

**IN THE HIGH COURT OF BOMBAY AT GOA**

**CRIMINAL APPEAL NO. 26 of 2013**

Shri Venkatesh Sadanand Pai,  
S/o Sadanand Pai  
Major of age,  
Married, Retired  
Resident of House No.620  
Madhegal, Cacora,  
Curchorem-Goa .. Appellant

V/s

- 1) Mrs. Kanchan A. Shenvi Kakodkar  
Major of age,  
Married,  
Resident of House No.153,  
Kamala Sadan, Cacora,  
Curchorem-Goa
- 2) State  
(Through P.P., High Court Complex).. Respondents

Mr. C. Padgoankar, Advocate for the appellant.

Mr. Ryan Menezes, Advocate for the respondent no. 1.

**CORAM :- C. V. BHADANG, J.**

**Date : 3<sup>rd</sup> July, 2015.**

**ORAL JUDGMENT :**

By this appeal, the appellant/ complainant is challenging the judgment and order dated 16/12/2011 passed by the learned Judicial Magistrate, First Class, at Quepem, by which,

the respondent has been acquitted from the offence under Section 138 of the Negotiable Instruments Act, 1881 (the Act, for short).

2. The brief facts are that the appellant was working as a teacher in New Educational Institute, Churchorem, where the husband of the first respondent/ accused was an Headmaster. This is shown to be the reason for acquaintance between the appellant and the first respondent. The appellant came with a case that the first respondent had approached him, for a hand loan from time to time to meet her 'urgent requirements'. According to the appellant, for a period from June 2006 to December, 2007, the appellant had advanced various amounts ranging from Rs.30,000/- to Rs.80,000/- to the respondent, totalling to Rs.7 lakhs. The first respondent had promised to repay the said amount within a month from the date of the last payment of Rs.75,000/- on 05/12/2007. However, she failed therein. The appellant with the intervention of the Avdhuth Kakodkar, the husband of the first respondent could obtain two post dated cheques from the first respondent for Rs.3 Lakhs and Rs.4 Lakhs each. The present appeal pertains to the cheque dated 09/05/2008 for Rs.3 Lakhs. On presentation of the said cheque for realisation, it was dishonoured on account of insufficient funds and difference in the signature. In such circumstances, the appellant, after issuing a statutory notice, had

filed the complaint under Section 138 of the Act.

3. At the trial, the appellant examined himself along with one Mirajkar, the Bank Manager (PW2), Devidas Kakodkar (PW3), a witness on the promissory note dated 20/08/2007 and one Narayan Mierkar (PW4), who was allegedly present when the first respondent had approached the appellant with a request for financial accommodation. The appellant also produced certain documents, including the promissory note exhibit 40. The material defence of the first respondent was that the cheque does not bear her signature.

4. The learned Magistrate came to the conclusion that the appellant has failed to prove that the cheque was issued in discharge of a legally enforceable debt or liability and in that view of the matter, proceeded to acquit the first respondent. Feeling aggrieved, the complainant is before this Court.

5. I have heard Shri Padgaonkar, the learned Counsel for the appellant and Shri Menezes, the learned Counsel for the first respondent.

6. It is submitted by the learned Counsel for the appellant

that the appellant was working as Assistant Teacher in the school, where the husband of the first respondent was Headmaster and as such, they were acquainted with each other. It is submitted that on account of this acquaintance and looking to the emergent need of the first respondent, he had advanced various amounts for the period from June 2006 to December, 2007 to the first respondent. It is submitted that when the first respondent failed to return the amount, the appellant sought intervention of her husband Mr. Avdhuth Kakodkar, whereupon the first respondent passed the subject cheques, which were dishonoured. The learned Counsel has also referred to a promissory note exhibit 40, on which he has placed heavy reliance, in order to submit that the same would establish that the first respondent owed an amount of Rs.7 Lakhs to the appellant. It is submitted that the learned Magistrate has not properly appreciated the evidence of PW1 and has also failed to place reliance on the promissory note, for reasons, which are not sustainable. It is submitted that the appellant had explained that although the stamp papers, on which the promissory note was written, were dated 31/03/2003 and in the name of Advocate Kudchadkar, the promissory note itself was executed in the year 2007 and there is nothing unusual about it.

7. The learned Counsel was at pains to point out that the

first respondent had not entered into the witness box or led any evidence to set up any probable defence as to how the subject cheque came into possession of the appellant. Insofar as the aspect about the signature is concerned, it is submitted that the first respondent did not make any effort to get the document examined from an handwriting expert and it would be sufficient to draw adverse inference. Reliance is placed on the decision of Kerala High Court in the case of **V. Vijaykumar Vs. M. T. Vijayan** reported in 2011 Cri.L.J. 343. It is submitted that the view taken by the learned Magistrate is based on improper appreciation of the evidence on record, requiring interference.

8. On the contrary, it is submitted on behalf of the first respondent that the learned Magistrate has properly appreciated the oral and documentary evidence on record, in order to come to the conclusion that the appellant has failed to establish that there was any legally enforceable debt or liability arising against the first respondent and in favour of the appellant. It is submitted that the whole case set up by the appellant is improbable and not inspiring confidence. It is submitted that on his own saying, the appellant had advanced various amounts over a period of time and all these amounts are said to be advanced in cash. It is submitted that the PW1 has admitted during his cross-examination that these

amounts are not reflected in the income tax returns. The learned Counsel submitted that such an advance of an amount in excess of Rs.20,000/- in cash, would be in breach of Section 269SS of the Income Tax Act and this itself would be sufficient to discard the evidence of the complainant. It is submitted that appellant had filed an application exhibit D74 before the learned Magistrate, in pursuance of which, the cheque was also referred to Central Forensic Laboratory at Hyderabad. However, it was returned with a request, to resubmit the same with a genuine admitted signature. It is submitted that thereafter, the matter was not pursued. It is submitted that the view taken by the learned Magistrate cannot be said to be perverse, requiring interference.

