IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO.164 OF 2018
IN
STAMP NUMBER MAIN NO.675/2018
WITH
CRIMINAL MISC. APPLICATION NO.165 OF 2018
IN
STAMP NUMBER MAIN NO.673/2018
WITH
CRIMINAL MISC. APPLICATION NO.166 OF 2018
IN
STAMP NUMBER MAIN NO.677/2018

Govind B. Prabhugaonkar .. Applicant

Versus

Romaldina Barreto E Carneeiro .. Respondent

Ms. Ankita Kamat, Advocate for the applicant in all the applications.

Shri J. A. Lobo, Advocate for the respondent in all the applications.

CORAM:- C.V. BHADANG, J.
DATE:- 12th OCTOBER 2018.

ORDER :

These three applications for leave to appeal against acquittal, are between the same parties and as such, they are being disposed of by this common order.

2. The applicant (complainant) and the respondent (accused) are acquainted to each other. The respondent is carrying on catering business under the name and style as 'Carneiro Caterers, Shellim, Loliem, Canacona, Goa. The applicant claims

that he had advanced a total amount of Rs.11 Lakhs to the respondent by way of “friendly advance”. On 04/02/2012, the applicant for the first time, had advanced an amount of Rs.2 Lakhs in cash to the respondent, which she promised to return shortly out of her business profits. However, she failed to return the amount. Notwithstanding this, the applicant advanced Rs.1 Lakh after 2 months and further, an amount of Rs.1 Lakh, after two months of the second payment. In September, 2012, again, at the request of the respondent, the applicant advanced an amount of Rs.2 Lakhs in cash and notwithstanding that she did not return the total amount of Rs.4 Lakhs, which was advanced, the applicant continued to advance her further amount totalling to Rs.11 Lakhs.

3. The respondent issued three cheques to the applicant all dated 22/02/2014. Two cheques were in the sum of Rs.2 Lakhs each, while the third was in the sum of Rs.3 Lakhs, drawn on the account of the respondent with Corporation Bank, Loliem branch, Cancona, Goa. None of the cheques could be encashed, as they were returned with an endorsement 'funds insufficient.' In such circumstances, the applicant issued a legal notice dated 08/03/2014 to the respondent, demanding the amount, which was duly received by the respondent, who issued a reply dated 19/03/2014. The respondent denied the liability arising out of the cheque. The respondent claimed that she had only obtained an amount of Rs.25,000/- from the applicant, which was returned. It

was contended that the applicant had advanced an amount of Rs.25,000/- on the condition of payment of interest @ 10 % p.a. and on furnishing 5 blank signed cheques as security, which were accordingly given. It was contended that the applicant is misusing the said cheques.

4. This led the applicant to file three complaints against the first respondent before the learned Judicial Magistrate, First Class at Canacona, under Section 138 of the Negotiable Instruments Act, 1881 (the Act, for short)

5. The applicant examined himself as PW1 and Ajaykumar Tiwari (PW2) being the Senior Branch Manager of Corporation Bank. The respondent neither entered into the witness box nor examined any defence witnesses.

6. The learned Magistrate framed a solitary point as to whether the cheque was issued towards the discharge of a legally enforceable debt and answered it in the negative and acquitted the respondent by separate judgment and order dated 21/12/2017. Feeling aggrieved, these applications are filed by the applicant.

7. I have heard Ms. Kamat, the learned Counsel for the applicant and Shri Lobo, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have

gone through the impugned judgment and the evidence led.

8. It is submitted by Ms. Kamat, the learned Counsel for the applicant that the signature on the cheque having been admitted, a presumption arises in favour of the applicant under Sections 118 and 139 of the Act, about the cheques being issued for consideration. It is submitted that the fact that the amount is not reflected in the Income Tax Return, is not decisive. Reliance, in this regard, is placed on the decision of the Madras High Court in the case of ***KTS Sarma Vs. M/s. Seshasayee Brothers (P) Limited, Madras Vs. Subramanian, Proprietor, M/s. Kumar Videos, Trichy;*** MANU/TN/0293/2001 : 2001 0 Supreme (Mad) 779, in order to submit that Section 269 SS of the Income Tax Act, 1961 has no bearing on the prosecution under Section 138 of the Act. It is submitted that the learned Counsel submits that it has not come on record that the applicant had advanced an amount on interest and, therefore, merely because there were other transactions, in which the applicant had advanced certain amounts to other persons cannot make the transactions, which are subject matter of three complaints, as money lending transactions.

