

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 21 OF 2016**

Mr. Rakesh Kambli
major, R/O H.NO 360,
St. Inez, Panaji Goa
presently residing at T-2,
3rd Floor, Parekh Classic,
Child Villas Colony,
Taleigao, Tiswadi Goa.

... Appellant

Versus

1. Mr. Ajit Tari,
major, C/o Sita Bar,
Kiran Pani, Pernem, Goa.

2. State of Goa,
through Public Prosecutor,
Altino, Panaji, Goa.

... Respondents

Ms. C. Collasso, Advocate for the Appellant.

None for Respondent No.1.

Mr. P. Faldessai, Addl. Public Prosecutor for the State – Respondent
No.2.

Coram:- M. S. SONAK, J.

Reserved on:- 18th September, 2020

Pronounced on:- 19th September, 2020

JUDGMENT:

Heard Ms. C. Collasso, Advocate for the Appellant and Mr. P. Faldessai, Additional Public Prosecutor for the State. Respondent No.1 though served is neither present nor represented.

2. This appeal is directed against the judgment and order dated 31.01.2011 made by the Judicial Magistrate, First Class at Panaji (JMFC for short), in OA Criminal Case No.1198/2007/B acquitting the respondent no.1 (accused) of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (said Act).

3. The appellant is the original complainant in OA Criminal Case No.1198/2007/B before the learned JMFC. It is the case of the complainant that he was known to the accused who is a businessman supplying sand for construction work. At the request of the accused, the complainant had stated to have advanced a sum of ₹1,06,000/- for purchase of bus on the assurance that the accused would repay the said amount by October, 2007. It is also the case of the complainant that towards repayment of the said amount the accused handed over to him a cheque bearing no.160528 dated 02.11.2007 of IndusInd Bank, Panaji branch for an amount of ₹1,06,000/-. However, on 09.11.2007 this cheque was dishonoured for want of sufficient funds in the account of the accused. Therefore, the complainant issued the necessary notices to the accused and thereafter filed the aforesaid case.

4. The issue before the learned JMFC was whether the cheque which was dishonoured was issued towards a legally enforceable debt. The learned JMFC has held that it was not and therefore, acquitted the accused. Hence the present appeal.

5. Ms. Collasso, learned counsel for the appellant submits that the view taken by the learned JMFC is vitiated by perversity. She submits that the learned JMFC erred in relying upon the decision in *Sanjay Mishra v. Ms. Kanishka Kapoor @ Nikki & Another – 2009 ALL MR (Cri) 1080*, since, the view taken therein, has been impliedly overruled by the Hon'ble Supreme Court and in any case, held as not reflecting the correct legal position by other learned Single Judges. She submits that the circumstance that this hand loan may not have been reflected in the income tax returns of the complainant, is a matter entirely between the complainant and the Income Tax Department. Based upon this circumstance, the presumption under the said Act can in no manner be diluted. She therefore submits that the view taken by the learned JMFC in this matter is not even a plausible view and therefore, the same warrants interference in this appeal. She relies on the decision in *Kashinath Balu Gaonkar v. Sunita Krishnajirao Dessai & Another – Criminal Revision Application No.14/2015; Ragini Gupta v. Piyush Dutt Sharma - CRLR No. 5263/2018 and Assistant Director v. Shanti – (2002) 6 SCC 259* in support of her submissions.

6. The contentions of Ms. Colasso will have to be appreciated by bearing in mind the scope of an appeal against acquittal. In *State of Goa v. Sanjay Thakran and another – (2007) 3 SCC 755* the Hon'ble Apex Court has held that while exercising powers in an appeal against the order of acquittal, the appellate court would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment of the court below.

7. In this case, whilst there may be some substance in the contention of Ms. Collasso that some dent has been made to the position explained in *Sanjay Mishra (supra)* by the decision in *Kashinath Balu Gaonkar*, the perusal of the impugned judgment and order would indicate that the acquittal is not based upon the decision in *Sanjay Mishra (supra)* or in any case, the decision, is not entirely based upon the decision in *Sanjay Mishra (supra)*. In this case, the complainant had averred in the complaint and also stated in his affidavit in evidence that the amount of ₹1,05,000/- was given to the accused by cheque and an amount of ₹1,000/- was given by cash. An impression was created that this amount of ₹1,05,000/- was in fact given to the accused by a cross cheque. However, the evidence on

record, including in particular, the statement of account at Exh.26 makes a reference to a cash payment. The complainant, in the course of his cross-examination, attempted to make out a case that a bearer cheque was given to the accused.

8. Now Surendra Gad (PW2) who was examined by the complainant in support of his case has clearly deposed that in case of a bearer cheque the name of the drawer will be invariably shown in the statement of account. Learned JMFC has concluded that there is absolutely no material on record to corroborate the fact that the accused had in fact encashed the cheque and had actually received the amount of ₹1,05,000/- from the complainant.

9. In the cross-examination the complainant has admitted that there was neither any agreement nor any receipt to show that he had actually advanced an amount of ₹1,05,000/- to the accused and that such amount was actually received by the accused. The complainant, was quite evasive in the replies which he gave during the course of his cross-examination. Initially he stated that he will have to check with his chartered accountant, if this amount is reflected in the tax returns but later on, he admitted that such amount is not at all reflected in the tax returns. The complainant also stated that he had furnished the bank statements to his chartered accountant and this amount is reflected in the bank statement, implying thereby that there was no

good reason as to why such amount will not be reflected in the tax returns.

10. Based upon the aforesaid discrepancies, the learned JMFC, has concluded that there is no evidence on record to establish beyond reasonable doubt that an amount of ₹1,06,000/- had indeed been advanced by the complainant to the accused. No doubt, there is also an observation in paragraph 30 of the impugned judgment and order that since such amount was not reflected in the tax returns, following the law laid down in *Sayed Iqbal Vakil v. Javed Latif Sheikh – 2008 ALL MR (Cri) 2743* and in *Sanjay Mishra (supra)*, the accused was entitled to an acquittal. However, even if the reference to these decisions is excluded, still, the learned JMFC, on the basis of the other evidence on record, has held that there is no evidence on record to substantiate the factum of advance or loan by the complainant to the accused.

11. Though, it is possible to say that this Court might have, taken up different view in this matter, it is not the same as saying that the view taken by the learned JMFC is perverse or not even a plausible view. Taking into consideration the material on record that there is not even a receipt in respect of such a large amount and further, there are no contemporaneous records about the payment of such amount to the accused, it cannot be said that the view taken by the learned JMFC is

totally perverse as to warrant interference in an appeal against acquittal. Besides, even the complainant has not been entirely candid to the Court, inasmuch as an attempt was made to portray that the amount had in fact been paid to the accused by means of a cross cheque directly into his account.

12. Therefore, by clarifying that the view taken by the learned JMFC relying upon *Sanjay Mishra (supra)* may not be correct, there is no case made out to interfere with the acquittal recorded by the learned JMFC in this matter.

13. Accordingly, by clarifying the legal position, this appeal is dismissed.

14. There shall be no order as to costs.

M. S. SONAK, J.