

HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.78 of 2011

Present: Mr. Justice Sajjad Ali Shah
Mr. Justice Naimatullah Phulpoto

Date of Hearing: 17.05.2013

Appellant: I.D.B.P through Mr. Masood Shaharyar Advocate

Respondents: Syed Farrukh Mateen Zaidi and another through Mr. Naheed Afzal Khan Advocate.

J U D G M E N T

NAIMATULLAH PHULPOTO, J- Through the instant Criminal Appeal, appellant/complainant Industrial Development Bank of Pakistan has called in question judgment dated 21.10.2010 passed by learned Banking Court No.III, at Karachi, whereby accused Syed Farrukh Mateen Zaidi and Nadeem Manzoor Hussain were acquitted in Criminal Complaint No.17/2001.

2. Brief facts leading to the filing of the appeal are that accused persons being Directors/Guarantors of M/s. M.M.Tanneries Pvt. Ltd. had requested the complainant for financial assistance to the tune of Rs.19.140 Million with resale price of Rs.42.941 Million on markup basis under State Bank of Pakistan Scheme for purchase of locally manufactured machinery and Rs.0.445 Million with resale price of Rs.0.833 Million under the Bank's Own Resources (BOR) on markup for establishing a new tannery unit for manufacturing of finished leather goods at Korangi Industrial Area, Karachi and their request was allowed vide Sanction Letters dated 27.01.1991 and 30.06.1991 respectively. The financial assistance of Rs.19.140 Million allowed by complainant Bank was payable in 16 equal 6 monthly installment each, after 18 months from the date of 1st disbursement and the financial assistance of Rs.0.445 Million under BOR Scheme was repayable in 20 equal half yearly installment commencing after 24 months from the date of disbursement as per Finance Agreement dated 29.06.1991. Accused persons as surety for repayment of said

financial assistance executed two Demand Promissory Notes dated 29.06.1991 in the sum of Rs.42,941,000/- and Rs.833,000/- respectively in favour of complainant Bank. As security for repayment of the said finance M/s. M.M.Tanneries Pvt. Ltd., also executed documents through accused No.1 viz (1) M/s. Memorandum of deposit of Title Deed dated 18.11.1991 and (2) Agreement of Hypothecation dated 29.06.1991 through accused No.1. After completing the documentary formalities the said financial assistance was disbursed by the complainant, which was utilized by M/s. M.M.Tanneries Pvt. Ltd. through accused persons and completed the project and installed the machinery, which was purchased out of Banks financial assistance and same was hypothecated with complainant Bank as security for the repayment of financial assistance availed by them. The complainant Bank's Engineer inspected the site/ factory and found that machinery, which was purchased from the BOR Scheme was installed in the factory vide Inspection Report dated 09.07.1992. At the request of accused persons named above, complainant further granted a Running Finance Facility in the sum of Rs.5.000 Million to M/s. M.M. Tanneries Pvt. Ltd. for a period of one year on markup basis vide Sanction Letter dated 12.11.1992, as security for repayment the accused persons and their company executed documents viz (i) Financing Agreement dated 19.11.1992 (ii) Demand Promissory Note dated 19.11.1992 and (iii) Letter of Hypothecation dated 19.11.1992. Accused persons committed default and complainant Bank filed Petition bearing J.M.No.43/1997 under Section 39 of IDBP Ordinance 1961 for recovery, attachment and sale of property. This Court appointed Official Assignee as Commissioner, who prepared inventory of project assets of M/s. M. M. Tanneries Pvt. Ltd and after final order moveable and immovable property was put to auction. After installation of machinery in factory, it was found that some of machinery was missing from the site. The inspection was carried out by complainant Bank's Engineer and he found some of machinery viz (i) Vaccum Dryer (1 No.) (ii) Drum 9' x 7' (4 Nos.) (iii) Wheeled Horses (20 Nos.), (iv) Wooden Horses (10 Nos.), (v) Trolleys (15 Nos.) (vi)

