

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEALS NO. 19 and 20 of 2011

Smt. Sharad Sukhtankar
W/o Prakash Sukhtankar,
Major in age,
R/o. H. No. 309,
Gajanan Niwas, Borda,
Margao, Salcete, Goa.

.. Appellant
(Original Complainant)

V/s

1. Shri Rajendra N. Biliye,
S/o. Narayan Biliye,
Major in age,
R/o. Junta Quarters,
C-3-12, Pajifond,
Margao, Goa.

2. State
through PP

.. Respondents
(Original Accused)

Mr. S. Shet, Advocate for the appellant.

CORAM :- C. V. BHADANG, J.

Date : 17th March, 2015.

ORAL JUDGMENT :

Both these Criminal Appeals involve a similar question of law and fact. They are between the same parties. As such, they are being disposed of by this common judgment.

2. The appellant is the original complainant, who had filed two separate complaint cases for the offence punishable under

Section 138 of the Negotiable Instruments Act, 1881 (the Act, for short) against the respondent/ original accused. According to the appellant, she had advanced a sum of ₹ 4,66,000/- to the respondent no. 1 as the respondent no. 1 was in dire need of the same. Further, according to the appellant, the respondent no. 1 had agreed to repay the said amount along with interest at the rate of 12 % p.a. amounting to a sum of ₹ 6,12,360/-. Further, according to the appellant, towards the repayment of the said sum, the respondent no. 1 had executed four promissory notes dated 12/06/2006 for a sum of ₹ 50,000/- each amounting to ₹ 2,00,000/-

3. The appellant claimed that towards the discharge of his liability, the respondent no. 1 issued many cheques. Present appeals pertain to two cheques in the sum of ₹ 20,000/- and ₹21,000/- dated 22/08/2008 drawn on the ICICI Bank, Margao Branch. Both these cheques when presented by the appellant for encashment, were dishonoured on account of insufficient funds. In such circumstances, the appellant instituted the complaint cases, after issuance of the notice.

4. The appellant examined herself before the learned Magistrate and produced the subject cheques, bank return memo, copy of legal notice and the envelope which was returned, as it was

unclaimed by the respondent no. 1. The appellant also produced the four promissory notes at exhibit C-25 to C-29. The respondent did not lead any evidence, however, produced the promissory notes dated 15/04/2003 collectively at exhibits C-26 again in the sum of ₹ 50,000/- each. The learned Judicial Magistrate, on consideration of the evidence, came to the conclusion that the appellant had failed to prove that the subject cheques were issued for discharge of a legally enforceable liability, which is the basic requirement for an offence under Section 138 of the Act. In the face of such a finding, both the complaints came to be dismissed by judgment dated 10/08/2010 and the respondent no. 1 has been acquitted. Feeling aggrieved, these appeals are filed.

5. I have heard Shri Shet, learned Counsel for the appellant. None for the respondents. With the assistance of the learned Counsel for the applicant, I have perused the record produced in these appeals and the impugned judgments.

6. It is submitted on behalf of the appellant that admittedly there were promissory notes executed by the respondent no. 1. Further more, the learned Magistrate in paragraph 26 of the judgment has also found that the other required ingredients of Section 138 of the Act have been fulfilled

and established. It is submitted that in such circumstances, the learned Magistrate was in error in holding that the appellant has failed to prove that the subject cheques were issued against legally enforceable debt or liability. It is, therefore, submitted that the impugned judgment of acquittal demonstrates an apparent error which needs to be corrected by this Court. The learned Counsel would submit that there is a presumption in favour of the appellant arising under Section 139 of the Act read with Section 118 of the Act and once the respondent no. 1 has admitted and/ or failed to dispute the signature on the cheque, a presumption would arise that the cheques were issued against legally enforceable debt or liability. He submitted that the learned Magistrate has failed to properly appreciate the evidence produced on record which has resulted into the judgment of acquittal being passed. He, therefore, submitted that the appeals be allowed.

7. I have considered the circumstances and the submissions made. It cannot be disputed that for an offence under Section 138 of the Act, the complainant has to prove that the cheque was issued for a legally enforceable debt or liability. That is *sine qua non* and an essential ingredient for the commission of offence under Section 138 of the Act.

8. In the present case, the appellant had come up with the case that the total amount of ₹ 4,66,000/- was advanced to the respondent no. 1 and as against this, the promissory notes which are produced on record, were only in respect of ₹ 2,00,000/-. It may also be noticed that when the promissory notes are shown to be executed on 12/06/2006, the subject cheques are dated 22/06/2008. The learned Magistrate has found that there is no explanation why the subject cheques were issued after a period of two years of the execution of the promissory notes. It has also been found that the appellant had not stated either in the complaint or in her evidence or legal notice, the time or the year when the said amount was advanced to the respondent no. 1. The appellant had also failed to produce any statement of account from the bank, in order to support her case that the amount so advanced was withdrawn from her bank account, as has been admitted by the appellant in her evidence. The learned Magistrate, in such circumstances, has noticed in paragraph 13 of the impugned judgment that the complaints and the evidence of the complainant run counter to each other. At one stage, the appellant had also admitted that the respondent no. 1 repaid the principal amount advanced and only the interest is outstanding, against which, the cheques were issued. This has been so noticed in paragraph 19 of the impugned judgment.

9. It is trite that while the complainant is obliged to prove his case beyond reasonable doubt, the accused can prove the defence and discharge the burden arising out of any presumption on preponderance of probability. It is now well settled that in an appeal against acquittal, the jurisdiction of this Court is limited in as much as this Court cannot substitute its own view in the face of the one, taken by the Trial Court, unless and until it is shown that the finding recorded by the Trial Court is perverse or is not at all borne out of record. I do not find that the present case is of such a nature in which it can be said that the impugned judgment is perverse, so as to warrant interference in the limited jurisdiction.

10. In the result, the Criminal Appeals fail and are dismissed.

C. V. BHADANG, J.

SMA