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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 47 OF 2012

Shri Antonio Menezes
@ Anthony Menezes
s/o Mr. C. Menezes, major,
Indian National, married,
resident of St. Estevam,
Ilhas Goa.

... Appellant

V e r s u s

1. Shri Mahesh Phadte,
Proprietor : Royal Builders
and Developers, major of age,
r/o Government Quarters,
First Floor, Building No. 16-D,
Patto, Panaji Goa.

2. The State of Goa,
Through the Public Prosecutor,
High Court,
Panaji Goa.

... Respondents

Mr. R. Menezes, Advocate for the appellant.

Mr. P. A. Kamat, Advocate for respondent no.1.

CORAM : K. L. WADANE, J

JUDGMENT RESERVED ON : 30.01.2015

JUDGMENT PRONOUNCED ON : 12.02.2015

J U D G M E N T :

The original complainant filed this appeal challenging the judgment and order dated 12.04.2012 passed by the learned Additional Sessions Judge, Mapusa, in Criminal Appeal No. 10/2011.

:2:

2. Parties are referred to their original status.

3. Brief facts of the case may be stated as follows :

The complainant (Antonio Menezes) filed a complaint against the accused for the offence punishable under Section 138 of the Negotiable Instrument Act.

4. The accused is a resident of Panaji and introduced himself to the complainant that he deals in construction and selling of flats in the surrounding locality.

5. In the year 1994, the accused represented to the complainant when the complainant had been to Goa that he proposed to construct an apartment at Old Goa and the accused gave offer to purchase one single bed room flat in the said apartment. On representation of the accused, the complainant shown his willingness to purchase the flat. Accordingly, an agreement was executed between the parties. However, for one or other reason the said project was not completed. Therefore, the accused informed the complainant about the new project which was to start at Taleigao. As per the representation of the accused, the complainant was ready to buy a double bed room flat in place of flat at Old Goa. The agreement was executed between the parties in the year 1997.

6. It is further stated by the complainant that he paid an amount of Rs.6,00,000/- to the accused as the consideration for the purchase of flat but subsequently the accused never completed the construction nor he paid the amount back. It was supposed to repay the amount to the complainant. On 27.10.2003, the accused issued a letter to the complainant informing that he is issuing four cheques in favour of the complainant for a total amount of Rs.8,00,000/- and in the letter it is clearly mentioned that the cheques were issued as a security for non fulfillment or cancellation of agreement and, therefore, requested for extension of time. It is further mentioned that if the sale deed is not executed on or before 22.12.2003 the complainant is at liberty to encash the aforesaid four cheques. Subsequently, the cheques were deposited in bank which were returned unpaid. Therefore, the complainant issued notice to the accused for which he had not replied. Thereafter, the accused gave assurance of making payment and to settle the matter amicably. Thereafter, the accused requested the complainant to wait for some time and issued six cheques for an amount of Rs.1,00,000/- each drawn on H.D.F.C. Bank. Out of the above six cheques, the cheque bearing No. 254729 for Rs.1,00,000/- dated 30.09.2004 was subject matter of the complaint. The aforesaid cheque was duly presented for its encashment but returned with remark " funds insufficient".

As a result thereof, notice for demand was issued to the accused on 10.11.2004 and thereby demanded the amount within 15 days from the date of receipt of the notice. Notice was received by the accused on 13.11.2004. In spite of the receipt of the notice, the accused did not even bother to reply to the notice nor he paid the amount within the stipulated time. Thus, the accused had committed offence punishable under Section 138 of the Negotiable Instrument Act.

7. The complainant states that the dishonour of the said cheque was intentional as the accused was fully aware of the fact that when the cheques were issued the funds were insufficient.

8. In the Trial Court, the complainant entered into witness box and deposed in the line of allegations/contents in the complaint at Exhibit – 1. As against this, no evidence of any kind is led by the accused besides the oral evidence on record. The certain documents were placed on record before the Trial Court.

9. Considering the evidence on record i.e. the oral as well as the documentary, the learned Trial Court has convicted the accused by directing the accused to remain in custody till rising of the Court and to pay compensation of Rs.20,000/- to the complainant by holding that the offence punishable under Section

138 of the Negotiable Instrument Act stands proved. It is also held by the Trial Court that the complainant has proved that the accused issued cheque for Rs.1,00,000/- to the complainant towards part discharge of the liability. Secondly, the cheque was returned unpaid with endorsement that "funds insufficient" and thirdly, the accused failed to make payment of dishonour of the cheque on receipt of the legal notice. Being aggrieved with the judgment and order passed by the learned Trial Court, the accused preferred an appeal bearing Criminal Appeal No. 10/2011 as well as the complainant preferred a revision bearing Criminal Revision Application No. 13/2011 for enhancement of sentence .

