IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 266 OF 2014

Shri Rameshchandra Deochandji Patel … Applicant

Versus

The State of Maharashtra & Anr. … Respondents

Ms. Ankita Chhajed I/by Shamim & Co. for Applicant.
Mrs. M. H. Mhatre, APP for Respondent No.1-State.
Mr. S. N. Naik I/by Mr. R. D. Suryawanshi for Respondent No.2.

CORAM : PRAKASH D. NAIK, J.
DATE : MARCH 9, 2018.

P.C. :-

. The matter is heard finally. This application is for seeking leave to file an Appeal against the Judgment and Order dated 5th May, 2014 passed by the learned Judicial Magistrate First Class, Thane in Summary Criminal Case No. 3810 of 2006.

2. The Applicant is the original Complainant in the subject complaint filed before the aforesaid Court for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act'). The Respondent No.2 was arraigned as Accused No.1 in the said complaint. The Accused No.2 had expired during the pendency of the proceedings, and therefore, the case against the said accused had abated.

3. The brief facts relating to the prosecution launched by the Applicant are as follows :

The Accused No.1 is the sister-in-law of Accused No.2. By Agreement dated 16th August 2006, the Complainant agreed to sell his right, title and interest in respect of the Flat No. 001 situated at Gurudatta Sahvas Co-operative Housing Society, Pandurang Wadi, Near Jain Temple, Dombivali (E), Tahsil Kalyan, District Thane to the Accused for consideration of Rs. 5,11,000/-. The said Agreement was registered on 17th August, 2006 and the possession of the premises was handed over to the Accused on 16th August, 2006. The Accused issued two cheques towards the consideration amount in respect to the said transaction. The cheque bearing No. 377705 dated 15th August 2006 was issued for an amount of Rs. 3,00,000/- and cheque bearing No. 377706 dated 16th August 2006 was issued for an amount of Rs. 2,11,000/-. The Complainant deposited the said cheques on 31st August 2006 for realization, but the same were dishonoured with remark, 'payment stopped by the drawer'. In pursuant to that, the Demand Notice was issued by the Complainant on 28th September 2006. However, the envelope containing the said notice returned back with remark, 'Intimation Dili'. Inspite of intimation of the notice to the Accused, he did not make the payment. Hence, the complaint was filed.

4. The trial court took cognizance of the complaint and issued the process. The complaint was initially decided on merits vide Judgment and Order dated 29th August 2011. Thereafter the complainant preferred an Appeal against the said decision. The High Court by order dated 9th August, 2012 remanded the matter back to the trial court for de-novo trial. The case was abated against Accused No.2 vide order dated 10th August, 2011. The plea of Accused was recorded on 21st February, 2013. Thereafter the trial had commenced and the Complainant led evidence by examining himself and another witness in support of the complaint. The Complainant placed on record several documents like Agreement, Cheque Deposit Slip, two cheques, Bank memo, Demand Notice etc. The Accused also adduced defence evidence by examining herself as well as two other witnesses namely, Anil Vasant Dedia and Nilkanth Patil vide Exh Nos. 160 and 170 respectively. The Accused also relied upon several documents which were exhibited in evidence such as, Stop Payment Instruction letter, Bank Pass Book, Application given to the Society for transfer of Flat, documents of Society regarding transfer of flat in the name of the Accused etc. The trial court thereafter recorded the statement of the Accused under section 313 of the Code of Criminal Procedure. The defence of the Accused is that, the cheques in issue were issued at the time of Agreement to Sell, however, the complainant represented that the cheques were lost, and therefore, he

requested to issue another bearer cheques and accordingly cheques at Exh. 155 and 156 were issued to him. He received the amount and inspite of the receipt of the amount, the Complainant deposited the earlier cheques with a malafide intention which were dishonoured for a reason stated herein above.

5. After recording the evidence and the statement of the accused under section 313 of the Code of Criminal Procedure, the trial court gave a finding that the complainant has not established his case and failed to prove that the disputed cheques were issued in discharge of legally enforceable liability. The Respondent No.2-Accused was thereby acquitted for the said offence vide Judgment and Order dated 5th May 2014.

6. The Applicant has therefore preferred this Application for leave to challenge the impugned Judgment and Order of acquittal. The parties were put to notice on the earlier occasion that the matter would be heard finally.

