

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 13 OF 2013**

Shri Rajendra Pangam,
Major of age, married,
In business,
R/at Shantadurga
Housing society, Flat No. 6,
Super Market,
Ponda, Goa.

.... Appellant
(Original Complainant)

V/s.

1. Shri Paresh B. Naik,
C/o Sai Garage,
Near Polytechnic College,
Sanguem Road,
Sanvordem,
Kaododa, Goa.

.... Respondent no.1
(Original Accused)

2. State of Goa,
Through P.P.

.... Respondent no.2

Mr. Arun Bras De Sa, Advocate for the Appellant.

Mr. John Abreu Lobo, Advocate under Legal Aid Scheme for the
Respondent No. 1.

CORAM : C.V. BHADANG, J.

Reserved on : 18th March, 2015

Pronounced on : 13th April, 2015

JUDGMENT :

This appeal is at the instance of the original complainant challenging the judgment of acquittal.

2. The brief facts are that the appellant/complainant filed a complaint before the learned Judicial Magistrate First Class at Ponda being Criminal Case No. 1259/NIA/2008/B under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act, for short). According to the appellant, the respondent no.1/accused was acquainted to him since last many years. Sometime in June, 2008, the respondent no. 1 had approached the appellant at his residence stating that respondent no. 1 is in financial difficulties and requested for accommodation in the sum of Rs.75,000/-. The respondent no. 1 also promised to repay the same. The appellant accordingly, paid an amount of Rs.75,000/- to the respondent no. 1 in cash. The respondent no. 1 issued two cheques dated 07.07.2008 in the sum of Rs.35,000/- and Rs.40,000/- towards repayment of the amount. The cheques were drawn on the account of the respondent no.1 with Syndicate Bank, Kavlem Branch. When the appellant presented

the cheques in his account for encashment with Ratnakar Bank Limited, Ponda Branch, the cheques were returned unpaid for want of sufficient funds. The appellant accordingly issued a notice dated 30.10.2008 calling upon the respondent no. 1 to pay the amount of Rs.75,000/- within 15 days. The respondent no. 1 failed to pay the amount inspite of service of the notice on 04.11.2008. In such circumstances, the appellant filed the complaint as stated earlier.

3. The appellant examined himself and produced certain documents including the subject cheques at Exhibit 24-C. The respondent no. 1 did not dispute that the cheques were signed by him. However, it was brought on record in the cross examination that the ink in which the details of the cheques are filled, is different from the ink used for signing the cheques. It appears that when the statement of the respondent no. 1 was recorded under Section 313 of the Code of Criminal Procedure, the respondent no. 1 stated that he does not wish to examine himself or any other witnesses in his defence. However, subsequently, the respondent no. 1 chose to examine himself

and his examination-in-chief was recorded on 29.10.2010 and the cross examination was deferred. The record shows that after granting time to the respondent no. 1 to subject himself for cross examination, as the respondent no. 1 failed to present himself, his evidence was closed on 01.12.2010. The learned Magistrate on hearing the parties was pleased to acquit the respondent no. 1 by judgment and order dated 29.01.2011. The learned Magistrate found that the appellant had produced his Income Tax Returns for the year 2009-2010 (Exhibit 42/C), and the same did not reflect the amount allegedly advanced to the respondent no. 1. The learned Magistrate also placed reliance on the decision of the Hon'ble Apex Court in the case of **Krishna Janardhan Bhat Vs. Dattatraya Hegde**, reported in (2008) 4 SCC 54 and decision in the case of **Sandeep Shirodkar Vs. Shankar Dhawaskar and another**, reported in 2010(1) Goa L.R. 498, in order to hold that the alleged advance of sum of Rs.75,000/- in cash was in violation of Section 269-SS of the Income Tax Act and as such, would not constitute a legally enforceable debt/liability. In such a premise, the learned Magistrate proceeded to acquit the respondent no. 1.

4. I have heard Shri De Sa, learned Counsel for the appellant and Shri Lobo, learned Counsel for respondent no.1. With the assistance of the learned Counsel, I have gone through the records and the impugned judgment.

