

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.21 OF 2014

Shri Rama Satelkar,
s/o Shiva Satelkar,
major of age, 36 years
married, business,
House No.929,Moirá,
Bardez, Goa.

..... Appellant
(Original Complainant in case no.583/09/F)

V e r s u s

1. Mr. K. K. Suresh,
Major of age,
R/o. H. No.,7/17,
Sounta Waddo,
Baga road, Calangute,
Bardez, Goa.

2. State
(Through P.P.) Respondents
(Amendment carried out as per order
dated 15.02.2014)

Shri A. D. Bhobe, Advocate for the Appellant.

Shri Nitin Sardessai, Senior Advocate with Ms. Neha Shirodkar, Advocate
for the Respondent No.1.

Coram :- C. V. BHADANG, J

Reserved for Judgment on : 11 October, 2018
Judgment Pronounced on : 26 October, 2018

JUDGMENT

This is an appeal against acquittal.

2. The brief facts necessary for the disposal of the appeal may be
stated thus :

That the appellant (original complainant) and the first respondent (accused) are acquainted to each other. According to the appellant, the first respondent was a Sub P.W.D. Contractor and was intending to take a sub-contract from one Mr. N. B. Dhargalkar who was registered as a PWD Contractor. The first respondent approached him for grant of financial accommodation to obtain the sub-contract from Mr. Dhargalkar. It appears that accordingly the appellant obtained a demand draft dated 05.04.2008 from his account with the Goa State Co-operative Bank Ltd., Mapusa, Goa in the sum of ₹3,08,728/-. That demand draft was drawn in favour of the Executive Engineer WD VII (NH) PWD. Further according to the appellant, the first respondent promised to repay the said amount within one year however failed to do so. He claimed that the first respondent voluntarily issued a cheque in favour of the appellant dated 15.06.2009 in the sum of ₹3,08,728/- which was drawn on the account of the first respondent with The South Indian Bank Ltd., Panaji. The cheque was dishonoured when presented for realisation on account of insufficient funds. This led the appellant to issue a notice dated 08.07.2009 to the first respondent which was received by him on 09.07.2009. The first respondent however failed to pay the amount as a result of which the appellant filed a complaint under Section 138 of the Negotiable Instruments Act (Act, for short) against the first respondent before the JMFC at Mapusa.

3. At the trial, the appellant examined himself as PW.1 and produced the subject cheque alongwith the intimation from the bank, copy of the notice and the acknowledgment. The appellant also produced a copy of the complaint in OA No.689/P/2008 alongwith copy of the verification at exhibit 45. That was a complaint under Section 138 of the Act filed by the first respondent against Mr. Dhargalkar. The appellant also produced the copy of the income tax returns and the statement of profit and loss account and the balance sheet as on 31.03.2010.

4. The first respondent examined Mr. Ulhas Kerkar, Executive Engineer as DW.1 and Mr. Sadashiv Vaze as DW.2, who is a Chartered Accountant of the appellant.

5. The learned Magistrate came to the conclusion that the appellant had failed to establish that the subject cheque was issued towards the discharge of a legally enforceable debt or liability. The learned Magistrate also found that the appellant was conducting a business of money lending without licence. In that view of the matter, the learned Magistrate by a judgment and order dated 11.09.2012, acquitted the first respondent of the offence punishable under Section 138 of the Act. Hence, this appeal.

6. I have heard Shri Bhobe, the learned Counsel appearing for the appellant and Shri Sardessai, the learned Senior Counsel appearing for

the first respondent. With the assistance of the learned Counsel for the parties, I have gone through the records and the impugned judgment passed by the learned Magistrate.

7. Shri Bhobe, learned Counsel for the appellant has submitted that there is no evidence to prove that the appellant was conducting a business of money lending. It is submitted that advance of money on interest is a sine qua non for a person to be conducting a business of money lending. It is submitted that in the present case there is no evidence that the appellant had advanced the money to the first respondent or to anybody else on interest. The learned Counsel was at pains to point out the definition of 'loan' as contained in section 2(k) of The Goa Money Lenders Act 2001, (Act of 2001, for short) in order to submit that a loan means an advance at interest. It is thus submitted that the finding recorded by the learned Magistrate that the appellant was indulging into money lending without licence is not correct.

