IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO.37 OF 2018

Maria Adelaide Pereira e Rodrigues
Daughter of late Leitero Simao Rodrigues,
Aged about 67 years, and resident of
B2, Palm Crest, Colva, Salcete, Goa. ... Applicant

V e r s u s

Neelesh Prabhudessai
S/o Keshav Prabhudessai,
Major of age,
Resident of House No.595(4)
Pulvaddo, Benaulim, Salcete, Goa. ... Respondent

Shri Kaif Noorani with Shri V. Amonkar, Advocates for the Applicant.

Shri John A. Lobo, Advocate for the Respondent.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Judgment on : 11 July 2018
Judgment Pronounced on : 13 July 2018

JUDGMENT

1. Heard Shri Kaif Noorani, learned Advocate appearing for the applicant and Shri John A. Lobo, learned Advocate appearing for the respondent.

2. The applicant as the original accused has invoked the revisional jurisdiction of this Court under Section 397 of the Criminal Procedure Code and the supervisory jurisdiction under Article 227 of the Constitution of India while challenging the judgment of the learned Additional Sessions Judge, Margao dated 03.04.2018 being convicted by the learned JMFC, Margao and the conviction being upheld by the learned Additional Sessions Judge, Margao in appeal.

3. The parties would be referred to as the accused and the complainant respectively for brevity's sake hereinafter.

4. Shri Kaif Noorani, learned Advocate for the applicant submitted at the outset that the accused had agreed to pay 1% commission in 2008 to the complainant towards procurement of a buyer to execute a Sale Deed in respect of her property. The respondent procured a buyer and the Sale Deed came to be executed on 21.05.2010 but the complainant claimed 2% commission of the consideration of the Sale Deed, 1% received from her daughter and 1% received from her by a cheque which is the subject matter of these proceedings. The accused had issued the cheque without knowledge that 1% commission was already paid by her daughter to the complainant. There was no agreement to pay 2% commission and therefore the findings of the learned JMFC and of the Additional Sessions Judge were erroneous and liable for interference in this revision. His next plank of argument was that although there was a presumption in favour of the holder of the cheque in terms of Section 139 of the Negotiable

Instruments Act (Act, for short in hereinafter), nonetheless, the holder as defined in Section 8 of the Act would have to be a person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. The question was whether the complainant was entitled to receive the amount from the accused under the said cheque and whether there was any legally enforceable debt which he could claim by way of the proceedings initiated under Section 138 of the Act.

5. Shri Noorani, learned Advocate next adverted to the records being the notice issued by the complainant, her specific reply thereto in which she had taken a plea that she had agreed to give 1% commission and that she was in a depressed state of mind when she gave the cheque to the complainant and upon knowing that he had already received 1% commission from her daughter. He next referred to the registration of the complainant as a Real Estate Agent with the Central Board of Excise and Customs and submitted that as on the date of the cheque i.e. 21.05.2010, he was not registered as Real Estate Agent and therefore he was not entitled to maintain the prosecution under Section 138 of the Negotiable Instrument Act when the amount in the cheque towards 1% commission did not amount to a legally enforceable debt. He next adverted to the evidence of the complainant and submitted that there was a duty on him to show how he was entitled to 2% commission. The judgment of the Trial Court and that of the Appellate Court were fraught with errors and therefore the same had to be set aside. Besides, the accused had lodged a complaint with the Margao Town Police Station against the complainant and had also issued a stop payment notice to her bank dated 01.06.2010 which had stopped the payment to the complainant. She was otherwise a mental patient as borne out from the medical reports produced in these proceedings and the complaint was not bonafide. There were ample powers in this Court by recourse to Section 391 read with Section 311 Cr.P.C. which had to be exercised and the matter remanded to the learned JMFC for affording an opportunity to the defendant to lead her defence considering her mental condition.

6. Shri J. A. Lobo, learned Advocate appearing for the respondent submitted at the outset that these certificates had yet to be proved. Even otherwise nothing turned on the medical records which were available with the accused and not produced before the learned JMFC or the Additional Sessions Judge in appeal and produced for the first time in the revision proceedings. They did not advance the case of the accused any way and therefore had to be discarded. On merits, it was his contention that there was an agreement between the parties i.e. the complainant and the accused regarding the sale of the property and where the accused had not denied the role of the complainant as a broker nor was there any despite at her instance that there were disputes between the accused and her daughter. In these circumstances, it was difficult to believe that the daughter would pay 1% commission of the sale consideration amounting to ₹2,40,000/- to the complainant on behalf of the mother when their relations were admittedly strained.

