IIN THE HIGH COURT OF BOMBAY AT GOA

Criminal Misc. Applications
No.82, 83, 84, 85, 86, 87, 88, 89 and 90 of 2018

Mr. Helcino Aleixo Fernandes,
son of late Jose Caetano Fernandes,
major, married, businessman,
resident of H. No.326,
Godinho Vaddo,
Majorda, Salcete, Goa. …. Appellant.

V e r s u s

Mr. Milind Madhukar Bhende,
son of Madhukar Bhende,
major, married, businessman,
resident of H. No.156-D-1,
Ansabhat, Mapusa,
North Goa, Goa. ….. Respondent.

Shri J. E. Coelho Pereira, Senior Advocate with Adv. V. Braganza for the Appellant.

Shri Myron D'Souza, Advocate for the Respondent.

CORAM: C. V. BHADANG, J.
DATE: 4th April, 2018.

Common Order:

All these criminal applications, seeking Leave to Appeal against acquittal are between the same parties and can be conveniently disposed off by this common order.

2. The applicant/complainant and the respondent/accused were working as commission agents for M/s.Venus Life Marketing India P. Limited. The applicant was also a investor in the said finance company. According to the applicant, he had advanced various small amounts by way of hand loans to the respondent, totaling to Rs.8,75,000/- between January 2005 to September 2005 as the respondent had represented that the said amount was required to make payment to his creditors. In the second week of October 2005 on finalization of the accounts, it was confirmed that the sum of Rs.8,75,000/- was due and payable by the respondent to the applicant. In the third or fourth week of October 2005, the respondent passed in all nine posted dated cheques in favour of the applicant, which were drawn on his account, with the HDFC bank Ltd. Panaji branch. All the nine cheques got dishonoured on presentation for realization which led the applicant to issue a legal notice, to which, the respondent sent a reply. As the respondent failed to pay the amount, the applicant filed nine separate complaints, before the learned Magistrate for the offence punishable under section 138 of the Negotiable Instruments Act, (Act, for short).

3. At the trial, the applicant examined himself and produced the subject cheques along with a copy of the notice etc. The respondent also examined

himself. According to the respondent, the cheques were obtained under duress by the applicant in the parking lot of Kala Academy. According to him, the applicant was known to him as both were working with Venus Life Marketing India Ltd. and the applicant had invested an amount of Rs.9.00 lkahs with the said company for a period of one year. However, before the expiry of the said period, the company came to be closed and the directors absconded. The respondent formed an association of the investors of which he was the president and filed Special Civil Suit No.42/2006 (New) for recovery of the amount of various investors in the company. The suit came to be decreed and in the said decree there is a mention of the amount of Rs.9.00 lakhs which was deposited by the applicant with the said company. It appears that a criminal case was also filed against the directors in which they have been convicted and are presently undergoing sentence. In short, according to the respondent the subject cheques were obtained forcibly and under duress towards the repayment of Rs.9.00 invested by the applicant in the company, in respect of which there is already a decree passed by the Civil Court. In short, the respondent contended that the cheques were not issued towards any legally enforceable debt or liability.

4. The learned Magistrate on appreciation of the evidence convicted the respondent and sentenced him accordingly. The learned magistrate in

particular found that the cheques were issued in discharge of legally enforceable liability. The learned magistrate has inter alia relied upon 5 SMS's sent b y the respondent to the applicant between 1st December 2005 to 13th December 2005 in which he had expressed his inability to pay the amount and also promised to pay it shortly after arranging the money and asking the applicant not to take any step till 16th December, 2005. According to the learned Magistrate, by these messages the respondent had promised to pay the amount after selling the property, at Malwan.

4. In appeal, the learned Sessions Judge has held that the amounts were allegedly paid in cash without being reflected in the Income Tax Returns and are also in breach of the provisions of section 269 SS of the Income Tax Act. In short, according to the learned Sessions Judge the claim of the applicant of having paid the total amount of Rs.8,75,000/- in installments would be in breach of section 269 SS for which a penalty is provided in section 271-D of the Income Tax Act. In so far as the SMSs are concerned, the learned Sessions Judge has found that there was no compliance of section 65-B (4) of the Evidence Act and in the absence of the procedure as contemplated in the said section being followed, the printouts of the SMS's message were inadmissible in evidence and could not be used for corroboration. In that view of the matter, the respondent came to be acquitted.

5. I have heard Shri Pereira, the learned Senior Counsel for the applicants and Shri Myron D'Souza, the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have gone through the record.

6. Shri Pereira, the learned Senior Counsel for the applicant submitted that the learned Sessions Judge was in error in interfering with the conviction recorded by the learned magistrate without any justification. It is submitted that the respondent has not disputed his signature on the subject cheques which would be sufficient to raise a presumption under section 118 r/w section 139 of the Act. It is submitted that the said presumption has not been displaced by the respondent. The learned Senior Counsel also pointed out that under section 269 SS of the Income Tax Act there is a prohibition against a person from accepting an amount in cash which is in excess of Rs.20,000/-. In the submission of the learned Senior Counsel for the applicant, the prohibition would not apply to a person paying such an amount. It is submitted that the SMS message were rightly taken into consideration by way of corroboration. It is submitted that it is improbable that the respondent would have carried his cheque book to the parking lot of Kala Academy, where according to the respondent the subject cheques were obtained forcibly. In short, according to the learned Senior Counsel the defence put

forth is improbable and was rightly not accepted by the learned magistrate.

7. On the contrary, Shri D'Souza, the learned Counsel for the respondent strenuously urged that this is not a case where Leave to Appeal against acquittal can be granted. On behalf of the respondent reliance is placed on the decision of the Supreme Court in the case of **G. Pankajakshi Amma and others Vs. Mathai Mathew (Dead) through Lrs and another (2004) 12 SCC 83,** in order to point out the scope and ambit of interference available to this Court in the matter of appeal against acquittal. The learned counsel has also placed reliance on the decision of this Court in the case of **Sandeep Shirodkar Vs. Shankar Dhawaskar and anr. (2010) ALL MR (Cri) 3212** and **Shri Rajendra Pangam Vs. Shri Paresh B. Naik and others (2015) (1) Goa L.R. 718**, in order to submit that this Court has held that where there is breach of section 269 SS of the Income Tax Act, the presumption would stand rebutted. Reliance is also placed on several other decision and on the decision in the case of **Shri Datta S. Nadkarni Vs. Mr. Salvador Fernandes & Anr. (2016) ALL MR (Cri) 3002**.. It is submitted that the self same consideration as are relevant while deciding the appeal will have to be considered while considering grant of Leave to Appeal against acquittal.

8. I have given my anxious consideration to the rival circumstances and

the submissions made.

9. From the submissions so recorded, itself it would be clear that the matter needs consideration by examining the rival contentions. It is true that the scope of interference in an Appeal against acquittal is limited and this Court would not interfere with the order of acquittal unless the finding recorded by the Court below is perverse or is an impossible view. Here is a case where the signature on the cheque is not disputed and, therefore, prima facie, the presumption under section 118 and 139 of the N.I. Act can be justifiably raised. The question is whether the said presumption stands rebutted. The question apart from the acceptability of the evidence of the complainant is also about the defence of the accused being probable. The rival contentions raised on the basis of section 65B (4) of the Evidence Act also need to be examined. For all the aforesaid reasons, I find that a case for grant of Leave is made out. The applications are accordingly allowed. Let the Appeals be registered, which shall be treated as admitted.

10. The learned Magistrate to take action under section 390 of Cr.P.C. Hearing is expedited.

C. V. BHADANG, J.

Ap/