IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.1081 OF 2011

Ghanshyam D. Katira,
Age : 40 years,
Res. Kothari Bldg. 1st Floor, Jakaria Road,
Malad (West), Mumbai – 400 064. ... **Appellant**

V/s.

1. Sanjay J. Ganatra,
Age : 45 Years,
Res. 3 Shivshakti Society
Bldg. No.7, Flat No.5, 2nd Floor,
Near Lotus Bldg. Santoshi Maa Lane,
Malad (East), Mumbai – 400 097.

2. State of Maharashtra ... **Respondents**

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Mr.Vidyashankar Yadav, Advocate for the Appellant.
Mr.H.J.Dedhia, Advocate for the Respondent No.1.
Mr.A.R.Patil, APP for the Respondent No.2.

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CORAM : ABHAY M. THIPSAY J.
DATED : 7TH DECEMBER 2015

<u>ORAL JUDGMENT</u> :

1. The appellant is the original complainant. He had filed a complaint alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1988 against the respondent No.1 herein. The learned Metropolitan Magistrate,

43rd Court, Borivali, after holding a trial, found the respondent No.1 not guilty and passed an order of acquittal. The appellant is aggrieved by the said order of acquittal, and has, after obtaining special leave of this Court, filed the present appeal, challenging the said Judgment and Order of acquittal.

2. For the sake of convenience and clarity, the applicant shall, hereinafter, be referred to as "the complainant" and the respondent No.1 as "the accused".

3. I have heard Mr.Vidyashankar Yadav, the learned counsel for the complainant. I have heard Mr.H.J.Dedhia, the learned counsel for the accused. With the assistance of the learned counsel, I have gone through the entire record of the case. I have gone through the evidence – oral and documentary – adduced during trial. I have gone through the impugned Judgment.

4. The case of the complainant, as made out from the complaint, was that the accused had approached the complainant on 15/12/2005, and had demanded a loan of Rs.1,50,000/-. According to the complainant, he paid the loan amount to the accused by cash on 12/01/2006. That, in repayment of the said loan, the accused issued a cheque bearing No.440856 dated 02/09/2006 in the sum of Rs.1,50,000/- drawn on The Kapol Co-operative Bank Ltd., Marve Road, Malad, Mumbai. That, the complainant deposited the said cheque in his bank on the very

same day i.e. 02/09/2006. The cheque, however, was returned by the banker with the remark ' *Account Closed* '. Since in spite of issuing a notice of demand the amount of said cheque was not paid, the complaint came to be filed.

5. During the trial, the complainant examined himself as a witness. He tendered a number of documents in evidence. The accused also examined himself as a witness and also tendered a number of documents in evidence.

6. The defence of the accused is that he had not taken any loan of Rs.1,50,000/- from the complainant. According to him, there was transaction of loan between the complainant and the accused in the year 1998, and that the amount of the said loan had been repaid. That, at that time, the complainant had taken a blank signed cheque from the accused as and by way of security. That, though the said loan was repaid, the cheque in question remained with the complainant, which was misused by the complainant.

7. In addition to hearing the learned counsel for the complainant, I have also heard the complainant, who is present in person in the Court, as he expressed a desire to make submissions before the Court clarifying certain aspects of the matter. It was thought fit to give him an opportunity to do so, though his counsel had been heard.

8. In the affidavit of evidence filed by the complainant, in lieu of evidence in examination-in-chief, he claimed to be a Licensed Money Lender. He also gave his license number and claimed that he gives loan on interest @21% P.A. According to him, the accused approached him on 15/12/2005 and demanded a loan of Rs.1,50,000/-, which amount was paid by him, in cash, to the accused on 12/01/2006.

9. Though the complainant has produced a number of documents, as and by way of evidence of the transaction between him and the accused, Mr. Dedhia, the learned counsel for the accused submitted that these documents could not be relied upon.

10. I have considered the matter carefully.

11. Among the documents tendered in evidence by the complainant, there is one purporting to have been executed on 15/12/2005. It purports to be an 'application for friendly loan' made by the accused. Though, according to the complainant, he is a professional money lender, the application shows a request for “friendly loan”. Anyway, that may not be of much significance, but what is significant is *that the document contains a recital that, the applicant for loan i.e. 'the accused had received from the complainant, by cash, the said amount of Rs.1,50,000/- on* <u>12/01/2006</u>'. There is substance in the contention advanced by

Mr.Dedhia that this document could not have been executed on 15/12/2005, inasmuch as, it speaks of and incorporates a future event – i.e. an event dated 12/01/2006, *as already having taken place*.

