IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.273 OF 2015

Shri.Sudam Chimaji Thorat)
Age:52 yrs. Occ: Business,)
residing at 203, Vighnahar Co-op. Housing)
Society Ltd. , Godapdev Road,)
Mumbai – 400033.).. Applicant
(Orig.Compltt)

vs

1. Mr.Shashikant S.Darandale)
Proprietor of M/s.Sign Tech,)
501, Neelkanth Corner, Sector No.2,)
Sanpada (E), Navi Mumbai-400705.)

2. State of Maharasahtra).. Respondents
(Respt no.1/Ori.accused)

Mr.Kishor Bhatia, for the Applicant

Mr.A.S.Khandeparkar i/b. Mrs Mansi S.Bane, for Respondent no.1

Mrs.Rajashree V.Newton Addl.Public Prosecutor, for Respondent no.2.

CORAM: ***G.S.KULKARNI,J***

JUDGMENT RESERVED ON: ***7th July, 2016***
JUDGMENT PRONOUNCED: ***19thJuly,2016***

Judgment:-

1. The Applicant /original complainant by this application seeks leave to file an appeal under section 378 (4) of the Criminal Procedure Code, 1973 against the judgment and order dated 30

April 2015 passed by the learned Metropolitan Magistrate in Criminal case No.15885/SS/2012 acquitting respondent no.1 of the offence punishable under section 138 of the Negotiable Instruments Act.

2. The applicant's case before the trial Court was that in the month of March 2009 the respondent no.1 – accused, had approached the applicant for sale of his flat being Flat no.501, Neelkanth Corner, Sector 2, Sanpada (East), Navi Mumbai, as respondent no.1 was in need of urgent cash. Though the market price of the said flat was Rs.40,00,000/- and the applicant was willing to pay the entire consideration in cash, it was agreed that the respondent no.1 would sell the flat at consideration of Rs.36,00,000/-. This proposal of the Respondent no.1 was accepted by the Applicant and the Applicant showed willingness to arrange for cash. The Applicant paid in cash of Rs.30,50,000/ to Respondent no.1 on 5 November 2009 in the presence of one Mr.Vinod Mahadik and Mr.Sampath Shirole and the Respondent No.1 accepted and acknowledged receipt of the said amount. The Respondent no.1 also assured handing over of possession of the flat within one month after the balance consideration of Rs.5,50,000/- was received. The Applicant was willing to make payment of Rs.5,50,000/-. However,

Respondent no.1 with malafide intentions changed his version and did not complete the transaction. The Applicant therefore sought return of the amount of Rs.30,50,000/- from Respondent no.1. Respondent no.1 after lot of persuasion issued a cheque for Rs.30,50,000/- on 27 July 2010 drawn on Bank of Maharashtra. The respondent no.1 however requested the Applicant not to deposit the said cheque. Further two more cheques of Rs.2,50,000/- and Rs.1,50,000/- were handed over and again requested the applicant not to deposit the said cheques. Finally, Respondent no.1 made a payment of a part amount of Rs.15,50,000/- by cheque and cash, and a document to that effect was prepared on a stamp paper of Rs.100/- in the handwriting of respondent no.1 in the presence of two witnesses namely one Mr.Vinod Mahadik and Mr.Dashrath Thorat, confirming the said receipt. A photocopy of the said document was handed over to the applicant and the original copy of the same was retained by respondent no.1 with an understanding that the original copy would be returned after making full and final payment. Thereafter, for the balance amount respondent no.1 issued one cheque bearing No.089794 of Rs.15,00,000/- dated 23 October 2012 drawn on Bank of Maharashtra, Sion Branch in favour of the applicant.This cheque was deposited by the applicant with his bankers “Satara Sahakari Bank, Ghodapdeo Branch on 23 October 2012.The same was dishonoured with an endorsement “funds insufficient” and was returned with bank memo dated 27 October 2012. A legal notice dated 1st November 2012 was addressed to the respondent no.1 and forwarded by registered post calling upon to make the payment which Respondent No.1 did not hand over. The applicant lodged a complaint in question prosecuting the respondent no.1 under section 138 of the Negotiable Instruments Act. Respondent No.1 appeared before the trial court in pursuance of a process being issued and pleaded not guilty.

3. Before the trial Court in support of the complaint, the applicant examined himself and one Mr.Vinod Ganpat Mahadik (PW 2) and Mr.Sampat Balasahab Shirole (PW 3). The respondent no.1 in defence examined himself (DW 1) and one Mr.Nitin Chandrakant Oza, Branch Manager of Bank of Maharashtra Sion Branch (DW2).

