IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO.363 OF 2018

Mr. Nimal Chandra Maity .... Applicant

V/s.

Mr. Ameet K. Naik .... Respondent

Shri S. Mauskar, Advocate for the Applicant.
Shri S. Karpe, Advocate for the Respondent.

CORAM : PRITHVIRAJ K. CHAVAN, J.

Reserved on : 9th September, 2019
Pronounced on : 24th September, 2019

ORDER :

By this special leave to appeal the appellant, who is the original complainant, has impugned the judgment of acquittal passed by the learned JMFC, Margao in Criminal Case No.119/OA/NI/2017/E dated 15/03/2018 by which the respondent came to be acquitted of the offences punishable under Section 138 of the Negotiable Instruments Act.

2. Briefly stated, the appellant is a goldsmith by profession. The respondent, who is a Government servant was friendly with

the appellant and, therefore, approached him somewhere in the month of August, 2016 as he was in dire need of money. It is the case of the appellant that he had, due to his friendly relations with the respondent, advanced an amount of ₹3,07,000/- in cash to the respondent. A document came to be executed in the form of an undertaking over a fifty rupee non judicial stamp paper on 03/08/2016 (Exhibit 20). As per the said undertaking, the respondent is said to have agreed to repay the loan amount by 31/09/2016 failing which the appellant would be entitled to recover the same with interest at the rate of 18% p.a. The said document came to be duly notarized before a notary public on 03/08/2016 itself.

3. Despite several oral requests by the appellant, the respondent did not pay any heed. However, as a part payment of the loan, the respondent had issued a cheque bearing no.000009 dated 19/12/2016 for an amount of ₹2,50,000/- drawn on PMC Bank, Margao Branch. The cheque was presented by the appellant with his banker namely Bank of India on 25/01/2017. It

was returned with a memo dated 27/01/2017 for the reasons "funds insufficient".

4. A statutory notice came to be issued to the respondent on 28/02/2017 calling upon him to pay the cheque amount within fifteen days on receipt of this notice. The said notice was duly served and acknowledged by the respondent on 01/03/2017. However, the respondent had neither replied nor complied with the said notice and, therefore, the appellant filed a complaint in the Court of JMFC, Margao on 28/03/2017 under Section 138 of the Negotiable Instruments Act.

5. At the trial, the appellant examined himself, tendered the cheque in question (Exhibit 17), cheque return memo dated 27/01/2017 (Exhibit 18), legal notice dated 28/02/2017 and the postal acknowledgment (Exhibit 19) and has also examined the Branch Manager of PMC Bank, who produced the statement of account of the savings account (Exhibit 26).

6. The respondent did not step into the witness box.

7. The learned JMFC after going through the evidence on record and hearing the respective Counsel, by the impugned judgment acquitted the respondent of the offence punishable under Section 138 of the Negotiable Instruments Act.

8. I heard Shri S. Mauskar, the learned Counsel for the appellant and Shri S. Karpe, the learned Counsel appearing for the respondent.

9. Shri Mauskar, while assailing the impugned judgment, argued that the appellant has proved that he had advanced an amount of ₹3,07,000/- to the respondent and pursuant to an undertaking on a stamp paper, the respondent had agreed to repay the same by 31/09/2016, in which he had failed. He drew my attention to the fact that the respondent had neither denied issuance of the cheque in question dated 19/12/2016 drawn on the PMC Bank, Margao from his account nor receipt of statutory

notice dated 28/02/2017. According to the learned Counsel, the presumption under Section 118 and 139 of the Negotiable Instruments Act has been in favour of the appellant. It has been shown that the respondent owed an amount of ₹3,07,000/- to the appellant in view of the aforesaid oral and documentary evidence. Merely because there is a delay in filing complaint as the Bank intimation of the cheque return memo was received late by the appellant, would not be a ground to throw away his genuine case.

10. Shri S. Karpe, on the other hand, vehemently opposed to grant special leave in the light of the fact that the statutory demand notice was not within 30 days.

11. I have meticulously gone through the impugned judgment of the Trial Court. I do not find any merit in the submissions of the learned Counsel for the appellant so as to interfere in the impugned judgment of acquittal by granting special leave to appeal. The reasons for the same are as follows:

12. A perusal of the complaint does not disclose the date on which the appellant had paid an amount of ₹3,07,000/- to the respondent. If it is the case of the appellant that the amount was paid in cash to the respondent, how come that the appellant would not remember the denomination of the currency notes in the light of the fact that he is a goldsmith by profession and, therefore, a reasonable doubt creeps in about the authenticity of the complaint itself. It is difficult to digest that the appellant, who is a goldsmith, would not remember the denominations of the currency notes while delivering such an huge amount to the respondent.

13. Another glaring aspect is that even the so called undertaking dated 03/08/2016 does not depict the denomination of currency notes, which normally could have been mentioned in the said document. It is unfathomable as to how the said stamp paper was purchased by Advocate N. Khan, who appears to have issued the statutory notice to the respondent on 28/02/2017 on behalf of the appellant on his letterhead? Was he anticipating the

alleged transaction between the appellant and the respondent? Normally, the stamp paper ought to have been purchased by the respondent or the appellant. This also creates a reasonable doubt about the genuineness of the transaction.

14. The amount of ₹3,07,000/- sounds unusual, as normally, if a loan is to be advanced, it is in round figures and not in odd figures as has been evident herein.

15. If it is the case of the appellant that he had borrowed loan from 3 to 4 persons for the purpose of paying the same to the respondent, why had he not examined at least one of them to substantiate his contention? Adverse inference, therefore, is required to be drawn against the appellant, for withholding material evidence.

16. There is no evidence indicating that the Bank had intimated the appellant electronically about the return memo on 05/02/2017 though the said memo is admittedly dated

27/01/2017.

17. No doubt, initial presumption is in favour of the appellant under Section 118(a) and 139 of the Negotiable Instruments Act in the light of the fact that the respondent had not denied issuance of cheque as well as his signature over it, nevertheless, the respondent had successfully rebutted the presumption in the light of the discussion made herein above. The respondent had successfully discharged the onus. Even otherwise, the statutory notice dated 28/02/2017 is beyond the period of limitation.

18. The defence raised by the respondent appears probable, acceptable and believable in the sense that he had been to the appellant for placing an order to prepare certain gold ornaments and the cheque was given as a security for the same. It is the defence of the respondent that the appellant had misused the said cheque.

19. Thus, the upshot of the aforesaid discussion would be

that there is no substance in this application and, hence, there is no question of granting special leave. The Criminal Misc. Application, therefore, stands dismissed.

PRITHVIRAJ K. CHAVAN, J.

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