

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1242 OF 2018

Prakash Krishna Mardhekar	Petitioner
versus	
The Dattatray Maharaj Kalambe, Jaoli	
Sahakari Bank Ltd; and others	Respondents

Mr.Shantanu Raktate with Mr.amar Parsekar for petitioner.
Mr.Pradeep Gole for respondent no.1.
Mr.Y.M.Nakhwa, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 12th June 2018

PC :

1. The petitioner is aggrieved by the judgment and order passed by Additional Sessions Judge, Mumbai dated 8th February 2018 in Criminal Revision Application No.1344 of 2015.

2. The petitioner was prosecuted for the offence u/s 138 of Negotiable Instruments Act for want of payment of dishonoured cheque of Rs.5,00,000/-. After recording evidence, the petitioner was convicted by the Court of Metropolitan Magistrate, 14th Court, Girgaum, Mumbai for the aforesaid offence and was sentenced to fine of Rs.2,000/-, and in default to suffer simple imprisonment for fifteen days.

3. The judgment dated 17th August 2015 passed by the Trial Court was challenged by the complainant by preferring revision application before the Sessions Court seeking enhancement of

sentence. The Additional Sessions Judge by order dated 8th February 2018 set aside the order of Trial Court and remanded the matter back to the said Court for hearing of the parties on the point of sentence. The petitioner has, therefore, approached this Court by preferring this petition.

4. Learned counsel for petitioner submitted that the Trial Court had taken into consideration the material aspects while imposing sentence and passed the order awarding sentence of fine of Rs.2,000/-. There was no reason for the Sessions Court to interfere in the said order. It is submitted that the complainant had resorted to attachment of the property and auctioning the same, which was sold for Rs.17.60 lakh. The complainant cannot resort to two parallel remedies and taking into consideration aforesaid aspects, the learned Magistrate has passed the order imposing aforesaid sentence. It is submitted that the order passed by the Sessions Court is contrary to law as the petitioner cannot be made to suffer in two different proceedings for the same cause of action. The case of complainant is that the petitioner-accused had obtained loan and for non payment of the loan amount, the requisite proceedings which were referred to by the Trial Court, were initiated by the complainant. Merely on the ground that possession could not be taken, the Sessions Court ought not to have set aside the order of Trial Court. The complainant ought to have resorted to remedies available under civil law.

5. Per contra, learned counsel for respondent-complainant submitted that the order of learned Magistrate is unreasonable and the reasons assigned for awarding the lesser punishment were unwarranted. It is submitted that the accused had issued a cheque of

Rs.5 lakh which was dishonoured. The complainant did resort to the remedy available in law and the property was sold. However, possession of the property could not be taken by the complainant and therefore auction money was returned to the person who had purchased the property in auction. It is submitted that the learned Magistrate failed to take into consideration the documents on record while passing the judgment and order dated 17th August 2015.

6. On perusal of the judgment passed by both the Courts below and documents on record it is apparent that the Trial Court had convicted the petitioner for the aforesaid offence. The cheque was issued for Rs.5 lakh. While imposing the sentence, the Trial Court has taken into consideration the fact that complainant had attached and sold the landed property of the accused for Rs.17.60 lakh and thereby recovered the whole outstanding including amount of cheque. It was observed that the complainant had taken drastic steps to recover the money and now there is no legal liability or any kind of outstanding towards compensation to the complainant. It is further observed that the process of attachment of landed property of the accused was initiated as he was in financial crises. There was no intention of default on the part of accused. The Trial Court although convicted the petitioner, directed that he should undergo sentence of payment of fine of Rs.2,000/- and in default to suffer simple imprisonment for fifteen days.

7. The learned Sessions Judge, however, set aside the order passed by the Magistrate only on the point of sentence and has remanded back the matter to the Magistrate. While passing the said order it was observed that possession of the premises was to be

delivered within thirty days of auction. The material filed on record reveals that though the flat of the accused was auctioned for Rs.17.60 lakh and it was purchased by party, the possession of the flat remained with the accused. Attempts were made to vacate the said premises but it could not be vacated. The documents viz letter and panchanama were on record vide Exhibits-34 and 35 before Trial Court. It was further observed that the auction purchaser could not get the physical possession of the premises. The auction money received by complainant was returned back to the auction purchaser on 29th January 2011 and Rs.2,00,000/- were retained. Learned Sessions Judge, therefore, observed that due to the conduct of the accused the award of the Court could not be executed and the purpose of auction was frustrated. The Trial Court failed to take into consideration Exhibits-34 and 35 while passing the order. In the light of the observations made in the judgment of Sessions Judge and considering the factual aspects, the order passed by the Trial Court was set aside and the matter was remanded back to the Magistrate to hear the parties on the said point. The petitioner had not challenged the judgment of conviction.

8. I do not find any infirmity in the observations of Sessions Court. It is pertinent to note that the Trial Court while passing the judgment of conviction and imposing sentence has not taken into consideration two documents viz Exhibits-34 and 35. The Sessions Court has rightly observed that the auction was frustrated and the amount which was collected out of sale of the said premises was required to be returned to the auction purchaser. In the circumstances, the order passed by the Sessions Court cannot be said to be unreasonable or contrary to law. Ultimately the parties will be

heard on the point of sentence and even if the petitioner is aggrieved by any sentence passed by the Trial Court after the matter is remanded back to the Trial Court, he will be at liberty to challenge the said order by resorting to appropriate remedy. In the circumstances, no case is made out to interfere in the order passed by Sessions Court. The petition, therefore, stands dismissed. The Trial Court is directed to decide the issue in accordance with law.

9. Both the parties will be at liberty to challenge the judgment passed by Trial Court, if it is adverse to them on merits and/or on the point of sentence. The Trial Court shall decide the case as per directions of Sessions Court and in accordance with law. Writ Petition is disposed off.

(PRAKASH D. NAIK, J.)

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