

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

Dated this the 27th day of February, 2015

PRESENT

THE HON'BLE MR.JUSTICE MOHAN M.SHANTANAGOUDAR

AND

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

CRIMINAL APPEAL NO.560/2009

C/W

CRIMINAL APPEAL NO. 562/2009

IN CRL.A.NO.560/2009

BETWEEN:

STATE OF KARNATAKA BY
MANGALORE EAST POLICE
STATION.

...APPELLANT

(BY SMT ANITHA R , HCGP)

AND:

K.P.SOMAPPA, (A-2)
S/O LATE K. PONNAPPA
SUBBAMMA SHETTY COMPOUND
BEJAI CHURCH ROAD, BEJAI
MANGALORE.

... RESPONDENT

(BY SRI R.B.DESHPANDE, ADVOCATE)

THIS CRL.A. FILED U/S.378(1) & (3) CR.P.C BY THE
STATE P.P. FOR THE STATE PRAYING THAT THIS HON'BLE

COURT MAY BE PLEASED TO GRANT LEAVE TO FILE AN APPEAL AGAINST THE JUDGEMENT AND ORDER OF ACQUITTAL DATED 31.03.2009 PASSED IN CRIMINAL APPEAL NOS. 51 TO 55/2002 ON THE FILE OF PRESIDING OFFICER, FTC, MANGALORE IN - ACQUITTING THE RESPONDENT/ACCUSED FOR THE OFFENCE P/U/Ss 120-B, 409, 477-A R/W SEC. 34 OF IPC.

IN CRL.A.NO.562/2009

BETWEEN:

STATE OF KARNATAKA BY
MANGALORE EAST POLICE
STATION.

..APPELLANT

(BY SMT ANITHA R, HCGP)

AND:

SHIVAPPA DEVADIGA, (A 3)
S/O LATE K KRISHNAPPA DEVADIGA
AGED ABOUT 58 YEARS
VADERABETTU HOUSE
BAPPAANADU VILLAGE
MULKY, MANGALORE.

...RESPONDENT

(BY SRI J PRAKASH, ADVOCATE -AMICAS CURIAE,)

THIS CRL. APPEAL IS FILED U/S 378 (1) & (3) CR.P.C. BY THE STATE P.P FOR THE STATE PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO GRANT LEAVE TO FILE AN APPEAL AGAINST THE JUDGMENT AND ORDER OF ACQUITTAL DATED 31.03.2009 PASSED BY THE PRESIDING OFFICER, FTC, MANGALORE IN CRL. APPEAL NOS. 68-72/2002- ACQUITTING THE RESPONDENT FOR THE OFFENCES P/U/S 120-B, 409 AND 477-A R/W SEC. 34 OF IPC.

THESE APPEALS HAVING BEEN HEARD, RESERVED AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **P.S. DINESH KUMAR, J.**, DELIVERED THE FOLLOWING:-

JUDGMENT

The appellant-State, in these two appeals is calling in question the order dated 31.3.2009, in CrI.A.Nos. 51/2002 to 55/2002 (K.P.Somappa Vs. State) and CrI.A.Nos.68/2002 to 72/2002 (Shivappa Devadiga Vs. State), on the file of Fast Track Court, Mangalore, D.K., acquitting the respondents of the charges punishable under sections 120-B, 509, 577-A read with 34 IPC, by reversing the judgment of the Trial Court.

2. Both the appeals emanate out of common order passed by the trial Court. Hence, they are heard together and disposed of by this common judgment.

3. We have heard Smt.Anitha R., HCGP for the Appellant- State and Sri J.Prakash, Amicus-curiae for the respondents.

4. The learned HCGP for the State submits that the trial Court, on appreciation of the material on record had come to the right conclusion and convicted the respondents. However, the first appellate Court has misread the evidence and reversed the finding of the trial Court. She submits that the respondents herein have committed commercial fraud with regard to the fixed deposits and the same is a serious offence. Hence, prays for allowing the appeals.

The respondent-Amicus-curiae, on the other hand submits that the trial Court had recorded conviction and passed orders of sentence by holding that the evidence on record was sufficient to bring home the guilt of the accused by not correctly appreciating the

evidence on record. The first appellate Court has rightly acquitted the respondents and therefore, the appeals are devoid of merit and prays for dismissal of the same.

