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IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO.43 OF 2014.

M/s Kadamba Transport Corporation Limited, A Company having their Registered Office at Paraiso de Goa, Porvorim, Goa, represented herein by their Managing Director Mr. Derrick Pereira Neto, major, service, having address at Porvorim, Goa. ... Appellant.

Versus

1 Shri Damodar K. Shirodkar, major Shivshankar Auto Traders, Shop No. 3, Salgaonkar Chambers, Margao, Goa.

2 STATE Through Public Prosecutor, High Court of Bombay at Goa, Panaji. ...Respondents.

Mr. Ajit R. Kantak, Advocate *for the appellant*.
Mr. Sudesh Usgaonkar and Ms. R. Pereira, Advocates for the respondent no.1.

CORAM: MANISH PITALE, J.
Reserved On: 18th November, 2021.
Pronounced On: 27th November, 2021.

JUDGMENT:

1. The original complainant, a government company, is before this Court in appeal to challenge judgment and order of acquittal passed in favour of the respondent no.1 for an offence under Section 138 of the Negotiable Instruments Act, 1881.

2. The complaint pertains to three cheques issued by the respondent no.1, two cheques for Rs.1,70,000/- each and one cheque for Rs.60,000/-, dishonoured upon presentation. According to the appellant, the cheques were issued for discharge of legal debt and liability and that therefore, respondent no.1 was guilty of the offence under Section 138 of the aforesaid Act.

3. The appellant filed complaint dated 26.11.2009, against the respondent no.1 under Section 138 of the aforesaid Act for dishonour of the aforesaid three cheques. The appellant led evidence of its witnesses in support of the allegations made against respondent no.1. Although the respondent no.1 cross examined the witnesses of the appellant, he did not lead evidence in his defence.

4. On completion of the proceedings before the Court of Judicial Magistrate, First Class, final arguments were heard and the Magistrate found that the respondent no.1 deserved to be acquitted. The Magistrate found that the appellant had failed to demonstrate that the cheques in question were issued in respect of specific debt or liability and that therefore, no case for conviction under Section 138 of the aforesaid Act was made out.

5. Mr. Ajit Kantak, learned Counsel appearing for the appellant submitted that the entire approach adopted by the Magistrate was erroneous for the reason that the concept of civil litigation was sought to be read into the present case. It was submitted that the provisions of the aforesaid Act, particularly presumption that arose under Section 139 thereof, was completely ignored by the Magistrate while acquitting the respondent no.1. It was submitted that the presumption that operated in favour of the appellant and against respondent no.1 was not rebutted in any manner. It was submitted that no evidence was led in his defence by the respondent no.1 and that the appellant had led oral and documentary evidence to clearly demonstrate that the respondent no.1 deserved to be convicted under Section 138 of the Act.

6. By referring to oral evidence of the witnesses who were examined on behalf of the appellant and the documents brought on record before the Magistrate, learned counsel for the appellant contended that clinching evidence was available to show the guilt of respondent no.1 and yet the Magistrate had erroneously acquitted him. By specifically referring to letters submitted by the respondent no.1 in response to notices and communications issued by the appellant, learned counsel for the appellant submitted that the respondent no.1 had admitted his liability and that therefore, he could not have been acquitted. The learned counsel for the appellant submitted that judgments of the Hon'ble Supreme Court and this Court demonstrated that when sufficient material was placed on record for demonstrating liability on the part of the accused and presumption under Section 139 of the Act arose because signature and issuance of cheques was not denied, an order of conviction ought to have followed in the present case. Reliance was placed on the judgments of the Hon'ble Supreme Court in ***Uttam Ram Vs Devinder Singh Hudan and Another, (2019) 10 SCC 287, Bir Singh Vs Mukesh Kumar, (2019)4 SCC 197, I. C. D. S.***

Ltd. Vs Beena Shabeer and another, 2002 Cri. L. J. 3925, K. N. Beena Vs Muniyappan and another, (2001) 8 SCC 458, Rangappa Vs. Sri Mohan, 2010(4) Bom. C. R. 652 and William Rosario Fernandes Vs Cabral & Co. & ors. 2006(6) Bom. C.R. 576.

