IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.406 OF 2002

Jagdish Associates A Proprietary concern through its Manager, Govindlal Meghraj Saboo having office at B/ 301, Yashoda Sadan No.2, Saraswati Nagar Navghar Road, Bhayandar (E), Tal. & Dist. Thane	)	....Appellant/Complainant
V/s.		
1. M/s. Sarla Enterprises A Proprietary concern through its proprietor, Mr. Ramprasad Vaishnav (Sharma), having office at A/303, Ghanshyam Apartment, Behind Natwar House, Navghar Road, Bhayandar (E), Tal. & Dist. Thane	)	
2. The State of Maharashtra	)	....Respondents/Accused

Mr. Chintan Shah i/b. Mr. Sandesh Patil for appellant.
Mr. S.V. Gavand, APP for respondent no.2.

CORAM : K.R.SHRIRAM, J.
DATE : 20th NOVEMBER 2019

ORAL JUDGMENT :

1 This is an appeal filed under Section 378 of the Code of Criminal Procedure impugning an order and judgment dated 13th April 2000 passed by the Civil Judge Junior Division and Judicial Magistrate, First Class, Thane by which the Court was pleased to acquit the accused of charges under Section 138 of the Negotiable Instruments Act 1881 (the said Act).

2 The facts in brief as per the complaint are one Gita Devi G. Saboo was carrying on business in the name and style M/s. Jagdish

Associates, the complainant. The complainant was carrying on business of dealing, *inter alia*, in craft papers and supplying craft papers as per the orders received. The complainant received an order in the first week of July 1996 from the accused for supply of 22 reels of various sizes of craft paper worth Rs.51,300/-. The accused received the goods on or about 6th July 1996 and issued a cheque dated 16th August 1996 for Rs.51,300/-. According to the complaint, after intimation to the accused, the complainant deposited the cheque in his bank on or about 6th January 1997 and the cheque came to be dishonoured because the accused had issued stop payment instructions. The complainant, thereafter, tried to resolve the matter with the accused but as the accused was avoiding his liability, caused the notice dated 14th January 1997 to be issued through his advocate. The accused replied to the notice through his advocate's letter dated 30th January 1997 denying liability. Hence, the complaint.

3 One thing which is very glaring is there is no explanation in the complaint as to why, when the goods were delivered on 6th July 1996, did the complainant accept a cheque dated 16th August 1996 because he does not say the accused issued a post dated cheque. Secondly, there is no explanation as to why only on 6th January 1997, almost five months later, was the cheque deposited. There is also an omission to the extent that in the complaint, the complainant states that after giving intimation to the accused, he deposited the cheque on 6th January 1997, whereas his

examination in chief is totally silent on that.

4 Per contra, the accused does not deny that he received goods worth Rs.51,300/-, the accused does not deny that he had issued the cheque for Rs.51,300/- and the accused does not deny that the cheque was dishonoured because of stop payment instructions. The case of the accused, which can be seen from the reply to the statutory notice issued by complainant, is that the accused also carried on business not just in the name and style of Sarla Enterprises but also in the name of Shree Balaji Enterprises. The complainant placed an order with Shree Balaji Enterprises for supply of computer stationery and pursuant to that the accused (Shree Balaji Enterprises) supplied the same and the value of that supply was Rs.20,160/-. As regards the cheque for Rs.51,300/-, it was a post dated cheque which was handed over to complainant on 26th July 1996. The goods supplied by complainant were of inferior quality and quantity also was not as per the challan and the accused called upon the complainant to replace the goods but complainant's son (Jagdish Saboo) approached the accused some time on 30th July 1996 requesting that the discrepancies of the goods can be adjusted as they were regularly carrying on business and requested the accused to release atleast Rs.10,000/- because the cheque issued was of 16th August 1996. Accordingly, the accused gave a bearer cheque for Rs.10,000/- to the son of the complainant, which has been encashed. It is also stated that the accused requested the complainant to return the cheque

dated 16th August 1996 in order to adjust the payment, complainant did not return the said cheque but in the meanwhile as the goods worth Rs.20,160/- was supplied by Shree Balaji Enterprises, complainant informed the accused that the amount of Rs.10,000/- plus Rs.20,160/- can be adjusted against the amount of Rs.51,300/- to which the accused agreed. Therefore, what was outstanding was only Rs.21,140/- which amount has been paid in cash to Jagdish Saboo, son of complainant, who agreed to issue a receipt for the amount. However, no receipt was issued. According to the accused, the entire amount has been paid and there is nothing outstanding.

5 As noted above, in the evidence of PW-1 there is an omission that he informed the accused before depositing the cheque, which is stated in the complaint. Even in the evidence, there is no explanation as to why, when the goods were supplied on 6th July 1996, the cheque dated 16th August 1996 was accepted. The evidence of PW-1 also does not explain why he deposited the cheque only in January 1997. Of course PW-1 has denied that his son withdrew Rs.10,000/- in cash or received Rs.21,140/- in cash or the transaction with Shree Balaji Enterprises.