Laboratory Equipment (Lumpsum), (vii) Funnel (15 Nos.), (viii) Sorting & Padding Tables (08 Nos.) (ix) Weighing Scale (2 Nos.), (x) Wheel Chukram (5 Nos.), (xi) Paddles 8' x 8' (2 Nos.) (xii) Dyes Fat Mixer (2 Nos.), (xiii) Lifts (4 Nos.) and (xiv) Pallats (35 Nos.) were removed from the project assets by accused persons, which were hypothecated with Bank. Complainant Bank called accused persons vide letter dated 18.07.1994 for return of machinery, which was removed without consent or approval of complainant Bank but accused persons failed to do so. In order to verify the machinery, on the request of complainant Bank, Official Assignee prepared inventory on 28.07.1996 of the project assets of machinery. On comparison of the inventory, it revealed that some of the machinery was missing from project assets, which was purchased from BOR Scheme. The accused persons dishonestly removed the hypothecated machinery from the site and thereby caused loss to complainant Bank. It is also stated that hypothecated machinery cannot be removed from the factory without written consent of Complainant Bank, as such, accused persons have committed an offence punishable u/s 19 of Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act 1997 and they are liable to be prosecuted. After recording statement of attorney of complainant Haider Ail Khan u/s 200 Cr.P.C, on 10.04.2001 the case was brought on record against accused persons. They appeared before Trial Court for facing trial.

3. Charge against accused was framed by learned Judge, Banking Court No.III, at Karachi at Ex.1, under above referred sections. Accused met the charge with denial and claimed to be tried.

4. In order to substantiate the charge, complainant Bank examined only one witness namely Haider Ali Khan at Ex.P. On the application of Advocate for complainant dated 07.09.2005, Court examined Akhter Javed as Court witness as Ex.P/4.

5. The statements of accused were recorded u/s 342 Cr.P.C in which accused had denied the allegations and pleaded innocence. They have stated that

some of articles were not identified at the time of preparing inventory and criminal complaint has been filed after about 6 years of sale of project, malafidely to damage their reputation. Accused did not examine themselves on oath or examined any witness in defence in disproof of the allegations.

6. Learned Trial Court, after hearing the learned counsel for the parties and after assessment of the evidence acquitted the accused.

7. Mr. Masood Shahreyar learned Advocate for the appellant contended that trial Court has overlooked the breach of the letter of hypothecation by not considering the difference of items between schedule attached to the letter of hypothecation and inventory made by the Official Assignee. He has further submitted that Trial Court has failed to consider two inventories dated 10.05.1994 and 28.02.1996 prepared by Official Assignee. Trial Court has not appreciated evidence as per law. Lastly, it is argued that judgment of the Trial Court is not sustainable under the law.

8. Mr. Naheed Afzal Khan Advocate for Respondents submitted that complainant has deposed that he is not aware as to whether any of the items were removed by the accused persons. It is also argued that breach of letter of hypothecation has not been established at trial, learned Trial Court has properly appreciated the evidence and recorded acquittal on the sound reasons.

9. From the perusal of the judgment passed by learned Banking Court No.III, Karachi, it appears that accused Syed Farrukh Mateen Zaidi and Nadeem Manzoor Hussain have been acquitted by judgment dated 21st October 2010 by assigning the sound reasons as follows:-

“35) It is evident from the cross examination of Complainant that he has admitted that he had not seen any of accused to remove the articles. He has further admitted that possession of items and factory was taken in year 1996 and he cannot disclose exact date of possession of factory & items by Official Assignee. He has also admitted that movable & immovable properties were also sold by the Official Assignee. He has also admitted that report dated: 10.05.1994 does not bear signature of Farrukh Mateen & report dated: 28.02.1996 does not bear signature of any of the accused persons. He had admitted that some of the articles mentioned in Para 10 of the complaint are not included and mentioned in Para 7 of the complaint.

36) The perusal of evidence of Court Witness Akhtar Javed, reveals that he was employee of Complainant as Officer Grade-I/Engineer & had accompanied Official Assignee for visiting the factory. Admittedly inventory Exh.P/3 was prepared in his presence and his signature was obtained on it, which was prepared by Official Assignee on the directions of Hon'ble High Court of Sindh, however, he has not supported the version of Complainant regarding missing or removal of articles is concerned. He is his cross examination has admitted that in inventory Exh-P/3, there is no mention of missing articles. Like Complainant, Court Witness Mr. Akhtar Javed has also does not deposed that inventory Exh-P/3 was prepared in presence of accused persons.