5. It is submitted by Shri De Sa, the learned Counsel for the appellant that the learned Magistrate has refused to accept the defence that the appellant was a money lender by profession and that the subject transaction was a money lending transaction. It is submitted that the respondent no.1 had not disputed his signature on the cheque and in such circumstances, a presumption arose in favour of the appellant under Section 139 read with Section 118 of the N.I. Act which has not been discharged. The learned Counsel was at pains to point out that although the respondent no. 1 had initially stated in his statement under section 313 of Criminal Procedure Code that he does not intend to enter into the witness box or to examine any defence witnesses, nevertheless opted to enter the witness box, however failed to present himself for cross examination. This

ought to have prompted the learned Magistrate to draw adverse inference against the appellant, which has not been done. The learned Counsel for the appellant has also taken me through the observations in paragraph 24 of the judgment, in order to submit that the same is contrary to the evidence on record. It is submitted that in fact the Assets and Liability Statement annexed to the Income Tax Returns (Exhibit-42/C) reflects the amount of Rs.75,000/- advanced to the respondent no. 1. Thus the finding that the sum is not reflected in the Income Tax Returns is clearly against, positive evidence in this regard.

6. It is next submitted that the reliance placed by the learned Magistrate on the decisions of **Krishna Janardhan Bhat** and **Sandeep Shirodkar** (supra) is also misplaced, particularly in view of the subsequent decision of the Hon'ble Apex Court in the case of **Rangappa Vs. Sri Mohan**, reported in 2010 (11) SCC 441 and **K. Subramani Vs. K. Damodara Naidu**, reported in (2015) 1 SCC 99. The learned Counsel also placed reliance on the judgment of the Hon'ble Apex Court in the case of **Vijay Vs. Laxman and another**, reported in (2013) 3

SCC 86, in order to show the parameters on which this Court can interfere in the judgment of acquittal. It is submitted that this is a case in which the learned Magistrate has neither considered the evidence which was material, namely the existence of advance of Rs.75,000/-, as reflected in Profit and Loss Account and/or also failed to draw proper presumptions, which are statutory in nature, namely under Section 139 and 118 of the N.I. Act. It is submitted that the learned Magistrate has also failed to draw an adverse inference under Section 104 of the Indian Evidence Act when the respondent no. 1, after stepping into the witness box, failed to present himself for cross examination. Lastly, it is submitted that the view taken by the learned Magistrate in so far as the applicability of Section 269-SS of the Income Tax Act is concerned, is also misplaced. He therefore submitted that this is a fit case in which this Court ought to interfere with the judgment of acquittal. He therefore prayed that the appeal be allowed and the respondent no.1 be convicted.

7. On the contrary, it is submitted by Shri Lobo, learned Counsel for the respondent no.1 that the presumptions under Sections 139 and 118 of N.I. Act even if available, stand rebutted in this case. The learned Counsel submitted that admittedly the appellant is not doing any business and according to him, the appellant was looking after the business of his wife. The appellant has not shown by acceptable evidence that he was in possession of cash worth Rs.75,000/-, which could have been paid to the respondent no.1. He submitted that the appellant has not examined his wife, who was a material witness in this regard. Even so far as the Income Tax Returns (Exhibit 42/C) are concerned, it is submitted that the statement of Assets and Liability cannot form integral part of the Income Tax Returns. Thus, the observation by the learned Magistrate that the amount of Rs.75,000/- does not figure in the Income Tax Returns is clearly borne out of the record. It is submitted that the statement of the Assets and Liabilities is not signed by the respondent no.1, but is purportedly signed by the Chartered Accountant who is not examined in this case. It is submitted

that the statement of Assets and Liabilities is also not exhibited or proved. In such circumstances, the learned Magistrate was wholly justified in ignoring the same. The learned Counsel has lastly submitted that the reliance placed by the learned Magistrate on Section 269-SS of Income Tax Act is quite justified and thus the finding recorded by the learned Magistrate that in the absence of the amount being reflected in the Income Tax Returns, the necessary ingredient of the cheques being issued towards a legally enforceable debt or liability is not proved, is perfectly legal and proper. The learned Counsel placed reliance on the decision of this Court in ***Sanjay Mishra Vs. Kanishka Kapoor alias Nikki***, reported in BCR(CRI)-2009-3-157, ***Peter Mascarenhas Vs. Monsabre Ashley Oswald Dias and others***, reported in MHLJ-2010-5-117 and ***Sandeep Shirodkar Vs. Shankar Dhawaskar***, reported in BCR(CRI)-2010-2-867, in support of his various submissions. The learned Counsel has lastly submitted that the scope and ambit of the jurisdiction available in an appeal against acquittal is essentially limited and this Court in the absence of any perversity in the finding as recorded by the learned Magistrate would not be

justified in interfering with the same. He therefore urged that the appeal be dismissed.

