

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 40 OF 2011**

Mr. Santosh Laximan Fadte,
Son of Laximan V. Fadte,
Aged 48 years, Advocate,
Indian National,
And R/ at H. No. 2089, Main
Road Bordem, Bicholim-Goa. .. Appellant

Vs.

1. Mr. Nitish Suryakant Kavlekar,
Son of Suryakant Kavlekar,
Major in age, business,
Indian National and R/at
H. No. 950/1, Krantinagar,
Porvorim Housing Board Colony,
Porvorim, Bardez-Goa.
Usgao, Ponda-Goa.
2. State
Through Public Prosecutor,
Panaji-Goa. .. Respondents.

Mr. N. Sardessai, Senior Advocate with Mr. L. Raghunandan,
Advocate for the appellant.

Mr. S. D. Lotlikar, Senior Advocate with Ms. M. Furtado and Mr. C.
Padgaonkar, Advocates for the respondent no.1.

CORAM : K. L. WADANE, J

RESERVED ON : 6th February, 2015

PRONOUNCED ON : 13th March, 2015

J U D G M E N T :

The present appeal is directed against the judgment
and order passed by the Judicial Magistrate First Class, 'E' Court,

Mapusa, (J.M.F.C.) in charge of 'D' Court, Mapusa, in Criminal Case No. 475/OA/2009/D dated 03.07.2010 by which the accused/respondent is acquitted for the offence punishable under Section 138 of the Negotiable Instrument Act, 1881 ('N. I. Act').

2. The parties are referred to as per their original status.

3. The brief facts giving rise to the present appeal may be stated as follows :

The complainant filed a complaint against the accused stating that the accused along with his wife had agreed to sell a plot No. 128 forming part of the property surveyed under no.77/1 of Village Pilerne of Bardez Taluka Goa to the complainant for total consideration of ₹ 30,00,000/-.

4. The complainant accordingly paid part consideration of ₹.10,00,000/- by two cheques of ₹ 5,00,000/- each dated 28.01.2009 drawn on the Bank of India, Bicholim Goa.

5. The complainant states that since the transaction

could not take place on account of reasons best known to the accused, the accused was pleased to refund the amount along with interest by way of two cheques, i.e. cheque bearing no. 112172 dated 17.03.2009 for a sum of ₹ 6,25,000/- and cheque No. 112173 dated 17.03.2009 for a sum of ₹ 5,00,000/- drawn on the State Bank of India, Candolim Branch. In due course, the complainant deposited the above mentioned cheques for their realisation in the Bank of India, Bicholim Branch. The above mentioned cheques were returned to the complainant by the Bank with the endorsement “insufficient funds” in the account of the accused. Therefore, the complainant, through his Advocate, issued notice to the accused on 01.06.2009 calling upon him to pay the amount of cheques within 15 days. The accused received the said notice on 08.06.2009, however, till the date of the filing of the complaint, the accused has not paid the amount under the cheques nor he replied the notice. Therefore, the complainant has filed the complaint against the accused for the offence punishable under Section 138 of the Negotiable Instrument Act. To prove the offence, the complainant has deposed at Exhibit 2 and has relied upon two cheques with return memo and copy of the notice.

6. As against this, the accused has examined one

witness K. Ashok Kumar at Exhibit 46. Considering the evidence on record and upon hearing both the sides, the learned Magistrate has acquitted the accused mostly on the ground that the contract between the parties was not terminated. So, there was remedy for the complainant to ask for specific performance. The complainant has not surrendered the right under the agreement and also on the ground that the cheques were issued by way of security for the transaction and the accused is not liable to pay any amount to the complainant and therefore, the present appeal.

7. I have heard the arguments of Mr. N. Sardessai, learned Senior Counsel appearing for the complainant/appellant and Mr. S. D. Lotlikar, learned Senior Counsel appearing for the accused/respondent.

8. During the course of the arguments, it is argued by Mr. Sardessai, learned Senior Counsel that the issuance of two cheques is an admitted fact. It is also admitted fact that the accused has not replied to the notice. The defence of the accused is that the transaction is not legal and there was difference between the amount paid by the complainant to the accused and the amount of the cheques. Mr. Sardessai, learned

Senior Counsel has argued that the complainant has established the fact that he paid an amount of ₹ 10,00,000/- to the accused by two cheques and the accused issued two cheques of ₹6,25,000/- and ₹5,00,000/- respectively for repayment of the amount to the complainant together with interest. He further argued that dishonour of the cheques is also established. The accused has not replied to the notice. Therefore, he has no defence to raise in the Trial Court. As such, according to Mr. Sardessai, the ingredients of the offence punishable under Section 138 of the Negotiable Instrument Act have been proved and established. Therefore, the Trial Court ought to have convicted the accused. Mr. Sardessai, further argued that the learned Trial Court has not considered the presumption under Section 139 of the Negotiable Instrument Act. Hence, the judgment and order passed by the learned Trial Court needs to be set aside.