6 Complainant also led evidence of one more witness, who is a bank employee. The accused having admitted issuance of cheque and stop payment instructions etc., there is no need to delve into the evidence of this witness. The defence led evidence of four witnesses. DW-1 was an employee of the accused, DW-2 is an employee of the bank from where the son of

complainant is supposed to have withdrawn the cash of Rs.10,000/-. DW-3 is one Arvind Chagan Joshi to whom the computer papers worth Rs.20,140/- was delivered by Shree Balaji Enterprises and DW-4 is the accused himself. DW-1 confirms having delivered 32 boxes of computer from Shree Balaji Enterprises to Arvind Chagan Joshi, i.e., DW-3. DW-3 is an independent witness who states that on instructions of complainant he received 32 boxes of paper rolls alongwith challan in his factory because complainant requested him to keep it with him as they did not have enough storage space. DW-3 also states that 32 boxes have been taken away by Jagdishbhai Saboo, son of complainant. DW-3 produces a letter dated 19th October 1996 (Exhibit 51) addressed by him to Shree Balaji Enterprises stating that the 32 boxes received by him does not belong to him and hence he has kept both the challans and material belong to Jagdishbhai Saboo of Jagdish Associates who had instructed to keep this material at his place till he delivers it to his customers. The letter also states that he retained the challan to be given to Jagdish Saboo and the material was not checked by him. In the cross examination, DW-3 has confirmed that he had dealings with Jagdish Associates and his relationship with Jagdish Associates have been good. DW-3 also says that he does not have any documentary evidence to show that Jagdish Saboo instructed him to keep the material at his premises. An attempt has been made by the prosecution to discredit this witness to say that a cheque for Rs.5,000/-, that he had issued in favour of

Jagdish Associates, was dishonoured and to avoid the payment, he was trying to discredit Jagdish Associates. DW-3 states that he has paid the amount of Rs.5,000/- to Jagdish Associates later. What is noticeable is that even from the cross examination it has come out that there has been business dealings between Jagdish Associates and DW-3. Strangely prosecution has not led evidence of Jagdish Saboo, the son of PW-1 or the sole proprietor of the complainant to disprove the stand taken by the defence. I would add Jagdish Saboo was a material witness. It is settled law that prejudice will result to the accused from the non-production of Jagdish Saboo whose evidence would have had a direct bearing on the facts urged by the accused. As held by the Apex Court in ***S. Harnam Singh V/s. The State (Delhi Admn.)***[1] non production of Jagdish Saboo as a witness would cause miscarriage of justice. If one sees the line of cross examination of PW-1 or the letter at Exhibit 51 or the reply to the statutory notice, the course adopted by the defence is that dealings were with Jagdish Saboo and not PW-1, who was the Manager of the complainant. I would have expected the prosecution to produce Jagdish Saboo to deny everything that is stated by the defence witness.

7 The stand of the defence also appears to be more probable. I say this because the defence states that they gave a cheque dated 16^{th} August 1996 though they received the goods on 6^{th} July 1996. On

1. (1976) 2 SCC 819

30th July 1996 accused gave a bearer cheque for Rs.10,000/-. The cheque has been received in evidence and marked Exhibit 57. On the reverse of the cheque there are two signatures of Saboo and both signatures are different. In the cross examination of DW-4 he has explained that in the morning Jaiprakash Saboo presented the cheque and as there was no balance, he went again in the evening and that time it was Jagdish Saboo who went to withdraw the amount and that is how the signature of Jagdish Saboo is on the reverse of the cheque. The prosecution has not led any evidence to prove that this was not the signature of Jagdish Saboo or Jaiprakash Saboo. The accused also has stated that on 15th October 1996 Jagdish gave order of computer paper of Rs.20,000/- and he gave address of party. On 19th October 1996 those computer papers were delivered to DW-3 - Arvind Chagan Joshi, who issued the letter dated 19th October 1996 (Exhibit 51). DW-4 also says that Jagdish agreed to adjust the amounts and on 23rd October 1996 DW-4 issued stop payment instructions and on 24th October 1996 he gave Rs.21,140/- to Jagdish Saboo in cash. The accused also says he had withdrawn Rs.20,000/- from bank on 24th October 1996 and gave Rs.21,140/-. He has not been called upon to prove that he withdrew Rs.20,000/- in the cross examination. One more thing which is really crucial is Exhibit 63. This is a letter dated 6th November 1996 addressed to Jagdish G. Saboo, Jagdish Enterprises, Bhayandar, in which the accused has recorded that the entire amount, for which he had issued the cheque for Rs.51,300/-, has been paid in full by giving on 30th July 1996 Rs.10,000/- in cash vide bearer cheque no.014022, on 19th October 1996 delivering goods worth Rs.20,160/- by Shree Balaji Enterprises and on 24th October 1996 by giving Rs.21,140/- in cash. Accused has also produced under certificate of posting receipt, which is marked Exhibit 64. There is no reply to this letter. As against this, there is no explanation from the complainant as to why they deposited the cheque only on 6th January 1997. Complainant does not even say either in the complaint or in the evidence of PW-1 that the accused requested them not to deposit the cheque until January 1997. In the complaint, it is stated after giving intimation to accused, the cheque was deposited, whereas PW-1 does not say so in his evidence. This is a glaring omission.

8 In these facts and circumstances, the Trial Court has given the benefit of doubt to the accused and acquitted the accused. It is settled law that where two views are possible, the benefit should tilt in favour of accused. The onus is on the prosecution to prove the accused to be guilty of offence beyond reasonable doubt. The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka***[2] in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

> *"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing*

2. (2007) 4 SCC 415

with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

9 There is an acquittal and therefore, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. For acquitting the accused, the Trial Court observed that the prosecution had failed to prove its case.

10 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with. The appeal is without any merits.

11 Appeal dismissed.

(K.R. SHRIRAM, J.)