8. I have considered the rival circumstances and the submissions made. The scope and ambit of the jurisdiction of the Appellate Court while dealing with an appeal against acquittal is no longer *res intriga*. The Hon'ble Supreme Court in the case of ***Vijay Pal Singh and others Vs. State of Uttarakhand***, reported in 2014 (14) SCALE 142, has after taking survey of its earlier decisions including in the case of ***Basappa Vs. State of Karnataka***, reported in (2014) 5 SCC 154 and ***Chandrappa and others Vs. State of Karnataka***, 2007 4 SCC 415, has held that unless the judgment of acquittal is based on, no material or is perverse or the view taken by the Court is wholly unreasonable or is not a plausible view or there is non consideration of any evidence or there is palpable misreading of evidence, the Appellate Court will not be justified in interfering with the order of acquittal.

In the case of ***Chandrappa*** (supra), the following general principles regarding power of the Appellate Court while

dealing against the order of acquittal have been set out:-

(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."

Thus, it would be clear that only because two views are possible, the Appellate Court would not be justified in substituting its view on the ground that it is more plausible.

9. Turning to the present case, it has come in the evidence of the appellant that he was knowing respondent no. 1 since 10 years prior to the date on which amount of Rs.75,000/- was allegedly advanced. The appellant has claimed that his father was having Tempos and respondent no. 1 was doing fabrication work and as the appellant was sending the vehicles

to the garage of the respondent no. 1 between Vadacadem and Usgao, since the year 1999 they were known to each other. From the year 2000, the vehicle were not sent. Further according to the appellant, he is a wholesale dealer in stationery. The business is in the name of his wife, which is looked after by him. The amount was given to the accused some 15 days prior to the date of the cheque and no receipt was obtained. The money was given to the respondent no. 1 in the presence of his wife at their residence. Prior to that, on two to three occasions when the respondent no. 1 had approached, requesting for financial accommodation, the appellant had refused. However, ultimately looking at the financial crises as claimed by the appellant, he decided to give the money. The money was given on or about 20th or 22nd June, 2008. It was given in cash. He claimed that there are two other similar complaints filed by the wife against other persons, who had borrowed money from them. One of the cheque is for Rs.89,000/- and the other for Rs.58,800/-. He claimed that the respondent no. 1 had brought the cheques with details filled in. According to the appellant, the respondent no. 1 said that he could not write properly and he

had got the details on the cheque filled by some other person. However, the cheque was signed in the presence of the appellant. He claimed ignorance as to any provision under Income Tax Act namely, amount exceeding Rs.20,000/-, mandatorily being payable by cheque. He admitted that as on 31.03.2009 he had cash in hand of Rs.9,951/- which jointly belonged to himself and his wife. He further admitted that on 31.03.2008, he was having cash in hand of Rs.10,251/- and his bank balance was Rs.54,460.60 with the Goa State Co-operative Bank and Rs.3,213/- in the account with Ratnakar Bank Limited. It would thus appear that as on 31.03.2008, the cash in hand does not make it up to Rs.75,000/-. As noticed earlier, the amount was allegedly advanced in June, 2008.

10. According to the respondent no. 1, he had requested the appellant to advance money in the sum of Rs.75,000/- as the respondent no. 1 had learnt that the appellant and his wife are lending money on interest. At that time the appellant had asked the respondent no. 1 to issue a cheque and said that he would give money within eight days. Accordingly, the

respondent no. 1 had given the cheques. He did not obtain any loan as he later found that the appellant is charging interest at exorbitant rate. However, he did not obtain the cheque back, as he had faith in the appellant.

11. The learned Magistrate on consideration of the evidence found that the appellant has admitted that the money was not given from his personal account. The learned Magistrate has found that the appellant has failed to show that he was in possession of cash of Rs.75,000/- on the date on which it is said to be advanced. In paragraph 22 of the judgment, the learned Magistrate has then considered the fact that the appellant did not obtain any receipt and has found that no prudent man would advance a huge sum of money without executing any document and without charging any interest.