7. On the other hand, Mr. Sudesh Usgaonkar, learned Counsel appearing for the respondent no.1 submitted that the Magistrate had correctly appreciated the material on record and applicable law to acquit the respondent no.1. It was submitted that when the view adopted by the Magistrate while acquitting the respondent no.1 was a reasonable and possible view, as per settled law, the appeal against acquittal ought not to be allowed, only because another view was possible on the basis of the material on record. It was further submitted that in the facts and circumstances of the present case, since the complaint filed by the appellant pertained only to alleged dues pertaining to bus stand fees of Panaji bus stand, the appellant was expected to place before the Court the amount allegedly due from the respondent no.1 in respect of Panaji Bus stand and that the cheques issued pertained to the said amount allegedly due. The learned counsel for the appellant further submitted in the absence of appropriate material being placed on record and the witnesses of the appellant being exposed in cross examination, there was no necessity for the respondent no.1 to lead evidence in defence. It was further submitted that the presumption that arose under Section 139 of the aforesaid Act was a rebuttable presumption on the test of preponderance of probabilities. The learned Counsel for the respondent no.1 relied upon the judgment of the Hon'ble Supreme Court in case of the ***M. S.***

Narayana Menon alias Mani Vs State of Kerala and another, (2006) 6 SCC 39, judgments of this Court in the case of Laxmikant D. Naik Vs Santosh V. Naik, 2006(2) Bom. C. R.(Cri.)830, M/s Enpee Earthmovers Vs. M/s Resources International and ors., 2013(1) ABR 646 and judgment and order dated 22.8.2007 passed by this Court Criminal Appeal No. 63 of 2005(Karekar Finance Pvt. Ltd. Vs Shri M. N. Bashyam and another).

8. Heard learned Counsel for the rival parties and perused the material on record. This Court also perused in detail the oral and documentary evidence placed on record before the Magistrate. It is settled law that when an appeal against acquittal is being considered, the appellate Court shall not reverse the order of acquittal only because another view in the matter was possible on the basis of the material on record, when the view adopted by the Court below while acquitting the accused was a reasonable and possible view. Therefore, the test to be satisfied by the appellant while seeking reversal of the order of acquittal is a stringent test and the material on record will have to be appreciated in that context.

9. In the present case, the Magistrate has acquitted the respondent no.1 on the basis that the complaint filed by the appellant for dishonour of the three cheques pertained only to the alleged liability towards bus stand fees for the Panaji bus stand. The Magistrate found that the oral and documentary evidence placed on record by the appellant pertained not only to the Panaji bus stand but also to other bus stands where respondent no.1 had been engaged for collection of bus stand fees and parking fees. On this basis, the Magistrate found that the extent of dues and/or liability was not clear and that amounts stated in the cheques were far more than the debt or liability as projected by the appellant, thereby justifying the acquittal of respondent no.1.

10. In the present case, much emphasis has been placed on behalf of the appellant on certain letters sent by the respondent in response to notices and demands sent by the appellant. A perusal of the relevant documents shows that when the appellant communicated to the respondent no.1 about the dues and the fact of dishonour of the three cheques, certain amounts were mentioned on behalf of the appellant. It is relevant that the cheques in the present case were dated 15.7.2009, 30.7.2009 and 5.9.2009. The legal debt or liability would obviously pertain to a period prior to the dates on which cheques were issued. In this context, documents on record show that the appellant had sent a letter dated 12.6.2007, to the respondent no.1 informing him that his offer had been accepted by the appellant/Corporation for six bus stands at Mapusa, Panaji, Bicholim, Margao, Churchorem and Vasco. The contract period was stated to be one year i.e. from 1.7.2007 to 30.6.2008.

11. The respondent no.1 was directed to furnish bank guarantee on the basis of existing rates pertaining to the bus stand fees and reference was also made to the revision of the rates of the bus stand fees and parking fees. On 6.5.2009, the appellant, through its Assistant Engineer, sent a letter to respondent no.1 stating that there were outstanding dues of bus stand fees and parking fees pertaining to Panaji and

Bicholim bus stands. The alleged amounts due were stated in the said letter, specifically claiming that the total amount of dues were Rs. 5,56,888/-

12. In response, the respondent no.1 sent a letter dated 26.6.2009 to the appellant stating that amount due for aforesaid bus stands came to about 3,50,000/-, claiming that certain amounts were not adjusted against the arrears. He stated that he had given two post-dated cheques, making a further specific request to the appellant that the accounts department must verify the dues.

13. It is significant that on 13.6.2007, much prior to exchange of the said communications, the appellant had communicated to the respondent no.1 that for the period between 16.6.2007 to 30.6.2007, amount to be paid towards bus stand fees of Panaji bus stand was Rs.56,250/- and as per a note dated 17.12.2009, prepared by the Assistant Financial Controller of the appellant, the outstanding dues towards Panaji bus stand were Rs.1,82,514/-. It is also significant that a document at Exh.66-C before the Magistrate signed by the Deputy Financial Controller of the appellant stated that the outstanding dues against the respondent no.1 pertaining to Panaji bus stand, as on 3.8.2008 were Rs.94,011/-.

