IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL MISC. APPLICATION NO. 178 OF 2019.
IN
STAMP NUMBER MAIN NO.2850 OF 2018.

BHIKAJI L. KERKAR ... Applicant.
Versus
OMPRAKASH K. KULKARNI., ... Respondent.

Shri S. Samant, Advocates for the applicant.
Shri G. Naik, Advocate for the respondent.

Coram:- PRITHVIRAJ K. CHAVAN, J.
Reserved on:- 13th August, 2019.
Pronounced on:- 17th September, 2019.

ORDER

By this application, the original complainant has sought special leave to appeal against the judgment and order of acquittal dated 14.9.2017 passed by the Judicial Magistrate, First Class, Pernem in Criminal Case No.138/OA/NIA/2015.

2. Heard learned Counsel for the applicant and the respondent.

3. The applicant is a Contractor by profession. The respondent is a retired person. The respondent had approached the complainant/

applicant in the month of May 2014 requesting him for some financial assistance for completing his business assignments. The complainant paid ₹13,20,000/- (Rupees thirteen lakhs twenty thousand only) to the respondent. The respondent issued receipts in lieu thereof dated 13.9.2014 and 24.2.2015 acknowledging the receipt of ₹9,20,000/- (Rupees nine lakhs twenty thousand only) and ₹4,00,000/-(Rupees four lakhs only) respectively. The respondent had also promised to return the entire amount by 5.10.2014. He issued two cheques of ₹9,20,000/- (Rupees nine lakhs twenty thousand only) bearing no.028907 and ₹4,00,000/- (Rupees four lakhs only) bearing no.028908 dated 5.10.2014 drawn on Axis Bank Mapusa Goa. In the month of January 2015, the respondent had instructed the complainant to deposit the cheques issued by him. However, when cheques were deposited both were returned dishonoured on 5.1.2015 for the reason "insufficiency of funds." Legal notice dated 17.1.2015 by registered post was duly served on the respondent. Since there was no compliance, the applicant filed a complaint under Section 138 of the Negotiable Instruments Act. The trial Court by the impugned judgment acquitted the respondent. The trial

Court held that the applicant has failed to prove that there was legally enforceable debt.

4. Shri Samant, learned counsel for the applicant contends that issuance of cheques by the respondent and the receipts are an undisputed facts. Since the applicant has discharged initial burden, the respondent could not rebut the presumption in favour of the applicant. It is contended that though the amount was deposited in the account of third person, it was done at the instance of respondent. If that being so, the respondent could not have issued the receipts and cheques in favour of the applicant. As such, learned counsel contends that since the trial court has failed to appreciate the evidence in a proper manner leave to appeal needs to be granted.

5. On the other hand, Mr. Naik submits that entire case of the applicant has been shattered during cross examination, wherein it has been brought on record that it was not a legally enforceable debt. The applicant on one hand submits that the amount was transferred through

RTGS but on the other hand, he states that the amount was handed over to one Mehar Kaushal. At one point of time the complainant states that amount of ₹13,20,000/-(Rupees thirteen lakhs twenty thousand only) was given in cash. Since the applicant has failed to take a firm stand about the nature of the transfer, it is submitted that trial Court has rightly acquitted the respondent.

6. It appears that the applicant had filed one more case against respondent under Section 138 of the NIA for dishonour of a cheque in sum of ₹30,00,000/-(Rupees thirty lakhs only). The applicant in his cross examination admits that some amount has been transferred by him in the account of one Mehar Kaushal by way of RTGS, however, he makes it clear that it was a transaction of a different case. It has been brought in cross that amount of ₹13,20,000/-(Rupees thirteen lakhs twenty thousand only) was paid to the respondent in this case in different instalments. One thing is clear that an amount of ₹13,20,000/- (Rupees thirteen lakhs thousand only) was paid by the applicant in cash is brought in cross examination by the respondent. It is stated in the cross that the

said amount was given on 8 to 10 different occasions. It necessarily mean that the said amount was given to the respondent by the applicant.

7. Merely because the applicant admits that ₹9,20,000/-(Rupees nine lakhs twenty thousand only) was transferred in the account of one Mehar Kaushal by way of RTGS would not necessarily mean that the amount was not received by the respondent if it was deposited in the account of Mehar Kaushal as per the instructions of the respondent.

8. If it is contention of the respondent that the receipts were obtained under force, then the respondent could have filed a police report. No such report is forthcoming. The cross examination also reveals that transfer of the amount through RTGS in the account of Mehar Kaushal was made in the presence of the respondent. The applicant could not recollect the name of the company and the type of the business being carried out by the respondent with Mehar Kaushal. It is not testified that the respondent and Mehar Kaushal were not acquainted with each other.

9. The evidence of the complainant, therefore, needs to be scrutinized as the learned trial Court has failed to appreciate the evidence in the sense as to whether there is sufficient material to rebut the presumption which is in favour of the applicant in given set of facts and circumstances.

10. Conspectus of the aforesaid observations is that special leave to appeal needs to be granted. Registry to register the appeal.

11. Application stands disposed of in aforesaid terms.

PRITHVIRAJ K. CHAVAN, J.

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