IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 38 OF 2014
with
CRIMINAL APPLICATION NO. 39 OF 2014

Chandrakant P. Mirani ..Applicant

v/s.

The State of Maharashtra & Anr. ..Respondents

Mr. J.S.Kini i/b. Suresh Dubey for the Applicant.
Mrs. R.V.Newton , APP for the Respondent/State.
Mr.Irfan Shaikh for the Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : AUGUST 19, 2015.

P.C.

1. Heard. These applications for leave to appeal are against the order of acquittal passed by the Metropolitan Magistrate, 72nd Court, Vikhroli, Mumbai in C.C.No. 4317/SS/2011, and C.C.No.4316/SS/2011 filed under Section 138 of the Negotiable Instruments Act.

2. Learned Counsel for the applicant-complainant submits that the

respondent no.2 accused had admitted having issued the cheque. He contends that the presumption under Section 139 of Negotiable Instruments Act was in favour of the applicant. The learned Counsel has further submitted that the defence raised by the respondent no.2 accused was not probable as to rebutt the presumption. The learned Counsel for the applicant-complainant therefore submits that the judgment is totally erroneous.

3. I have considered the submissions of the learned counsels for the applicant-complainant and the respondent no.2. Perused the judgment, notes of evidence and other relevant material placed for perusal.

4. The case of the applicant-complainant was that the respondent no.2-accused had approached him for financial help for clearing the loan dues of the bank and other financial institutions, pertaining to their flat No.C-101, 1st floor, Shivarpan Co-operative Housing Society ltd., Plot No.15, Node, Ghansoli, Navi Mumbai 400 701. The respondent no.2-accused had expressed willingness to mortgage the

said flat on condition that the complainant would clear the entire loan liability.

5. The complainant initially gave to the accused loan of Rs.4 lakhs between the period from 10th February, 2008 to12th February, 2008, partly by cash and partly by cheque. On receipt of said amount of Rs.4 lakhs the respondent no.2 (Jyotshna and her husband) executed a deed of mortgage wherein they agreed to repay the amount with interest at the rate of 36% per annum.

6. Subsequent to the execution of mortgage deed, the complainant paid to the accused an amount of Rs.50,000/- on 30th July, 2008, an amount of Rs.50,000/- on 31st July, 2008 by cash and Rs.1,00,000/- by cheque. The accused issued 6 post dated cheques for various amounts towards the discharge of their joint liability. The complainant deposited two cheques dated 2nd December, 2011 and 26th November, 2011 and encashed the amount of Rs.2,50,000/- and Rs.1,00,000/-, total being Rs.3,50,000/-.

7. The applicant-complainant has stated that the respondent no.2 Jyotsna (in Criminal Application No.38 of 2014) had issue a cheque dated 1.10.2011 for Rs.1,00,000/- and her husband Abani Dutta Respondent no.2 (in Criminal Appln. 39 of 2014) had issued cheque dated 26.12.2011 for Rs.1,00,000/- towards payment of the balance amount.

8. The applicant-complainant claimed that the said cheques were deposited in bank, but were dishonoured. He therefore called upon the accused respondent to pay the cheque amount. The respondents accused replied to the notice and denied their liability to pay the amount to the complainant.

9. It is pertinent to note that the respondent no.2-accused had acknowledged receipt of Rs.4 lakhs from the respondent. It is not in dispute that the accused-respondents had repaid Rs.3,50,000/- by cheques dated 2.12.2011 and 26.11.2011. The accused had disputed having received from the applicant-complainant cash of Rs.50,000/- each on 30th July, 2008 and 31st July, 2008. The learned Magistrate

has held that the complainant has failed to prove such payment.

10. It is pertinent to note that the applicant-complainant has admitted that the receipts dated 30th July, 2008 and 31st July, 2008 show that the said amount was paid by one Nikhil Mehta and that the applicant-complainant had signed the said receipts only as a witness. The applicant-complainant has admitted in his cross examination that the said receipts reveal that the amount was paid by Mr. Nikhil Mehta. The complainant had come out with the case that Nikhil Mehta had paid the said money to the accused and that he was the guarantor to the said transaction. The complainant had claimed that he had paid the said money to Nikhil Mehta and therefore he was entitled to recover the same from the accused. It is to be noted that the complainant had not mentioned the said fact in the complaint, the statutory notice as well as in the affidavit in evidence and had put forth such story only in the cross examination. Furthermore, the complainant had not examined Nikhil Mehta to substantiate his contention that he had borrowed the said money from Nikhil Mehta and subsequently repaid the money to Nikhil

Mehta, and that Nikhil Mehta had authorized him to recover the same from the accused. In the light of the above, the learned Magistrate was therefore perfectly justified in holding that that the receipts falsify the claim of the complainant that he had paid the amount of Rs.50,000/- to the accused on 30th July 2008 and further amount of Rs.50,000/- on 31st July, 2008.

11. The learned Magistrate has further held that though the complainant had alleged that he had paid the sum of Rs. 1,00,000/- to the accused by cheque dated 2.1.2011 bearing cheque no.202769 drawn on Sahebrao Deshmukh Co-op. Bank, Ghatkoper, the statutory notice referes to the cheque dated 2.1.2009. The passbook entry of the complainant also reveals that the cheque no.202769 was encashed from his account on 5.1.2009. In view of the above factual aspect, the learned Magistrate has rightly held that the complainant has failed to prove that the said amount was paid by the complainant. Consequently, the complainant had failed to prove that the said cheque was issued by the accused towards repayment of legally enforceable debt. The reasons assigned by the Magistrate are

justifiable and do not call for any interference.

12. Under the circumstances, the applications seeking leave to appeal are hereby rejected.

(ANUJA PRABHUDESSAI, J.)