IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC.APPLICATION NO. 69 OF 2019

Mr. Bhupesh Umesh Naik Dessai,
s/o Umesh Naik Dessai,
Aged 35 years,
R/o H.No. 49, Catta Balli, Goa. ... Applicant

Versus

1. Mr. Jayesh P. NaiK,
Aged about 40 years,
R/o H.No.54,
Near Govind Mahadev Devastan
Temple,
Dhavli, Ponda, Goa.

2. State of Goa.
Represented by the Public Prosecutor,
Panjim, Goa. ... Respondents

Shri Shailesh Redkar, Advocate for the applicant.

Shri Shirin Naik, Advocate for the respondent no.1.

Coram:- NUTAN D. SARDESSAI, J.

Date:- 9th March, 2020

ORDER:

This is an application for leave to appeal at the instance of the original complainant.

2. Heard Shri Redkar, learned Advocate for the applicant who contended at the outset that the learned JMFC had found favour with his case and observed that the defence was improbable which was recorded at paragraph 24 of the judgment namely that the plea taken by the respondent that the cheque was not issued by him to the applicant could not be believed when it was duly signed by him, drawn on his account and was in the possession of the complainant and for which there was no justification at the instance of the respondent who had otherwise failed to prove that he had issued the cheque to one Henry Patekar and not the applicant. However, the Court had not found favour with the case of the applicant that the debt was a legally enforceable debt on the specious premise that the applicant did not have a license which was required in terms of the Goa, Daman and Diu Minor Mineral Concession Rules,1985 even though he was a transporter/supplier of granite stones and laterite stones.

3. It was the contention of Shri Redkar, learned Advocate that the Rule relating to the transit pass was not applicable

to the applicant and even assuming at the highest that the same applied to his case, the applicant could be held liable for punishment under the provisions of the said Act and same could not be used to negate his case that there was a legally enforceable debt by the respondent in his favour. He also adverted to Rule 62 of the said Rules which prescribed the penalty and it was not open to the respondent/accused who contended that for want of a transit pass, there was no legally enforceable debt in favour of the applicant. He placed reliance in **Krishna P. Morajkar v/s. Joe Ferrao, State of Goa [2013 All MR (Cri) 4129]** in support of his case. He, therefore, prayed that his application for leave to appeal be granted and the appeal be registered accordingly.

4. Shri Shirin Naik, learned Advocate for the respondent submitted that the affidavit of the respondent clearly revealed that he was a civil servant and not a contractor and therefore the case of the applicant that he was supplying such material to the respondents could not be believed. The applicant had set out his case in his evidence but had not examined one Shri Faldessai nor the Supervisor in support of his case. Therefore there was no basis in the case of the applicant that he was in the business of laterite stones and minerals. He placed reliance in **Raymond Morenhas v/s Rajanna S. Kothur and Anr (CRMA No.223 of 2006)**

and **Zaheeda Kazi v/s Sharona Ashraff Khan (CRMA No.410 of 2006)**, both these judgments of a learned Single Judge of this Court and pressed for the dismissal of the application.

5. i have heard both the learned advocates, considered the judgments relied upon by them and also the provisions of the said Rules apart from the order of the learned JMFC dismissing the complaint.

6. The learned Magistrate had clearly found favour with the case of the applicant that the cheque was issued by the respondent in favour of the complainant which was duly signed by him and there was no reason to believe that it had been issued to one Henry Patekar as was the case of the respondent. The learned JMFC had however disbelieved the case of the complainant that the cheque was issued in discharge of a legally enforceable debt only on the specious premise that there was no transit pass in favour of the applicant while he was dealing with the laterite/granite stones. If at all there was an infraction of the provisions of the said Rule, the complainant could face penalty thereunder and there was no basis for the learned JMFC to hold only on that premise that there was no legally

enforceable debt owed by the respondent to the applicant herein.

7. In **Krishna Morajkar** (supra), a learned Single Judge of this Court had considered the judgment in **Krishna Janardhan Bhat**, where the operation of Section 269SS of the Income Tax Act was invoked and where it was submitted that section 269SS of the Income Tax Act did not cast any burden upon a person making advance in cash to record it in his returns and did not prevent any such cash advance from being made.

8. In **Raymond Morenhas** (supra), the applicant who was the complainant had sought leave to appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881 in which the complaint was based on the allegation that the cheque which the accused had issued in the sum of ₹1,65,000/- had bounced. In the facts of the case the complainant had examined himself. The accused had stepped into the witness box and had also examined the Manager. The complainant in the course of his cross examination, admitted that the accused had been taking money from the year 1978. The learned JMFC found from the evidence of the Manager that the last amount advanced by the complainant to the accused was by cheque dated

23/08/1999, and on the basis of the same, came to the conclusion that the complaint filed by the accused in respect of the cheque which was issued in the first week of December,2002 was beyond the period of limitation of three years. On that basis, the learned J.M.F.C. came to the conclusion that the said cheque issued by the accused to the complainant was issued towards the time barred debt. This judgment is clearly distinguishable and does not at all apply in the facts of the present case. Hence, the respectful departure.

9. **Zaheeda Kazi** (supra), also sought leave to appeal against the accused under Section 138 of the Negotiable Instruments Act,1881. In the facts of that case the complainant had prosecuted the accused on the allegation that the accused had issued the subject cheque for ₹10,00,000/- which was returned dishonoured when presented for encashment with an endorsement that the funds were insufficient and after the complainant issued the statutory notice claiming the payment due thereof, the same was refused by the accused. The fact showed that the complainant as an attorney of her father had sold two plots for ₹10,00,000/- and advanced the amount to the husband of the accused to be invested in the business of the accused. On the said Sale Deeds the consideration shown was ₹1.5

lakhs for each of the two plots. However, there was no dispute that the sale took place on or about 15/11/1999 and the sale proceeds advanced to the husband of the accused to be invested in the business of the accused on that date. It was further alleged that the money was advanced after the execution of the said sale deed dated 15/11/1999 and the subject cheque was issued on 22/05/2004. The learned Magistrate in acquitting the accused came to a conclusion that the subject cheque was issued in respect of the time barred liability since the sale deed was executed on 15/11/1999. This judgment too deals with the aspect of a time barred debt which is not the case presently. It had also considered its earlier judgment in **Raymond Morenhas** (supra) which was held to be distinguishable in the facts of the case.

10. At the cost of repetition, if at all the applicant did not possess the transit pass as required under Rules, he would be liable for penalties thereunder for flouting the said Rule and therefore it was not open to the respondent/ accused to contend that for want of a transit pass, the applicant was not in the business of transporting laterite stones and/ or that the same was not supplied to the respondent. A fit case has been made out by the applicant for leave to appeal and in view thereof the application is allowed. Hence, the

application for leave to appeal is granted. Registry to register the appeal and place the same for admission.

NUTAN D. SARDESSAI, J.

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