12. The learned Counsel for the appellant has taken serious objection to the observation and finding with regards to the Income Tax Returns in paragraphs 25 and 26. It is submitted that the observation by the learned Magistrate that

advance of Rs.75,000/- is not reflected in the Income Tax Returns for the Assessment Year 2009-10 at Exhibit-42/C is apparently incorrect. The learned Counsel has invited my attention to the document at Exhibit-42/C, in order to submit that Balance Sheet as on 31.03.2009, shows an advance of Rs.75,000/- to the respondent no. 1, under the Head of Current Assets.

13. I have considered the rival circumstances and the submissions made. The Income Tax Return is in respect of M/S Kamala Traders of which the Proprietor is shown as Smt. Radhika R. Pangam and the appellant. The Balance Sheet is signed by the Chartered Accountant and not by the appellant. It is true that in the matter of filing of Returns, the party takes the assistance of a Chartered Accountant/Expert. However, in the present case, the appellant could have examined the Chartered Accountant or atleast produced the accounts maintained, in order to establish that the amount of Rs.75,000/- was advanced to the respondent no. 1. That evidence is not forthcoming. The appellant has not examined his wife, who is the Proprietor and in

whose presence the amount is allegedly advanced. As noticed earlier from the evidence of the appellant, it does not appear that the appellant was having sufficient amount, so as to support the loan of Rs.75,000/-, somewhere in June, 2008.

14. The learned Magistrate has then went upon considering the effect of Section 269-SS of the Income Tax Act, 1961, in order to hold that advance of Rs.75,000/- was in violation of said provision. The learned Magistrate has placed reliance on the decisions of the Hon'ble Supreme Court in the case of **Krishna Janardhan Bhat** (supra) and **Sandeep Shirodkar** (supra). In the case of **Krishna Janardhan Bhat** (supra), the Hon'ble Supreme Court has found that the High Court had not drawn any inference as to probability of the complainant's advancing Rs.1,50,000/- on mere asking, and that too without keeping any documentary proof. The purported story that the appellant (original accused) gave the cheque, knowing fully well that he is not having sufficient funds, was difficult to believe. The Hon'ble Court further found that the Court's below had failed to notice that ordinarily in terms of Section 269-SS of

the Income Tax, any advance of amount more than Rs.20,000/- had to be made by an account payee cheque only.

The judgment in the case of **Krishna Janardhan Bhat** (supra), has been considered by the Hon'ble Supreme Court in a three Judges bench decision in the case of **Rangappa** (supra). The observation in the case of **Krishna Janardhan Bhat** above, to the extent of nature of presumption under Section 139 were not approved. However, the Hon'ble Apex Court held in paragraph 26, that this does not in any way cast doubt on the correctness of the decision in that matter (Krishna Janardhan Bhat) since it was based on the specific facts and circumstances in that case. Thus, the observations and findings based on Section 269- SS of the Income Tax Act in the case of **Krishna Janardhan Bhat** (supra) are not affected by the later decision in the case of **Rangappa** (supra).

15. The submission on behalf of the appellant that adverse inference needs to be drawn as the respondent no. 1 had failed to subject himself for cross examination, also cannot be accepted. It is now well settled that the accused can rebut

the presumption on the basis of the cross examination of the complainant and other witnesses if any, and it is not necessary that he should enter the witness box as a rule.

16. In **K. Subramani** (supra), the High Court had decided a batch of ten appeals remanding the complaints under Section 138 of the Negotiable Instruments Act to the learned Magistrate. In one of the appeals, the complainant and the accused were working as Lecturers in Government College. It was found that the complainant had come with the case that he had advanced an amount of Rs.14,00,000/- to the accused. Both of them were governed by Government Servants' Conduct Rules which prescribed the mode of lending and borrowing. There was nothing on record to show that the prescribed mode was followed. It was also found that the complainant could not establish the source of the amount. In such circumstances, the appeal was allowed and the judgment of acquittal was restored.

17. For the reasons aforesaid, I do not find that the view recorded by the learned Magistrate can be said to be perverse or

based on misappreciation of evidence on record, so as to need inference, in the present appeal. In the result the appeal fails and is hereby dismissed.

The parties to bear their own costs.

C. V. BHADANG,J

MV/EV