IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 206 OF 2015

Shri Eli Furtado,
49 years of age,
Builder & Developer,
Residing at G-4, Madhuban-II,
Opp. St. Inez Church,
Panaji- Goa ... Applicant
(Original Complainant)

Versus

1) Dr. Shyam Murti Gupta
Major of age, Scientist by
Profession, Residing at
134-D, Nagali Hills Colony,
Dona Paula, Goa.

2) State through
Public Prosecutor ... Respondents

Mr. P. A. Kholkar, Advocate for the applicant.

Mr. P. Lotlikar, Advocate for the respondent no. 1.

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

Reserved on : 18th April, 2016.

Pronounced on : 26th April, 2016

ORDER :

This is an application for leave to appeal against acquittal.

2. The applicant was the original complainant before the learned Magistrate in which the first respondent was an accused. That was a complaint filed under Section 138 of Negotiable Instruments Act 1881 (the Act, for short) being Criminal Case No.534/OA/NI/2007/C before the Judicial Magistrate, First Class at Panaji, Goa.

3. The applicant is developer engaged in construction business and is proprietor of Keiva Constructions while the first respondent is an employee of National Institute of Oceanography (NIO), Dona Paula. Under an agreement dated 24/06/2004 between the parties, the applicant had agreed to sell a Villa / bungalow in Keiva Villas Scheme at Dona Paula. The agreement was in respect of sale of Villa D, for a total consideration of Rs.15 Lakhs. Indisputably, the first respondent had obtained financial assistance for purchase of the said villa from State Bank of India. The case made out in the complaint is that by an undated letter (Exh.PW1-42), the first respondent had asked the applicant to carry out certain changes in the said villa. The said letter sets out in all 25 items which includes marble flooring for the ground floor the living and dining and staircase, some teak wood work, POP, loft, utility room with platform and stainless steel Sink and certain changes, to be carried out as per the plan annexed with the letter.

According to the applicant, the said additional work was carried out by him on account of which the applicant incurred an expenditure of Rs.50,000/- to 55,000/-. According to the applicant, out of this amount, the first respondent had paid a total amount of Rs.30,000/- in instalments in cash and an amount of Rs.25,000/- was outstanding for which the first respondent had passed a post dated cheque dated 30/08/2015 bearing No.535708 drawn on State Bank of India. When the said cheque was presented for encashment, the same was returned without realisation for the reason that the account was closed. Thereafter, the applicant issued a notice dated 28/09/2015 (Exh.PW1-39), which was admittedly served on the son of the first respondent as the first respondent had gone abroad on 03/09/2005. Nevertheless, the first respondent managed to issue a reply dated 03/10/2005 which is at Exh.DW1-40, thereby denying the allegation that the cheque was issued towards payment of balance amount for carrying out the additional work in the villa. As the first respondent had failed to pay the amount, the applicant lodged a complaint under Section 138 of the Act before the learned Magistrate in which the applicant examined himself and produced certain documents. The first respondent also examined himself and produced some documents. The defence set up by the first respondent is that the applicant had failed to complete the construction of the villa and to hand over its possession as agreed on account of which, the bank was not ready to release the final instalment of the loan in favour of the applicant amounting to Rs.1,50,000/-. The first respondent was in a hurry to occupy the house. In such circumstances, the first respondent passed two cheques one dated 15/01/2005 for Rs.1,25,000/- and the other being the subject cheque for Rs.25,000/- which was undated as a security for the outstanding amount of Rs.1,50,000/- towards the cost of the villa. Thereupon the applicant gave an undertaking dated 18/01/2005 Exh.DW1-56 to the Bank requesting the Bank to release an amount of Rs.1 Lakh immediately and remaining Rs.50,000/- on completion of the work. By the said undertaking, the applicant had undertaken to complete the construction work and to remove minor defects, if any. In short, it is the defence that the subject cheque was not issued towards balance payment for undertaking additional work, but was issued as a security so that the applicant can complete the work and hand over the possession. According to the first respondent, the cost of additional work to the tune of Rs.3 Lakhs was paid in cash. The possession of the villa was handed over to the first respondent on 15/01/2005 and it is not disputed that so far as the total consideration / price of the villa is concerned, the entire amount is paid and received by the applicant.

