IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.920 OF 2013
WITH
CRIMINAL APPLICATION NO.472 OF 2013
IN
CRIMINAL APPEAL NO.920 OF 2013

THE KARAD URBAN CO-OPERATIVE BANK)
LIMITED)...APPELLANT

V/s.

SUNIL LAXMAN DALVI AND ANR.)...RESPONDENTS

Shri Shekhar Jagtap i/b. J.Shekhar & Co., Advocate for the Appellant/Applicant.

Smt.M.R.Tidke, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 15th DECEMBER 2015.

ORAL JUDGMENT :

1 The appellant is a co-operative bank. It had filed a complaint against respondent no.1 herein alleging commission of an offence punishable under Section 138 of the Negotiable Instruments Act (N.I.Act). The Judicial Magistrate First Class,

Karad, after holding a trial, held respondent no.1 not guilty and passed an order of acquittal. Being aggrieved by the said order of acquittal, the appellant has, after obtaining special leave of this court, filed the present appeal.

2 During the pendency of the appeal, the appellant has also filed an application praying that additional evidence, as contemplated under Section 391 of the Code of Criminal Procedure (Code), be directed to be taken. It was decided that this application for a direction to take additional evidence, be also considered along with the appeal.

3 Respondent No.1 did not remain present at the time of final hearing of the appeal, inspite of notice, and inspite of granting him repeated opportunities to be present. The appeal, as well as the application for further evidence to be taken is, therefore, being decided, after hearing the learned counsel for the appellant and the learned APP; and after going through the relevant record and proceedings.

4 I have heard Mr.Shekhar Jagtap, the learned counsel for the appellant. With his assistance, I have gone through the impugned judgment, the complaint, and the notes of evidence adduced during the trial, which are annexed to the appeal memo.

5 For the sake of convenience and clarity, the appellant shall hereinafter be referred to as "the complainant" and respondent no.1 as "the accused."

6 The case of the complainant was that, in repayment of the loan taken by the accused from the complainant bank, the accused had issued a cheque in the sum of Rs.5 Lac, which was dishonoured, and that, inspite of making a demand for the amount of the said cheque, the same was not paid.

7 One Hindurao Kumbhar, authorized Officer of the complainant bank, was examined as a witness during the trial. No other witness was examined by or on behalf of the complainant. The accused also did not examine himself on oath or lead any evidence in defence.

8 The order of acquittal was passed by the learned Magistrate mainly on two grounds. The Magistrate was of the view, firstly, that the authority of the said Hindurao Kumbhar to file a complaint on behalf of the complainant bank, was not satisfactorily proved. He was of the view that since the complaint had not been filed by a person duly authorized by the payee i.e. the complainant bank, the complaint was not maintainable. Secondly, the Magistrate held that, that the cheque had been issued in discharge of a legally enforceable debt or other liability, had also not been proved.

9 The learned counsel for the appellant submitted that, that the complaint had not been filed by an authorized officer or person, was not correct. He pointed out that the resolution passed by the complainant bank authorizing the said Hindurao Kumbhar was filed before the Magistrate, and that, the resolution clearly authorized the said Hindurao Kumbhar to file a complaint on behalf of the complainant bank.

10 This submission of the learned counsel for the applicant appears to be proper. The Magistrate's reasoning that the resolution had not been proved because the same had been passed in the absence of the said Hindurao Kumbhar, and that, he had no personal knowledge about the said resolution is not sound. The Magistrate's view that some of the persons who passed the resolution ought to have been examined, is not correct.

11 However, the other finding recorded by the Magistrate – i.e., that 'the complainant had failed to prove that the cheque in question was issued in discharge of a legally enforceable debt or other liability' appears to be correct.

12 Interestingly, the complaint merely states that *the accused had issued the cheque in repayment of the loan <u>without giving any particulars of the loan.</u>* The complaint does <u>not</u> give any details as to *when* the amount of loan was disbursed. <u>It does not even give the amount of loan that was given to the accused</u>. In the affidavit of his evidence in lieu of examination-in-chief also, the

witness for the complainant, did not give these details. On the contrary, he admitted that he did not know about these details.

13 In the cross-examination of the complainant's witness, he admitted that, usually, when a cheque is given for repayment of a loan, the (loan) account number of the debtor is written on the reverse of the cheque. He admitted that, in the instant case, such account number was not written. Inspite of repeatedly being questioned in the cross-examination, he could not give the loan account number of the accused, while admitting that such loan account number ought to be there, if the accused had been given a loan.

14 In the cross-examination of the complainant's witness, he admitted that proceedings had been filed against the accused in the Co-operative court and some award had been obtained from the Co-operative court. He also admitted that the accused had deposited some amount in the loan account. He, however, was unable to state how much amount had been deposited by the

accused in the loan account and / or how much loan amount had already been satisfied on 25th February 2005, i.e., the date on which the cheque was supposedly issued. *The witness also stated that he <u>did not have any record or account</u> to show how much amount was due and payable by the accused to the complainant on 25th February 2005*.

15 The accused had taken a defence that he had previously obtained loan from the complainant bank which had been repaid. These facts were admitted by the complainant's witness in his cross-examination. The case of the accused was that, a cheque given by him to the complainant at that time, as and by way of security, had been misused, and the accused was wrongly being prosecuted with respect to an offence punishable under Section 138 of the N.I.Act.

16 In light of the fact that the complainant had scrupulously avoided giving any details, whatsoever, of the loan allegedly obtained by the accused, and the admission of the

complainant's witness that he did not have such details, the defence of the accused was certainly plausible. The Magistrate's conclusion, that the accused had successfully rebutted the presumption created by Section 139 of the N.I.Act, was proper and legal.

17 The question that now remains is, whether the appellant should now be permitted to adduce further evidence as contemplated under Section 391 of the Code. I have specifically heard the learned counsel for the appellant on this aspect. Interestingly, the new evidence that is sought to be adduced is the award passed by the Co-operative court. *Inspite of specifically questioning, the learned counsel for the appellant did not say that he wanted to produce the statement of the loan account of the accused by way of additional evidence*.

18 The award would show the opinion of the Co-operative court. The decision rendered by the Co-operative court would not be admissible or even relevant in the proceedings that

were before the Magistrate. The law regarding the relevancy of judgments delivered by the courts is found in Sections 40 to 44 of the Evidence Act. The judgment delivered by the Co-operative court or the award passed by it is not even relevant in the context of the proceedings that were before the Magistrate.

19 As such, I do not find any merit in the application for permitting the appellant to adduce further evidence in the matter.

20 The judgment and order of acquittal, as passed by the Magistrate, is proper and legal. There is no merit in the appeal.

21 The appeal, as well as Criminal Application No.472 of 2013, are both dismissed.

(ABHAY M. THIPSAY, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment /Order.