

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

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.116 OF 2006**

**PRADEEP KASHIRAM KADAM )...APPELLANT**

**V/s.**

**K.A.VERGHESE AND OTHERS )...RESPONDENTS**

Mr.Jitendra G. Damani, Advocate for the Appellant.

Mr.P.M.Havnur a/w. Ms.Najafiya Shroff, Advocate for Respondent Nos.1, 2 and 3.

Mr.Deepak Thakre, APP for Respondent No.4 - State.

**CORAM : ABHAY M. THIPSAY, J.**

**DATE : 24<sup>th</sup> JUNE 2015.**

**JUDGMENT :**

1           The appellant is the original complainant. He had prosecuted respondent nos.1, 2 and 3 herein, on the allegation that they had committed an offence punishable under Section 138 of the Negotiable Instruments Act ('N.I.Act' hereinafter). The

Metropolitan Magistrate, 44<sup>th</sup> Court, Andheri, Mumbai, after holding a trial found the said respondents not guilty and passed an order of acquittal. Being aggrieved by the said order of acquittal, the appellant, after obtaining special leave of this court, has filed the present appeal, challenging the order of acquittal.

2           For the sake of convenience and clarity, the appellant shall hereinafter be referred to as 'the complainant' and the respondent nos.1, 2 and 3 as 'the accused'.

3           The case of the complainant, as made out from the complaint filed by him, was in brief, as follows :

That, by an Agreement for Sale dated 6<sup>th</sup> July 1994, the complainant had agreed to sell, transfer and convey all his rights, title and interest in respect of a certain immovable property to the accused persons, who were, at the material time, carrying on business of builders and developers in the name and style of M/s.Kalpana Constructions. That, the accused persons made the part payment towards the purchase of the said property and

requested the complainant to complete the transaction by executing the Conveyance in favour of the accused persons. That, the complainant agreed to convey the property to the accused persons, but required payment of a sum of Rs.4,79,000/-, which was the balance consideration, to be paid by the accused to the complainant by August 1996. The three accused executed, by way of security for payment, an Indemnity bond cum Declaration, on 2<sup>nd</sup> November 1996, and relying on the representations of the accused, the complainant conveyed the property to the accused persons by executing a Conveyance Deed, though the full amount of consideration had not been received by him from the accused. That, the accused did not make the payment of the balance amount within the stipulated time, but issued two cheques – one in the sum of Rs.4,79,000/- and the other in the sum of Rs.1,00,000/-, being the amount due and payable towards the balance of the purchase price and the interest on delayed payment, respectively. When the said cheques were deposited by the complainant, they were dishonoured with the banker's remark 'payment stopped by the drawer'. That, the complainant then

made a demand in respect of the amount of the said cheques as contemplated under Section 138 of the N.I.Act. The accused persons received the demand notice, but failed to comply with the requirement and raised certain false and frivolous contentions. It is, thereafter, that the complainant filed a complaint in the court of the Magistrate, pursuant to which, the accused, as aforesaid, came to be prosecuted.

4           I have heard Mr.Jitendra G. Damani, the learned counsel for the appellants. I have heard Mr.PM.Havnur, the learned counsel for the accused nos.1, 2 and 3. I have heard Mrs.M.R.Tidke, the learned APP for the State – Respondent no.4. With the assistance of the learned counsel, I have gone through the record and proceedings before the Magistrate. I have gone through the evidence and the impugned judgment carefully.

5           The complainant examined himself as a witness during the trial. He also examined one Girish Shah – an employee of the bank – through whom the statement of accounts of M/s.Kalpana

Constructions was got produced. The accused no.1 examined himself as a defence witness and also examined one Jayantilal Shah as the second witness for the defence.

6           That, the cheques in question had been signed by the accused no.1 is not in dispute, and that, the cheques had been signed and issued by him on behalf of all the accused, is also not in dispute. That, they had been issued in favour of the complainant is also not in dispute. That, they had been issued towards the transaction of the purchase of the property in question is also not in dispute. That, the cheques in question were dishonoured as the bankers of the accused persons were instructed not to make the payment of the said cheques, is also not in dispute. That, there was no sufficient balance in drawer's account, so as to honour the cheques, is also not in dispute. That, a demand notice was received by each of the accused is also not in dispute, and obviously, that the amount in respect of the said cheques has not been paid is also not in dispute. The accused persons during the trial had come up with a case that they had

valid and proper justification for not paying the amounts of cheques in question. The same contention has been taken before this court also.