4. As can be seen from the evidence of Respondent No.1, his defence is that the Applicant was running a money lending business without licence. During the period 2006 to 2009, Respondent No.1 had taken amounts from the Applicant for about 6

to 7 times. To give such money, the Applicant used to take blank signed cheques and blank stamp papers from Respondent No.1. Even on repayment of money, the Applicant used to avoid returning the blank signed cheques and the blank signed stamp papers. About 3 to 4 such stamp papers and 6 to 7 cheques signed by Respondent No.1 were lying with the Applicant despite repayment of entire money taken from the Applicant with interest. As regards the cheque in question, the case of Respondent No.1 is that there was no lawful debt or liability of Respondent No.1 towards the Applicant. The entire story as stated in the complaint was false and concocted. There was no transaction whatsoever to sell the flat of Respondent No.1 to the Applicant. Respondent No.1 in his deposition ('Exhibit 58) has stated that in fact in September,2009 one Khandu Kashid and his son Ganesh Kashid (for short 'Kashid') were in need of finance. Respondent No.1 introduced them to the Applicant, the Applicant was ready to give money to Kashid if Respondent No.1 was ready to stand as a guarantor. Accordingly, money was given to Kashid after Respondent No.1 signed one blank stamp paper and blank signed cheque and gave the same to the Applicant. Kashid paid to the Applicant interest only for two months and, therefore, the interest for the whole of the year was paid by Respondent No.1 to the Applicant.

After one year, as further interest was not paid, the applicant and Vinod Mahadik-P.W.2 came to Respondent No.1's office and behaved disorderly and gave threats to Respondent No.1 which led Respondent No.1 to file a police complaint against the Applicant and P.W.2 – Vinod at Trombay police station. In October,2011 the said Kashid paid an amount of Rs.15,50,000/- out of Rs.30,50,000/- to the Applicant and sought time of one year for repayment of balance amount. The Applicant extended the time for one year. However, Kashid again sought further six months time. Respondent No.1 on behalf of Kashid requested the Applicant to extend time limit. However, the Applicant continued demanding the amount from Respondent No.1. On 12 October 2012 at about 8 p.m., the Applicant alongwith Vinod Mahadik-P.W.2 and two unknown ladies came to the residence of Respondent No.1 in his absence. Applicant and P.W.2 misbehaved with his wife and children and entered inside his house. On being so informed by his wife, Respondent No.1 contacted the police control room and two police personnel visited Respondent No.1's residence. Respondent No.1's wife also lodged a police complaint to that effect at the Turbhe Police station.

5. Respondent No.1 has stated in his deposition that the

Applicant has prepared a false affidavit (Exhibit 53) on blank signed papers which was in his custody. Respondent No.1 has deposed that the Applicant has filed a false case on the basis of blank signed cheque which was in his custody and in fact the subject cheque on record at 'Ex.16' was of the series 2006. This cheque book was issued to Respondent No.1 by the Bank of Maharashtra in the year 2006 and the corresponding cheques numbers of the same series were honoured in the year 2006. The original passbook to that effect was placed on record. The applicant and his nephew Mr.Sandeep Waykar were in the money lending business and a similar complaint was filed against Respondent No.1 by said Mr.Sandee Waykar in the Court of Metropolitan Magistrate, 56th Court, Mazgaon, Mumbai in C.C.No.134/SS/2012 in which Respondent No.1 came to be acquitted by a judgment as placed on record at Exhibit 62. Respondent No.1 also deposed that he has appropriately replied to the statutory notice dated 1 November 2012 (Exhibit 63). Respondent No.1 was cross examined on behalf of the Applicant. However, as regards the evidence of Respondent No.1 that the Applicant was running a money lending business without lincence, there is no cross examination. In the cross examination, Respondent No.1 has categorically denied that Respondent No.1 intended to sell the said flat at any point of time. It is denied that Respondent No.1 had approached the complainant and that there was an agreement to sell the flat for an amount of Rs.36,00,000/-. Respondent No.1 categorically denied that as he was in need of money, and that the Applicant had paid him an amount of Rs.30,50,000/- as part payment under the said transaction on 5 November 2009 in the presence of Vinod Mahadik -P.W.2 and Sampat Shirole-P.W.3. Respondent No.1 further denied that he was to give possession of the flat to the Applicant on receiving balance amount of Rs.5,50,000/- on or before 5 December 2009 as alleged by the Applicant. He also stated that he was not knowing Vinod Mahadik – P.W.2.