7. The Applicant has placed on record the compilation of documents which is subject matter of the proceedings. The learned Counsel for the Applicant-Complainant submitted that the trial court has committed an error in passing the impugned Judgment of acquittal. The complainant has proved all the ingredients to constitute the offence and there was sufficient evidence before the trial court to convict the Respondent No.2 -

Accused. It is submitted that the Accused have failed to rebutt the presumption under Section 139 of the Negotiable Instruments Act. The trial court has failed to appreciate that the Complainant had sold the Flat to the Respondent No.2 - Accused and in respect to the said transaction, the Complainant did not receive the consideration in accordance with the Agreement. The impugned cheques were issued towards the consideration for the sale transaction which was borne out from the documents proved by the Applicant, and therefore, it cannot be said that the Complainant has not proved that the cheques were issued in discharge of legally enforceable liability.

8. It is submitted that the transaction of sale of the Flat premises is not disputed. The signature on the cheques are also not disputed. The defence of the Accused that the said cheques were issued on the representation of the complainant that the earlier cheques were lost is also not established, and therefore, in the light of the presumption under Section 139 of the Act, the Respondent No.2 - Accused ought to have been convicted by the trial court. It is submitted that the Complainant has adduced sufficient evidence in support of his complaint which could not be demolished by the Accused in the cross-examination. The trial court had failed to take into consideration that consideration towards the sale of immovable property is never done by cash and it is always made by

cheque. It is submitted that the Complainant had denied having withdrawn the amount of Rs. 5,11,000/-, and therefore, the fact that the bearer cheques which were issued purportedly by the Accused in respect of the sale transaction were not proved to have been honoured at the instance of the Complainant. It is also submitted that the defence raised by the Respondent No.2 - Accused is afterthought. The Demand Notice was not replied by the Accused. The documents which were subject matter of the complaint could not be discarded and most of them were signed by the Accused. It was for the Accused to prove that signature on the stamp paper writing [Exh. 158] was of the Complainant, since the said fact was denied by the Applicant - Complainant. It is further submitted that the Accused have also not established their defence that the signature appearing on the bearer cheques was that of the Complainant and that the said amount was withdrawn by the Complainant. It is thus submitted that the Judgment of the trial court acquitting the Respondent No.2 - Accused is erroneous and the same is required to be set aside and the Respondent No.2 - Accused be convicted for the said offence.

9. The learned Counsel for the Respondent No.2 - Accused submitted that the complaint is false and frivolous. The Complainant has deliberately deposited the cheques with a view to grab the money from the Accused, although he was not entitled for the same. The Agreement of Sale

of the Flat premises was executed between the parties. The Respondent No.2 - Accused was put into possession. The Agreement was registered before the concerned authority. It is, thus, submitted that the aforesaid factual aspects established that transaction was completed on receipt of entire consideration towards the sale of the Flat.

10. It is submitted that on the representation of the Complainant, two bearer cheques were issued towards the sale transaction to the tune of Rs. 5,11,000/- which is the consideration amount as per the Agreement executed between the parties and that the said amount was withdrawn from the Bank. It is, therefore, submitted that the defence of the Accused has been clearly established and there is no error committed by the trial court in acquitting the Respondent No.2 - Accused. It is submitted that the documents placed on record by the Accused in the form of the bearer cheques, the writing executed on the stamp paper etc. clearly shows that there was no other liability existing in respect to impugned cheques, and therefore, the offence under Section 138 of the Act was not made out. It is submitted that the version of the Accused is corroborated by the defence witnesses examined by the Accused and the evidence of the said witnesses could not be discarded in the cross-examination conducted by the Complainant. It is, thus, submitted that the trial court has taken into consideration all the aspects of the matter and after analyzing the evidence

on record has passed the impugned Judgment and Order of acquittal. It does not require any interference in the Appeal preferred by the Complainant.

11. After hearing the rival submissions as stated above, I have also perused all the documents on record, which were subject matter of the proceedings before the trial court. It is noted that the Complainant has adduced his evidence as well as the evidence of direct witness in respect of his complaint. Per contra, the defence has also adduced evidence in the form of defence witnesses. It is true that once the issuance of cheques is admitted by the Accused, the presumption under Sections 118 and 139 of the Act arises in favour of the Complainant. In view of Section 118, the presumption as to debt and consideration arises and in accordance with Section 139 of the Act, the presumption as to legal liability arises in favour of the Complainant. However, the Accused can rebut the said presumption by adducing evidence or even by effective cross-examination of the evidence of the witnesses examined by the Complainant.

