

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 31 OF 2013

Shri Abhaykumar Krishna Kamat,
Major of age, married,
Indian National,
R/o. B F 1,
First Floor,
Hirashray Apartment,
Merces-Vaddem, Vaddem,
Vasco da Gama.

..... Appellant

V e r s u s

Shri Rajnish Udaykar,
Major of age, married
Indian National,
R/o. House no. 77, Talwado
Behind Shani Temple,
Veroda,
Cuncolim,
Salcete, Goa.

..... Respondent

Mr. Anthony Rebello, Advocate for the Appellant

Coram :- C. V. BHADANG, J
Date : 14th March, 2016

ORAL JUDGMENT

By this Appeal, the Appellant/Original Complainant is taking exception to the Judgment and Order dated 08.08.2012, recorded by the learned Judicial Magistrate First Class, Vasco da Gama, in Criminal Case no. 94/OA/NIA/2011/C by which the Respondent-Accused has been acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, ('Act', for short).

2. Briefly stated, it was the case of the Appellant that on account of friendship, the Appellant had accommodated the Respondent in the sum of

Rs.1,70,000/-. In the complaint filed before the learned Magistrate, the Appellant has set out the details of the payment which were made to the Respondent from time to time from December 2010 to May 2011. The Appellant further claimed that towards repayment of the said amount, the Respondent had issued a cheque bearing no. 231641 dated 15.09.2011 for a sum of Rs.1,70,000/- in favour of the Appellant. The said cheque was drawn on Centurion Bank Ltd., Vasco da Gama branch. When the said cheque was presented for encashment through UCO Bank, the same was dishonoured with the endorsement that the concerned account of the Respondent was closed. The Appellant thereafter issued a statutory notice which was returned unclaimed. Thus, on account of the failure of the Respondent to pay the amount inspite of the issuance of the notice, the Appellant filed the complaint under Section 138 of the said Act before the learned Magistrate.

3. At the trial, the Appellant examined himself and produced the subject cheque and the copy of the legal notice (Exhibit 19) along with the registered envelope (Exhibit 20). The Appellant also examined one Krishna Venkatesh Shenvi, the Branch Manager of UCO Bank, Vasco da Gama Branch. In defence, the Respondent examined himself apart from Smt. Swati Naik (Dw.2), Asst. Branch Manager of Lokmanya Multipurpose Co-operative Society and Shri Sameer Lotlikar, (Dw.3), the Branch Manager of H.D.F.C. Bank, of Vasco Branch.

4. The learned Magistrate came to the conclusion that the Appellant had failed to prove that the subject cheque was issued for a legally enforceable debt or liability. In the face of the finding, the learned Magistrate held that the Appellant

had failed to prove that the Respondent had committed an offence punishable under Section 138 of the said Act. In that view of the matter, the Respondent came to be acquitted. Feeling aggrieved, the Appellant is before this Court.

5. I have heard the learned Counsel appearing for the Appellant. There is no appearance on behalf of the Respondent. With the assistance of the learned Counsel appearing for the Appellant, I have perused the evidence and the impugned Judgment.

6. It is submitted by the learned Counsel appearing for the Appellant that the Respondent had not issued any reply to the notice issued by the Appellant. It is submitted that although the Respondent had raised defence that the Appellant had misused the cheque which was in fact given as a blank cheque while the Respondent had obtained a loan from the Lokmanya Co-operative Credit Society in July, 2008, where the Appellant was serving as a Manager at the relevant time, the Respondent had failed to lodge any complaint with the police about the alleged misuse of the cheque. It is further submitted that there is no document to show that the Respondent had handed over twelve blank cheques when he had obtained a loan of Rs.25,000/- from the Lokmanya Co-operative Credit Society in July 2008. It is further submitted that it is unlikely that the Appellant would be able to obtain a blank cheque from the record of the said Credit Society and then misuse the same for his own purpose. Learned Counsel has submitted that the defence raised by the Respondent is not probable and the learned Magistrate was in error in holding that the Respondent has probalised his defence. It is submitted that the learned

Magistrate has also failed to see that the amount of Rs.1,70,000/- was not advanced at once and the same was advanced in instalments out of the friendly relations between the parties. It is submitted that the learned Magistrate erred in attaching too much importance to the fact of the said amount not being reflected in the Income Tax Returns. It is submitted that the impugned Judgment is based on misreading and mis-appreciation of the evidence on record and the finding recorded is consequently rendered perverse, requiring interference of this Court.

