

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPLICATION NO.264 OF 2018.

IN

STAMP NUMBER MAIN NO. 790 OF 2018.

S. N. PANDEY

... Appellant.

Versus

DAMODAR KRISHNA GAUNS

... Respondent.

Mr. P. Kamat, Advocate for the appellant.

Mr. J. A. Lobo, Advocate for respondent.

Coram:- PRITHVIRAJ K. CHAVAN, J.

Reserved on:-2nd July 2019.

Pronounced on:-22nd July 2019.

ORDER

This is an application by the original complainant in which he seeks leave to file an appeal against judgment of Additional Sessions Judge in Criminal Appeal No.64/2016 by which learned Additional Sessions Judge set aside the conviction and sentence passed by the trial Judge in Criminal Case no.182/OA/NI/2011/F under Section 138 of Negotiable Instruments Act on 22.4.2013.

2. In short, it is the case of the appellant that cheque issued by the respondent in the sum of Rs.50,00,000/- (Rupees fifty lakhs only)

was dishonoured on its presentation.

3. It is the case of the appellant that he had lent money to the respondent. Respondent, in turn, issued disputed cheque dated 5.10.2011 in the sum of Rs.50,00,000/- (Rupees fifty lakhs only). On presentation, it was returned by the banker due to insufficient funds. Despite receipt of the statutory notice, it is contended that the respondent failed to comply with the demand.

4. The trial Court observed that the complainant had discharged the initial burden by producing the cheque, bank memo, copy of the notice with AD card and, therefore, there is presumption in his favour as per Section 139 of the Negotiable Instruments Act. It is observed that the respondent had failed to rebut the presumption under Section 139 of the Negotiable Instruments Act as he failed to raise probable defence as regards the existence of legally enforceable debt/liability. It appears that the respondent had raised defence viz: the disputed cheque sought to be recovered is a time barred debt which cannot be said to be legally enforceable. The next defence as emerged from the judgment of the trial

Court is that body of the cheque was not written by the respondent but was written by the appellant. However, it was the contention of the appellant that at the instance of the respondent he had written the cheque but it was signed by the respondent. Thus, issuance of the cheque by the respondent is not in dispute.

5. It reveals from the record that the appellant had paid an amount of Rs.16,00,000/-(Rupees sixteen lakhs only) to the respondent for purchase of a property situated at Cansaulim. However, it reveals that respondent's title in respect of the said property was unclear. It has resulted into a litigation in the Civil Court at Vasco. The matter could not be settled between the parties despite efforts. It is contention of the appellant that either the respondent should get his title cleared in respect of the property, or in the alternative, return his money with interest in the light of the fact that the price of the property increased manifold since 2007-2008. The respondent wanted to sell the property to a third party at higher price. Under such circumstances, the appellant and the respondent decided to settle the matter towards one time settlement in which respondent issued the disputed cheque of Rs.50,00,000/-(Rupees

fifty lakhs only)

6. It appears that the respondent did not reply the statutory notice issued by the appellant under Section 138 of the Negotiable Instruments Act and, therefore, there is presumption under Section 139 of the Negotiable Instruments Act. It appears that the learned Additional Sessions Judge has failed to appreciate that there was no proper defence in the light of the fact that the amount was received by the respondent and he had issued a cheque in favour of the appellant. It is significant in the light of the statement under Section 313 of Cr.P.C. wherein he admits signing the cheque. It is also pertinent to note that the respondent admits receipt of Rs.16,00,000/- towards sale of property in the year 2008 and that due to rise in price of land he wanted to sell the plot for higher amount.

7. As such, arguable issues are raised and the judgment of the lower Appellate Court needs to be scrutinized. I am, therefore of the view that the view taken by the learned Additional Sessions Judge is required to be re-looked, in the light of the aforesaid facts and evidence.

8. As such, leave to appeal is granted.
9. Appeal be registered.
10. Application stand disposed of.
11. Learned Additional Sessions Judge, South Goa Margao to take action as per Section 390 of Cr.P.C.

PRITHVIRAJ K. CHAVAN, J.

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