

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

905 CRIMINAL APPEAL NO. 487 OF 2017

DEVGIRI NAGRI SAHAKARI PATH-SANSTHA
MARYADIT, AURANGABAD THROUGH
ANIL S/O. KACHRU SULTANE

.. Appellant

VERSUS

SMT. MEENABAI ASHOK SURADKAR

.. Respondent

...

Advocate for the Appellant

:

Shri S.A. Gaikwad

...

CORAM : P. R. BORA, J.

Dated: November 09, 2017

PER COURT :

1. Heard the learned Counsel for the appellant. Though the respondent is duly served, has not appeared in the matter.

2. The appellant has filed the present appeal against the Judgment and order passed by the Court of Judicial Magistrate, First Class at Aurangabad in Summary Criminal Case No.613 of 2011 decided on 28.07.2015.

3. The appellant is a Co-operative Society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960. The appellant - Society had filed the complaint against the present

respondent under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'N.I. Act'). It was the case of the appellant in the said complaint that, the cheque issued by the respondent in favour of the appellant - Society for the amount of Rs.31,739/- got dishonoured because of the insufficient funds in her account on which the said cheque was drawn. According to the appellant – Society, the cheque as aforesaid was issued by the respondent towards the repayment of the loan, which was obtained by the respondent from the appellant- Society. Before filing of the aforesaid compliant, the statutory notice as provided under Section 138 of the N.I. Act was issued by the appellant - Society and was duly served upon the respondent. As is revealing from the pleadings, no reply was given to the said notice by the respondent. Since, even after receipt of the said notice, the cheque amount was not paid by the respondent, the appellant - Society filed the aforesaid compliant against the respondent under Section 138 of the N.I. Act.

4. In order to substantiate the contentions raised in the complaint, one witness was examined by the appellant - Society and necessary documents were placed on record.

5. The respondent neither entered into the witness box nor

examined any witness in her defence.

6. The learned Magistrate after having assessed the oral as well as documentary evidence brought on record, rejected the complaint filed by the appellant - Society. Aggrieved by, an application was preferred by the appellant - Society before this Court seeking leave to appeal against the said Judgment. Vide order passed on 4th October, 2017, the leave was granted to the appellant - Society and the present appeal came to be registered in pursuance of the said order.

7. Perused the impugned Judgment. While deciding the complaint filed by the appellant -Society, the learned Magistrate had framed four points. I am reproducing the said points herein below with the findings thereon recorded by the learned Magistrate.

SR. NOS.	POINTS	FINDINGS
1)	Does complainant society prove that, it has complied with all the necessary ingredients of the offence ?	.. In the affirmative
2)	Does the complainant society prove that the subject cheque is drawn by the accused towards the discharge of her legally enforceable debt ?	.. In the affirmative

3)	Whether the complaint is lawfully instituted?	.. In the negative.
4)	What order ?	As per final order.

8. From the issues framed and the findings recorded as above by the learned Magistrate, it is quite evident that, the complaint has been dismissed on the count that, the complainant has failed to prove that the complaint was lawfully instituted. While answering point no.3, the discussion made by the learned Magistrate is thus:

“14. The learned Counsel for the accused has mainly challenged the maintainability of the complaint in absence of valid authority in favour of the complainant, Mr. Manoj Pasare. The prosecution is launched by the complainant by virtue of a resolution dated 14.10.2004, passed in his favour by the Board Committee of the complainant society. The copy of such resolution dated 14.10.2004 is placed on record, it is not proved as the provisions of the Evidence Act. This true copy of the extract of the resolution dated 14.10.2004 is signed by the Executive Director of the complainant society. Complainant has admitted in his cross-examination that there is no resolution passed in his favour authorizing him to issue true copies of the entries in the proceedings books of the complainant society which is governed by the Maharashtra Co-operative Societies Act, 1960 and Rules, 1961.