9. As against this, Mr. Lotlikar, learned Senior Counsel appearing for the accused/respondent has argued that the transaction was not between two persons but it was between four persons as per the terms and conditions of the agreement. Therefore, one person alone is not entitled to file complaint under the provisions of Section 138 of Negotiable Instrument

Act. Mr. Lotlikar, further argued that the view favourable to the accused has been accepted by the learned Trial Court and ordinarily, such findings cannot be disturbed in the appeal against the acquittal. He further argued that the cheques were by way of security. Therefore, the accused has not presented the same soon after their issuance and were presented to the bank after about one month. That indicates that the cheques were issued by way of security. Looking to the evidence on record and upon hearing both the sides, the following points arise for my determination :

POINTS FOR DETERMINATION

1. Whether the complainant proves that the accused has legal enforceable liability for an amount under two cheques dated .. Yes 17.03.2009 ?

2. Whether the complainant proves that the two cheques dated 17/03/2009 issued by the .. Yes accused are dishonoured ?

10. On going through the reasons recorded by the learned Magistrate, it appears that the learned Magistrate has acquitted the accused broadly on the ground that the

complainant paid an amount of ₹10,00,000/-(Rupees ten lakhs only) by way of two cheques and within one and half month the accused repaid the amount of ₹11,25,000/- (Rupees eleven lakhs twenty five thousand only) along with interest. Therefore, the learned trial Court has suspected the genuineness of the cheques themselves. Secondly, on the ground that the agreement between the accused and the complainant is unlawful because the accused was not entitled to alienate the plot to the complainant because of the rider put at the time of allotment of the plot to the accused. So it was observed by the learned Magistrate that the agreement of the sale between the complainant and the accused is unlawful and, therefore, there was no legally enforceable debt. Further, the learned Magistrate has observed that the complainant has not surrendered his right to claim the repayment of the amount paid to the accused.

11. To constitute the offence under Section 138 of the Act, following ingredients need to be fulfilled :

“1. Cheque should have been issued for the discharge, in whole or part, of any debt or other liability.

2. The cheque should have been presented within the period of six months or within the period of its validity, whichever is earlier.

Note – The cheque may be presented any number of times for collection within its validity.

3. The payee or the holder in due course should have issued a notice in writing to the drawer within thirty (fifteen prior to 2002 amendments) days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

4. After the receipt of the said notice by the payee or the holder in due course, the drawer should have failed to pay the cheque amount within fifteen days of the receipt of the said notice.

Note -Notice of dishonour is unnecessary when the party entitled to notice cannot after due search be found (See section 98, Negotiable Instruments Act)."

12. Further the necessary ingredients of Section 138 of N. I. Act have been spelt out by the Apex Court in the case of ***Kusum Ingots & Alloys Ltd.***, AIR 2000 SC 954, which read as under :

“(i) a person must have drawn a cheque on an account maintained by him in the bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iii) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

13. Looking to the ingredients of the offence punishable under Section 138 of N. I. Act, now it is necessary to assess the evidence on record. Before assessing the evidence, a reference has to be made to the written statement of the accused recorded under Section 313 of Cr.P.C. vide exhibit 20 in which, it is mentioned by the accused as follows :

" I say that in these circumstances I showed my willingness to transfer the said plot to the complainant. However, I made it expressly clear to him that I will be under no obligation to get the said plot transferred in his

name or responsible for any consequences. I say that the complainant under these circumstances advanced me as a part consideration of the said plot ₹ 10,00,000/-. However, it was never being agreed that the said amount is refundable in the event of non-transfer of the plot. I say that since there was no written agreement between us and only considering the contingencies involved, in order to bind me to transfer the said plot to him, the complainant obtained said two blank cheques from me.”

14. So, looking to the written statement of the accused, it appears that he wants to suggest that he was not under obligation to transfer the plot. He also admitted that the complainant has paid an amount of ₹ 10,00,000/-. However, he further came with a case that the complainant obtained two blank cheques from the accused. During the course of the argument, Mr. Lotlikar, learned Senior Counsel has argued that the agreement between the parties is still in force, therefore, there was no question of issuance of two cheques in lieu of repayment of the amount which the accused has accepted being part payment. From further evidence, it is seen that the agreement between the complainant and the accused was not enforceable because the DW1, who was examined by the

accused, says in examination-in-chief that the plot no. 128 was auctioned to Nitin Kavlekar i.e. the accused and possession of the plot was given to him. One of the conditions of the allotment was that the plot was not transferable and it could not be sold. The allottee of the plot was required to construct within four years or within such time extended from time to time. Only after the construction was completed, the ownership of the said plot would be conveyed to the allottee on production of the occupancy certificate. From the record, it is seen that the accused has received the possession of the plot on 08/10/2001. Looking to the above position, it appears that the accused was unable to sell the plot to the complainant because of the above condition. Some explanation is invited on behalf of the accused during cross-examination of the complainant which reads as follows :

“It is true that the remedy of the specific performance was provided under the said contract. I had never given any intimation to the accused that I have surrendered my rights under the same agreement of specific performance. I voluntarily say that since the accused called and requested me that he could not honour the contract, he is returning my money along with expenditure.”

