

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL MISC. APPLICATION NO. 222 OF 2019**

Mr. Arvind Coutinho,
age 39, businessman,
Residing at 480/14 R-4,
Dona Monulta,
Dongorim, Navelim,
Salcete, Goa.

... Applicant.

Versus

1. Mrs. Nelly Fernandes e D'Costa,
Alias Nelly D'Costa,
d/o Mr. Rosario Santo Fernandes,
r/o House No.1 376, Butica,
Navelim, Salcete, Goa.

2. State of Goa,
Through PP
Panaji, Goa.

... Respondents.

Shri Arun Bras De Sa, Advocate for the Applicant.

Shri R. Kudalkar, Advocte for the Respondent.

Coram:- NUTAN D. SARDESSAI, J.

Date:- 20th January, 2020

ORDER:

This is an application for leave to appeal filed at the instance of the aggrieved complainant challenging the order of acquittal dated 02.05.2019 passed by the learned Judicial Magistrate, First Class, 'E' Court, Margao.

2. Heard Shri Arun Bras De Sa, learned Advocate for the Applicant who submitted in brief that the respondent/accused admitted the receipt of ₹20,00,000/- by RTGS from the applicant. He adverted to the appeal memo and more particularly the answers to the 313 Cr.P.C. statement in which the accused had clearly admitted that she had taken ₹20,00,000/- by RTGS from the applicant. In spite of her claim that the mortgage deed was extended to return the amount to the applicant and her claim that she used to withdraw the amount from her husband's account and that her brother would give her money, she had neither examined her husband nor her brother to substantiate her plea. It was further put to her that the cheques were issued by her in favour of the applicant which were returned dishonoured to which she had taken a plea that the applicant had forcefully taken the cheques from her and had not returned the same even after she had paid him the amount. However, no complaint was

filed by her immediately to substantiate her case and such a complaint came to be filed only when she was called for an inquiry about the cheques at the Police Station. In any event the defence was not proved and nor had the respondent examined herself. The bank statement of the respondent which was a part of the trial court record would clearly indicate that there was no sufficient balance in her account at any point of time. Besides, the learned Judicial Magistrate, First Class had failed to consider the presumption available in favour of the applicant being the complainant in the case. There was therefore, a prima facie case for grant of leave and there was no basis in the defence plea that the applicant was a money lender. He placed reliance in **Kishan Rao Vs. Shankargouda, {(2018) 8 SCC 165}** to substantiate his case and pressed for the grant of leave to file the appeal.

3. Shri R. Kudalkar, learned Advocate for the respondent no.1 placed reliance in **Krishna Janardhan Bhat, {2008 1 Crimes (SC) 227}** and further submitted that the respondent/accused had a right to remain silent. He next adverted to the judgment of the Judicial Magistrate, First Class and submitted that there were clear findings in favour of the respondent and against the applicant. Besides there was a clear admission by the applicant that he was into lending of money and in the absence of any license in that regard, there was still material to hold that he was in the money lending

business. No leave to appeal was to be granted and the application had to be dismissed.

4. i have considered the submissions of Shri Arun Bras De Sa, learned Advocate for the applicant and Shri R. Kudalkar, learned Advocate for the respondent no.1.

5. From the tenor of the defence taken by the respondent, it is apparent that there was a clear admission that the money had passed hands from the applicant to the respondent in the amount of ₹20,00,000/- by RTGS mode. In the face of this transaction, it was for the respondent to rebut the presumption arising in favour of the applicant when he had shown on the basis of the cheques issued in his favour that there was a legally enforceable debt. The respondent had taken several pleas but had failed to rebut the presumption arising in favour of the applicant. The plea that the cheques were forcibly taken was contrary to another plea that the cheques were misplaced. The bank statement of the respondent to which learned Advocate Shri D'sa adverted also does not show that the respondent had sufficient balance in her account to make the payment to the applicant.

6. The learned Judicial Magistrate, First Class had purely gone on surmises and conjectures to hold that the applicant was a money lender only because of some stray admissions in

his statement that there were several other cases of cheque bouncing filed by him against some other persons. The plea on behalf of the respondent no.1 that the accused had a right to remain silent would not be available in such proceedings where there is a duty cast on the respondent/accused to rebut the presumptions statutorily available in favour of the complainant under the Negotiable Instruments Act, 1881.

7. In **Kishan Rao** (supra), the Hon'ble Apex Court held in the facts of that case that the Trial Court as well as the Appellate Court having found that the cheques contained the signatures of the accused and it was given to the appellant to present in the bank, the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come into the witness box to support his case. In reply to the notice which was given by the appellant, the accused took the defence that the cheque was stolen by the appellant which defence was rejected by the learned Trial Court after considering the evidence on record with regard to which a contrary view had also been expressed by the Hon'ble High Court and in that view of the matter allowed the appeal setting aside the judgment of the High Court.

8. **Krishna Bhat** (supra), held that an accused need not

examine himself for discharging the burden of proof placed upon him under a statute and he may discharge his burden on the basis of the material already brought on record. Nonetheless it does not absolve the respondent/accused to refuse to examine herself to rebut the presumption available in the applicant's favour under Section 139 of the Act.

9. In the facts of our case, the applicant had not at all discharged the burden of rebutting the presumption arising in favour of the applicant in the face of her clear admission that she had received the amount of ₹20,00,000/- from the applicant by RTGS mode. All these aspects of the matter were clearly lost on the Learned Judicial Magistrate, First Class while passing the judgment of acquittal. The respondent had otherwise failed to establish her plea in defence that the cheques were either forcefully taken by the applicant or that they were misplaced at her instance. Last but not the least, the respondent had not even replied to the statutory legal notice issued to her at the instance of the applicant which too speaks volumes about her plea in defence. There is a prima facie case made out by the applicant which would stand his case in good stead and therefore, i find it a fit case to grant leave to appeal. The application is accordingly allowed.

NUTAN D. SARDESSAI, J.