15. According to Section 40 of the Maharashtra Co-operative Societies Act, 1960, a copy of any entry in any book, register or list, regularly kept in the course of business and in the possession of a society, shall, if duly certified in such a manner as

may be prescribed, be admissible in evidence of the existence of any entry and shall be admitted as evidence of the matters and transactions therein recorded in every case where, and to the same extent to which, the original entry would, if produced, have been admissible to prove such matters. Thus subject to exceptions, a Co-operative Society cannot be compelled to produce any of the society's books in any legal proceedings in which it is not a party.

16. However, this provision must be construed along with Rule 34 of the Maharashtra Co-operative Societies Rules, 1961. As per Rule 34, for the purpose of section 40, copies of any entries referred to in that section may be certified by any officer of the society duly authorized in that behalf by the committee under the seal of the society. It is pointed out by the learned Counsel for the accused that though the document exhibit 15 bears the seal of complainant society, it never bears the date on which the copy of the extract is prepared and the name of the officer who has signed the document as he has such authority to do so. Therefore, in conclusion it is very much clear that the document exhibit 15 is not at all admissible in evidence and is not a valid authority favouring Mr. Manoj Pasare to conduct the prosecution against the accused and to depose in the instant case on behalf of the complainant society. Hence, I record my negative finding as to Point No.3.”

9. According to Shri Gaikwad, learned Counsel for the appellant - Society the finding recorded by the learned Magistrate is erroneous and the complaint filed by the appellant-Society could not have been dismissed on the aforesaid ground.

10. The learned Counsel submitted that, in the case of **Bicholim Urban Co-operative Bank Limited Vs. Anil Madhusudan Sawant & another**, 2015 All M.R. (Cri) 1532, similar controversy has been dealt with by the learned Single Judge of this Court. In the said matter also, the learned Judicial Magistrate, First Class had held that, the cheque was issued towards the discharge of legal liability and that the legal notice issued by the complainant to the accused was received by him. It was also held that, all the ingredients of Section 138 of the N.I. Act were established. However, still the complaint was dismissed holding that, PW No.1 had no authority to depose. Aggrieved by, the appeal was preferred before this Court. The learned Single Judge of this Court relying on earlier Judgment of this Court in the case of **Central Bank of India Vs. Tarseema Compress Wood Manufacturing Company and others**, AIR 1997 **Bombay 225** set aside the finding recorded by the Magistrate that, the complaint was liable to be dismissed on the ground that PW No.1 who deposed on behalf of the complainant had no authority to depose. I deem it appropriate to reproduce herein below para nos.9 and 10 of the said Judgment, which are relevant for the purposes of deciding the present appeal.

"9. A perusal of the affidavit-in-evidence of PW 1 reveals that she had specifically

stated in paragraph 2 thereof that she was duly authorised to depose in the matter and that she was producing along with the affidavit a certified copy of the resolution. Even in the cross-examination, she had specifically stated that she had produced the resolution giving her powers to depose in the matter. It is further seen that annexed to the affidavit-in-evidence of PW1, there is extract of resolution passed in the Board of Directors meeting held on 31/08/2010 whereunder PW1 has been authorised to sign and present the pleadings and affidavits and also to depose and give evidence in all criminal cases as well as civil suits, etc. First of all, therefore, it is wrong to say that no authority was produced by PW1 for deposing in the matter.

“10. Be that as it may, in the case of “Central Bank of India” (supra), this Court has held that anybody can come and give evidence in the Court, provided that he is acquainted with the facts of that case and no power of attorney or authorisation is necessary for any witness to give evidence in the Court. In the present matter, the complaint was under Section 138 of the N.I. Act. The entire case depended on documentary evidence as well as the records of the complainant-Bank. A perusal of the testimony of PW1 reveals that she deposed on the basis of records of the Bank. The ratio held in the case supra should apply to Civil cases as well as to the Criminal Cases. Therefore, for the aforesaid reason also, it cannot be said that the testimony of PW1 cannot be considered.”