9. On hearing the learned Counsel for the parties and on perusal of the record and the impugned judgment, I do not find that any case for interference is made out. The scope and ambit of the powers available to this Court in an appeal against acquittal are no longer *res integra*. In a decision in the case of ***Chandrappa Vs. State of Karnataka***, (2007)4 SCC 415, the Hon'ble Apex Court has held thus in paragraph 42 of the judgment:

*"42. From the above decisions, in our considered*

*view, the following general principles regarding powers of the appellate court while dealing 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 emphasise 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 accused. Firstly, the presumption of innocence is 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 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."*

This has been considered and relied on by the Hon'ble Supreme Court, in a recent decision in the case of "**Basappa Vs. State of Karnataka**" reported in (2014)5 SCC 154.

Thus, it is only when the view taken by the Court below is found to be either perverse or an impossible view that the Appellate Court can justifiably interfere. In other words, in a case where two views are equally possible, the Appellate Court cannot substitute its view on the ground that it is more plausible view. In that context, the powers available in an appeal against acquittal are limited and circumscribed.

10. Turning to the present case, admittedly, the appellant had retired from the school when various advances of the amounts from June 2006 is said to be made to the first respondent on a specious ground that the first respondent was known to the appellant, as she was the husband of the headmaster of the school, where the appellant was earlier serving. It has come in the

evidence of PW1 that there was no business transaction as such between the appellant and the first respondent and for the matter of that, between the appellant and Avdhuth Kakodkar, the husband of the first respondent. It is not even the case that Avdhuth Kakodkar had at any time approached the appellant with a request for financial accommodation. According to the appellant, it is only when the first respondent defaulted in the matter of repayment of the amount that he sought intervention of Avdhuth Kakodkar, when the subject cheque and another cheque for Rs. 4 Lakhs were passed by the first respondent. If we see the details of the amounts, which are allegedly advanced, they are ranging from Rs.30,000/- to Rs.80,000/- and extend over a fairly long period. PW1 has admitted that the first respondent was a housewife. It is difficult to understand as to what would be the "emergent need", of a housewife that too without the intervention of the husband, she approached the appellant, seeking amounts totalling to Rs.7 Lakhs. PW1 has further admitted that he had not taken anything in writing for the amount of Rs.30,000/- and Rs.40,000/-. Thereafter, he has stated that he had taken receipts, however, he does not remember where he has kept the said acknowledgments. Although he says that he can produce the same, if located, they were not produced. He has further admitted that his monthly income was Rs.30,000/-. However, he then stated

that the balance amount was given from the income of his wife, besides the rental income and income from agriculture. He then stated that he paid the amount of Rs.30,000/- for the second time, even when the earlier amount was not repaid. He has stated that he has paid income tax till 2004 and after his retirement, he has not filed any income tax returns. It is further stated that the first respondent had not paid any interest as there was no talk about the same between them. It is really difficult to accept that the appellant would advance these amounts without there being anything in writing and without there being any agreement to pay interest and particularly, when on his own saying, he continued to advance the amount, although the amounts paid earlier, were not repaid.

11. Now coming to the promissory note exhibit 40, the said document is dated 20/12/2007 and is written on a stamp paper dated 31/03/2003 in the name of Advocate Kudchadkar. It is significant to note that the appellant has neither made a mention about the first respondent having executed the promissory note in the notice exhibit 9 dated 22/05/2008 and even in the complaint. Ordinarily, one of the material circumstances to be established in a prosecution of the present nature is that the cheque should have been shown to be issued in discharge of a legally enforceable debt

or liability. The existence of such a promissory note by the first respondent was a material circumstance and would have found place in the notice as well as the complaint. However, that is lacking.

12. It is trite that presumption under Sections 118 and 139 of the Act can arise only where the signature is admitted. In the present case, it appears from the cross-examination of PW1 that the first respondent had disputed her signature on the cheque. It cannot be gainsaid that the first respondent had not made any attempt to get the documents examined. The fact remains that the appellant had himself made an application for sending the document to the forensic laboratory. However, that exercise was not taken to its logical end. It is trite that even where the presumption under Sections 118/ 139 of the Act is available, the same can be rebutted on the basis of the cross-examination of the witnesses of the complainant and other material evidence on record. Thus, it is not mandatory for the accused to enter into the witness box for the purpose of rebuttal of the said presumption. There is one more circumstance in this case which turns upon the applicability of Section 269 SS of the Income Tax Act. In the case of **Krishna Janardan Bhat Vs. Dattatraya G. Hegde**, reported in (2008)4 SCC 54, the Hon'ble Supreme Court has *inter alia* held

that in terms of Section 269SS of the Income Tax Act, any advance by way of loan for more than Rs.20,000/- has to be made by an Account Payee cheque only. The fact that all the transactions are said to be in cash, which are not evidenced in any income tax returns, would be sufficient to hold that the appellant had failed to establish that the cheque was issued in discharge of any legally enforceable debt or liability. I have carefully gone through the impugned judgment of the learned Magistrate and I am unable to persuade myself to hold that the view taken by the learned Magistrate is either a perverse view or an impossible view, requiring interference.

13. Before parting with the final order, it is made clear that the observations herein pertain to the complaint under Section 138 of the Act, and the issues which arise thereunder. If the appellant has taken recourse to any other legal remedy for recovery of the amount, the same shall be decided on its own merits, without being influenced by any of the observations herein.

14. In such circumstances, there is no merit in the appeal. It is consequently dismissed, with no order as to costs.

**C. V. BHADANG, J.**

SMA