9. Shri Lobo, the learned Counsel for the respondent has supported the impugned order. It is submitted that the applicant is a money lender, which is apparent from the evidence as led and the fact that apart from the respondent, the applicant had

advanced money to several other persons. It is submitted that the legal notice issued by the respondent is also defective. It is submitted that there is clear non-compliance with the provisions of Section 269 SS of the Income Tax Act as the huge amount of Rs.11 Lakhs is allegedly paid in cash, according to the applicant. The learned Counsel has placed reliance on the decision of this Court in the case of ***Mr. Shaikh Jalal Vs. State of Goa*** (CRIA No.28/2013, decided on 01/09/2017) and ***Mr. Rajendra Pangam Vs. Shri Paresh B. Naik*** (CRIA 13/2013, decided on 13/04/2015), in order to submit that non-compliance with the provisions of Section 269-SS of the Income Tax Act, would clearly render the transaction illegal and consequently, the subject cheques cannot be said to be issued in discharge of a legally enforceable debt or liability.

10. I have carefully considered the circumstances and the submissions made and I do not find that a case for grant of leave is made out.

11. It has come in the evidence of the applicant that he never had any fixed employment and he was working as an agriculturist and his monthly income is less than Rs.50,000/-. The applicant also stated that he did not file income tax returns. Although the applicant claimed that he had advanced a total amount of Rs.11 Lakhs in cash, he states that on 04/02/2012, for

the first time, he advanced an amount of Rs.2 Lakhs followed by Rs.1 Lakh each on an interval of two months and yet another Rs.2 Lakhs in September, 2012. This was in spite of the fact that according to the applicant, the respondent failed to repay the amounts earlier advanced. Again, in the month of November, 2012, the applicant allegedly advanced yet another Rs. 1 Lakh and further amount of Rs.1 Lakh in January, 2013. It is inconceivable and unacceptable that a person having income less than Rs.50,000/- per month would advance such a huge amount in cash to the respondent, as claimed.

12. It has further come in the evidence of the applicant that apart from the respondent, he had advanced Rs.2 Lakhs each to one Rajendra Varik and Mr. Ketan Gaonkar, Rs.50,000/- to one Sudhakar Kankonkar and Rs.60,000/- to one Balaji Varik.

13. This entire story put up by the applicant of advancing a huge amount of Rs.11 Lakhs in cash to the respondent in the wake of his own income being less than Rs.50,000/- per month, is not acceptable. The applicant, at one stage, claimed that the amount was out of the sale proceeds of a certain land. No particulars of any such sale are produced on record. It has also come on record that the legal notice was issued to the respondent as a guardian of her minor daughter Malaika Carneiro in whose name the bank account stands. The amounts are also allegedly advanced in cash,

which is in breach of Section 269-SS of the Income Tax Act. This Court in the case of ***Rajendra Pangam*** (supra) has considered the decision of the Supreme Court in the case of ***Krishna Janardan Bhat vs. Dattatray Hegde; (2008)4 SCC 54***, in which the Supreme Court has held that the Court ought to have taken notice that ordinarily in terms of Section 269-SS of the Income Tax Act, any advance of amount more than Rs.20,000/- has to be made by an Account Payee Cheque only. This Court also found that this part of the observations and findings in the case of ***Krishna Janardan Bhat*** (supra) based on Section 269-SS of the Act, are not affected by the later decision of the Supreme Court in the case of ***Rangappa Vs. Sri Mohan***, (2010)11 SCC 441. The learned Magistrate, after considering this, has acquitted the respondent. The judgment, in my considered view, does not exhibit any infirmity.

14. The case of ***KTS Sarma*** (supra) before the Madras High Court arose out of a Civil Suit for recovery of an amount. In any event in the face of the decision of the Hon'ble Supreme Court in the case of ***Krishna Janardan Bhat*** (supra), it is not possible to agree with the findings as recorded by the Madras High Court in ***KTS Sarma*** (supra).

15. It is not necessary to go into the question whether the applicant is a money lender. This is for the reason that even

assuming that the applicant is not in the business of money lending without licence, the applicant has failed to show that the subject cheques were issued in discharge of a legally enforceable debt or liability.

16. The learned Counsel for the applicant placed reliance on the decision of the Supreme Court in the case of ***Hiten P. Dalal Vs. Bratindranath Banerjee; (2001)6 SCC 16.*** There cannot be any manner of dispute with the proposition that the burden to displace the presumption under Section 139 of the Act is on the accused. However, the question whether such a burden is discharged or not would depend upon facts and circumstances of each case. It is further well settled that the burden on the accused to discharge such presumption is not as heavy as that on the complainant to prove his case. The accused can discharge the burden on preponderance of probability. It is also not necessary for the accused to enter into witness box to discharge such burden. The accused can do so on the basis of cross-examination of the complainant and other evidence, if any. In the present case, I find that the respondent has discharged the burden on the basis of evidence of the applicant himself.

17. In the result, I find that the view taken by the learned Magistrate is a plausible view, based on the evidence on record, which does not require any interference. Thus, no case for grant

of leave is made out. The Criminal Applications are, accordingly, dismissed.

C.V. BHADANG, J.

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