IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.888 OF 2005

Meera S. Chiplunkar .. Appellant
Versus
Ashalata Rawji Kondkar and Anr .. Respondents

Mr.Sagar Kasar, Advocate for the appellant.
Mrs.S.V.Gajare, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 2nd JULY, 2015

ORAL JUDGMENT :

1 The appellant is the original complainant. She had prosecuted the respondent no.1 herein on the allegation that the respondent no.1 had committed an offence punishable under section 138 of the Negotiable Instruments Act. The Metropolitan Magistrate's 7th Court, Dadar, after holding a trial, found the respondent no.1 not guilty, and passed an order of acquittal. Being aggrieved thereby, the appellant, after obtaining special leave of this Court, has filed the present Appeal.

2 When the Appeal was called out for final hearing, none appeared for the respondent no.1. Under the circumstances,

the Appeal is being decided after going through the record, and after hearing the learned counsel for the appellant.

3 For the sake of clarity, the appellant is hereinafter referred to as 'the complainant' and the 'respondent no.1' as 'the accused'.

4 I have heard Mr.Sagar Kasar, the learned counsel for the appellant. He has taken me through the evidence adduced during the trial, and the impugned judgment.

5 The case of the complainant as made out against the accused, as per the complaint, was that the husband of the complainant had advanced a friendly loan of Rs.5,50,000/- to the accused and her sister Smt.Shalini (who was mentioned as accused no.2 in the complaint), and that the accused had agreed to repay the loan on 1st August 2002. That, towards the repayment of the said loan, the accused issued a cheque in the sum of Rs.5,50,000/- which was dishonored when presented for payment with the remark 'funds insufficient'. That since even after sending a demand notice, the amount of the cheque was not paid, the complaint came to be filed.

6 During the trial, the complainant examined herself and also her husband. The accused examined herself as a witness in her defence.

7 The Magistrate did not believe the evidence of the complainant and her husband, inasmuch he doubted whether an amount of Rs.5,50,000/- was indeed due and payable by the accused to the complainant or to her husband. He did not accept the theory of a friendly loan having been given by the complainant's husband to the accused, and the cheque having been issued in repayment thereof. Undoubtedly, the Magistrate also found some other shortcomings in the case of the complainant such as absence of proof of the service of a valid demand notice etc., but the main reason for his coming to the conclusion that the accusation against the accused had not been proved, seems to be the doubt felt by him about the transaction in question.

8 I have taken into consideration the contentions advanced by the learned counsel for the appellant, carefully, but inspite of that, upon considering the evidence adduced before the Magistrate, and upon going through the judgment delivered by

him, I do not find anything improper or illegal in the view taken by the Magistrate.

9 The case of the complainant suffered from a number of weaknesses. In the first place, whether the amount of Rs.5,50,000/- was paid by the husband of the complainant to the accused, is itself not clear, inasmuch as the complaint speaks of two accused i.e. the present accused, and as aforesaid, her sister Shalini, against whom process was not issued. The complaint proceeds on the basis that a friendly loan was given *to both of them* in re-payment whereof the accused had issued the cheque in question. However, when the process was not issued, and when only the accused was being prosecuted, the complainant appears to have modified this version by saying that the loan had been given *to the accused*.

10 That by itself would not be very material or conclusive, but the fact remains that the complaint does not give any details about the payment of the loan to the accused which was, as per the complainant, advanced not by her, but by her husband. Only the total amount of loan has been mentioned, without specifying whether it was paid at one time, or on different

dates, and what were the different amounts paid on different occasions, if it was not paid at one time. In the evidence, complainant admitted that she was not present on the occasion when the loan amount was advanced by her husband to the accused.

11 Since the Magistrate has doubted that any amount was really due and payable by the applicant to the husband of the complainant, it would be more appropriate to refer to the evidence of the husband of the complainant. In his evidence, he states that he had given a friendly loan of Rs.1,90,000/- to the accused in the year 1997-98. That, another amount of Rs.1,90,000/- was given to the accused in the year 2000, and that an amount of Rs.60,000/- was given to her by him in the year 2001. Thereafter, he states that the total amount of Rs.5,60,000/- was given by him to her. It is apparent that these amounts do not work out to Rs.5,50,000/- or Rs.5,60,000/- and they merely work out to Rs.4,40,000/-. However, before this Court – when counsel for the appellant is specifically asked about it by the Court – it is submitted by the husband of the complainant, who is present in the Court hall that he had also stated additionally about an amount of Rs.1,10,000/- having been given to the accused by him,

but it was not recorded in the evidence. Though it would be difficult to accept such a plea, since not much turns on that, I proceed on the basis that the husband of the complainant *did* state about a further amount of Rs.1,10,000/- also having been given to the accused. The fact, however, remains that the complaint does not give these details. Lastly, even after the break up of the loan amount is given by the husband of the complainant, he only gives it by mentioning the years in which the amount was advanced without giving the dates or months, and without specifying the place/s where it was given.

