IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL MISC. APPLICATION NO. 191 OF 2019.
IN
STAMP NUMBER MAIN NO.2396 OF 2019.

ALLAN VAZ., ... Applicant.

Versus

AJJU C.S., ... Respondent.

Mr. J. A. Lobo, Advocate for the applicant.
Mr. E. Usapkar, Advocate for the respondent.

Coram:- PRITHVIRAJ K. CHAVAN, J.
Reserved on:- 4th November, 2019.
Pronounced on:- 6th November, 2019.

ORDER

This is an application for special leave to appeal by the applicant who has failed in securing conviction of the respondent before the trial Court under Section 138 of the Negotiable Instruments Act.

2. Few facts germane for disposal of the present application are that the applicant (now retired) was an employee of State Bank of India. The respondent deals in Real Estate business. Sometime in the year 2012-13, the respondent informed the applicant that he had developed

some plots of land in Socorro, Porvorim and offered those plots for sale. The applicant decided to purchase three plots and paid a sum of ₹12,00,000/-(Rupees twelve lakhs only) through cheque in the month of February 2013. Admittedly, there was no written agreement between them. The respondent assured that he would execute necessary Deed of Sale or Conveyance.

3. Since the respondent did not hand over possession of the plots to the applicant nor did he execute Deed of Sale or Conveyance for a year or so, both the parties agreed to cancel the transaction. The respondent, therefore, issued a cheque bearing no.000232 dated 5.4.2014 for an amount of ₹.12,00,000/- (Rupees twelve lakhs only) drawn on Bank of India, Marcela Branch in favour of the applicant. On presentation, the cheque was dishonoured. The applicant received a memo on 20.5.2014 from his bank informing him that the cheque was returned unpaid with the reason "funds insufficient". A statutory notice dated 2.6.2014 demanding the payment from the respondent within 15 days has not been complied with.

4. Aggrieved, the applicant filed a complaint in the Court of Judicial Magistrate, First Class, Panaji against the respondent under Section 138 of the the Negotiable Instruments Act.

5. Learned Magistrate recorded the evidence of the applicant and after going through the documents, by the impugned judgment and order acquitted the respondent of the offence.

6. Heard Mr. J. A. Lobo, learned Counsel for the applicant and Mr. E. Usapkar, learned Counsel for the respondent.

7. At the outset, Mr. Lobo submits that despite there being clinching and convincing evidence of dishonour of the cheque which was issued in favour of the applicant towards discharge of legally enforceable liability, the learned Magistrate failed to appreciate presumption in favour of the applicant which could not be rebutted by the respondent. It is submitted that the reply to the notice by the respondent clearly

indicates that he owe ₹12,00,000/-(Rupees twelve lakhs only) to the applicant.

8. On the other hand, Mr. Usapkar, submits that presumption has been rebutted in view of the admissions given by the applicant in his cross examination. Learned Counsel vehemently urged to refuse the leave mainly on the ground that it was not a legally enforceable debt but the cheque was issued as a security to the State Bank of India, Patto Branch, which was misused by the applicant. It is also submitted by Mr. Usapkar that a highly qualified person like the applicant would not blindly pay such a huge amount without executing any Deed or Conveyance in respect of sale transaction of plots.

9. Admittedly, there is no written agreement between the applicant and the respondent to purchase three plots. It is an undisputed fact that the cheque in question was issued by the respondent on 5.4.2014 for a sum of ₹12,00,000/- (Rupees twelve lakhs only) drawn on Bank of India in favour of the applicant. It is equally undisputed that the cheque

bounced on presentation for the reason "funds insufficient" as per return memo. Statutory notice dated 2.6.2014 and its reply is also an undisputed fact. It is not the case of the respondent that he did not issue any cheque in question. As per Section 139 of the Negotiable Instruments Act, the presumption indeed is in favour of the holder of the cheque that he had received the same for discharge in whole or in part of any legally enforceable liability.

10. However, it is pertinent to note that during the cross examination of the applicant, it has been elicited that the respondent had taken the applicant to see the site meaning thereby the plots in question. Cross examination further reveals that the respondent informed the applicant that the development of the property will be taking place. The cross examination has further substantiated the fact that the applicant had shown the amount of ₹12,00,000/- (Rupees twelve lakhs only) in his income tax returns. It would not lie in the mouth of the respondent to say that the applicant had not tendered the Income Tax returns. The applicant could have been asked to produce the income tax returns,

however, no such question was put to the applicant.

11. Conjoint reading of notice, its reply as well as the evidence of the applicant is sufficient to show that the presumption has not been rebutted by the respondent. The learned Magistrate emphasized on the aspect of absence of agreement of sale between the parties. This is not a civil litigation and, therefore, that question would not be material in the instant case. The impugned judgment of the trial Court needs to be scrutinized by reassessing the evidence on record. There is sufficient material to grant special leave to appeal to the applicant. There is one more aspect which needs to be mentioned is that during cross examination it was suggested that the applicant misused the cheque given as a security to the State Bank of India. The cheque was not given to the State Bank of India, but to the applicant. Respondent has not clarified as to why instead of issuing the cheque in name of the bank it was given in the name of the applicant?

12. As such from the aforesaid discussions, special leave to

appeal needs to be granted.

13. Registry to register the appeal. Application stands disposed of accordingly.

PRITHVIRAJ K. CHAVAN, J.

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