11. In the present matter, an objection was that, the copy of the resolution dated 14.10.2004 whereby an authority was given to Shri Manoj Pasare to file the complaint under Section 138 of the N.I. Act was not proved as per the provisions in the Evidence Act. The

learned Magistrate, therefore, held the said document inadmissible and consequently held that the complainant-Society failed in proving that, Shri Manoj Pasare was authorized to conduct the prosecution against the accused and to depose in the said case on behalf of the complainant - Society.

12. Perusal of the impugned Judgment reveals that, after having considered the evidence brought on record by the complainant – Society, the learned Magistrate has recorded an affirmative finding holding that, the complainant – Society has proved that, it has complied with the necessary ingredients to prove the offence under Section 138 of the N.I. Act against the accused. Insofar as the objection as about the competence of Manoj Pasare to give evidence in the case for and on behalf of the complainant – Society is concerned, the same is liable to be rejected in view of the law laid down by this Court in the case of **Central Bank of India Vs. Tarseema Compress Wood Manufacturing Company and others** (cited supra) and **Bicholim Urban Co-operative Bank Limited Vs. Anil Madhusudan Sawant & another** (cited supra). The accused has not disputed that, Manoj Pasare is an employee of the complainant – Society. It is also not disputed that, the said Manoj Pasare is acquainted with the facts of the case. It is further not in dispute that,

the complaint filed against the respondent is entirely based on the documentary evidence as well as the record of the complainant – Society. Manoj Pasare has undisputedly deposed on the basis of the record of the complainant – Society. In view of the above, the finding recorded by the learned Magistrate that, there is no valid authority favouring Shri Manoj Pasare to depose in the case on behalf of the complainant – Society cannot be sustained and deserves to be set aside.

13. Now the only ground remains that, the complainant – Society did not legally prove that, Manoj Pasare was having valid authority to file and prosecute the complaint against the accused for the offence under Section 138 of the N.I. Act.

14. As is revealing from the record the resolution dated 14.10.2004 authorises Manoj Pasare to file and prosecute the complaints under Section 138 of N.I. Act on behalf of the complainant – Society. The infirmity as has been noticed by the learned Magistrate is that, the Executive Director of the complainant – Society, who has issued the true copy of the said resolution was not authorized by the complainant – Society to issue the said true copy. It is thus evident that, though the complainant – Society has

sufficiently proved that, the subject cheque was issued by the accused towards the legally enforceable debt and though has further proved that, the said cheque was dishonoured because of the insufficient funds in the account of the drawer and further that, though the statutory notice under Section 138 of the N.I. Act was issued to the accused and was duly served upon her, she failed to pay the amount of the cheque, the Magistrate has dismissed the complaint on the technical ground that, the resolution placed on record is not duly proved by the complainant – Society.

15. In the aforesaid circumstances, it appears to me that, it would be appropriate to remand the case to the learned Magistrate by setting aside the Judgment of the acquittal and direct the learned Magistrate to decide the issue no.3 afresh by allowing the complainant-Society to place on record the further necessary evidence i.e. the copy of the resolution dated 14.10.2004 issued by the person having authority to issue the same. In the result, the following order is passed.

ORDER

i) Impugned Judgment and order passed by Judicial Magistrate, First Class at Aurangabad in Summary Criminal Case No.613 of 2011

is quashed and set aside.

ii) Summary Criminal Case No.613 of 2011 is restored to the file of learned Judicial Magistrate, First Class at Aurangabad.

iii) The learned Judicial Magistrate, First Class at Aurangabad shall permit the Complainant-Society to place on record the copy of the resolution dated 14.10.2004 certified to be the true copy by the person duly authorized to certify the same to be the true copy and to adduce the necessary evidence limited to the said extent. Need not to be stated that, the respondent - accused would have an opportunity to rebut the said evidence.

iv) After recording of such evidence, the learned Magistrate shall decide point no.3 afresh on its merits and consequently pass the final order in the complaint.

v) Criminal Appeal stands allowed in the aforesaid terms.

(P. R. BORA, J.)