7            Though apparently, a number of grounds were urged as and by way of justification for not making the payment of the said cheques, before the trial court, only one of them is specifically and emphatically put forward before this court, viz., '*that the area of the plot of land, which was sold by the complainant to the accused, was less than what was mentioned in the Agreement for Sale and the Conveyance Deed.*' It is contended that the consideration was fixed on the basis that the plot of land was of a particular area, but since it was revealed that it comprised of a lesser area, the complainant was not entitled to have the agreed consideration, and that, the price of the land was liable to be reduced proportionately. Thus, in short, the contention is that, since the area of the plot of land in question was less than what was believed to be at the time of entering into the Agreement for Sale and effecting Conveyance, the accused persons were entitled

to have a reduction in the purchase price to be paid by them to the complainant, and were, therefore, justified in withholding the payment of the balance amount for which the cheques had been issued.

8           Mr.Damani, the learned counsel for the complainant, submitted that, the stand taken by the accused persons was a thoroughly dishonest one. He submitted that the Agreement for Sale was entered into on 6<sup>th</sup> July 1994. That, the Conveyance Deed was executed on 19<sup>th</sup> August 1995, and that, till that time the accused persons had not raised any grievance about the area of the land agreed to be sold being less than mentioned in the Sale Deed. The same area was mentioned in the Conveyance Deed also. Mr.Damani also pointed out that even thereafter the accused persons had, on 2<sup>nd</sup> November 1996, executed an Indemnity bond cum Declaration, but at that time also, there was no reference to the area of the plot of land to be less than that mentioned in the Agreement and the Conveyance. Mr.Damani lastly contended that, the contention that the area of the plot of land was less than

that agreed to be sold, was false, and there was nothing to support such assertion.

9           Mr.Havnur, the learned counsel for the accused persons, on the other hand, attempted to show that the area of the plot of land that was conveyed to the accused was indeed less. According to him, the accused persons, after the Conveyance was effected, got the area of the plot of land measured and found the same to be less by 137 square yards. He, therefore, submitted that under these circumstances, the complainant was not entitled to have the cheques, which were given for the payment of the balance consideration, encashed.

10           It is not possible to accept the contention advanced on behalf of the accused for a number of reasons.

11           In the first place, the cheques had been issued towards the balance of amount of consideration that was to be paid by the accused to the complainant. In spite of the fact that full

consideration was not paid, the accused got the Conveyance executed and got the property transferred into their name only on the basis that the balance would be paid. It was, therefore, not open for them to say, after having got the property transferred in their name on the assurance that the balance consideration would be paid, and only after the cheques issued for the payment thereof were dishonoured, that they will not pay the same.

Secondly, the property has been described in the Agreement as “*the piece or parcel of land admeasuring about 569.1 sq.yds. equivalent to 472.26 sq.metres or thereabout and bearing Survey No.42, Hissa No.19, (Part) and C.T.S.No.308-B situate lying and being at Jeevan Vikas Kendra Marg, Koldongri, Vile Parle (East), Bombay 400 057.*” The property has been described in the Schedule in greater details, and is described by the boundaries thereof. It is stated to be “*bounded as follows : that is to say : on or towards the North : by an 18 ft. means of access and forming land in part of Survey No.42 Hissa No.20 : on or towards the South by land in Survey No.28, Hissa No.1 (Part) on or towards the East by the land in Survey No.20, Hissa No.22 and*

*on or towards the West by Plot No.1 of the sanctioned and approved lay out and sub-division and bearing Survey No.42, Hissa No.19(Part) Survey No.28, Hissa No.4 and shown delineated on the Plan thereof hereto annexed.”* A plan of the property is also annexed to the Agreement to Sale.

12           It is not the case of the accused persons that this description of the property by its Survey number, Hissa number, C.T.S. number etc., as given in the Agreement, is **wrong**. It is also not the case of the accused persons that the boundaries of the plot of land in question has been wrongly shown or described in the Agreement. Even in the Conveyance, the property is described in the same manner. In the schedule thereto, the property is described in the same manner, as has been described in the Schedule to the Agreement to Sale. All the boundaries of the plot of land in question, have also been described in the same manner. The question is '*when the particular plot of land is described by Survey number and C.T.S. number and when the boundaries thereof are well defined can the*

*purchaser raise a plea that he is not liable to pay the agreed consideration, but is entitled to have it reduced, because on actual measurement, the area of the property is found to be less than that mentioned in the Agreement and / or Conveyance Deed, though the other description of the property – particularly that of the boundaries thereof – is correct.'* In my opinion, when the boundaries of the property are well defined and when a particular consideration is fixed for the property, described by its boundaries, it would not be open for the purchaser to raise such a plea unless the purchaser can establish fraud or misrepresentation, as defined in Sections 17 and 18 of the Contract Act. The accused persons had gone ahead with the Conveyance by agreeing to pay the balance consideration. They had indemnified the complainant against any possible loss or damage due to the non-payment of the consideration amount. Moreover, they had not taken any steps to avoid the contract. After having got the property transferred in their name by assurance of paying the balance amount due and payable, they are simply content on avoiding the payment thereof.

