

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL MISC. APPLICATION NO. 355 OF 2018
IN
STAMP NUMBER MAIN NO. 2279 OF 2018

Laxmikant Harishchandra Bhagat ... Applicant
Versus
Sanjay Vithu Barde & Anr. ... Respondents

Shri Shivan Desai, Advocate for the Applicant.
Shri Anthony D'Silva, Advocate for the Respondent No.1.

Coram:- PRITHVIRAJ K. CHAVAN, J.

Reserved on : 28th August, 2019
Pronounced on : 17th September, 2019

ORDER :

A special leave is sought to appeal against the impugned judgment and order of acquittal dated 22/03/2018 passed by the learned Additional Sessions Judge, North Goa, in Criminal Appeal No.33/2016 by reversing the judgment and order of conviction passed by the learned Magistrate on 18/02/2016 in case no.194/NIA/2012/B for the offence punishable under Section 138 of the Negotiable Instruments Act.

2. A few undisputed facts are that the respondent no.1 in the capacity of a power of attorney holder on behalf of the other co-

owners entered into an Agreement of Sale in respect of an immovable property known as 'Demyeche Bhat' or 'Kumya Morod' situated at Kumya Morod, Guirim, Bardez-Goa on 11/02/2012. Pursuant to the said agreement applicant paid a sum of ₹6,25,000/- in favour of respondent no.1. The applicant was ready and willing to pay the balance amount towards execution of Deed of Sale, however, respondent no.1 failed to execute the Sale Deed.

3. On 22/06/2012, pursuant to clause 10 of the Agreement of Sale, respondent no.1 endorsed two cheques of ₹6,25,000/-, each drawn on ICICI Bank, Siolim Branch in favour of the applicant.

4. When the cheques were presented to the Bank on 01/08/2012, same were returned unpaid for reasons "funds insufficient". On 06/08/2012, a legal notice on behalf of the applicant was issued to the respondent no.1 calling upon him to make payment of ₹12,50,000/-.

5. Neither the notice was replied nor compliance has been made and, therefore, the applicant was constrained to file a complaint in the Court of JMFC, Mapusa – Goa on 24/09/2012 under Section 138 read

with 142 of the Negotiable Instrument Act.

6. The learned JMFC by a judgment and order dated 18/02/2016 sentenced respondent no.1 to undergo simple imprisonment for three months, inter alia, directing him to pay compensation of ₹12,50,000/- and in default to undergo simple imprisonment for one month.

7. The Lower Appellate Court on an appeal by the respondent set aside the judgment and order of conviction passed by the learned JMFC.

8. Heard Shri Shivan Desai, learned Counsel for the applicant and Shri Anthony D'Silva, learned Counsel for the respondent no.1.

9. It is apparent from the record or rather it is not in dispute that the legal notice had not been replied. There is no denial of issuance of cheque in question by the respondent no.1. There is no denial of the terms of the agreement for sale.

10. Shri Shivan Desai, learned Counsel has drawn my attention to

the findings rendered by the Lower Appellate Court, which according to him are capricious and in ignorance of the evidence on record as well as in ignorance of scope of Section 139 of the Negotiable Instruments Act which raises a presumption in favour of the drawee that it was issued in discharge of a legally enforceable debt. There is no discussion as to how it came to be rebutted. Para 19 of the impugned judgment reads thus:

“19. PW1 has deposed that he had appointed his lawyer to check the original documents and PW1 has not checked the documents himself. He also stated that at the time of signing the agreement the accused obtained an amount of ₹5,00,000/- and he had requested the accused to furnish the documents within two weeks. This shows that the complainant has approached this Court with unclean hands. He stated that he intended to purchase two plots from the builder but he does not remember before whom the said agreement was executed. He does not know the names of the witnesses. As per the agreement the complainant had to pay an amount of ₹2,00,000/- to the accused. PW1 has stated that he did not pay ₹2,00,000/- to the accused within one week. He also does not know on which date he paid ₹1,25,000/-. He also stated that he did not take any receipt while paying ₹1,25,000/-.”

11. The Lower Appellate Court has not at all discussed the scope of Section 139 of the Negotiable Instruments Act in the light of the aforesaid admitted facts. The averment of the learned Counsel for the respondent no.1 that the respondent no.1 being the only co-owner who

acted as a power of attorney on behalf of all ought not to have been proceeded with when all the vendors admit and acknowledged the liability. It is pertinent to note that the present lis is not a civil dispute and the scope of Section 138 of the Negotiable Instruments Act is restricted as per the provision. The findings arrived at by the learned Lower Appellate Court in the impugned judgment are therefore required to be reassessed and scrutinized.

12. In view of what has been said aforesaid, special leave needs to be granted and, accordingly, the Criminal Misc. Application is allowed. The learned JMFC to take steps in terms of Section 390 Cr.P.C. Application stands disposed of.

PRITHVIRAJ K. CHAVAN, J.

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