5. The case of the prosecution is that the respondents/accused were employees of South Kanara Government Officers' Co-operative Bank Ltd. and had committed falsification of books and raised loans on the fixed deposits of gullible constituents of the bank. They were charged with commission of offences punishable under Sections 120-B, 406, 408, 420, 465, 477-A read with section 34 IPC. Separate charge sheets were filed for separate crimes committed in respect of separate cases.

In C.C.No.193/1990, it was alleged that the accused had created a loan accounts on fixed deposits placed by the account holders. In this case, Jennifer Lasrado had deposited Rs.3,000/- in a fixed deposit vide F.D.No.03107 dated 1.8.1980. When presented through

Canara Bank for encashment, the proceeds were not paid to her as a loan of Rs.4,300/- was marked against the said fixed deposit in loan account No.736. Another F.D. bearing receipt No.3209 for Rs.2,100/- held by the same account holder was also marked with a loan of Rs.4,300/-. However, the account holder had not raised any loan in respect of the fixed deposits.

In C.C.No.194/1990, it was alleged that the accused had created a loan of Rs.44,700/- on fixed deposit belonging to Raymond Fernandis and Cyril Coelho and mis-appropriated the amount.

In C.C.No.195/1990, it was alleged that the accused had created a loan of Rs.38,000/- on fixed deposit belonging to Helen Vaz and Cyril Coelho and mis-appropriated the amount.

In C.C.No.196/1990, it was alleged that the accused had created a loan of Rs.92,900/- on fixed deposits belonging to seven persons viz. Robert

Monthero, Cyril Coelho, F.N.Menezes, Jessy Alvers, B.M.Menezes, Raymond Fernandes and misappropriated the amount.

In C.C.No.197/1990, it was alleged that the accused had created a loan of Rs.29,350/- on fixed deposit belonging to three persons viz. C.E.Fernandes, Cyril Coelho and Seetharama Shetty and misappropriated the amount.

Thus, cumulatively, a sum of Rs.1,55,250/- was misappropriated in respect of various fixed deposits which were subject matter of C.C.No.194/1990, 195/1990, 196/1990 and 1990/90.

The case of the prosecution in sum and substance is that the accused respondents along with two other deceased persons namely, B.Dhanakeerthi J. and V.Surendra Nath had falsified documents to show that loans were raised against various fixed deposits belonging to aforementioned persons and mis-

aappropriated the money and whereas, as a matter of fact, none of the depositors had raised any loan against their respective fixed deposits. The other documents such as cash books, day books, etc. which are maintained in the normal course of business in a bank did not reflect the corresponding liabilities created against the said fixed deposits.

These appeals pertain to C.C.No.193/1990 and C.C.No.195/1990.

6. The prosecution to prove its case had examined 13 witnesses in CC.Nos.193 and 195/1990. 49 common exhibits were marked in respect of all cases. Defence had got only one document Ex.D1 marked on their behalf. The prosecution had given up allegations under Sections 420 & 465 IPC before the trial Court. Thus the trial court has recorded its findings only with regard to offences punishable under Sections 120-B, 409, 477-A read with section 34 IPC.

7. The respondent-accused with three others have been charged with allegations of falsifying the document in misappropriating the amount by showing existence of loans against fixed deposits of various depositors in the absence of any of the depositor factually raising any loan during the period 1983 to 1985. The trial Court on appreciation of evidence, has recorded conviction and sentenced the accused. The first appellate Court has reversed the findings of the trial Court and acquitted the accused.

8. Ex.P1 is the complaint given by the incharge secretary of the South Kanara Government Officers' Co-operative Bank Ltd. In the said complaint, it is alleged that the respondent-accused along with three others conspired together and misappropriated the funds of the complainant-bank by forging and creating false documents and caused loss to the complainant-

bank; the accused have misappropriated the amount by making false entries in the account books of the bank as loan advanced against fixed deposit; the said loans were alleged to have been advanced to various persons is not entered in the loan ledger as no such loan was really advanced; the cash and day book do not contain the particulars of the loan number or the F.D. number on the basis of which the alleged loans were purported to have been granted; there were no loan applications nor vouchers by the F.D. holders; the first accused namely, A.A.Soans, Secretary of the Bank, in collusion with other accused has created false records; complainant bank apprehends that the accused have misappropriated some other amount also. Thus, the main imputation is against A.A.Soans, the Secretary of the Bank. The complaint does not disclose any specific illegal act of each accused. The charges leveled in the charge sheet by the police against the accused in

C.C.Nos.193/1990 and 195/1990 are omnibus in nature. The specific act of each of the accused is not described in the charge sheet.

