IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.477 of 2011

Bharati Walia w/o Bhagwan Das Walia .. Appellant

Versus

Krishan Mamlal Kapoor and anr .. Respondents

Mr.M.S.Mohite i/b Mr.Ashish Sawant, Advocate for the appellant.

None for respondent no.1.

Mrs.M.R.Tidke, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 2nd FEBRUARY, 2016

ORAL JUDGMENT :-

1 The appellant is the original complainant. She had filed a complaint against the respondent no.1 herein alleging commission of an offence punishable under Section 138 of the Negotiable Instruments Act. The Metropolitan Magistrate. 38th Court, Kurla, after holding a trial, acquitted the respondent no.1. Being aggrieved by the said order of acquittal, the appellant has, after obtaining special leave of this Court, filed the present Appeal.

2 By an order dated 28th April 2011, this Court (Coram Smt.Roshan Dalvi, J) stipulated that the Appeal would be taken up for final hearing at the stage of admission. The matter had been appearing on board thereafter on several dates, but none appeared

for the respondent no.1. The appellant and the respondent no.1 are sister and brother. It was, therefore, thought proper by this Court that the parties be given an opportunity to arrive at an amicable settlement of the dispute. However, no such settlement has been possible.

3 Today also, when the matter is called out for final hearing, none appeared for respondent no.1. Mr.M.S.Mohite, learned counsel for the appellant submitted that the respondent no.1 has not been remaining present, and that the final hearing of the Appeal shall not be deferred any further just because the respondent no.1 is not present.

4 Under these circumstances, the Appeal is being decided after hearing the learned counsel for the appellant, and the learned APP, and after going through the evidence adduced during the trial, as also the impugned judgment.

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

6 The case of the complainant, as put forth before the trial Court, may be stated thus :-

That the accused is the brother of the complainant. The accused was in need of money and therefore, the complainant gave financial help to him by obtaining loan of Rs.2,00,000/- from her friend – one Mr.Balvinder Singh – and giving the amount to the accused. The accused executed a promissory note on 14th November 2005, undertaking to pay the said amount on demand. Towards the partial repayment of the amount, the accused issued five cheques of Rs.6,000/- each, in favour of the complainant, out of which four were honoured and one was dishonored. Ultimately, the accused issued a cheque dated 31st January 2007 in the sum of Rs.1,76,000/- towards the payment of the entire amount due and payable by him to the complainant. That the said cheque, when presented, was dishonored with the remark 'account closed'. Since the accused did not pay the amount of the said cheque inspite of notice, the complainant prosecuted the accused as aforesaid, but the case resulted in acquittal of the accused.

7 The learned counsel for the complainant submitted that the appreciation of evidence, as done by the learned Magistrate was not proper. According to him, the learned Magistrate did not give any weight to the presumption contained in section 139 of the Negotiable Instruments Act. He also submitted that the fact that the accused had taken various and inconsistent deficiencies ought to have been weighed by the learned Magistrate in favour of the complainant. It is submitted that the order of acquittal being not in accordance with law needs to be interfered with and the accused needs to be convicted.

8 In her affidavit in lieu of examination in chief, the complainant stated the facts consistently with the complaint. She categorically stated that the cheque in question has been signed by the accused. The cheque was produced before the Court, tendered in evidence and marked as “Exhibit P5”. In the cross-examination,

the complainant admitted that the accused is her real brother and that the accused and complainant were visiting the houses of each other. She said in the cross-examination that Balvinder Singh is her relative. A suggestion was given to her in the cross-examination that she had paid some amount to the accused in the year 2000, which suggestion was denied. The amount that was paid by her to the accused, was said to have been paid in cash by her. She maintained in the cross-examination that the amount of Rs.2,00,000/- had been taken by her from Balvinder Singh. The cross-examiner also asked her whether she had executed a receipt in favour of Balvinder Singh to which she replied in negative. A suggestion was given to the complainant that there was some transaction of loan between Balvinder Singh and the accused to which she replied that she was not aware of any such transaction. It was also suggested to her that Balvinder Singh is a Money Lender and that he has licence of Money Lending business, which suggestion, she denied.

9 A suggestion was also given to the complainant that the actual transaction was between Balvinder Singh and the accused, and that it was necessary for the said Balvinder Singh to have filed a complaint against the accused. This suggestion was also denied by the complainant.

10 The accused examined himself in his defence. According to him, in the year 2003, he misplaced three cheques from the cheque book in respect of his bank account in Abhyudaya Co-operative Bank, Panvel Branch. According to him, the cheque which was dishonored is one of the said three cheques. In his

cross-examination, he claimed that he had informed the bank of misplacing of the cheque book, and that after taking penalty from him, the bank had closed this account. He admitted that he had not given any "stop payment" instructions with respect to the misplaced cheques. He also examined one Mr.Pramod Bhosale, clerk working in the Abhyudaya Co-operative Bank as a witness in his defence. This witness was examined to show that the account in question was closed in the year 2003. In the cross-examination, this witness admitted that the accused had not reported missing of the cheques which is contrary to the version of the accused.

11 I have carefully gone through the impugned judgment.

12 The learned Magistrate framed only one point for determination which reads as follows :-

> "Does the complainant prove that the accused has committed the offence under Section 138 of Negotiable Instruments Act ?"

The Magistrate answered the same in negative. Since such a composite point for determination was framed, (which defeats the very object behind framing points for determination) the precise reasoning of the Magistrate leading to acquittal is not very clear.

