

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.170 OF 2015

Mr. M. Jayaram Shetty,
Residing at, 204, "Springleaf"
Seven Bungalows, Andheri-West,
Mumbai.

...Appellant

Versus

1. Mr. Vijay V. Haria
Soleve proprietor of M/s. Champion
International, 12 Anand Niwas,
Rajawadi Road No.4, Ghatkopar-
East, Mumbai-400 077.

2. State of Maharashtra

...Respondents.

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Mr. A.N. Mulla for the Appellant.

Ms Nilam B. Ghorpade for Respondent No.1.

Mr. J.H. Ramugade for Respondent No.2- State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATE :8th OCTOBER, 2015.

ORAL JUDGEMENT :

The Appellant herein has challenged the judgment dated 16th June, 2009 whereby the learned Additional Sessions Judge, Greater Mumbai, allowed the appeal filed by the Respondent No.1 and set aside the judgment dated 7th October, 2005 passed in C.C. No.1908/SS/1998 passed by the learned Metropolitan Magistrate, 44th

Court, Andheri, Mumbai, thereby acquitted the Respondent No.1 of offence punishable under section 138 of the Negotiable Instruments Act.

The brief facts leading to the present appeal are as under:-

2. The Appellant-complainant had filed a complaint under section 138 of the Negotiable Instruments Act alleging that on 12th April, 1998 he had given to the Respondent No.1-accused a loan of Rs.7,00,000/-. The Appellant-complainant had further stated that the Respondent No.1-accused had issued to him a cheque dated 3rd July, 1998 for Rs.7,00,000/- towards the repayment of the said amount. The Appellant-complainant deposited the said cheque on 5th August, 1998. The said cheque was dishonoured with endorsement "Stop Payment Reported Lost". The Appellant-complainant issued statutory notice dated 13th August, 1998 calling upon the Respondent No.1-accused to pay the cheque amount. The Respondent No.1-accused replied to the said notice wherein he denied having issued the said cheque and claimed that the said cheque was lost and misused by the Appellant-complainant. Since the Respondent No.1-accused failed to make the payment, the Appellant-complainant lodged complaint under section 138 of the Negotiable Instruments Act.

3. The Respondent No.1-accused put in his appearance before the Trial Court. The substance of the accusation was explained to him and the Respondent No.1-accused pleaded not guilty and claimed to be tried. The Appellant-complainant examined himself and another witness P.W. No.-2 Mahendra Ruparel whereas the accused examined himself in defence.

4. Upon considering the evidence adduced by the Appellant-complainant as well as by the accused, the learned Magistrate held the Respondent No.1-accused guilty of offence punishable under section 138 of the Negotiable Instruments Act and sentenced him to undergo imprisonment for the period of three months and to pay compensation of Rs.8,00,000/- to the Appellant-complainant, in default to undergo simple imprisonment for three months. Being aggrieved by the said judgment Respondent No.1-accused preferred an appeal No.615 of 2005 before the Sessions Court, Greater Mumbai. The learned Sessions Judge by judgment dated 16th June, 2009, allowed the appeal and set aside the impugned judgment dated 7th October, 2005 passed by the learned Metropolitan Magistrate, 44th Court, Andheri, Mumbai in C.C. No.1968/S/88 and consequently acquitted the Respondent No.1-accused of the offence punishable under section 138 of the

Negotiable Instruments Act. Being aggrieved by the said judgment the Appellant-complainant has preferred this appeal.

5. The learned counsel for the Appellant-complainant has submitted that the Respondent No.1-accused has admitted that there was business transaction between him and the Appellant-complainant. He has further submitted that the evidence adduced by the Appellant-complainant proves that the Appellant-complainant had advanced to the Respondent No.1-accused a loan of Rs.7,00,000/-. He has further submitted that the evidence adduced by the Appellant-complainant further proves that the Respondent No.1-accused had issued a cheque dated 3rd July, 1998 of Rs.7,00,000/- towards the repayment of the said loan. He has submitted that the presumption under section 138 of the Negotiable Instruments Act is in favour of the complainant and that said presumption has remained un rebutted.

6. The learned counsel for the Appellant-complainant has submitted that the finding of the learned Sessions Judge that the complainant had not proved the capacity to lend such a huge amount, is totally erroneous. He submitted that this court can take on record the books of accounts, which are public documents and take judicial note of the entries in the said books. He submits that the said entries

sufficiently prove that the Appellant-complainant was having sufficient means to lend the amount of Rs.7,00,000/- to the Respondent No.1-accused. The learned counsel for the Appellant-complainant has further submitted that the defence raised by the Respondent No.1-accused is inconsistent and is not probable. He therefore, contends that the learned Sessions Judge has erred in interfering in the judgment of the learned Metropolitan Magistrate.

7. Per contra the learned counsel for the Respondent No.1-accused submits that the Appellant-complainant has failed to prove that he had capacity to lend such a huge loan to the accused. She has further submitted that the Respondent No.1-accused had already intimated to the Bank that the cheque in question was lost. The Respondent No.1-accused had also lodged a complaint before the police to that effect.