12 Several curious facts were revealed before the Magistrate from the evidence. It turned out that the husband of the complainant and the accused were having a rather unusually friendly relationship. The husband of the complainant got acquainted with the accused while traveling by public transport, and they used to frequently meet each other. It was revealed that the accused was having in her possession a *blank cheque* signed by the husband of the complainant, which she produced before the Magistrate and tendered in evidence. This was, according to the accused, given by complainant's husband to her for the purpose of giving it to some other lady, when required. The fact that the

husband of the complainant had handed over a blank signed cheque to the accused, undoubtedly, indicates that their friendship was considerable, and the accused was fully trusted by the husband of the complainant.

13 The learned Magistrate also referred to a number of weaknesses in the evidence adduced on behalf of the complainant. The Magistrate observed that initially the complainant stated that she and her husband had given a friendly loan of Rs.5,50,000/- to the accused, but in the cross-examination had to admit that she did not have any knowledge about the loan and that she was never present when any amount was advanced by her husband to the accused. The Magistrate was right in observing that therefore, the transaction was a transaction between the husband of the complainant and the accused, simplicitor. In this background, the Magistrate, while considering the reliability of the version of the complainant, expressed a doubt as to why in such circumstances, the accused would issue a cheque in the name of the complainant instead of issuing the same in the name of the husband of the complainant. There is substance in this view, particularly because why such course was adopted has not been explained either by the complainant, or by her husband.

14 The Magistrate also observed that th evidence indicated that the accused and the husband of the complainant used to visit restaurants, and that the husband of the complainant used to visit the residence of the accused also. The Magistrate also observed that, according to the husband of the complainant, his friendship with the accused started in the year 1987-88, and the first instalment of the 'friendly loan' was paid by him to the accused in 1997-98.

15 The reason for demanding the loan amount back from the accused, (at that particular point of time) as given by the complainant, was that the complainant needed money for the marriage of her daughter. The evidence however, revealed that the marriage of the complainant's daughter had already taken place in the year 2001 itself. The Magistrate, therefore, observed that this reason viz. for feeling the necessity of demanding the loan back as mentioned in the complaint, was not believable.

16 The Magistrate also observed that what was the necessity for the husband of the complainant to give a blank cheque to the accused was not clear, when he was to receive an

amount of Rs.5,50,000/- from the accused. The Magistrate also observed that, that accused could have misused the said blank signed cheque, but had not done so, was significant. The observations made by the Magistrate cannot be said to be irrelevant in the context of ascertaining whether the version of the complainant and that of her husband – which again do not sufficiently match with each other – could be relied upon.

17 The Magistrate has considered the evidence minutely, and in my opinion, the appreciation of evidence as done by him, is proper.

18 The learned counsel for the appellant emphasized two aspects of the matter. He submitted that when the accused had appeared before the Court on the first date, she had given an undertaking to the Court that she would pay the amount of the cheque. According to him, this amounts to an admission that she was liable to pay the amount, and should have been taken into consideration by the learned Magistrate while deciding the matter. I find that the complainant had made an application before the Magistrate which was styled as 'an application for speedy disposal'. On this, the Magistrate appears to have made an endorsement to

the effect 'other side to say'. Thereafter, there is a writing in Marathi made by the accused on this application, which reads as follows :-

> "८ ऑगस्ट पर्यंत मी जास्तीत जास्त पैशाची व्यवस्था
> करीन दोन हप्तात मी रक्कम देईन न दिल्यास
> केस चालविण्यास हरकत नाही.
> शा.वा. नेरुरकर (सही)
> आ.रा.कोंडकर
> 6.6.03"

Translated in English, it would read thus :

> "I would make the arrangements for maximum payment to be made by 8th August. I would pay the amount in two instalments. If amount is not paid, the case may be proceeded with".