9. C.C.No.193/1990:

P.W.1 was working as a District Auditor in the co-operative department. He has deposed that all the registers, records, vouchers and files of the bank will be in the custody of the Secretary; the Secretary has to give the cash to the cashier everyday in the morning; there are two cash chitta books, one with the secretary and the other with the cashier; a cashier is required to give back the amount and show the day book, cash book and other books to the secretary and secretary should tally the entries made in the said books with the entries in the cash chitta book maintained by the cashier and thereafter the Secretary and the Assistant Secretary have to keep the amount in the safe iron chest. He has further deposed that whenever a loan

application is received, the accountant has to verify as to how much amount is available in the account of a depositor and after verifying the F.D. register he has to put up before the secretary along with relevant papers and the secretary, after verifying the ledger, should make entry in the cash chitta book maintained by him and forward the application to the cashier. Thereafter, the cashier shall make payment based on the papers sent by the secretary.

P.W.2, the depositor, has stated that the proceeds of the fixed deposits were not paid when presented on maturity on the ground that there existed a loan on the fixed deposit.

P.W.3 is an employee working as a clerk at the relevant point of time. He has stated that he was making entries in the cash book and day book as per the instructions of the Secretary. He has mentioned about the name of one Surendranath, having made

some entries. However, the names of accused in this case is not mentioned in his evidence.

P.W.4 was an employee of the bank having joined the service as a clerk. He has stated that during the relevant point of time, accused No.1 was the Secretary of the bank. In the cross-examination he has admitted that he did not remember in which Section he was working as a clerk and that he was unable to state as to who was doing which particular work. He has also admitted that he was held guilty in surcharge proceedings held under Section 64 of the Co-operative Societies Act. He has also admitted in the cross-examination that it is the Secretary who issues the pay order and cashier does not have any power to refuse the instruction of the Secretary. In sum and substance, his evidence suggests that Secretary is the controlling authority in the bank and all acts happen under his instructions.

P.W.5 was the President of the bank. In the cross examination he has admitted that the management committee meeting happens once in two months and accounts are audited every year. He has not spoken anything specific with regard to case on hand.

P.W.6 was working as an in charge Secretary. He has deposed that he does not remember as to in which year, the misappropriation has taken place. He has stated in the cross-examination that he was working as a Recovery Officer and carried out the instructions of Board of Management. He has not spoken anything which may advance the case of the prosecution.

P.W.7 was working as an auditor and has stated that he has not audited the books for the period 1981-82. He is not even cross-examined.

P.W.8 is a police constable and the scribe of Panchanama.

P.W.9 is the investigating officer. He has admitted in the cross-examination that he did not know as to which document contained imputations and evidence against which of the accused.

P.W.10 is the Station House Officer of Padubidri Police Station, who has registered a crime.

P.W.11 was working as Sub-Inspector (Crime) at the relevant point of time. In paragraph 5 of the cross-examination, he has admitted that he did not know as to what incriminating evidence is available against the accused. He has further admitted that during the year 21.10.1983 to 20.03.1985, there are no signatures of the accused in the concerned documents of the society and therefore, they cannot be held guilty.

P.W.12 is hand writing expert. He has stated that the model signature of the accused match with some of the signatures in documents in Q series.

However, the evidence does not disclose as to which document in Q series corresponds which exhibit.

P.W.13 is a police officer who has done part of the investigation. He has stated that he has collected the model signatures and handed it over to his successor. He has admitted in the cross-examination that when he collected the model signatures, there were no witnesses.

10. C.C.No.195/1990:

Except P.Ws.2, 7 and 9, rest of the witnesses are the same who have deposed in C.C.No.193/1990.

P.W.2 Ramachandra was working as a clerk. He has stated that Mr. Soans was the Secretary at the relevant point of time and maintaining the Chitta book. He has admitted in the cross-examination that the entries which he had referred to in the examination in chief have been made as per instructions of others. He has further deposed that he has not verified any entries

that he made in the books. In substance, he has not spoken anything in support of the prosecution.

P.W.7 is the auditor. He has admitted in cross-examination that whenever there is misappropriation of funds, a special report is submitted by the auditor. In this case, he has audited the books from 1.7.1982-30.6.1983 but he has admitted to have not given any special report.