8. The learned counsel for Respondent No.1-accused has stated that names of the two witnesses who were allegedly present at the time of loan transaction were not reflected in the complaint or in the list of witnesses and that the statement made by the witness (PW.-2) in the affidavit was only an afterthought. She has further submitted that even otherwise the testimony of PW No.2 does not prove that the

complainant had given the money to the accused in his presence. She has further drawn my attention to para 9 of the complaint, whereas the complainant has stated that the loan was given to the Respondent No.1- accused at his residence at Andheri wherein the evidence of PW No.2 indicate that the loan was paid to the accused at the office of the complainant, which is at Masjid Bunder. She has further submitted that the Appellant-complainant has not produced and proved the books of account and as such, the same cannot be looked into or even considered for the purpose of deciding the appeal. She has submitted that the defence raised by the accused is probablised and hence, the learned Sessions Judge was justified in setting aside the order of conviction.

9. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties. At the outset it may be mentioned that it is well settled that the Appellate Court should not disturb the findings of the acquittal, if two reasonable views are possible, unless the findings are patently illegal and erroneous. In the case of **Ghurey Lal Vs. State of Uttar Pradesh (2008) 10 SCC 450** the Hon'ble the Supreme Court has reiterated that the Appellate Court in dealing with the case in which the Trial Courts

have acquitted the accused should bear in mind that the Trial Court's acquittal bolsters the presumption that he is innocent. The Appellate Court must give due weight and consideration to the decision of the Trial Court as the Trial Court had the distinct advantage of watching the demeanor of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

10. In the instant case, the Appellant-complainant had approached the court with a specific averment that on 2nd April, 1988 the Respondent No.1-accused had approached him and requested for loan of Rs.7,00,000/-. The Appellant-complainant had stated that he had given to the Respondent No.1-accused a loan of Rs.7,00,000/- in turn, had issued the subject cheque dated 3rd July, 1998 towards repayment of the said loan. In para 9 of the complaint the Appellant-complainant had averred that the said transaction had taken place at his residence at Andheri, Mumbai.

11. It is to be noted that the Respondent No.1-accused has not disputed his signature on the cheque but had claimed that the said cheque was stolen. It is pertinent to note that by letter dated 25th June, 1998 the accused had informed the Manager of the Bank of Baroda that he had lost a blank signed cheque No.455920 of his current A/c.

No.1632. By the said letter the accused had requested the bank to stop the payment in respect of the said cheque. The bank had acknowledged the receipt of the said letter. It is also to be noted that the accused had also lodged a complaint before the senior inspector of police stating that a blank cheque No.455920 was missing/stolen. Both these letters were sent much before the date on which the cheque was allegedly issued i.e. on 3rd July, 1988. In the light of the above facts, it was incumbent upon the Appellant-complainant to prove that he had advanced loan of Rs.7,00,000/- to the accused and that the subject cheque was issued by the Respondent No.1-accused towards repayment of the loan. As rightly held by the learned Sessions Judge the complainant had not produced any documentary evidence to prove such loan transaction or to prove that he had capacity to advance loan of Rs.7,00,000/-.

12. The Appellant-complainant had examined P.W.-2 Mr. Ruparel in order to prove such loan transaction. The evidence of this witness does not indicate that the Appellant-complainant had paid the loan in his presence. Be that as it may the testimony of that witness reveals that on 2.4.1988 he had gone to the office of the Appellant-complainant and that the Appellant-complainant had told him that he

had given Rs.7,00,000/- to the Respondent No.1-accused and the Respondent No.1-accused in turn had issued a cheque in his favour. The evidence of this witness thus, indicate that the alleged loan transaction was in the office of the Appellant-complainant at Masjid Bunder. The said statement is in total variance with the evidence of the Appellant-complainant as well as the averments in the complaint. The complaint also does not reveal that the Appellant-complainant had handed over Rs.7,00,000/- to the accused in presence of this witnesses. The name of this witness does not reflect in the list of witnesses. The said witness appears to be a got up witness and his evidence does not inspire confidence.

13. It may be mentioned that section 139 of the Negotiable Instruments act reads as under :

Section 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.”*

14. This section raises a presumption that the holder of a cheque has received the cheque of the nature referred to in section 138 of the Negotiable Instruments Act for the discharge, in whole or in part,

of any debt or other liability. This presumption is however, rebuttable. It is open to the accused to prove preponderance of probabilities that the cheque was not issued towards consideration or towards the discharge of any debt or other liability.

15. In the instant case, as stated earlier the accused had already reported to the bank as well as to the police that the subject cheque was missing/stolen. The evidence adduced by the complainant does not prove the loan transaction and further that he had capacity to pay to the accused loan of Rs.7,00,000/-. Under the circumstances, the learned Additional Sessions Judge was justified in holding that the accused has discharged the burden of rebutting the statutory presumption. The findings of the learned trial Judge are probable and are neither illegal nor perverse.

16. Under the circumstances, the appeal has no merits and is hereby dismissed.

(ANUJA PRABHUDESSAI, J.)