4. The learned Magistrate framed as many as six points, including whether the subject cheque was issued in discharge of a legally enforceable liability ? The learned Magistrate answered all the points in the affirmative and convicted the first respondent by a judgment and order dated 27/11/2013. The first respondent was sentenced to undergo Simple Imprisonment for six months and to pay compensation of Rs.50,000/- and in default, to undergo further Simple Imprisonment for three months. The first respondent challenged the same before the learned Sessions Judge in Criminal Appeal No.132/2013. The learned Sessions Judge, by a judgment and order dated 28/05/2015, has allowed the appeal and acquitted the first respondent. Feeling aggrieved, the applicant is before this Court.

5. I have heard Shri Kholkar, the learned Counsel for the applicant and Shri Lotlikar, the learned Counsel for the first respondent at length. With the assistance of the learned Counsel for the parties, I have perused the copies of the documents and the evidence, which are produced in this appeal.

6. Shri Kholkar, the learned Counsel for the applicant strenuously urged that the learned Sessions Judge was in error in

interfering with the order of conviction passed by the learned Magistrate. He submitted that once the first respondent had not disputed the signature on the subject cheque, a presumption arose under Section 139 of the Act in favour of the applicant, which has not been rebutted. It is submitted that the finding of the learned Sessions Judge that the presumption stood rebutted is erroneous, requiring interference. The learned Counsel has taken me to the undertaking Exh.DW1-56 to say that there are some manipulations/ interpolations made in the same. The learned Counsel has also extensively taken me through the evidence led by the parties in order to show that the cheque was issued towards balance payment of Rs.25,000/- for undertaking the additional work. The learned Counsel has also referred to clause 3 of the Agreement entitled "changes" which provides that the developer will not accept any changes or additions to the said villa. The learned Counsel relied upon judgments, namely (i) ***T Vasanthakumar Vs. Vijay Kumari***, reported in 2006(2) Mh.L.J. 335, (ii) ***Gaurav Omprakash Jaju Vs. Shakti Fabrics,*** reported in 2010(6) Mh.L.J. 59, (iii) ***Purushottam Gandhi Vs. Manohar Deshmukh***, reported in 2007(1) Mh.L.J. 210 and (iv) ***Bratindranath Banerjee Vs. Hiten P. Dalal,*** reported in 2000 DoCh. 56, in order to submit that the Appellate Court while examining the findings of the Trial Court, particularly in case where apart from the factual aspects, there are statutory presumptions available as well, the Appellate Court should be extremely slow in interfering with the findings of the Trial Court. It is submitted that it is necessary for the Appellate Court in such cases to find out as to what facts are established and as to whether on the basis of such facts, any presumption is attracted or rebutted, in order to draw an appropriate inference. The learned Counsel was at pains to point out that once the signature on the cheque is not disputed, even assuming that it was a blank cheque, there is an implied authority given by the drawer of the cheque to the holder thereof to fill in the details. He, therefore, urged that leave to appeal against acquittal be granted.

7. On the contrary, the learned Counsel for the first respondent has supported the impugned judgment. It is submitted that the first respondent has succeeded in displacing the presumption, on the basis of the evidence on record. The learned Counsel submitted that while the complainant is obliged to establish the case beyond reasonable doubt, the accused can discharge the burden on preponderance of probability. It is submitted that the Sessions Judge has rightly held that the presumption stood rebutted and it was not proved that the cheque was issued towards the payment of balance amount for

undertaking additional work. It is submitted that the cheque was not issued towards discharge of a legally enforceable debt or liability is correct and does not need any interference.

8. I have given my anxious consideration to the rival circumstances and the submissions made and I do not find that a case for grant of leave is made out. The law relating to trial of offence under Section 138 of the Act is now too well settled to be restated. There cannot be any dispute with the proposition that once the accused admits the signature on the cheque, a presumption arises under Section 139 of the Act, which would also cover a presumption that the cheque was issued towards discharge of legally enforceable debt or liability. Such presumption, nevertheless, is rebuttable and the accused can rebut the said presumption on preponderance of probability. The accused can do so on the basis of cross-examination of the witness of the complainant and/ or by leading independent evidence. However, the question whether the presumption stands rebutted or not would be a question of fact individual to each case. In other words, the said aspect would essentially depend upon the fact and circumstances of each case.