5. Respondent No.1 examined Nitin Chandrakant Oze, the Branch Manager (D.W.2) who in his deposition on the basis of the banker's books of account, confirmed that the cheque in question being Cheque No.89794 was from the series of the cheques issued on 11 July 2006 and that after the cheque book containing the cheques commencing from series nos.89781 to 89800 were issued, the bank issued 14 cheque books to Respondent No.1. This witness was cross examined on behalf of the Applicant. However, except for the fact that Respondent No.1 had maintained account with the said

bank and that there is no time limit to use any of the cheques, nothing more of relevance can be seen in the cross examination.

6. The Applicant examined himself as P.W.1. In the cross examination the Applicant stated that in the year 2006 he was getting yearly income of Rs.7 to 8 lakhs and that he can produce the income tax returns. On a question as to how the Applicant raised the amount of Rs.30,50,000/- to be paid for the alleged transaction to purchase the house of Respondent No.1, the Applicant stated that he had taken the amount from his brother, also pledged the golden ornaments and certain other borrowings from his brother etc., and certain amount was taken from his business. The Applicant also admitted that in the year 2009, he has not shown any such amount in the Income Tax returns as the amount was paid to Respondent No.1 in cash. Respondent No.1 also admitted that he has not seen the papers of flat in question before making the deal as according to him, Respondent No.1 had stated that the papers were in the bank, as Respondent No.1 had taken a loan from the bank. In the cross examination, he stated that the flat belongs to Respondent No.1, however when confronted with the document of the flat namely agreement dated 31 August 2001 (Exhibit 22) he admitted that the

flat stands in the joint name of Respondent No.1 and his wife. Respondent No.1 further admitted that he knew Respondent No.1 and he had miscellaneous monetary transactions with Respondent No.1 and sometimes Respondent No.1 used to take hand loan from him upto Rs.50,000/- and used to return it. He admitted that the amount was not shown in the income tax returns. He denied that he was dealing in the business of money lending and he used to advance amount to accused and his friend. In the cross examination, the Applicant was confronted with a copy of the document (Exhibit 54), which was on a stamp paper of Rs.100/- which is a declaration on the part of the Applicant which states that an amount of Rs.30,50,000/- was payable by Respondent No.1 to the Applicant and that out of the said amount, Rs.15,50,000/- was received by him in the following manner:-

Cheque No.	Amount	Date	Bank
076377	Rs.2,00,000/-	29.07.11	NKGSB-Deonar
078776	Rs.5,00,000/-	20.10.11	---- “ ----
084818	Rs.4,65,000/-	20.10.11	Maharasahtra Bank, Pa
–	Rs.3,85,000/-	20.10.11	Cash
	Rs.15,50,000/-		

Applicant has stated that the balance amount of Rs.15,00,000/- has been agreed to be returned by Respondent No.1 within one year i.e. by 20 October 2012 and after the return of the said amount, the signed stamp papers which are in the custody of the Applicant and the cheque of Rs.30,50,000/- and other documents would be returned by the Applicant to Respondent No.1. The Applicant further stated that in future he would not threaten Respondent No.1 of any legal consequence. The execution of the document was witnessed by Mr.Dashrath B. Thorat and Mr.Vinod Mahadik (P.W.2). In his deposition, he has stated that this document was in the handwriting of Respondent No.1 and that it was signed by himself, Respondent no.1-Dashrath Thorat and Vinod Mahadik-P.W.2. He admitted the contents of the said document. In this regard in the cross examination he also admitted that even in this document there was no mention about the transaction in respect of the flat as alleged in the complaint.

7. P.W.2 Vinod Mahadik in his affidavit of examination in chief stated that he knew Respondent No.1 as he was in the relation of the Applicant and that they became friend for last 6 to 7 years. What is of relevance in examination in chief is the following statement:-

> "4. That on 5.11.2011 Mr.Sudam Thorat had made payment of Rs.30,50,000/- to Mr.Shashikant Darandale in my presence in cash and affidavit in this regard was executed by Mr.Shashikant Darandale, I signed the same as witness and Mr.Sampat Sirale also

> signed as witness along with me and promised to hand over possession within one Month, on receipt of remaining amount.”

8. In cross examination, P.W.1 Vinod Mahadik admitted that there was dealing between the Applicant and Respondent No.1 in the year 2008 or 2009, but he did not remember the month. In the cross examination, he further confirmed the statement in the affidavit that the payment was made by the Applicant on 5 November 2011.