12. It is admitted fact that Agreement was executed between the parties. Towards the consideration of the said transaction, the cheques at Exh. 131 and 132 were issued. The defence of the Accused is that the entire consideration towards the said transaction was received by the Complainant. According to the Accused, at the time of transaction the

impugned cheques were issued in favour of the Complainant towards the consideration of this transaction. However, the complainant represented that he had lost the said cheques, and therefore, in view of exigency two bearer cheques for the same amount were issued which were honoured by the accused by presenting the same in the Bank.

13. It is the case of the accused that payment in respect of the said cheques was stopped by giving instructions to the bankers, since the amount in relation to the Agreement was parted to the Complainant by way of bearer cheques. It is also brought on record by placing reliance on the documents that the amount was withdrawn from the account of the Accused which is evident from the entries in the pass book. It is also apparent that on 22nd August 2006 the Complainant had transferred the documents of society in the name of the Accused. The said documents were also exhibited in evidence vide Exh. 153 and 154. The Accused has also pointed out that after submitting all the documents to the Society the Share Certificate was also issued in her name which is exhibited in evidence vide Exh.154. In support of the oral testimony, the Accused had relied upon the Bank Pass Book [Exh.152] and Stop Payment Instructions to the Bank issued by a letter [Exh.151]. It is also brought on record that entries in the Pass Book reveals that the amount of Rs. 5,11,000/- has been withdrawn on 19th August 2006 vide the bearer cheques [Exh.155 & 156]. The Stop

Payment letter was issued on 18th August 2006 i.e. on the next date of the execution of the Agreement. The reasons stated in the letter requesting the stop payment of the said cheques was that the cheques were misplaced on 17th August 2006.

14. The Accused has also examined two witnesses in support of her defence. One is the broker i.e. Anil Dedia (DW2), who deposed in consonance with the version of Accused. He has stated that bearer cheques [Exh.155 and 156] were issued to the Complainant in his presence. He also deposed that the Complainant had signed the Stamp Paper [Exh.158], wherein it was stated that he had received the aforesaid cheques in lieu of the previous cheques which were misplaced by him. The trial court then perused the said documents including the writing on the stamp paper and noted that the said document bears the signature of the Complainant. The Accused also examined Dnyaneshwar Patil (DW3), who is the Chairman of the Society and from his evidence it was brought on record that the Complainant had transferred the Share Certificate of the Society in the name of the Accused on 22nd August 2006. He also deposed that thereafter the Complainant had informed him that he did not receive the consideration of the said transaction and that the Flat may not be transferred in the name of the Accused, however, the Flat premises were already transferred in the name of Accused on 22nd August 2006.

15. On perusal of the Agreement, it is apparent that Paragraph No. 5 of the said Agreement indicates that the Transferor/Seller has not yet issued the Share Certificate in respect of the said Flat however he authorizes the Society to issue the same in favour of the Transferee on completion of the transaction and he shall sign all the Transfer Forms, declarations, undertakings etc. required for effective transfer of the shares in respect of the said Flat. The Accused was handed over the possession of the premises which is apparent from the evidence on record. He also completed the formalities of transfer in the name of the Accused and it is also evident that the disputed cheques were deposited for realization on 31st August 2006 when the cheques were issued on 15th August 2006 and 16th August 2006. It is also clear that the Share Certificates were also transferred in the name of the Accused and it is difficult to accept that the consideration for the said transaction was not received by the Complainant.

16. On the basis of the aforesaid evidence, the trial court came to the conclusion that the circumstances brought on record by the Accused are sufficient to show that the Complainant has received the amount of disputed cheques through the bearer cheques. Hence, no question arises of any legal liability in respect to the disputed cheques. The trial court, therefore, gave a finding that the Complainant has not been able to establish the requisite ingredients to constitute the offence under Section

138 of the Negotiable Instruments Act. Taking into consideration the above aspects, I find no reason to interfere in the order of acquittal passed by the trial court. On perusal of the evidence on record as stated herein above, I do not find any reason to take a different view of the matter. The trial court has scanned the evidence on record and thereafter has passed the impugned Judgment by assigning cogent reasons. In the circumstances, no case is made out for grant of leave and to set aside the impugned Judgment and Order of acquittal. Hence, I pass the following order.

ORDER

(1) Leave to file Appeal refused.

(2) Criminal Application No. 266 of 2014 is rejected.

PRAKASH D. NAIK, J.