P.W.9 is the senior auditor of co-operative society. He has deposed that he and seven associates worked together and he has checked all the registers. He has admitted in the cross-examination that there was misappropriation. He has mentioned that all accused have misappropriated the funds together and has not mentioned specific misappropriation of funds by individuals.

11. Criminal jurisprudence mandates that to record conviction and to sentence an accused, the prosecution has to prove the alleged offence beyond reasonable doubt. In these two cases, the accused are charged with the offences punishable under Sections 120-B, 409, 477A and 374 IPC. In a case of commission of offence under Section 120-B, the prosecution must prove the following ingredients:

- i) an agreement between two or more persons;
- ii) the agreement should be to do or cause to be done some illegal act;

12. In case of Section 409 IPC, the prosecution must prove that the accused was entrusted with a property in any manner and that such a property was in his dominion in his capacity as a public servant for a banker and further that the accused committed breach of trust in respect of such entrusted property.

13. In case of Section 477-A IPC, following are the essential ingredients. A person charged with this Section must:

- (i) be falling within the category of a clerk, an officer, or a servant;
- (ii) he must have willfully and with an intend to defraud, destroy, alter, falsify any book or valuable security which belonged to, or in the possession of his employer or which has been received by him on behalf of the employer; or
- (iii) make a false entry or omit or alter any material particular in such a book or a valuable account.

Thus, to bring home a guilt of the accused charged with this offence, the prosecution must establish that at the relevant point of time, the accused was a

clerk, officer or a servant and acting in that capacity, he has either altered, falsified, or destroyed the valuable security or account which belonged to or was in possession of his employer.

In the backdrop of these legal requirements, the facts narrated in the complaint will have to be examined with reference to the evidence brought on record by the prosecution.. We have examined the material on record in the above background.

14. A careful analysis of the evidence on record clearly shows that the prosecution has not made out any case much less a case beyond reasonable doubt against the accused.

15. As mentioned supra, this is a case involving a commercial fraud. It is alleged by the prosecution that though the depositors had not raised any loans against

their fixed deposits, the accused employees of the bank had raised liabilities against the said fixed deposit/s which came to the knowledge of the depositors when the proceeds were not paid to them on presentation of matured Fixed Deposits. If this theory of the prosecution has to be established, the prosecution has to prove that a forged application was put up before a sanctioning authority and the sanctioning authority on the strength of such forged application, sanctioned loan against the fixed deposit and ordered for release of such loans. It must be further established that based on such instructions/orders of the sanctioning authority, the disbursement of money was made to some other person other than the depositor. Further, if according to the prosecution the depositors had not made any application at all, then the prosecution has to specifically point out and establish in whose hands the cash was actually delivered. The evidence brought on

record does not specifically pinpoint the specific act/offence committed by the respondents in these two appeals. The auditors have admitted in the cross-examination that no special report was given by them which is required to be prepared and given whenever discrepancies are found after auditing the accounts. None of the witnesses have pointed out any specific illegal act of, committed by the respondents herein. Regrettably, the investigating officer –P.W.9 has stated in his cross-examination that he did not know as to which document contained any evidence against the respondents.. P.W.11-the Sub-inspector (Crime) has completely damaged the case of the prosecution by admitting in the cross-examination that he did not know as to what incriminating evidence was available against the accused. He has further stated that during the relevant period, there were no signatures of the accused in the concerned documents of the society and

that the accused cannot be held guilty. A perusal of the deposition of the witnesses discloses a very unprofessional way of conducting a criminal trial and the apathy of the prosecution. In such cases involving banks and its constituents, investigation must be prudent. Bank is a fiduciary trustee and required to maintain high degree of institutional integrity. But the case on hand is completely bereft of any evidence much less cogent and consistent evidence to accept the case of the prosecution. The first appellate Court reversing the judgment of trial court has acquitted the respondents herein. This being an appeal against acquittal, after carefully perusing and re-appreciating the material on record, we are of the considered opinion that the prosecution has miserably failed to prove its case and therefore, we concur with the finding of the first appellate Court.

Consequently, the appeals fail and are accordingly
dismissed.

We place on record the valuable services rendered by Sri J.Prakash, learned *amicus curiae*. In token thereof, we direct the Registry to pay Rs.7,000/- (Rupees Seven thousand only) as honorarium to the learned amicus curiae.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Yn.