

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.824 OF 2013

S.Rajakumar S/o.K. Sarangabani
Aged about 44 years, Proprietor
of Five Star Gents Wear, Having
the place of business at Shop No.A/3,
Block No.2, Transit Camp, Dharavi,
Mumbai – 400 017 ... **Appellant**

V/s.

1. N.Maran Pillai, Age 42 years,
Residing at Room No.2/260/2/5,
Nithyanand Chawl, Anna Nagar,
Kumbharwada Road, Dharavi,
Mumbai-400 017.
2. State of Maharashtra
Through P. P. Office,
Annex Building,
High Court, Fort, Bombay ... **Respondents**

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Mr.Datta Mane with Prasad Patil i/b. P.M.Havnur, Advocate for the
Appellant
Ms.Jaymala Ostwal i/b.M/s.J.J.Associates, Advocate for the
Respondent No.1.
Mr.M.R.Tidke, APP for the Respondent/State.

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CORAM : ABHAY M. THIPSAY J.

DATED : 28TH JANUARY, 2015

ORAL JUDGMENT :

1. The appellant is the original complainant. He had filed a complaint against respondent No.1 herein alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act. After holding a trial, the Metropolitan Magistrate, 30th Court, Kurla found the respondent No.1 guilty of the said offence and sentenced him to suffer Simple Imprisonment for a period of two months. The Magistrate also directed the respondent No.1 to pay a sum of Rs.90,000/-, which was the amount of the cheque, as compensation to the appellant herein. Being aggrieved by his conviction and the sentence imposed upon him, the respondent No.1 moved the Court of Sessions by filing an appeal. This appeal was allowed by the Court of Sessions by recording an order of acquittal. Being aggrieved by the said order of acquittal, the appellant has filed the present appeal after obtaining special leave of this Court as contemplated under Sub-section (4) of Section 378 of the Code of Criminal Procedure.

2. Though I have heard the learned counsel for the parties at length, in the view that I am taking and in view of the final order that I intend to pass, it is neither necessary nor proper

to have an elaborate discussion of the rival contentions as raised before me. It is sufficient to mention only the broad features of the case.

3. For the sake of convenience and clarity, the appellant shall, hereinafter, be referred to as “the complainant” and the respondent No.1 as “the accused”.

4. The complaint came to be filed against two persons; the present accused and also his wife Smt.Sangeetha, who was mentioned as accused No.2 in the said complaint. She was, however, acquitted by the learned Magistrate.

5. The case of the complainant was that he had advanced a hand loan in the sum of Rs.1,00,000/- to the accused. This loan was supposed to be a friendly loan given in cash. This was given, some time, in the month of November, 2007. As per the complainant's belief, it was for the purchase of a flat. The complainant's case is that towards repayment of the said loan of Rs.1,00,000/-, the accused had issued a cheque dated 05/11/2008 in the sum of Rs.90,000/-, which was dishonoured.

6. Primarily, two contentions were raised during the trial. The first was that no notice of demand had been served upon the accused and that, there was no evidence to show service of such notice. The other contention was that the cheque had been forcibly

obtained from the accused at the intervention of one Mr.Arunachalan, who happens to be a relative of the accused.

7. The case of the accused as suggested by him was that in order to seek recovery of some amount that had been advanced by the complainant to some other person and for the repayment of which the accused was not responsible, the cheque was taken from the accused with the help of said Shri.Arunachalan. The accused, in his evidence, also gave the name of the person for whose supposed liability the accused was made to issue the cheque. The accused had put forth the case that except his signature, the other matter on the cheque was not written by him. The complainant's case, on the contrary, was that the entire handwriting on the cheque was that of accused. This stand was repeated by the parties before this Court also. In spite of the parties having taken such a stand, no finding on that aspect has been given, either by the learned Magistrate, or by the learned Additional Sessions Judge who decided the appeal. Unfortunately, none of the parties wanted to take the matter further and were complacent with mere denial of the other's claim.

8. In the peculiar facts of the case, particularly because there is no evidence of the loan transaction, except the cheque itself, which incidentally, does not correspond to the amount of loan taken, it appears necessary to ascertain as to whether the

writing on the cheque is that of the accused. Though this would not conclude the question, that would enable the Court to judge the matter in a more satisfactory manner, in the light of the respective contentions of the parties. That, 'the matter on the cheque has been written by the accused' or, that, 'it has not been written by the accused' would be relevant in deciding the truth of the case of the complainant.

9. In my opinion, the decision given by the Magistrate and also by the Court of Sessions has been perfunctory. None of them appears to have made any serious attempt to ascertain the truth. Undoubtedly, it was for the parties to have taken initiative to adduce relevant evidence, but when the parties failed to do so, such evidence could have been obtained by the Court for satisfying itself about the correct position and for enabling it to decide the controversy in a satisfactory manner.

10. In my opinion, the Judgment of the trial Court, as also the appellate Judgment came to be delivered without getting on record extremely relevant and significant evidence. Decisions given on incomplete or insufficient material are not likely to advance the cause of Justice.

11. In my opinion, this is a case where the matter should be remanded back to the Magistrate with liberty to parties to

adduce further evidence in support of their respective contentions. It is made clear that, among other things, opinion about the identity of the handwriting on the cheque will go a long way in establishing the truth or otherwise of the complainant's case and it would be desirable to have such evidence before the Magistrate for a just decision of the case.

12. The learned counsel for the accused submits that she has no objection for a remand of this case with appropriate directions. Though the learned counsel for the complainant has some reservations about the same, having considered the facts of the case, in my opinion, it would be proper to adopt such a course, in the interests of justice.

- I) The appeal is partly allowed.
- II) The impugned order is set aside. The order of conviction, as recorded by the Magistrate, is also set aside.
- III) The matter is remanded back to the learned Magistrate with a direction to permit the parties to adduce further evidence in the case, if so desired; and to decide the case thereafter, afresh, on merits and in accordance with law.

- IV) Should the complainant and/or the accused make an application to the Magistrate for sending the cheque to an expert for obtaining the opinion of such expert as to the identity of the writings on the cheque, the Magistrate shall forthwith allow said application, subject to the question of payment of professional fees of the expert, as may be determined by the Magistrate.
- V) After receipt of the opinion of the Expert, the Magistrate shall decide the matter afresh as aforesaid.
- VI) The learned Magistrate shall expedite the case and endeavour to dispose it of within a period of six months from the date of receipt of this order by him.
- VII) Appeal is disposed of in the aforesaid terms.
- VIII) Record and proceedings be sent back forthwith.

(ABHAY M. THIPSAY J.)