19 The Magistrate has not given much importance to this writing, and has observed that the accused had explained about this by saying that her husband had expired at about that time, and she had not engaged any Advocate. According to me, the learned Magistrate was right in that regard. As a matter of fact, in my opinion, no such writing should have been obtained from the accused. In the given situation, the accused would obviously be under pressure thinking that having signed the cheque, she would not be able to establish her point and ultimately would have to face consequences for non-payment of the amount of the cheque. Thinking that the payment of the amount inevitable, to avoid

further serious consequences, the accused was quite likely to assure the payment. This commitment, however, cannot be construed as an admission of the fact by the accused that the case of the complainant was true, or that she was legally liable to pay the amount. All that it shows that the accused was frightened and wanted to buy some time, and therefore, agreed *that she would either pay the amount, or in case of her failure to pay, the case may be proceeded with*. On the basis of this writing obtained from her in the Court, it cannot be said that she was indeed liable to pay the amount of the cheque in question to the complainant.

20 The learned counsel also pointed out that the accused had taken a false defence that the signature on the cheque was not her. I find that the accused had indeed made such a claim, and the cheque was referred to an expert for opinion on the identity of the signature. However, the expert who examined the matter and give his report, was not examined during the trial. It appears to be a fact that had the expert been examined, he would not have supported the theory of the accused. Thus, it does appear that the accused attempted to take a false defence. That, however, does not mean that, that by itself, would indicate her to be guilty of the offence in question.

21 The principle that a criminal charge must be proved beyond reasonable doubt, applies to the cases of offences punishable under section 138 of the Negotiable Instruments Act also. The presumptions laid down in sections 118 and 139 of the Act do not do away with the necessity of proving the accusation beyond reasonable doubt. The principle that the prosecution must succeed on its own merits, and not on the basis that the defence version is false, has also not undergone any change. Therefore, false defence can only add strength to the prosecution case, but by itself, will not amount to the proof of the accusation being true. Where the complainant's case suffers from serious weaknesses, it cannot be believed merely because the accused has taken a false defence on a particular point.

22 What must be clearly understood is that for acquitting an accused of an offence punishable under section 138 of the Negotiable Instruments Act, it is not necessary that the Court must come to a positive conclusion that there was absolutely no transaction between the accused and complainant, or that, no amount whatsoever was due and payable by the accused to the complainant. As a matter of fact, when post dated or blank

cheques are issued and issuance of cheque is not in dispute, it would be difficult to accept that there would be absolutely no transaction between the parties, but that does not solve the problem. There may be transactions which are of a totally different nature than projected by the complainant in the complaint, or in the evidence. The real nature of the transaction is quite often suppressed, because the disclosure thereof might invite a scrutiny of the legality of the transaction and create further legal complications, or enable the accused to raise a probable defence. Therefore, in respect of offences under sectin 138 of the Act, the Court cannot hold an accused guilty only because it comes to the conclusion that there must have been some understanding or transaction between the parties, and the accused is falsely claiming that there was no transaction whatsoever. The Court must be satisfied that the entire amount mentioned in the cheque was due and payable. Now, in the instant case, the observation of the Magistrate that there appeared to be very close relationship between the husband of the complainant and the accused, cannot be said to be incorrect. Therefore, under what circumstances, the amounts were paid to the accused, how much amount was actually paid to her, and under what circumstances a cheque was obtained from her – not in his own name, but in the name of his

wife – is entirely unclear. Why the husband of the complainant who had to recover the loan amount from the accused would give to the accused a blank signed cheque, is further unclear. The complainant as also her husband have tried to be as vague as possible about the details of the payment made, and even about the persons to whom the payment was made, inasmuch as, the original story was that the payment of loan was made to the accused *and* her sister.

23 In my opinion, even if there was some transaction between the complainant's husband and the accused, the version of the complainant, and that of her husband as to what it was, cannot be believed. The doubt felt by the Magistrate about the truth of the complainant's case is proper, legal and does arise out of the evidence adduced before him.

24 It is well settled that while dealing with Appeals from orders of acquittal, this Court would not interfere in the matter if the view of the matter, as taken by the trial court is a possible view. Undoubtedly, in this case, it cannot even be suggested that the view taken by the Magistrate is not a possible view.

25 No interference is warranted.

26 Appeal is dismissed.

(ABHAY M.THIPSAY, J)