7. I have considered the circumstances and the submissions made. It is not in dispute that in July, 2008, the Respondent had obtained a loan of Rs.25,000/- from the Lokmanya Co-operative Credit Society. At the relevant time, the Appellant was serving as a Manager with the said Credit Society. It is further undisputed that since then, the Appellant had retired from the service of the said Credit Society. The Respondent came with a defence that when he had obtained the loan of Rs.25,000/- from the Lokmanya Co-operative Credit Society in July 2008, he had handed over twelve blank/undated cheques in the hands of the Appellant for securing the loan. It was further the defence that the Appellant had misused one of the cheques.

8. A perusal of the impugned Judgment, shows that the Magistrate found that the amount of Rs.1,70,000/- was not reflected in the accounts or in the Income Tax Returns of the Appellant although he had admitted that the Appellant was filing Income Tax Returns. The learned Magistrate further found that according to the Appellant, he had withdrawn various amounts which were paid to the Respondent

from the UCO Bank and the State Bank of India. However, admittedly, the Bank statements from the said Banks were not produced to show that indeed such amounts were withdrawn and that too on the date which would correspond to the dates on which the various amounts were allegedly paid to the Respondents as set out in the complaint. The learned Magistrate has further found that the Appellant failed to explain as to why the amount was not reflected in the Income Tax Returns. It was further found that admittedly the subject cheque which was issued by the Respondent in the year 2011 was drawn on the account of the Respondent with Centurion Bank. The Centurion Bank had merged with H.D.F.C. Bank sometime in the year 2009. It was found that the Appellant who was earlier Branch Manager of a Credit Society could not have accepted the cheque of Centurion Bank in the year 2011 when the said Bank had merged with the H.D.F.C. Bank in the year 2009. The learned Magistrate has found that the Appellant as an erstwhile bank employee, ought to have known that the Bank in which Centurion Bank had merged will not honour the cheque. These circumstances, has led the learned Magistrate in holding that the Appellant has failed to prove that the subject cheque was issued in the discharge of a legally enforceable debt or liability.

9. It is trite that in a criminal case, the burden to prove that the Accused has committed the offence would lie on the Complainant. It is only when there is some evidence to show that the Respondent had indulged into the offence that the question of probability of the defence can arise and can be looked into. Here is a case, where admittedly, the amount of Rs.,1,70,000/- is neither shown to be reflected in any accounts or Income Tax Returns although the Appellant was filing

Income Tax Returns. Further, the learned Magistrate has held and to my mind rightly so, that the Appellant could not have accepted the cheque of the Bank which had earlier merged with the H.D.F.C. Bank sometime in the year 2009. Merely because the Appellant has not filed any police complaint about misuse of the cheque, would not cure the defect in the case of the Appellant, to hold that the cheque was issued in the discharge of a legally enforceable debt or liability. Thus, even assuming for a moment that the Respondent has failed to probabalise the defence of misuse of one of the twelve blank undated cheques (allegedly handed over to the Appellant sometime in July, 2008), I find that the Appellant has failed to establish by acceptable evidence that indeed the subject cheque was issued in discharge of a legally enforceable debt or liability.

10. It is well settled that the scope of interference in a matter of acquittal is limited. It is only when the view taken by the Trial Court is an impossible view or it is based on total misreading and mis-appreciation of evidence that interference is called for. In a case where two views are equally possible, the Appellate Court cannot substitute its view in the place of the one recorded by the Trial Court. In the present case, I find that the view taken by the learned Magistrate is a plausible view based on appreciation of evidence. In the absence of the same being perverse or an impossible view, no interference is called for.

11. In the result, the Appeal is hereby dismissed.

C. V. BHADANG, J.

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