

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 41 OF 2012**

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. Colasso, 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 13.05.2010 made by the Judicial Magistrate, First Class at Mapusa (JMFC for short), in Criminal Case No.728/OA/2007/D 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 Criminal Case No.728/OA/NI/2007/D before the learned JMFC, who claims to have advanced a sum of ₹69,000/- to the accused. It is the case of the complainant that towards repayment of this loan amount the accused handed over to him a cheque bearing no.043752 dated 02.11.2007 drawn on Bank of India, Mapusa branch for an amount of ₹69,000/-. However, when the complainant presented the same for encashment, it was dishonoured on the ground of insufficient funds in the account of the accused. Accordingly, by issuing the necessary notices to the accused the complainant filed the complaint bearing Criminal Case No.728/OA/NI/2007/D. By the impugned judgment and order the learned JMFC has however acquitted the accused.

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 total perversity. She submits that the entire decision is based upon the ruling in *Sanjay Mishra v. Ms. Kanishka Kapoor @ Nikki & Another – 2009 ALL MR (Cri) 1080*. She submits that this decision stands impliedly overruled by the Hon'ble Supreme Court. 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. Collasso 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, though, it is true that the learned JMFC has relied upon the decision in *Sanjay Mishra (supra)*, it is not as if such reliance is the only reason on account of which the learned JMFC has concluded that the complainant had failed to establish that the cheque which has been dishonoured was issued towards a legally enforceable debt. The view taken in *Sanjay Mishra (supra)* is only one of the reasons for which the learned JMFC has reached this conclusion.

8. Therefore, even after excluding the reasoning which is based upon *Sanjay Mishra (supra)*, it cannot be said that there was no material whatsoever in this case to sustain the conclusion that the cheque in question was not issued towards the legally enforceable debt.

9. In this case, the accused had clearly taken the defence that he does not have any business of supplying sand for construction purpose. He had taken a defence that he only has a bar named Sita Bar at Kiran Pani, Pernem and this position was even confirmed by the complainant in the course of his cross-examination.

10. In this case the complainant had come up with a specific case that the accused had issued a “*slip*” in the name of “*Sita Supplies*” acknowledging the receipt of ₹69,000/-. However, such slip, has not been produced in evidence by the complainant.

11. The learned JMFC has held that the complainant has not bothered to explain the source of such a large amount of cash which he claims to have advanced to the accused. At one stage, the complainant, claimed that he had such amount in his house. At another stage, the complainant explained that he had withdrawn some portion of this amount from his bank account. However, the complainant neither specified the bank from which such amount was withdrawn nor the quantum of the amount which was withdrawn.

12. The complainant in fact offered to produce the receipts and bank documents to substantiate his claim that at least a portion of this amount was withdrawn by him from the bank for the purposes of advancing it as a loan to the accused. However, despite opportunities,

no receipts or bank documents were ever produced by the complainant in the course of evidence before the learned JMFC. Based upon all this, the learned JMFC proceeded to draw an adverse inference against the complainant.

13. The complainant, in his evidence before the learned JMFC had claimed that he was a tax payer but was evasive initially as to whether this amount of ₹69,000/- was reflected in the tax returns. He only stated that he would confirm this position from the chartered accountant but at a latter point of time, he neither produced his returns nor examined his chartered accountant in the matter. In fact, in the course of his cross-examination, the complainant accepted that he is not in a position to produce any document to show that the accused had indeed received the amount of ₹69,000/- from the complainant.

14. In the aforesaid state of evidence, even if the position emerging from the reliance on *Sanjay Mishra (supra)* is excluded from consideration, the other evidence on record, is sufficient to sustain the conclusion that the cheque in question was not issued towards a legally enforceable debt. In such matters, the accused, has to only probabalize his defence and the burden on the accused is not to prove his defence beyond reasonable doubt. In such circumstances, it really cannot be said that the view taken by the learned JMFC is a totally perverse view

or in any case, a view, which was not even plausible on the basis of the evidence on record.

15. Therefore, whilst not approving the reliance on *Sanjay Mishra (supra)*, there is no reason to interfere with the impugned judgment and order and the acquittal recorded therein.

16. For all the aforesaid reasons, this appeal is dismissed.

17. There shall be no order as to costs.

M. S. SONAK, J.