10. On perusal of the reasons recorded by the Trial Court, it appears that the accused has been convicted mostly on the ground that the complainant has established that the accused was liable to pay amount under the cheque in discharge of his liability or legally enforceable debt. On perusal of the reasons recorded by the learned Appellate Court, it appears that the learned Additional Sessions Judge has observed that the complainant failed to give clear account of the amount paid to the accused and evidence on record shows that the accused has paid the amount to the complainant in excess of the amount which the complainant has paid to the accused.

:6:

11. I have heard the arguments of Mr. R. Menezes, learned counsel appearing for the complainant and Mr. P. Kamat, learned counsel appearing for the respondent no.1 at length. The following point arises for my determination.

POINT FOR DETERMINATION

FINDING

Whether the learned Additional Sessions

Judge erred in acquitting the accused ?

No

R E A S O N S

12. Looking to the contents in the complaint and the arguments advanced by both the sides, it appears that there is no serious dispute between the parties about the earlier transaction, its cancellation and issuance of four cheques for Rs.8,00,000/-. For the issuance of four cheques for an amount of Rs.8,00,000/-, the relevance in the present matter would be discussed later on. It is also undisputed fact that the accused had issued another six cheques for Rs.1,00,000/- each, out of which there was settlement between the parties and the accused paid an amount of Rs.4,00,000/-. The amount due towards four cheques of Rs.1,00,000/- each and also the accused paid part payment of 5th

cheque and the criminal complaint was the subject matter of the 6th cheque. So looking to the averments and the evidence on record, it appears that the accused had given cheque to the complainant as he was unable to fulfill the contract between the parties more particularly he was unable to give the possession. Therefore, the allegations in the complaint and the oral evidence relating to the facts and the figure of the amount from the pleadings and evidence of the complainant are most relevant factor to be taken into consideration. During the course of the arguments, no other aspect relating to the offence punishable under Section 138 of the Negotiable Instrument Act regarding issuance of cheque, its dishonour and notice by the complainant to the accused were argued. Therefore, it appears that other aspects of the matter are not in dispute. Looking to the arguments advanced by both the parties, it appears that the controversy is around the aspect of "legally enforceable debt". The learned counsel appearing for the complainant has argued that once the accused has admitted the fact of issuance of cheque the presumption under Section 139 of the Negotiable Instrument Act raises in favour of the complainant. Hence, once the complainant has established that the accused issued cheque in his favour then the burden shift upon the accused. Thus, the accused has to establish or rebut the presumption by preponderance of

probability. The learned counsel appearing for the complainant has argued that in view of the strong presumption in favour of the complainant under Section 139 of the Negotiable Instrument Act coupled with the evidence led by the complainant, the offence punishable under Section 138 of the Negotiable Instrument Act stands proved. It is also proved that the accused had issued cheque for repayment of "legally enforceable debt". Therefore, the learned Trial Court has rightly convicted the accused. As against this, it is argued on behalf of the accused that if the accused is able to show from the circumstances that he had already paid amount to the complainant in excess which amount has been accepted, then the presumption in favour of the complainant stands rebutted. According to the learned counsel appearing for the accused, the accused has to establish his defence on the basis of preponderance of probability and not required to establish beyond reasonable doubt. Looking to the arguments advanced by both the sides, now it is necessary to consider the evidence on record.

13. On scrutiny of the complaint at Exhibit 1 as well as the oral evidence of the complainant, it appears that there is variance between the contents of the complaint and the oral evidence. Only it has been mentioned in the complaint that the complainant paid

:9:

an amount of Rs. 6,00,000/- to the accused for the purpose of purchase of the flat. However, the record shows that there was an agreement between the parties initially in the year 1997 and the accused agreed to sell a flat for the consideration of Rs.2,79,000/- and the mode of payment is shown in the agreement. However, the accused was unable to give the possession of the aforesaid flat so again the parties entered into another agreement dated 05.12.1997 vide Exhibit 7 and the mode and the manner of the payment was as follows :

- 1) On signing the agreement – Rs. 1,50,000/-.
- 2) In the month of December 1997-Rs.1,50,000/-.
- 3) In the month of February 1998 - Rs.1,50,000/-.
- 4) In the month of July 1998 - Rs.1,15,000/-.
- 5) At the time of possession - Rs.1,00,000/-.