7. Shri Lobo, learned Advocate next referred to the reply filed by the accused to the statutory notice under Section 138 of the Act and submitted that there was no basis in her pleas that her liability stood extinguished on payment of the 1% commission by her daughter and that it was restricted to 1% alone. In so far as the want of registration of the complainant that he was Real Estate Agent is concerned, it was his contention that the accused had not shown any prohibition qua the complainant to act as such without registration unlike the prohibition as contemplated under the Money Lenders Act as to take the cheque amount beyond the pale of a legally enforceable debt. It was also not the case of the accused in the cross examination that the complainant was not entitled to the commission since he was not registered as a Broker. This is besides the fact that the Sessions Judge had made due reference to this aspect in the judgment and distinguished the position under the Money Lenders Act.

8. Shri J. A. Lobo, learned Advocate for the complainant met the arguments of Shri Noorani on not being a "holder" by submitting that the Sale Deed was executed by the accused and her daughter on 21.05.2010 and on which date the cheques came to be issued both by the daughter and mother. The complainant therefore was a holder in due course and entitled to the amount in the said cheque. The cheque was dishonured for insufficient funds and not on account of the instructions issued by the accused to the bank to "stop payment". There was no basis in such a defence and the defence would have been possible and palpable if she had sufficient amount in her account and yet she had issued the direction to the bank to stop the payment. There was no dispute that the cheque was issued by her, handed over to the complainant and besides admitted in her reply to the statutory notice that she owed 1% commission of the consideration amount to the complainant as brokerage.

9. The documents on her medical condition were available in 2010-2012 and which were produced now in this Court for the first time in 2018. He pointed out to the Sale Deed dated 21.05.2010 which made a pertinent reference to the dispute between the accused and her daughter, submitted that the daughter had paid 1% commission as her share and the cheque amount too was encashed. If at all it was the case of the accused that the daughter had made the payment at her instance to the complainant, she ought to have examined herself and her daughter in support of her case and the daughter should have come on record to state that she had wrongly paid the amount to the complainant.

10. The complainant had proved his case under the Act and therefore the Trial Judge and the Appellate Court both held in his favour and the revision had to be dismissed. The accused had executed the Sale Deed personally and not through an Attorney and it had to be presumed that the official acts done before the public authorities had been done by the parties in their full senses and properly. The complainant from his notice and the reply and other contemporaneous material had established that he was entitled to 2% commission of the consideration amount, 1% commission from the accused and 1% from her daughter as co-owners of the property and there were no basis for the accused to put her plea that she came to know later on that the commission was paid by her daughter. The accused had not examined herself in defence and the complainant could not be expected to prove the defences on her behalf. The Trial Judge had rightly held that the complainant was entitled to 2% commission. There was no ground to interfere with the judgments of the Courts below and hence the revision had to be dismissed.

11. i would consider their submissions, the provisions of the Act, the judgment of the Trial Court and that of the Additional Sessions Court and on consideration thereof decide the revision accordingly.

12. i would first deal with the medical records of the accused which were canvassed as a ground to seek for a direction to take additional evidence in terms of Section 391 of the Cr. P.C. If at all the contention on behalf of the accused is to be accepted that her mental condition was not good and that she was under treatment, nothing should have precluded her from producing the records from the year 2010 and onwards before the Trial Court or even before the Appellate Court and seek appropriate relief there-from. It is only for the first time that such a plea is taken on behalf of the accused and invoking the jurisdiction of this Court under Section 391 of the Cr.P.C. to direct evidence to be taken on the specious plea that she was a mental patient and under treatment for a period of time.

13. As rightly submitted by Shri Lobo, these records were not produced before the learned JMFC or the Appellate Court and the contents whereof could be looked into only on their admission and proof of its contents and in the absence thereof, the request on behalf of the accused for a remand of the matter to take evidence afresh by invoking the jurisdiction of this Court under Section 391 read with 311 of the Cr.P.C. would not survive. Besides, even after recording her statement under Section 313 of the Cr.P.C. she was afforded an opportunity to lead her defence evidence and which she had denied without any plausible explanation. Such an attempt now in revision is only a frantic bid at her instance to salvage her case, unsuccessfully. Another point raised on behalf of the accused that she was a mental patient and taking advantage of her mental condition, her daughter had taken undue advantage of her position and forced her to sign the Deed of Sale also does not ring a true bell inasmuch as even the Sale Deed drawn at her instance shows that there was dispute between them over the apportionment of the property left behind by her husband and where she had sought the annulment of the marriage after his demise. Therefore, the plea that her daughter used force and/or compulsion taking advantage of her weak state of mind to execute the Deed cannot stand the test of scrutiny.

