

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 10 OF 2014

M/s Sim Enterprises, Represented by its proprietor, Shri Shaik Ibrahim Mohammed Hussain, s/o late Shri Mohammed Hussain, aged about 65 years, businessman, r/o Shop No. 1, CDC Appt., Vidyanagar, Next to Corp. ATM, Margao, Goa.

.... Appellant

Versus

1. Shri Shaikh Abdul Rashid Choudhary, s/o late Shri Asgar Choudhary, major in age, businessman, r/o H. No. 1350/1, near petrol pump, Mujawar Wada, Sanquilim, Goa.

2. State of Goa (Through Public Prosecutor)

.... Respondents

Shri Prasad Dessai, Advocate for the Appellant.

CORAM:- C.V. BHADANG, J.

DATE:- 26th FEBRUARY, 2018.

ORAL JUDGMENT:

This is an appeal, by the complainant, against acquittal of the respondent no. 1, from an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (Act, for short).

2. The appellant was in service of Central Bank of India and has since retired. The respondent no. 1 is said to be a relative of the appellant. The appellant is running a business of

hardware, under the name and style as “M/s Sim Enterprises”, which is a proprietorship concern. According to the appellant, the respondent no. 1 was in the business of trading iron ore.

3. It was the material case that on account of their close relationship, the appellant had advanced to the respondent no. 1, an amount of Rs.6,00,000/- as a hand loan, out of which Rs.1,50,000/- was given by way of a Demand Draft and the remaining amount of Rs.4,50,000/- was paid in cash. The appellant claims that the entire amount was out of the retiral dues received by the appellant. Admittedly, there is no document which evidences that the appellant had given Rs.4,50,000/- to the respondent no. 1. It was contended that towards re-payment of the hand loan, the respondent no. 1, issued a cheque dated 19.05.2008, drawn on his account with Syndicate Bank, Sanquelim Branch, which got dishonoured on presentation. The appellant issued a statutory notice on 30.05.2008, which was neither replied nor complied with by the respondent no. 1. This led the appellant to file a complaint under Section 138 of the Act. The appellant examined himself and produced the subject cheque along with the cheque return memo and the copy of the legal notice and the A/D card.

4. The learned Magistrate by judgment and order dated 03.05.2011, convicted the respondent no. 1 for the offence punishable under Section 138 of the Act and sentenced him to undergo simple imprisonment for six months and to pay fine of Rs.10,000/- and in default to undergo simple imprisonment for two months, as also compensation of Rs.6,00,000/-. Feeling aggrieved, the respondent no. 1, challenged the same in Criminal Appeal No. 40/2011, before the learned Sessions Judge. The learned Sessions Judge by judgment and order dated 18.02.2013 allowed the appeal and acquitted the respondent no. 1 of the offence punishable under Section 138 of the Act. Feeling aggrieved, the appellant is before this Court.

5. I have heard Shri Dessai, the learned Counsel for the appellant. None appears for the respondent no. 1. With the assistance of the learned Counsel for the appellant, I have gone through the record and the impugned judgment of the learned Sessions Judge.

6. It is submitted by Shri Dessai, the learned Counsel for the appellant that the respondent no. 1, neither issued any reply nor led any evidence in defence. It is submitted that once, the signature on the cheque was not disputed, there is a

presumption, which would arise under Section 118 read with Section 139 of the Act, which has not been rebutted by the respondent no. 1. He submits that thus, the learned Sessions Judge was in error in acquitting the respondent no. 1.

On behalf of the appellant, reliance is placed on the decision of this Court, in the case of **Krishna P. Morajkar Vs. Joe Domnic Ferrao & Another, 2014(2) Bom.C.R. (Cri) 738** and **Yavatmal District Mahesh Urban Credit Co-op. Society Ltd. Vs. Narayanrao Ukandrao Paikrao, 2011 All M.R. (Cri.) 2769.**

Except this, there are no other contentions raised.

7. I have carefully considered the circumstances and the submissions made. The case made out by the appellant is that he was working in Central Bank of India and has since retired and that he had paid Rs.6,00,000/- to the respondent no. 1, out of which, a substantial amount i.e. Rs.4,50,000/- were paid in cash, out of the retirement dues. Admittedly, there is no document got executed at the time when the said amount was advanced. The notice as well as the complaint is silent about the date on which the amount is allegedly advanced to the respondent no. 1. Even during the course of his evidence, the appellant failed to give the date on which the amount was given

to the respondent no. 1. In the cross examination, the appellant has admitted that the hand loan was given to the respondent no. 1, out of his personal Account as also from the Account of the firm. The complaint was filed in the capacity of the proprietor of the proprietary firm. To a specific question whether, the appellant has paid Tax for the relevant financial year, the answer is that the entire amount is paid out of the retiral dues, after deducting the Income Tax. The learned Sessions Judge found and to my mind rightly so, that the appellant has made an attempt to dodge the question by answering that the amount was paid from his retirement dues after deduction of Tax. It is now well settled that a statutory presumption, arises in favour of the complainant, where the signature on the cheque is not disputed. The said presumption is a rebuttable presumption. The accused can rebut the presumption on preponderance of probability, which can be done by virtue of cross examination of the complainant's witness or at the time of the statement under Section 313 of Cr.P.C. or by leading defence evidence. The question whether, the presumption stands rebutted or not, would depend upon facts and circumstances of each case. Here is a case where the appellant has failed to give any particulars as to the date and time, when he advanced the amount of Rs.4,50,000/-, which he

had paid in cash. There is no writing obtained from the respondent no. 1 and it is also not shown that the said amount was reflected in the Income Tax Returns of the firm, in as much as, the complaint was filed in the capacity of the proprietor of the firm.

8. The decision in the case of **Narayanrao Ukandrao Paikrao** (supra) cannot come to the aid of the appellant. In that case, on facts, it was held that the statutory presumption was not rebutted. As noticed earlier, the question about whether, the presumption stands rebutted, would be peculiar to facts and circumstances of each case.

In the case of **Krishna P. Morajkar** (supra), this Court has held that non-compliance with Section 269SS of the Income Tax Act (about the requirement to pay the sum of more than Rs. 20,000 by a cheque), would not be relevant, as it would be essentially, a matter between the concerned person and the Income Tax Authority. It is not necessary to go into the said aspect in as much as apart from the question whether, there is non-compliance of Section 269SS of the Income Tax Act, the amount is also not reflected in the Income Tax Returns. I have carefully gone through the judgment of the learned Sessions Judge and I find that it has been rightly found that the statutory

presumption stood rebutted in the present case.

9. Coming to the scope, ambit and powers of this Court while considering an appeal against acquittal, it is now well settled that in an appeal of the present nature, this Court cannot re-appreciate the material unless and until the view taken by the subordinate Court is perverse or is an implausible view. It is well settled that where two views are equally possible, this Court would not substitute its view on the ground that it is more plausible than the one taken by the Court below. On a careful perusal of the impugned judgment, I do not find that the view taken by the learned Sessions Judge is perverse or an implausible view, so as to require interference. The appeal is without any merit and is accordingly dismissed.

C. V. BHADANG, J.

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