37) The appreciation of evidence of complainant Mr. Haider Ali Khan and Court Witness Mr. Akhtar Javed as discussed above, suggests that none has deposed that accused were responsible for removal or missing of alleged articles/machinery as mentioned in Para 10 of the complaint. Not only this, but inventory Exh-P/3 prepared by Official Assignee also does not suggest that any article or machinery was missing and it was removed by accused persons. It is admitted fact, that neither factory was visited by Official Assignee in presence of accused persons nor inventory was prepared in their presence nor possession of factory in year 1996 was taken over by the Official Assignee in their presence. All the acts and exercise was carried out by Official Assignee unilaterally, without notice to accused persons, as such, accused persons cannot be held responsible for missing articles, if any, or removal thereof in absence of cogent & convincing evidence against accused persons. In the instant case, Complainant has not been able to bring such reliable evidence against accused persons.

38) It is well-settled law that Complainant has to prove its case against accused persons beyond shadow of reasonable doubt and accused persons are not required to prove their innocence. In the instant case, Complainant have not been able to adduce a reliable & confidence inspiring evidence to connect accused persons with alleged incident. Not only this, but Complainant's case suffers from infirmities, discrepancies and is full of major legal defects.

39) In order to extend benefit of doubt to accused persons more than one infirmity, is not required. A single infirmity containing reasonable doubt in prudent mind regarding the truth of the charge makes entire case doubtful. In this case, Complainant has failed to prove its case against accused persons beyond shadow of reasonable doubt. On the contrary, accused persons have succeeded in creating dent in the Complainant story. In support of this, reliance can be placed upon 1999 PCRLJ 595 Karachi and SBLR 2010 Sindh 507 at Page 508(D).

40) In view of what has been discussed above, I am constrained to hold that Complainant has miserably failed to prove charge framed against accused persons, as such, Point No.1 is answered as "Doubtful" and Point No.2 is answered in "Negative".

POINT NO. 1 & 2.

41) For the reasons and findings given on above points, I hold that accused persons are not liable to be convicted in this case and they deserve benefit of doubt and consequently acquittal. I, therefore, extending benefit of doubt in this case, acquit accused persons namely Syed Farrukh Mateen and Nadeem Manzoor Hussain, under Section 265-H(1) Cr.P.C. Accused persons are

present on bail. Their bail bonds stands cancelled and surety discharged."

10. From perusal of the evidence, it transpires that complainant has deposed that he is not aware as to whether any of the items were removed by the accused persons. It has also been admitted that possession of the items and factory was taken over in 1996. Attorney of complainant Hyder Ali Khan has deposed that accused were not responsible for removal/missing of machinery/articles as mentioned in complaint. Movable and Immovable properties were sold by the Official Assignee. Acquittal of the accused is based upon the evidence brought on record by the prosecution. It is elementary principle of law that in criminal cases prosecution has to prove its case against the accused. In the present case complainant failed to prove the case beyond shadow of doubt, definitely its benefit would go to accused. Trial court in the circumstances/evidence brought on record rightly acquitted accused by cogent reasons. The ordinary scope of acquittal appeal is considerably narrow and limited and obvious approach for dealing with the appeal against the conviction would be different and should be distinguished from the appeal against acquittal because presumption of double innocence of accused is attached to the order of acquittal. In case of **Zaheer Din v. The State (1993 SCMR 1628)**, following guiding principles have been laid down for deciding an acquittal appeal in a criminal case:-

"However, notwithstanding the diversity of facts and circumstances of each case, amongst others some of the important and consistently followed principles can be clearly visualized from the cited and other cases-law on, the question of setting aside an acquittal by this Court. They are as follows:-

- (1) *In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for reappraisal of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well accepted presumptions: One initial, that, till found guilty, the*

accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence.

- (2) *The acquittal will not carry the second presumption and will also thus lose the first one if on pints having conclusive effect on the end result the Court below: (a) disregarded material evidence (b) misread such evidence (c) received such evidence illegally.*
- (3) *In either case the well-known principles of reappraisal of evidence will have to be kept in view while examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumption keeping always in view that a departure from the normal principle must be necessitated by obligatory observations of some higher principle as noted above and for no other reason.*
- (4) *The Court would not interfere with acquittal merely because on reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."*

11. On re-appraisal of prosecution evidence and scrutiny of the judgment of the trial Court, it transpires that prosecution has failed to substantiate the accusation or producing tangible evidence reasonably connecting the accused in this case. Finding of acquittal recorded by the Trial Court did not suffer from any impropriety, illegality or infirmity and the same is based on sound reasons warranting no interference by this Court. Therefore, Criminal Appeal No.78 of 2011 is dismissed.

JUDGE

JUDGE