IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPLICATION NO.152 OF 2017
IN
STAMP NUMBER MAIN NO.1681 OF 2017.

WIBRO CONSTRUCTION
COMPANY THR. ITS PROP.,
MR. K. ABDULLA. .... Applicant.

Vs.

THE MANAGING DIRECTOR
AND ANR. .... Respondents.

Coram:- PRITHVIRAJ K. CHAVAN,J.

Reserved On:-7th November, 2017.

Pronounced On:-21st November,2017.

Shri A. Kakodkar, Advocate for the applicant.

Shri V. Shirodkar, Advocate for the respondent no.2.

ORDER

By this application, the original complainant/ applicant prays for grant of Special Leave against the judgment of acquittal passed by learned JMFC, "C" Court, Mapusa on 31.3.2017 thereby acquitting the respondents for an offence punishable under Section 138 of Negotiable Instruments Act ("NIAct" for short).

2. Heard learned Counsel appearing for the applicant as well

as the learned Counsel appearing for the respondents. Perused the impugned Judgment and order of the learned JMFC.

3. At the outset, the learned Counsel for the applicant argued that the learned Trial Court in the impugned Judgment wrongly interpreted Section 138 of the NIAct by placing the burden on the applicant, which in fact, is against the settled principles of law wherein the presumption of existence of legally enforceable debt or liability is in favour of the applicant, which is required to be rebutted by the respondents. It is also argued that the learned trial Court, in the impugned judgment, placed reliance on the statement of the accused under Section 313 of Cr.P.C. by holding that subject cheque was given as a security.

4. The learned Counsel for the respondents supported the impugned judgment.

5. The case of the applicant as reflected from the record is that he had paid ₹6,75000/- to the respondent no.2 and then respondent no.2 had issued a cheque dated 26.4.2011 for and on behalf of the respondent no.1 for sum of ₹6,75,000/- which was towards the repayment of the legally enforceable debt. On depositing the said cheque with the bank it was returned with the remark

"Exceeds arrangement". The applicant, therefore, issued a legal notice to the respondents for dishonour of the cheque calling upon him to make the payment within 15 days from the date of receipt of the demand notice. Since the respondents failed to reply or make payment, therefore, the applicant has filed the complaint.

6. The applicant had tendered his affidavit in lieu of his evidence. The applicant was cross-examined at length on behalf of the respondents. The law is well settled inasmuch as Sections 118, 138 and 139 of the Act are concerned. Several presumptions have been created in favour of the complainant in a prosecution under Section 138 of the Negotiable Instruments Act. It is obligatory on the Court to raise a presumption that there is existence of legally enforceable debt or liability in favour of the complainant once the complainant proves the issuance of cheque and its due receipt by the accused. The accused then shall have to rebut the presumption so as to say to disprove the existence of any legally enforceable debt or liability even by raising probable defence from the material on record that the consideration did not exist. If the accused succeeds in creating a doubt about the probability of the transaction then burden again will shift on the complainant to prove it. It is not necessary that the accused should step into the witness box in order to rebut the presumption. If the accused succeeds in bringing on record material

consistent with his innocence which may be reasonably true, the accused is entitled for acquittal.

7. Here, it seems that the respondents had raised a plea that the applicant is a moneylender who is habitually lending money by charging some interest. Subject cheque was given as a security to the applicant. It would, therefore, be necessary to see the evidence of the applicant and his cross examination.

8. Admittedly the applicant is a proprietary firm of which complainant is the owner. According to the applicant, he deals in the business of work of PWD contract in the State of Goa. He had business relations with the respondent no.2 for more than 30 years. It is surprising that the applicant in his cross examination admits that he will have to check his pass book whether there is any entry of having paid such huge amount to the respondents. He further admits that he is not in a position to produce Income Tax Returns in order to show that such a huge transaction has taken place between him and respondent no.2. No ordinary prudent man, that too any businessman would pay such a huge amount to any person without executing a single document or a receipt. This conduct of the applicant itself speaks volume. He further admits that he had filed two to three cases against the respondents. In one of the cases, the respondent no.2's

wife has been convicted. However, he is unable to tell the amount as he does not remember the same. He further admits that he might have filed 29 cases against different persons in different Court under the NIAct would only lead to draw a presumption that he is probably dealing in the business of money lending. The applicant did not speak as to date on which he had paid an amount of ₹6.25,000/- to the accused. He admits that he does not know the date which also creates a doubt about the authenticity of his complaint and payment of such a huge amount to the respondents. He also admits that he does not have anything in writing to show that an amount of ₹6.75,000/- was paid by him to the respondents. He also admit that he had not taken any security from the respondents/accused while advancing him such a huge amount. When he was specifically asked whether the accused had repaid him an amount of ₹9,50,056/- or any part payment towards that amount to which he answered, he does not remember. He does not say in so many words that the respondent had paid aforesaid amount or its part. He admits that the respondent has been taking the amount from him on several occasion but he does not recollect the amount borrowed by respondent from him on various occasions. He further does not recollect whether the respondents had made payment of ₹9,95,800/- from the period 8.1.2010 to 1.4.2015.

9. He denied the suggestion that he is a moneylender but

from the aforesaid admissions on record an inference can be drawn to that effect. The respondent has, therefore, rebutted the presumption and, therefore, there is no reason for interference in the impugned judgment of acquittal passed by the learned JMFC, in view of the fact that it is settled proposition of law that if the view of acquittal could have been reasonably arrived at then, mere circumstance that lower Court could have taken a different view would not be a ground to interfere. In the absence of any evidence either in the form of documents or corroborative in nature, it is difficult to accept and place full reliance on the evidence of the applicant which has been shattered in the cross examination by the defence and, therefore, I do not see any reason to grant Special Leave to Appeal.

10. The learned Counsel for the applicant has placed reliance on a case law reported in ***2015(4) Bom. C.R. 38*** in the case ***of T. Vasanthakumar Vs Vijayakumari***. The ratio of said ruling would not be of any help to the applicant/complainant as it was the case where cheque was stopped by the appellant which he knew that it was being presented. In that case, the trial Court has placed burden of proof of consideration on the complainant which ought to have been placed on the accused as per Section 139 of the Negotiable Instruments Act. Facts in the case at hand are different as there is initial presumption in favour of complainant as per Section 139 but, as

discussed herein above, said presumption has been rebutted by the respondents during the cross examination of the applicant.

11. On the other hand, the learned Counsel for the accused has placed reliance on a judgment of this Court in ***(2008) 2 Bom Cr(cri)210*** in the case of ***Anjana Balkrishna Shewale Vs. Chayya Baban Jagdale and anr.*** In the said case the complainant had advanced loan of ₹3,20,000/- to the accused. The accused issued cheque in question in discharge of liability which was dishonored. In that case, the complainant did not mention the date and amount paid to the accused. No details were given what amount was advanced and on what date it was advanced to the accused. The complainant did not produce any documentary evidence to show that she had ₹3,20,000/- with her to pay to the accused. The complainant was a housewife. She could not produce any document that she had some source of income. In cross, she stated that she had borrowed loan of ₹4,00,000/- from Pune Urban Co-operative Bank and paid the amount to the accused. Thus, it has been observed that the view taken by the learned Magistrate was a reasonable and the possible view to acquit the accused in view of the peculiar facts and evidence of that case. Thus, this ratio is squarely applicable to the case in hand.

12. As such, no case is made out for grant of a Special leave

to Appeal by the applicant and, therefore, the application stands rejected.

PRITHVIRAJ K. CHAVAN, J.

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