9. Let us now consider the facts as obtaining in the

present case. The applicant claims that he had carried out the additional work as requested by the first respondent in the undated letter and had incurred cost of about Rs.50,000/- to Rs.55,000/- out of which, a total amount of Rs.30,000/- was paid in cash and Rs.25,000/- was outstanding towards which the subject cheque was given. On the contrary, the defence is that the construction was not complete, as a result of which the Bank was not ready to release the final payment of Rs.1,50,000/- and as the first respondent was in a hurry to occupy the villa, two cheques were passed including the subject cheque by way of security whereupon, the applicant undertook to the bank to complete the work, requesting to release an amount of Rs.1 Lakh immediately and Rs.50,000/- three days after the completion of the work. The question is which of the versions is proved or appears to be probable. The Courts below have differed in this regard in their conclusions.

10. Before adverting to the evidence on record, it is necessary to state that in an appeal against conviction, the Session Judge would be justified in reappreciating the entire material and coming to his own conclusion unlike in an appeal against acquittal where this Court cannot substitute its view for the one taken by the Court below where two views are equally and reasonably

possible. It is only when the view taken and the finding recorded by the Court below is found to be perverse or an impossible view that this Court can justifiably interfere with the finding.

11. The learned Sessions Judge has found that the work in respect of 25 items as set out in the letter Exh.PW1-42 cannot be undertaken for Rs.50,000/- to Rs.55,000/- as the work was of extensive nature. It is also found that although the applicant had claimed in his evidence that a rough estimate for the additional work was given to the first respondent, the same is not produced before the Court. The applicant was cross-examined on the point of production of books of accounts to show that the first respondent had paid Rs.30,000/- in 2 to 3 instalments, but such record was not produced. No final bill towards carrying out the additional work was produced or shown to be issued to the first respondent. According to the applicant, after allowing certain discount to the first respondent, the amount due was Rs.50,000/- to Rs.55,000/-. However, there was no evidence as to how much was the discount given. It was also found that if the additional estimate was for Rs.50,000/- and after deducting the payment of Rs.30,000/- (which was admitted by the applicant), the balance would only be Rs.20,000/-. It would be less than the amount of subject cheque. It was also found that the undertaking given by

the applicant to the Bank would be in consonance with the defence that indeed an amount of Rs.1,50,000/- was due and outstanding towards the price of the villa and, therefore, it was probable that the cheque was given towards security so that the applicant can complete the work and hand over the possession.

12. Apart from the above, what is significant is that the first respondent had issued a letter dated 03/03/2005 Exh.DW1/63 to the Branch Manager which makes a mention about the applicant holding two cheques totalling worth Rs.1,50,000/-. This letter was issued about 5 months prior to presentation of the subject cheque in question and thus would have great probative value. It would further be significant to note that in notice Exh.PW1-39 issued by the applicant, there is no mention at all of any additional work being undertaken or the subject cheque being issued towards the balance payment for undertaking the additional work. The said notice is conspicuously silent on this aspect. It may further be mentioned that the first respondent had approached Consumer Disputes Reddressal Forum against the applicant seeking compensation of Rs.4,50,000/- and District Forum had granted compensation of Rs.1,50,000/- which order was confirmed upto National Forum. Record of these proceedings was also produced before the learned Magistrate. The first

respondent had, inter alia, claimed that the complaint was filed as a counterblast as the first respondent had approached the Authorities under the Consumer Protection Act.

13. I have carefully gone through the order of the learned Sessions Judge and I find that the view taken is a plausible view and the acquittal of the first respondent does not need any interference.

14. In the case of ***T. Vasanthakumar*** (supra), on facts, it was held that the accused failed to discharge the burden thereby displacing presumption under Section 139 of the Act.

In the case of ***Purushottam Gandhi*** (supra), this Court has held that when the drawer of cheque delivers a signed cheque, he gives an authority to holder to put a date of his choice.

In the case of ***Gaurav Jaju*** (supra), a hand loan transaction was held to be proved on the basis of the evidence of PW3 and the defence that the cheque might have been stolen by brother of the complainant, was found to be not acceptable. The defence was forced to be by way of an afterthought.

In the case of ***Bratindranath Banerjee*** (supra), it was, *inter alia,* held that "the holder in due course" may not know what was the consideration or liability as he would be "far removed from the drawer or his payee". This is obviously not the case in this matter as the applicant claims to be a payee and not holder in due course. As noticed earlier, the legal propositions although not in dispute, the question whether the presumption stands rebutted would depend upon the fact and circumstances of each case.

15. Thus, I do not find any reason to interfere with the finding recorded by the learned Sessions Judge. In the result, the application for leave is hereby rejected.

C. V. BHADANG, J.

SMA