ms. Neeta Parekh and others, Notice of Motion No.275/1998 in Suit No.2567/1997, this court had observed that as per the provisions of Rule 3 of the Securities and Exchange Board of India (Stock Brokers and Sub-Brokers) Rules, 1992 (said 'Rules, 1992' for short), there was a complete ban imposed on a stock-broker or sub-broker from buying, selling and dealing in the securities without holding a certificate granted by the Board under the Regulations. The learned Magistrate, upon considering the evidence available on record, recorded a finding that there was nothing available on record in the nature of certificate granted to the appellant under the provisions of Rule 3 of Rules 1992. Therefore, the learned Magistrate held that the debt in discharge of which cheque in

question was issued by the respondent no.1, was not a legally enforceable debt and accordingly acquitted the respondent no.1 of the offence punishable under Section 138 of the Negotiable Instrument Act.

9. On consideration of evidence of the case, I find that the conclusions so drawn by the learned Magistrate cannot be said to be perverse or being made by considering inadmissible evidence or some extraneous material. It is an admitted fact that the appellant is a sub-broker and, therefore, it was necessary for the appellant to have produced reliable evidence of its holding a certificate as required under Rule 3 of the said Rules, 1992. However, no such evidence has been brought on record by the appellant. It is also an admitted position that the debt in discharge of which cheque in question was issued was arising from dealings of respondent no.1 with the appellant as a part of share transactions and in these dealings the appellant had engaged himself as a sub-broker, but there being no evidence regarding holding by the appellant of certificate under Rule 3 of the said Rules, 1992, the debt in discharge of which cheque in question was

issued by respondent no.1, becomes a debt not enforceable at law. Learned Magistrate is, therefore, right in recording a finding that cognizance of complaint cannot be taken and consequently rightly acquitted the respondent no.1 of the offence punishable under Section 138 of the negotiable Instrument Act.

10. No case has been made out in making any interference with the impugned judgment and order. The appeal deserves to be dismissed. Appeal stands dismissed.

JUDGE

Gulande, PA