14. It is necessary to now peruse the contents of the complaint dated 26.11.2009, filed by the appellant before the Magistrate under Section 138 of the aforesaid Act. Paragraph 2 of the complaint specifically states that the three cheques in question were issued in favour of the appellant for collection of bus stand fees pertaining to Panaji bus stand. There is no reference to the amounts due in connection with the other bus stands in the State of Goa, in respect of which the respondent no.1 was awarded the contract. Thus, as per the stated case of the appellant itself in the complaint filed before the Magistrate, the three dishonoured cheques pertained to legal debt or liability, only in respect of bus stand fees of Panaji bus stand.

15. The witnesses who were examined by the appellant in support of its case were officers having knowledge about the finances of the appellant, particularly about the amounts that could be said to be outstanding against respondent no.1 pertaining to the Panaji bus stand. A perusal of the cross examination of PW1 Vidhyadhar Harmalkar, who was authorised by the Managing Director of the appellant to depose, stated in his affidavit in evidence that the dishonoured cheques pertained to amounts due from respondent no.1 towards bus stand fees of Panaji bus stand. But, in cross examination, the said witness admitted that he was not acquainted with the financial transactions of the appellant. It was admitted that statement of dues was not produced and that the said witness was not aware of any letter sent to the respondent no.1 about dues payable in respect of collection of fees of the Panaji bus stand. It was also conceded that no document was produced to show the specific amounts due from the respondent no.1 in that regard.

16. The appellant examined PW2 Gurudas Naik, who was the Assistant Engineer. In his affidavit in evidence, this witness stated that the respondent no.1 was liable to pay dues towards bus stand fees for Panaji bus stand and Bicholim bus stand and also parking fees towards Panaji bus stand. This was a clear improvement over the statement in the original complaint, which pertained only to the dues towards bus stand fees of Panaji bus stand. This witness stated that the three dishonoured cheques were issued by the respondent no.1 towards total outstanding Rs.5,55,888/- as on 6.5.2009. In the cross examination, this witness claimed that the matter pertained to the dues concerning three bus stands. But, he referred to Exh.66-C and admitted that the amount shown outstanding was less than the total amount of the three cheques. This witness referred to the notice issued and complaint filed on behalf of the appellant and admitted that there was no mention of Bicholim bus stand fees and further specifically stated that it was true that the notice was defective, as the value was not correctly mentioned.

17. The appellant examined PW3 Tukaram Pawse, the Deputy Finance Controller of the appellant. He stated in cross examination that dues against the respondent no.1 as on 30.6.2012 were Rs.3,83,262.20. Even this amount was less than the value of the aforesaid three cheques. It is significant that the said amount, according to the said witness for the appellant, was due as on 30.6.2012. If the amounts mentioned in the cheques were in the context of the Panaji bus stand when the cheques were issued, subsequently i.e. by 30.6.2012, the dues would certainly have become much higher. The dues could never have been less than the total amount of the cheques issued. This clearly shows, that there was absence of material on record to support the stated case of the appellant in the complaint that the amounts of dishonoured cheques pertained to legal debt or liability in the form of bus stand fees pertaining to Panaji bus stand.

18. The appellant cannot be heard to say that there were outstanding dues against the respondent no.1 pertaining to other bus stands in the State of Goa for which contract of bus stand fees and parking fees was awarded to the respondent no.1 and that the cheques in question could be examined in the context of alleged dues pertaining to other bus stands also. This is because the complaint in the present case specifically pertains to alleged outstanding dues from the respondent no.1 in the context of bus stand fees of the Panaji bus stand only. It is for this reason that the appellant ought to have produced details of the accounts to buttress its case, that the cheques were issued towards outstanding dues i.e. legal debt or liability pertaining to Panaji bus stand only. No such material was placed on record and, as noted above, the witnesses of the appellant were exposed in cross examination.

19. There can be no doubt that under Section 139 of the aforesaid Act, a presumption operates in favour of the appellant and against the respondent no.1 (accused). But, the presumption arises when foundational facts are proved by the complainant i.e. appellant in the present case. The appellant fell short of placing the foundational facts before the Magistrate with cogent material on record. In cross examination of witnesses of the appellant, the aforesaid witnesses were exposed and the presumption that could have operated in favour of the appellant, stood clearly rebutted in the face of the statements made by the witnesses under the stress of cross examination. The documentary material on record was used on behalf of the respondent no.1 to confront the witnesses in cross examination, which brought on record material that effectively rebutted the presumption that could have operated in favour of the appellant under Section 139 of the aforesaid Act.

