

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL MISC. APPLICATION NO. 256 OF 2019**

Mrs. Dnyanavi Dnyaneshwar Naik,
w/o Shri Dnyaneshwar Naik,
Proprietor of M/s Shree Kelbai
Enterprises,
major of age,
r/o of H.No.288 1, Rua de Maria,
Near Old Church, Sancoale, Goa.

... Applicant

Versus

1. Mrs. Shakuntala Kudav,
Proprietor of M/s Shruti Ore
Carriers,
w/o Shri Sajjan Kudav,
r/o H.No.146, Near Bharat Gas
Godown, Mercedes, Vaddem,
Vasco-da-Gama, Goa.

2. Shri Sajjan Kudav,
Son of Mr. Kudav,
major of age,
r/o H.No.146, Near Bharat Gas
Godown, Mercedes, Vaddem,
Vasco-da-Gama, Goa.

3. State of Goa,
Through its Public Prosecutor,
Panaji, Goa.

... Respondents

Shri Jatin Ramaiya, Advocate for the Applicant.

Shri Banerjee Ranaditya Subroto, Advocate for the
Respondent.

Coram:- NUTAN D. SARDESSAI, J.

Date: 10th February, 2020.

ORDER:

Heard Shri Jatin Ramaiya, learned Advocate for the applicant who submitted that the cheque had been issued by the respondent no. 2 favouring the applicant towards the work of barge repairs, through the respondent no.1 being the authorised signatory. The cheque was dishonoured for insufficient funds followed by a notice in terms of Section 138 of the Negotiable Instruments Act, 1881 ('Act' for short hereinafter). The respondent had not denied the issuance of the cheque but had taken a plea in defence that the jobs were incomplete. The learned Judicial Magistrate, First Class however, disbelieved the case of the complainant and acquitted the accused. Looking to the tenor of the relationship between the parties, the learned Judicial Magistrate, First Class ought to have convicted the respondent. In a similar case between the spouses of the present parties another learned Single Judge of this Court had granted leave to appeal.

2. Shri Banerjee Subroto, learned Advocate for the respondent submitted at the outset that even the application

for leave to appeal was not maintainable looking to the requirements of Section 378 (4) of Cr.P.C. which required the leave to appeal to be filed within 60 days from the date of the order in terms of Sub Section 5 of Section 378 Cr.P.C. The order was passed on 04.07.2019 while the application for leave to appeal came to be filed only on 04.09.2019 being well beyond the 60 days period. On merits it was his submission that there was no business transaction between the applicant and the respondents but with one M/s Nikhil Enterprises. There was no merit in the application for leave to appeal and the same had to be dismissed.

3. Shri Jatin Ramaiya, learned Advocate for the applicant placed on record a copy of the order dated 25.04.2016 passed by another learned Single Judge of this Court though between the spouses of the parties hereto in Cr. Misc. Application No. 281/2015 where the respondent no.1 being the present respondent no.2 had signed the subject cheque in favour of the applicant's husband towards the repair charges as the authorised signatory. The learned Judge had found that an arguable question arose in the matter and accordingly granted leave to file the appeal against the acquittal having found that the proprietorship concern M/s Shruti Ore Carriers and its proprietor i.e. the respondent no.1 herein were not issued notice, nor made parties to the complaint in the said case before it which had found favour with the learned Magistrate

as well as the learned Sessions Judge to record the concurrent findings of acquittal.

4. In the present case the applicant had pleaded that she was the proprietress of M/s Shree Kelbai Enterprises, was in the business of barge repairs and had a workshop from which it was operated and that her husband used to look after and manage the affairs of M/s Shree Kelbai Enterprises. The respondent no.1 was the proprietress of M/s Shruti Ore Carriers and the respondent no.2 being her husband was equally responsible for the day to day management of M/s Shruti Ore Carriers and was the authorised signatory of the respondent no.1. It was also the case of the applicant that the respondent no.2 acting on behalf of the respondent no.1 had approached the applicant and engaged the services of M/s Shree Kelbai Enterprises to carry out the repairs of the barge and thereafter issued the cheque which was later on discounted to an amount of ₹3,28,900/-being the cheque in question.

5. Section 378 Cr.P.C. provides for appeal in case of acquittal and Sub Section (4) reads that if such an order of acquittal is passed in any case instituted upon the complaint and the High Court, on an application made to it by the Complainant in this behalf, grants special leave to appeal from the order of acquittal the complainant may present such

an appeal to the High Court. Sub Section (5) provides that no application under sub Section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal. It was pointed out by Shri Ramaiya, learned Advocate for the applicant that the order under challenge was passed on 04.07.2019, the certified copy applied for on 05.07.2019 and the date given for delivery was on 15.07.2019 and the certified copy was delivered on 16.07.2019. The Appeal filed on 04.09.2019 was therefore within time i.e. within the sixty days period. The contention on behalf of Shri Banerjee Subroto, learned Advocate for the respondent cannot at all be entertained that the sixty days period had to be counted from the date of the order since the applicant could not have filed an appeal with an application for leave to appeal without the certified copy of the order under challenge and therefore the days taken for obtaining the certified copy would of necessity have to be excluded from the computation of sixty days period. Therefore, the application for leave to appeal was definitely within time and not belated as contended on behalf of the respondents.

6. Shri Ramaiya, learned Advocate for the applicant had rightly pointed out to the judgment where the learned Judicial

Magistrate, First Class had answered the questions 2 to 5 formulated for determination in the negative which militated against the case of the applicant as otherwise the learned Judicial Magistrate, First Class would not have issued process against the respondent/accused in the first instance when there was non compliance with the mandatory requirements of Section 138 of the Act. As rightly submitted by Shri Ramaiya, learned Advocate, the learned Magistrate had overlooked the transaction between the parties in their status as proprietors of the firms of the proprietorship concerns and had gone off a tangent to dismiss the complaint and acquit the accused inspite of the presumption arising in favour of the Applicant. There appears an arguable case in favour of the applicant and therefore, leave is granted to file appeal against acquittal. The application is accordingly allowed.

7. The Registry to register the appeal.

8. The learned Judicial Magistrate, First Class to take action against the respondent/accused under Section 390 Cr.P.C.

NUTAN D. SARDESSAI, J.

MF/-