12. In his evidence, the accused stated that he had taken a loan of Rs.10,000/- from the complainant in the month of November, 1998, and that, at that time, he had given the said cheque to the complainant, which was, at that time, blank, and except the signature of the accused, there was no other matter on it. The accused further pointed out that the loan taken by him from the complainant in the year 1998 was repaid by him by two cheques of Rs.5000/- each, but the complainant did not return the cheque in question i.e. the cheque which is the subject matter of the present complaint, to him. Among the documents tendered by the accused in his evidence, there is a statement of accounts, which shows that cheque No.440855 has been issued by the accused on 02/11/1998. The cheque which is the subject matter of the present case is next in number to the said cheque and bears No.440856. This being so, the learned Magistrate doubted that whether the cheque in question had been issued in the year 2006, as claimed by the complainant. The Magistrate, in that connection, also observed that the printed matter on the cheque indicates the printed figure '19_' indicating that the cheque book was issued in the decade of 1990. On this, the learned counsel for

the complainant, as well as the complainant himself, contended that there would be no prohibition to use such a cheque even in the year 2006. Though this is true, the question is not of any prohibition to use such a cheque, but the question is of *likelihood* of the same having been issued in the year 2006. When cheque No.440855 had been issued in the year 1998, the possibility of the next cheque – bearing No. 440856 – having been issued in the year 2006 – i.e. after a gap of eight years – is rather remote; and this aspect is capable of rendering the version of the accused, plausible.

13. There is also some confusion as to whether the loan in question was given by the complainant in his capacity as a 'money lender'. It is not only because the same has been described as a 'friendly loan', but also because the money lenders business is being done by the complainant in the name of 'Harshal Money Lender'. The cheque has not been issued in favour of 'Harshal Money Lender'.

14. Admittedly, the complainant had issued two notices to the accused. These have been produced before the Court and tendered in evidence. The genuineness of these two documents is not in dispute. The first notice, out of these two notices, is dated <u>07/06/2006</u>, whereby the complainant has called upon the accused to pay the same amount of loan – i.e. loan of

Rs.1,50,000/- taken by the accused from the complainant on 12/01/2006. There is no dispute that these notices relate to the same loan for which the cheque in question is said to have been given. Now, in this notice the complainant mentions that "you issued a cheque for refund of said loan amount *in my favour* ……". Similar is the case with respect to the notice dated 19/06/2006. In other words, in these notices the complainant has mentioned that 'the accused had (already) issued a cheque for the refund of the said loan amount, and such a cheque was with the complainant, when these two notices were issued – i.e. in June 2006'. *If that was so, it is not reconcilable with the theory that the accused had given a cheque in question for repayment of the loan to the complainant on 02/09/2006.*

15. I have asked the complainant, who was desirous of making certain submissions in person, as to what had happened to the previous cheque, which has been referred to in his notices dated 07/06/2006 and 19/06/2006. I have specifically asked him that *if the present cheque was given on 02/09/2006*, as claimed by him, *then what has happened to the cheque, which has been referred to by him in the said notices*. The complainant is unable to give any satisfactory reply to this question, and merely submits that 'he had indeed given some loan to the accused in good faith and because of the family relationship'; and that 'certain amount is indeed due and payable by the accused to him, etc.'

16. It is apparent that the documents produced by the complainant cannot be accepted as a truthful record of the transaction that had taken place. The version of the complainant about the date, on which a loan was advanced to the accused, and the date on which the accused gave a cheque towards the purported repayment thereof, cannot be relied upon. The story put forth by the complainant cannot be accepted as true. The weight of the evidence on record, supports the possibility of the accused having given a blank cheque to the complainant, much prior to 2006; and, in any case, such a possibility cannot be reasonably and satisfactorily ruled out.

17. The doubt felt by the Magistrate about the truth of the prosecution case was absolutely justified. The conclusion arrived at by him-: viz– *that the complainant had failed to prove that the cheque in question had been issued in the discharge of the legally enforceable liability,* is proper and legal.

18. The impugned Order does not suffer from any error or infirmity. There is no merit in the appeal.

19. The appeal is dismissed.

(ABHAY M. THIPSAY J.)

CERTIFICATE

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