13           However, that is also not the real point that needs determination. The cheques had already been issued by the accused persons. Infact, the date of the cheque was got extended by the accused persons by making a request to the complainant and by agreeing to pay an additional sum of Rs.1,00,000/- (for which a separate cheque came to be issued) as a consideration for the complainant granting further time to the accused persons to pay the balance consideration. Thus, the transaction of sale, and even the Conveyance was already complete on a given date and the amount agreed to be paid towards the purchase price of the plot of land, had already fallen due. The accused persons were supposed to pay the entire consideration at that time itself, but it is because of their own inability to pay the entire consideration at the time when the transaction was completed, that time was granted by the complainant to them to make the payment. The transaction was complete at that stage itself and further time that was given to the accused persons to pay the balance consideration was only an arrangement arrived at by and between the parties. Had the full consideration been paid at that time, the complainant

would have got the agreed amount. When such is the position, the accused persons were not entitled to withhold the payment of the cheques, even if it is assumed just for the sake of argument, that they later found the area of the plot of land to be less than mentioned in the Agreement and / or Conveyance. It is because, there was no such discovery viz., of the area being less at the time when the payment of the consideration was to be made. All that can be said in that regard is that in such a case, the accused could have taken appropriate legal proceedings against the complainant for avoidance of the contract on the ground of fraud, or misrepresentation, or recovery of the excess amount paid to the complainant, on the basis of a mistake.

14           *Apart from this, there does not seem to be any satisfactory evidence for showing that the area of the plot of land on measurement was found to be less. Moreover, when did the accused realize this, is not clear.* In the reply to the demand notice submitted by the accused persons, a number of reasons for stopping the payment of the cheques have been mentioned, and

one of them is that the area of the land was noticed to be '*much less*' than what was supposed to have been handed over to the accused persons. There is such a vague assertion, but how much area was less has not been specified. It appears from the reply that the accused persons wanted some encroachment upon the land by one Jalusha Housing Society to be removed, and to get 'the deficit area recovered from Jalusha Housing Society.' Thus, the dispute in reality does not appear to be a plain dispute about the area being less, but apparently accused had some grievance about the encroachment on the said land. Such grievance, obviously, could not be raised by the accused persons after the Agreement was completed and the property was conveyed by executing Conveyance Deed, particularly because, the Agreement at Exh.D1 clearly indicates that the accused had agreed to purchase the property on 'as it is where it is condition.'

15           I have gone through the impugned judgment to ascertain the reasoning of the Magistrate in passing the order of acquittal. The Magistrate has referred to the evidence of the

accused no.1, wherein, he had stated that an amount of Rs.4,79,000/- was not paid and the payment was kept pending for the reason of clearance of title, survey of land, clearance from one Jayantilal Shah and Arun Mehta, with whom, apparently, the complainant had a dispute, etc. The Magistrate also referred to the evidence of the accused no.1, wherein, he stated that during the survey of the land it was found that it was less by 137 sq.mts. This fact was just believed by the Magistrate, though no details of such survey were given by the accused no.1 in his evidence. The Magistrate also referred to the evidence of Jayantilal Shah as the second witness for the defence, with whom, the complainant, as aforesaid, had a dispute. This dispute was regarding the same land, and the said Jayantilal Shah had written to the accused no.1 informing him of the dispute and advising him not to have a transaction with the complainant, as the transaction in respect of the same land was pending between him and the complainant. The Magistrate then referred to the provisions of Section 54 of the Indian Contract Act, Section 52 of the Transfer of Property Act, Sections 18 and 19 of the Indian Contract Act and

came to the conclusion that the accused were not liable to pay the amount of the contract. Apart from the fact that the reference to the said provisions was absolutely unwarranted and irrelevant in the light of the controversy that was involved in the matter, the fact remains that the only basis for the Magistrate's coming to the conclusion that the accused were not liable to pay the amount, was that the area of the plot of land in question was indeed less than what was agreed to be sold. The Magistrate, in that regard, as aforesaid, only relied on the oral testimony of the accused no.1 to that effect, and did not require any report of any such survey. The Magistrate was of the view that the complainant had not specifically denied that the area of the plot of land was less while giving rejoinder to the reply of the accused to the demand notice in the complaint etc. What he, however, overlooked is the assertion of the accused persons, in reply to the demand notice was itself vague i.e. *'the area is noticed to be much less.'* The Magistrate overlooked that the accused no.1 even did not give the details as to when and by whom the survey of the land was taken. The Magistrate did not bother to think that the alleged survey