14. It is also unbelievable that with that such strained relations, the daughter of the accused would issue a cheque in an amount of ₹2,40,000/- as 1% commission to the complainant on behalf of the accused. It was not a paltry sum to do so but even otherwise when their relations were strained, it cannot be believed that her daughter had issued the cheque in the amount of ₹2,40,000/- in favour of the complainant on 21.05.2010 i.e. the date of the execution of the Sale Deed towards her share of the commission to him. This is the only reasonable explanation which can flow from the conduct of the parties and it is not open to the accused to contend otherwise. The complainant had issued a legal notice to the accused spelling out that she was a co-owner alongwith her daughter and that it was agreed between her and the accused that he would receive 2% of the sale price as compensation for his services. He was instrumental in procuring a buyer for their property which was agreed to be purchased for ₹2,40,00,000/- and a Sale Deed was executed on 21.05.2010 between the accused, her daughter and the purchaser and that ₹4,80,000/- was due and payable by the accused and her daughter to the complainant as compensation of the services which would be paid equally between them.

15. It was made clear in the legal notice that the accused had issued a cheque in the amount of ₹2,40,000/- dated 21.05.2010 towards her share of the payment, presented to the bank for encashment and which was returned with the cheque return memo carrying the endorsement "insufficient funds". The accused who had duly received the notice had taken a plea in reply to the statutory notice that her daughter had no right in the property being self acquired and that at his instigation, her daughter had forced her to sell the property to the purchaser arranged by him and that on the instigation of her daughter, she had signed the Sale Deed. Pertinently she had admitted in her reply that she had come in contact with the complainant sometime in the year 2008 and had agreed to pay the commission and as per her agreement she had given her cheque of ₹2,40,000/- qualifying her statement that she was in completely depressed state and without knowing that he had received commission from her daughter.

16. The accused had claimed in her reply that no sooner she knew that the complainant had taken 1% commission from her daughter, she requested the bank to stop payment. However, from the material produced on record, it has been shown by Shri J. A. Lobo, learned Advocate for the complainant that the bank memo showed clearly that the cheque was returned for 'insufficient funds" and not as "payment stopped" as per the instructions of the accused. One could expect her version in case there were sufficient funds available in her account and she had issued such stop payment in the bank which is not the case and on that premise too her pleas in defence are falsified that she had paid the commission to the complainant through her daughter and it was not a case where they were equally liable to pay the commission to the complainant.

17. It was the contention on behalf of the applicant that the amount in the cheque was not a legally enforceable debt and besides the respondent was also not registered as a Real Estate Agent and therefore he was not entitled to the amount in the cheque. The learned Additional Sessions Judge had clearly referred to Section 14(1) of the Goa Money Lenders Act and found that there was no similar provision which bars the suit for recovery by an unregistered Real Estate Agent or of any provision being there which bars a person from acting as a Real Estate Agent without a valid license. Shri Noorani, learned Advocate for the applicant was also not able to show if there was a bar for the respondent to act as a Real Estate Agent and as to buttress his contention that the amount in the cheque received by him from the applicant was not a legally enforceable debt. Therefore, even considering the document issued by the Central Board of Excise and Customs and accepting the position that the complainant was registered as a Real Estate Agent only on 04.06.2010 and not at the time of the Sale Deed, it would not carry any penal consequences or make the amount due to him thereunder not a legally enforceable debt.

18. Shri Noorani learned Advocate for the accused made a frantic bid to buttress his case that the theory of 2% commission was not believable when on the complainant's admission, he had met the daughter of the accused for the first time in the second half of the year 2009. Assuming it is so, the transaction of the Sale Deed was done by the accused and her daughter in 2010 which also recorded that there was dispute between the accused and her daughter as to whether she got half right to the land through her father taking into consideration the endorsement of the declaration of the marriage of the accused with her husband null and void was made after the death of her husband and taking into consideration the relationship of the accused and her daughter, it was mutually settled that both of them would hold half share each in their assets. Even at the time of the execution of the Sale Deed in 2010, the relations between the accused and her daughter were strained and which makes it all the more unbelievable that her daughter would issue a cheque in a substantial amount of ₹2,40,000/- favouring the complainant towards 1% commission payable by the accused. Besides, the daughter had not initiated any proceedings against the complainant that she was duped or induced to part with the said amount as 1% commission due from the mother to the complainant apart from the accused not examining herself and her daughter in defence.

19. The learned JMFC and the learned Additional Sessions Judge on the basis of the material rightly held that the complainant had established his case that he was entitled to 2% commission, 1% each from the accused and her daughter established from his notice, the reply of the accused admitting so and having received 1% from her daughter without any dispute being raised by her. The judgment of the trial Court and that passed by the Appellate Court are neither arbitrary and/or perverse as to justify interference.

20. In view thereof, i pass the following :

ORDER

The revision petition is dismissed with no order as to costs.

NUTAN D. SARDESSAI J.

DATE: 13.07.2018

Shri Kaif Noorani, Advocate for the applicant.

Shri John A. Lobo, Advocate for the Respondent.

JUDGMENT CONTINUED

21. Shri K. Noorani, learned Advocate for the applicant prays for four weeks time to surrender.

22. Considering that the applicant was secured by such an order of the learned Sessions Court, plea is granted. The applicant is granted four weeks time to surrender.

NUTAN D. SARDESSAI J.

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