15. This explanation invited during the cross-examination, therefore, assumes significance. From the circumstances, it is revealed that the accused was unable to perform his part of contract and, therefore, he issued two cheques in lieu of repayment to the complainant.

16. Next important aspect which requires to be considered is about the excess payment of ₹ 1,25,000/-. The complainant has stated in his complaint that the accused repaid the amount along with interest. Again more clarification is given by the complainant during his cross-examination which is in question and answer form and reads as under :

Question : It is true it is not that the subject cheques are more than the amount which alleged to have been advanced to the accused on 28/01/2009.

Answer – Since the accused failed to honour the contract, he returned me the cheque amount with interest calculated till 15/05/2009 and the cost of mortgage charges and my personal expenses.

17. The explanation of excess amount of ₹ 1,25,000/- is invited on behalf of the accused during cross-examination.

Therefore, the explanation is brought on record why the accused has repaid the excess amount than obtained from the complainant, but the learned Trial Court has lost the sight to consider the explanation invited by the accused.

18. On perusal of the oral evidence of the complainant, it appears that the accused agreed to sell the plot No. 128/A. However, the transaction was cancelled by the accused for the reason best known to him. In this behalf, a reference has to be made to the document exhibit 27 i.e. the term and condition for auction of the plots. Admittedly, the accused has succeeded this plot in an auction and at the time of allotment, he agreed to one of the term and condition that no transfer of the plot will be permitted once the plot is allotted. This is the hurdle for the accused to transfer the plot in the name of the complainant and probably, because of this, the agreement/ contract between the parties was not materialised.

19. Looking to the further evidence, it appears that the accused issued two cheques in favour of the complainant, one is for ₹6,25,000/- and another is for ₹5,00,000/-. Both the cheques were deposited in the concerned Bank for their encashment. However, the same are returned unpaid on 23/05/2009 and

19/05/2009 respectively with an endorsement “funds insufficient”. Then, the complainant issued notice to the accused on 01/06/2009 and thereby demanded the amount due under the cheque. That notice was received by the complainant on 08/06/2009. In spite of the receipt of the notice, the accused failed either to pay the amount or to reply the notice. The cheques and return memorandum are at exhibits 3 and 4 and the copy of the notice is at exhibit 6. So looking to the oral evidence of the complainant, coupled with documents on record, it appears that this evidence is sufficient to constitute the offence punishable under Section 138 of N. I. Act. Looking to the reasons recorded by the Trial Court, it appears that it considered the aspects and rights/ defence available to the parties in a civil suit and, therefore, has wrongly held that unless and until the contract between the parties is terminated, the complainant is not entitled to ask for refund.

20. In this behalf, it is material to note that as per the provision of Section 65 of the Contract Act, the accused is under obligation to repay the amount, if the agreement for sale is not materialised. Section 65 of the Contract Act reads as under :

“65. Obligation of person who has received advantage under void agreement, or contract that

becomes void. - When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

21. Mr. Lotlikar, learned Senior Counsel has relied upon the observations in the case of ***Gangabhavani Vs. Rayapati Venkat Reddy and others***, reported in 2013 15 SCC 298. Paragraph 10 of the judgment in the case (supra) reads as under:

"This Court has persistently emphasised that there are limitations while interfering with an order against acquittal. In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the acquittal by the lower Court bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

22. The above observations are inapplicable to the facts of the present case because here in the present case, the

learned Trial Court has acquitted the accused under wrong assumptions. The Trial Court has not considered the evidence on record in reference to the ingredients of offence punishable under Section 138 of the N. I. Act as referred above. Therefore, interference with the findings recorded by the Trial Court is needed. Therefore, considering the presumptions under Section 139 of the N. I. Act and the evidence available on record, I am of the opinion that the offence levelled against the accused stands proved. Therefore, the judgment and order passed by the J.M.F.C. at Mapusa in Criminal Case No. 475/OA/2009/D needs to be quashed and set aside.

23. Hence, the appeal is allowed.

(i) The judgment and order passed by the J.M.F.C. at Mapusa in Criminal Case No. 475/OA/2009/D needs to be quashed and set aside.

(ii) The accused is convicted for the offence punishable under Section 138 of N. I. Act.

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24. Since the accused is not present before the Court in spite of his having furnished bond under Section 390 of the

Criminal Procedure Code, the learned Magistrate shall enforce the appearance of the accused before him by appropriate process within one month of receipt of writ of this Court and after hearing the parties, inflict appropriate sentence upon the accused- respondent no. 1.

24. The appeal stands disposed of accordingly.

K. L. WADANE, J.

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