was, admittedly, not taken in the presence of the complainant. Such oral evidence of the accused no.1 could not have been relied upon to hold that the area was indeed less. Once that itself was not established, there was no question of judging by reference to the provisions of the Indian Contract Act as to whether the accused were liable to pay the amount of the cheques in question or not. The Magistrate overlooked that the accused had not approached any civil court for avoidance of the contract or any other appropriate relief, where the dispute could have been properly adjudicated upon, but were merely content with holding back the part of the payment. The Magistrate overlooked that after the Agreement, Conveyance was effected and the property was actually conveyed to the accused and was in their possession. Moreover, as aforesaid, the Agreement at Exh.D1 clearly indicates that the accused had agreed to purchase the property on 'as it is where it is condition.' The evidence of the accused no.1 was clearly, contrary to the terms of the written agreements / instruments and could not have been relied upon.

16           The reasoning of the Magistrate and the approach adopted by him was not in accordance with law. Here, there was a completed and clear transaction between the complainant and the accused, and cheques had been issued by the accused in favour of the complainant towards the payment of the balance consideration in respect of the land purchased by them from the complainant. The object of Section 138 of N.I.Act is to lend credibility to the cheque transaction by bringing them on par with transactions in cash. Even assuming that the accused had a right to recover the amount of compensation paid to the complainant, on the basis of some mistake or misrepresentation, still, the accused were not entitled to withhold the payment of the cheque which was agreed to be done when the Conveyance was effected. The accused had got the property conveyed in their name by a registered Conveyance Deed and it was not open for them, thereafter, to stop the payment of the cheque, which had been issued towards the balance consideration, which was, as per the notion of the parties at the time when the Conveyance was effected, payable to the complainant.

17           Moreover, on facts, the stand of the accused persons does not appear to be sincere, or at any rate, supported by satisfactory evidence. In the first place, as aforesaid, that the area of the plot of land in question is less, itself has not been established. Secondly, the accused were not interested in approaching a civil court, where the issues - (i) whether the contract was voidable and the accused could avoid it, (ii) whether there had been a fraud, misrepresentation or mistake, and (iii) whether the accused were liable to recover some amount from the complainant, and if so, how much, - could have been properly and fully adjudicated.

18           This was a case where the cheques had been clearly issued for the payment of what was agreed to be due and payable, and that the payment would be received by the complainant on a future date, was only an arrangement arrived at by the parties, by mutual consent. It was, infact, not necessary for the Magistrate to have gone into the finer aspects of the matter in the prosecution in respect of an offence punishable under Section 138 of the N.I.Act,

when, as per the notion of the parties, when the cheques were given and when the transaction was completed, the accused were liable to pay the amount. There is no dispute that as per the notion of the accused themselves, at that time, the amount was due and payable to the complainant; and their claim is only that the subsequent revelation made them realize that, that amount should not be paid to the complainant. If that was so, the proper course for the accused persons would not be to stop the payment of the cheques, but to raise the issue directly by approaching the civil court and claiming refund of the excess amount, if any, paid to the complainant.

19           The order of acquittal, as recorded by the Magistrate, is not proper and legal. The accusation against the respondents had been proved and they were liable to be convicted.

20           At this stage, I have heard the learned counsel for the parties on the question of sentence. In the facts and circumstances of the case, I do not think that a sentence of

imprisonment is called for. It is not disputed before me that the accused persons are an association of persons, who had entered into the relevant transaction with the complainant, and that, though the cheques had been signed only by accused no.1, the other accused are also jointly and severally liable to pay the amount of the said cheques. Infact, that position is accepted by the accused themselves before me.

21           The appeal is allowed.

The impugned judgment and order of acquittal is set aside.

Respondent nos.1, 2 and 3 are convicted of an offence punishable under Section 138 of the Negotiable Instruments Act, and each of them is sentenced to pay a fine of Rs.3,75,000/- (Rupees Three Lac Seventy Five Thousand Only), in default, to suffer Simple Imprisonment for Four (4) months.

If the fine is realized, an amount of Rs.11,00,000/- (Rupees Eleven Lac Only) therefrom, shall be paid to the appellant as compensation.

On the oral prayer of the learned counsel for respondent nos.1 and 2, time of eight weeks from today, is granted to the respondents to pay the amount of fine.

The appeal is disposed of in the aforesaid terms.

**(ABHAY M. THIPSAY, J.)**