So the agreement price of the schedule agreed between the parties was Rs.6,65,000/- and this is exactly contrary to the contents of the complaint at Exhibit 1. The complainant has stated that an amount of Rs.6,00,000/- was paid which can be seen from the para no. 6 of the complaint and this amount also erased and written as Rs.6,09,000/-. Nowhere it is mentioned in the complaint that the agreed price was Rs.6,65,000/-. Therefore, the contents in complaint at Exhibit 1 are quite contrary to the oral

evidence of the complainant.

14. Admittedly, the possession of the flat under the agreement of the year 1997 was not given to the complainant therefore, question of payment of last installment of Rs.1,00,000/- does not arise.

15. In terms of the above agreement, the complainant was to pay Rs.1,50,000/- at the time of signing the agreement, Rs.1,50,000/- in the month of December 1997, Rs.1,50,000/- in the month of February 1998 and Rs.1,15,000/- in the month of July 1998 and during the possession, an amount of Rs.1,00,000/- was to be paid. If assuming in terms of the said mode the complainant was required to pay only an amount of Rs.5,65,000/- before taking possession, therefore, there was no question of his paying an amount of Rs.1,00,000/- which was required to be paid at the time of taking possession of the flat. The complainant has not produced any evidence to show the manner in which the said amount of Rs.6,00,000/- was paid. The complainant has testified that at the time of execution of the agreement he paid an amount of Rs.1,50,000/- as per the schedule in the agreement. In the cross examination he initially admitted that he has issued cheque bearing no.557659 for Rs.1,00,000/- dated 05.12.1997. In this

context, the admission given by the complainant is very material which reads as follows :

"It is true that I have issued to the accused two cheques no. 557658 dated 05.12.1997 and cheque no. 557659 for Rs.50,000/- which is encashed and the entries of the same are reflecting in my bank statement and I have the bank statement right now."

16. Then he was confronted with the cheque bearing no. 557658 dated 05.12.1997. He has identified the said cheque at Exhibit 37 and admitted that this was the cheque issued by him. He then admitted that the said cheque was not encashed and has stated that it was agreed that it was only a commercial transaction.

17. A further reference has to be given to the certain admissions given by the complainant during his cross examination. It was in the question and answer form, which is reproduced as follows :

Que : Whether he has received D.D. dated 15.04.2004 for Rs.1,15,000/- and cash of Rs.50,000/-. What do you want to say ?

:12:

Ans : I say that with reference to the letter dated 15.04.2004 the accused visited advocate's office and handed over to him the D. D. plus cash and then sought re-scheduling of the balance liability of Rs.6,00,000/- by issuing six new fresh cheques, drawn on H.D.F.C. Bank for Rs.1,00,000/-.

If the above position is considered then it is very difficult to know particularly when the complainant had received an amount of Rs.1,65,000/- by way of D.D. and cash and how then the accused is liable to pay again Rs.6,00,000/- when even from the say of the complainant the price of the flat was settled to Rs.6,00,000/-. One can understand if the parties are agreed to pay the interest and certain cost on account of delay. Still it must be clarified by the complainant as to how much amount of interest to be paid on account of delay, in case, it is caused, in absence of any particular, and due to infirmity in the evidence regarding the amount paid by the complainant to the accused, it is difficult to hold that the accused was liable to pay the amount at least as per the cheque in question in the present matter. There was no difficulty for the complainant to clarify the situation about the

:13:

payment by him to the accused from time to time.

18. It is further came in the evidence that the accused issued four cheques of Rs.8,00,000/-. The complainant failed to explain how the accused was liable to repay an amount of Rs.8,00,000/- as against the payment of Rs.6,00,000/-. It is further came on record that again the accused had issued six cheques of Rs.1,00,000/- each, out of which the amount of Rs.4,00,000/- were already settled and the accused had also paid part amount of 5th cheque. So there is a serious infirmity between the oral evidence and the contents of the complaint. Therefore, I am of the opinion that the learned Additional Sessions Judge has considered all the aspects of the matter and has rightly acquitted the accused. Hence, the present Criminal Appeal No. 47 of 2012 is liable to be dismissed. Accordingly, it is dismissed.

K. L. WADANE, J

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