13 In paragraph no.8 of the impugned judgment, the Magistrate observed the case of the accused to be that he had no transaction with the complainant, and that, it was the case of the

complainant herself that she had taken amount from Balvinder Singh and given it to the accused. The Magistrate observed that the complainant had not examined Balvinder Singh who had paid the amount to the accused. The Magistrate also observed that according to the complainant, when the loan amount was advanced to the accused, apart from Balvinder Singh, the complainant's son was also present, but she had not examined her son as a witness. This observation was made inspite of the submission made by the learned counsel for the complainant that the son was not available as he had gone abroad. The Magistrate considered non-examination of Balvinder Singh as the non-examination of the most important witness which, in his opinion, weakened the case of the complainant. The Magistrate observed that the alleged transaction was between the accused and Balvinder Singh, and the complainant was acting only as middleman. It would be appropriate to reproduce the reasoning of the learned Magistrate appearing in paragraph no.8 of the judgment.

> "It appears that the alleged transaction was in between accused and Balwinder Singh and the complainant was acting only as a middleman. In fact, it appears that there is no any privity of contract in between the complainant and the accused."

14 This approach of the Magistrate does not seem to be proper or in accordance with law. It was not necessary to go into the nature of the transaction or understanding between Balvinder

Singh and the complainant, inasmuch as the accused had admittedly issued a cheque in favour of the complainant and not in favour of Balvinder Singh. The concept of any privity of contract, as introduced by the Magistrate was not called for, as the question was whether the cheque in question was issued by the accused in discharge of a legally enforceable debt or other liability. In ascertaining this, the presumption contained in section 139 of the Negotiable Instruments Act was required to be kept in mind, but a perusal of the impugned judgment shows that the same was not kept in mind or, at any rate, not given due weight by the learned Magistrate in appreciating the evidence.

15 It is not that the Magistrate came to the conclusion that there was no transaction at all between the parties; but he came to the conclusion that the transaction was '*between Balvinder Singh and the accused*'. Even if that would be so, since the accused was not required to pay the amount to Balvinder Singh, but to the complainant, the consideration that the transaction was between Balvinder Singh and the accused was not relevant in deciding whether the cheque had been issued in discharge of legally enforceable debt or other liability. It was not the case that in respect of the alleged transaction between him and the said Balvinder Singh, the accused had paid, or was required to pay anything to the said Balvinder Singh.

16 The learned counsel for the appellant also pointed out that the observation made by the Magistrate in paragraph no.9 of the impugned judgment which reads as “promissory note on the record is also issued in the name of Balvinder Singh”, is not

correct. It is pointed out that the promissory note has been issued jointly in the name of the complainant and the said Balvinder Singh. On examining the promissory note, copy of which is at Exhibit-A, I find that this claim made by the learned counsel for the complainant is correct.

17 I find that the accused has been evasive in his evidence. Though he spoke about the cheques having been 'misplaced' and claimed that he had not issued any cheque or promissory note in favour of the complainant, he avoided to say whether the signature on the cheque and/or on the promissory note was his or not. He also avoided to say whether, according to him, when the cheques were misplaced, they were already signed by him. In the cross-examination of the complainant also, he did not put forth a case that the signature on the promissory note and more particularly on the cheque, was not his. In fact, he admitted of having entered into a transaction, but claimed that it was with Balvinder Singh. A suggestion was given by the accused in the cross-examination to the effect that '*it was Balvinder Singh who was required to file a complaint in respect of the dishonor of the cheque*'. This indicates and amounts to an admission on the part of the accused of having entered into some money transaction.

18 In my opinion, the Magistrate has not given due and proper weight to the presumption contained in section 139 of the Negotiable Instruments Act while appreciating the evidence. The said presumption is statutory and when there was no denial of the accused having signed the cheque, to render it probable that the cheque might have been signed by the accused without any

amount being due and payable by him to the complainant, sounder grounds were necessary. The Magistrate simply took into consideration the assertions of the accused to the effect that the complainant had misused the cheque, without there being any basis for accepting such assertions. Even if the accused is not required to prove his assertions, he is required to create a reasonable doubt about the truth of the complainant's case, which is possible only if the assertions are considered as '*plausible*'. The accused did not dispute his signature on the cheque, and took various inconsistent defences one of which was that 'the transaction was not with the complainant but was with Balvinder Singh' and that therefore, 'examining Balvinder Singh was necessary'.

19 Upon re-appreciation of the evidence that was adduced during the trial, I find that the complainant had succeeded in proving the case against the accused. The accused had not been able to create a reasonable doubt to the effect that the cheque might not have been issued in discharge of a legally enforceable debt or other liability. This was a case where keeping in mind the presumption under section 139 of the Negotiable Instruments Act, the accused ought to have been convicted.

20 I have heard Mr.M.S.Mohite, learned counsel for the complainant, in respect of the sentence that ought to be imposed upon the accused. In my opinion, a sentence of find would meet the ends of justice.

20 Appeal is allowed.

21 The impugned judgment and order of acquittal is set aside.

22 The respondent no.1 is convicted of an offence punishable under section 138 of the Negotiable Instruments Act, and is sentenced to pay a fine of Rs.2,50,000/-, in default to suffer Simple Imprisonment for a period of three months.

23 If the fine is realized, an amount of Rs.2,00,000/- therefrom shall be paid to the appellant as compensation.

24 The respondent no.1 shall pay the amount of fine within a period of two months from today, failing which the learned Magistrate shall take appropriate further steps in the matter.

25 Appeal is disposed of accordingly.

(ABHAY M.THIPSAY, J)