8. It is next submitted that the first respondent had filed a complaint against Mr. Dhargalkar bearing No.OA 689/P/2008. The learned Counsel has referred to the verification of the first respondent in OA 689/P/2008 in order to submit that the first respondent had admitted that he had made the arrangement of the amount from the appellant which was obtained by way of a demand draft from the account of the appellant. It

is thus submitted that there was clear evidence to show that it was at the instance of the first respondent that the appellant had drawn the draft in the name of the Executive Engineer, PWD in the sum of ₹3,08,728/- and the first respondent had agreed to repay the same within one year. It is thus submitted that the Magistrate was in error in holding that the subject cheque was not issued in discharge of a legally enforceable debt or liability.

9. Shri Sardessai, the learned Senior Counsel appearing for the first respondent on the contrary has supported the impugned judgment. It is submitted that there are several instances wherein the appellant was found to have advanced money and although it is claimed that it was a 'friendly advance' without interest, the same cannot be accepted. The learned Senior Counsel has referred to various complaints filed by the appellant against others under Section 138 of the Act including against one Mr. Narendra Asnodkar, Santosh Chodankar, etc. It is submitted that the matter is one of inference as documentary evidence of advance on interest which cannot be expected or insisted upon.

10. It is next submitted that admittedly the amount of ₹3,08,728/- was not paid to the respondent no.1 and as such there is no liability which is established on record of the respondent no.1 to repay the said amount. It is submitted that there is evidence that sub-contracting of

the work is not permissible and thus even assuming that the amount was given in order to enable the respondent no.1 to obtain a sub-contract from Mr.Dhargalkar, the same being illegal, cannot be acknowledged or acted upon.

11. I have carefully considered the rival circumstances and the submissions made. I do not propose to go into the question whether the appellant is conducting a business of illegal money lending and whether the transaction which is subject matter of the present appeal was a money lending transaction, for the reason that the acquittal has to be upheld on the ground that the appellant has failed to establish that the subject cheque was issued towards the discharge of a legally enforceable debt or liability. Now it is a matter of record that the appellant had drawn the demand draft which was favouring the Executive Engineer, PWD and on the basis of which a contract was awarded to Mr. Dhargalkar. Thus, there is nothing on record to show that the amount came to the respondent no.1 or for his benefit although a case is made out by the appellant that the respondent no.1 was to obtain a sub-contract from Mr. Dhargalkar. The evidence of Dw.1 would indicate that the contract granted cannot be sub-delegated. At the highest, the record discloses that the respondent no.1 used his acquaintance with the appellant to arrange for money for Mr. Dhargalkar who was to obtain the PWD contract. Although it is contended that co-laterally the respondent

no.1 had agreed to repay the said amount within a period of one year, there is no acceptable evidence to prove that there was any such co-lateral oral agreement. Even assuming that there is any such agreement, the consideration for which, viz the respondent no.1 obtaining a sub-contract from Mr. Dhargalkar, itself being illegal and impermissible, cannot be acknowledged.

12. The matter can be looked at from another angle. The respondent no.1 had arranged for money using his acquaintance with the appellant and the appellant had paid the amount directly to the Executive Engineer in the form of a demand draft in respect of which a contract was awarded to Mr. Dhargalkar. Assuming that the subject cheque was given for repayment of the said amount, it has to be shown that on the date when the cheque was issued, there was an existing or a subsisting liability of the respondent no.1 to pay the amount to the appellant which is lacking in this case. Reliance in this regard can be placed on the case of **Indus Airways Private Limited & Ors. vs. Magnum Aviation Private Limited & anr. [(2014) 12 SCC 539]**.

13. Thus it cannot be accepted that there was any legally enforceable liability of the respondent no.1 which is established on record to repay the amount to the appellant. It is true that in the verification bearing No. OA 689/P/2008 which was filed by the first respondent against Mr.

Dhargalkar, he has admitted that the draft was drawn from the account of the appellant. However, that cannot take the case of the appellant any further inasmuch as the draft was admittedly drawn in favour of the Executive Engineer for awarding a contract to Mr. Dhargalkar and even assuming that there was any understanding between the parties that the work would be sub-delegated to the respondent no.1, the same was illegal. A legally enforceable debt or liability presupposes that the liability is legally enforceable which in the present case is not. For these reasons, no fault can be found, with the impugned Judgment in acquitting the first respondent. It is now well settled that this Court will not interfere with an order of acquittal unless and until the view taken by the Court below is an impossible view. Even where two views are equally possible, this Court cannot substitute a view of its own in the place of the one taken by the Court below on the ground that it is a more plausible view.

14. I have carefully gone through the impugned judgment and I find that the view taken by the learned Magistrate is a possible view. Thus, no case for interference is made out. The appeal is without any merit and it is accordingly dismissed.

C. V. BHADANG, J.

arp/*