9. In the affidavit of evidence of P.W.3 – Sampat Bala Shirole, he stated that there was a deal about purchase of flat of Respondent No.1 by the Complainant in the year 2009 for the consideration of Rs.36,00,000/- and for that the Applicant had paid an amount of Rs.30,50,000/- to the accused by cash on 5 November 2009 and that on 5 November 2009 Respondent No.1 executed the writing on the stamp paper of Rs.100/- mentioning that Respondent No.1 had received Rs.30,50,000/- in cash before executing the said writing. He stated that Respondent No.1 promised to the applicant that he would hand over possession of the flat within one month from execution of the said document on receipt of balance amount of Rs.5,50,000/- from the Applicant. He stated that he and Vinod Mahadik (P.W.2) had signed the document as witnesses. In the cross

examination, P.W.3 made a statement that talks as regards the flat took place on 5 November 2009 and an amount of Rs.5,50,000/- was paid on that date.

10. In the statement of Respondent No.1 recorded by the Trial Court under Section 313 of the Code of Criminal Procedure, in reply to the question as to what Respondent No.1 had to say on the document at Exhibit 54 prepared on stamp paper of Rs.100/- where Respondent No.1 agreed to make payment of Rs.15,00,000/- out of Rs.30,50,000/- within a period of one year, the Respondent no.1 stated that the said document was prepared as per the instructions of one Mr.Khandu Kashid and his son Ganesh Kashid to whom the applicant had given an amount of Rs.30,50,000/- and for which Respondent No.1 was a guarantor. He stated that an amount of Rs.15,50,000/- was paid by Khandu Kashid and Ganesh Kashid to the Applicant through him and accordingly, the said document as executed by the Applicant was in his handwriting. He categorically stated that the said amount was not paid by him for any lawful debt on his part payable to the Applicant. In reply to question No.27, Respondent No.1 denied that the cheque in question was issued by Respondent No.1 in discharge of his liability.

11. Having considered the evidence on record, it is clear that the applicant was conducting a money lending business without licence and that in the past he had advanced money to Respondent No.1 five to six times as is seen from his evidence. The document at Exhibit 54, a copy of which is produced at the instance of the Applicant, makes the position further clear that certain blank cheques and stamp papers which were signed by Respondent No.1 was in the custody of the Applicant which the Applicant had agreed to return the same after the financial dealing between the parties are over. The evidence which is on record does not inspire any confidence of the case of the Applicant in the complaint that there was a transaction between the parties to sell a flat belonging to Respondent No.1 and his wife to the Applicant and for that purpose any amount was paid by the Applicant to Respondent No.1. In fact the document at Exhibit 54 dated 26 October 2011 on the basis of which the Applicant asserts existence of transaction is completely silent in that regard. Moreover the said document supports the case of Respondent No.1 that the Applicant was conducting a money lending business without licence and in regard to certain previous borrowing, the Applicant had taken blank signed cheque and blank signed stamp paper from Respondent No.1. The document categorically mentions

about these blank cheques and blank stamp papers. The Applicant has also stated that he has filed income tax returns, and in the year 2006 and 2009 his yearly income was Rs.7 to 8 lakhs. The Applicant failed to bring any evidence to show that as to how the amount of Rs.30,50,000/- was paid in cash by the Applicant to Respondent No.1 on 5 November 2009. The Applicant has not examined any witness to prove the borrowings of this large amount of money. Moreover, the Applicant has admitted that he has not reflected either these borrowings or the payment made to Respondent No.1 in the income tax returns. The evidence thus clearly reveals that the story of sale of flat and that any amount was paid towards the same to Respondent No.1 was false as it could not be proved by the Applicant. The cumulative effect in appreciation of the evidence is that the Applicant failed to discharge his burden under Section 138 of the Negotiable Instruments Act to prove that there was any lawful debt payable by Respondent No.1 in respect of the transaction of the sale of the flat as alleged by the Applicant in the complaint. Further more, it is clear from the evidence which has come on record that the cheque book in question pertaining to cheque in question was itself of the year 2006 and that 14 cheques were issued thereafter.

12. The case of Respondent No.1 that in September,2009 one Khandu Kashid and his son Ganesh Kashid had borrowed the amount from the Applicant and Respondent No.1 stood guarantor is also required to be believed as there is no cross examination on this as also nothing contrary has come in the cross examination or in the evidence of the Applicant, and therefore these facts would be required to be considered as proved.

13. In view of the above discussion and taking into consideration the substantive evidence on record, I do not find that there is any perversity factual or legal in the findings as recorded by the Trial Court in dismissing the complaint of the Applicant.

14. Accordingly, the Application is rejected. No order as to costs.

(G.S.Kulkarni,J.)