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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 264 OF 2003

Venilal C. Savak, Hindu Adult
Indian Inhabitant of Bombay
having his address at 13 Saideep
Near Post Office, Daulat Nagar,
Borivali (East), Bombay – 400 066. … Appellant.
(Orig. Complainant)

V/s.

1. Mr. Upin Shamji Chheda
2. Ramila Upin Chheda &
3. Bupendra Shamji Chheda

All of Bombay Indian Inhabitants
having their address at A-1,
Industry Annexe, M. Vasanji Road,
J.B. Nagar, Andheri (East),
Bombay - 400 059.

4. State of Maharashtra. ... Respondents.
(Orig.Accused 1,2 & 3)

Mr. Ashutosh Kaushik i/b. Mr. R.C. Kaushik for the Appellant.

None for the Respondents.
Mr. P.H. Gaikwad-Patil, Asstt. Public Prosecutor for the State.

CORAM : N.M. JAMDAR, J.

DATE : JULY 18, 2017.

<u>Oral Judgment</u> :-

By this Appeal the Original Complainant has challenged the judgment and order passed by the Metropolitan Magistrate, Borivali, Mumbai dated 20 January 1999 acquitting the Respondent – accused of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. The Appellant – Original Complainant filed a complaint in the Court of Metropolitan Magistrate, Borivali on 26 February 1993. According to the Appellant, a sum of Rs.50,000/- was advanced as a loan to the Respondents – Accused. The Respondents – accused did not pay the entire amount of Rs.50,000/- and only paid an amount of Rs.25,000/-. According to the complainant, ultimately the accused issued five cheques of Rs.5,000/- dated 1 August 1992, 8 August 1992, 15 August 1992, 22 August 1992 and 29 August 1992. According to the complainant, the cheques were issued by Accused No.3 to adjust the amount against the account of Nirmal Agency. Since the cheques issued were dishonored, a notice was issued by the complainant, and thereafter a complaint was filed. The complainant led his oral and documentary evidence. The learned Magistrate, after considering the oral and documentary evidence, came to the conclusion that the complainant had narrated different versions in respect of advancement of the loan and that the link between the complainant, Accused Nos.1 and 2, and the

Accused No.3 was not established and that the photo-copy of the cheques was placed on record. Accordingly, the learned Magistrate proceeded to pass the impugned order on 28 January 1999.

3. Heard Mr. Kaushik, learned Counsel for the Appellant and Mr. Gaikwad-Patil, Asstt. Public Prosecutor for the State. None appears for the Respondent – accused.

4. The learned Counsel for the Appellant submitted that the Accused No.3, under a covering letter, while forwarding the cheques, had clearly stated that he was re-paying the amounts on behalf of the other accused and the Nirmal Agency. He submitted that these cheques have been admittedly dishonored and therefore, a case for convicting the Respondent – Accused under Section 138 of the Act of 1881 was made out. The learned Counsel submitted that the only ground which the learned Metropolitan Magistrate had held against the complainant was that a photo-copy of the cheque was produced, and not an original.

5. As far as the contention that the only ground held against the Appellant was the production of photo-copy of the cheque, the same is not correct. The learned Magistrate has given other grounds for acquittal as well. The learned Magistrate has noted that different versions have been put forth by the Appellant.

The learned Magistrate has also found that the link between the Accused No.3 and the Appellant – complainant and the other accused, qua any business transaction, was not established.

6. In the cross-examination, the Appellant admitted that he cannot state that the Respondent – Accused No.3 was a partner of the Nirmal Agency with whom the complainant had a business transaction. Merely because the Accused No.3 is a brother of Accused Nos.1 and 2 it will not make him a party to the business transaction between the complainant and the Nirmal Agency, a firm of which only the Accused Nos. 1 and 2 were the partners. Going by the case of the Appellant in the complaint and the oral arguments of the learned Counsel, the Accused No.3 had merely offered to extend his help. As far as the legally enforceable debt between the complainant and Accused No.3 is concerned, there exists none. The cheques have not been issued by the Accused Nos.1 and 2 and therefore, they cannot be held guilty of any offence under Section 138 of the Act of 1881. Though the learned Counsel for the Appellant has sought to separate the role of Accused No.3 from Nirmal Agency, in the case put to the accused under Section 313 of the Code of Criminal Procedure, no such separation of roles is found. The case put to all the accused is that the cheques were issued by the Nirmal Agency and Accused No.3 was a part of the same, which the Accused No.3 had denied. Therefore, the learned

Magistrate had rightly come to the conclusion that different versions were put up by the Appellant.

7. There was no commercial transaction of whatsoever nature between the complainant and Accused No.3. The Accused Nos. 1 and 3 had not issued the cheques. Considering all these aspects, there is no reason to reverse the order of acquittal. Unless the conclusion of the trial court is perverse, the Appeal Court will not readily reverse the order of acquittal. It also cannot be lost sight of that the cheques were issued in the year 1991, and the Appeal has come up for hearing in the year 2017. The Appeal is dismissed.

(N.M. JAMDAR, J.)