20. Hence, the appellant is not justified in contending that since the respondent no.1 failed to lead evidence in defence, the presumption ought to have operated against him. The presumption can be rebutted on the touchstone of preponderance of probabilities and it stands rebutted not necessarily by leading defence evidence on behalf of the accused but it can be rebutted by discrediting the witnesses of the complainant by thorough cross examination. This is exactly what has happened in the present case, which was properly appreciated by the Magistrate while acquitting the respondent no.1.

21. In this context the learned counsel appearing for the respondent no.1 is justified in relying upon the judgment of the Hon'ble Supreme Court in the case of ***M. S. Narayana Menon alias Mani Vs State of Kerala and another***(supra), wherein it was held that in such cases the complainant must place on record details of accounts and books of accounts to demonstrate the amount due from the accused, as per the averments made in the complaint and that the cheques in question pertained to such amounts which could be held to be legal debt or liability.

22. In the case of ***Laxmikant D. Naik Karmali vs Santosh V. Naik***(supra) also, this Court found that a specific claim was raised on behalf of the complainant as regards the amount due from the accused and when the cheque was found to be for an amount more than the amount due, no case was made out under Section 138 of the aforesaid Act. The said judgment was followed by this Court in the case of ***M/s Enpee Earthmovers Vs. M/s Resources International and ors.,***(supra) and in the case of ***Karekar Finance Pvt. Ltd Vs Shri M. N. Bashyam***, (supra). In the said case, it was found that the statement produced by the complainant itself did not demonstrate that the accused owed the specific amount in respect of which the cheque in question was allegedly issued. The aforesaid judgment and the law laid down therein clearly support the case of respondent no.1.

23. In so far as the judgments relied upon by the learned counsel for the appellant are concerned, the case of ***Uttam Ram Vs Devinder Singh Hudan and another***(supra), wherein the Hon'ble Supreme Court held in favour of the complainant, is clearly distinguishable for the reason that in the said case the accounts between the parties had been finally settled and a specific amount was found to be recoverable from the accused. The amount stated in the cheque was indeed the exact amount found to be recoverable from the accused after final settlement of the accounts.

24. In the present case, as noted above, the complaint pertained only to dues of Panaji bus stand and the appellant fell short of supporting its case that the amount due was the amount for which the cheques in question were issued by the respondent no.1. In the case of **Bir Singh Vs Mukesh**

Kumar(supra), the Hon'ble Supreme Court laid down that it was immaterial that a blank cheque was given and details were filled subsequently. There can be no quarrel with the said proposition, but the same does not apply to the facts of the present case.

25. In the case of ***I.C. D. S. Ltd. Vs Beena Shabeer and another***(supra), the Hon'ble Supreme Court laid down that an offence under Section 138 of the aforesaid Act, not only pertains to legal debt but it also includes other liability as well. But, in the present case when the stated case of the appellant itself was that the cheques in question were issued specifically with reference to the dues and therefore, the liability pertained only to Panaji bus stand, there was no question of taking into consideration alleged liabilities pertaining to other bus stands, while considering the case of the parties.

26. In the case of ***K. N. Beena Vs Muniyappan and another***(supra), the Hon'ble Supreme Court referred to the presumption that arises under Sections 118 and 139 of the aforesaid Act. This Court has already discussed the said aspect herein above and it is found that in the facts of the present case, despite presumption that would arise under Sections 118 and 139 of the said Act, the respondent no.1 could not be held liable for the said offence.

27. In the case of ***Rangappa Vs Sri Mohan***(supra) the Hon'ble Supreme Court again referred to the presumption that would arise under Section 139 of the aforesaid Act. But, it was held that when the accused is able to raise a probable defence which creates a doubt about existence of a legally enforceable debt or liability, for which the accused can rely on the materials submitted by the complainant itself to raise such a defence, the prosecution case must fail. This judgment, in fact, inures to the benefit of the respondent no.1 herein.

28. In so far as the judgment of this Court in the case of ***William Rosario Fernandes Vs Cabral & Co. & ors***. (supra) is concerned, it was held that it would not make any difference if the accused does make good the amount due after the period specified in the notice issued under Section 138 of the said Act. The ratio of the judgment is wholly inapplicable to the facts and circumstances of the present case. Therefore, the reliance placed on the aforesaid judgments on behalf of the appellant is no avail.

29. As noted above, the appellant while challenging an order of acquittal has to pass a stringent test to successfully demonstrate that the order of acquittal deserves to be reversed.

30. This Court is of the opinion that in the facts and circumstances of the present case, the appellant has failed to pass the stringent test. Therefore, it is found that the appeal is without any merits and accordingly, the appeal is dismissed and all the pending applications are disposed of.

MANISH PITALE,J.

VINITA VIKAS NAIK Digitally signed by VINITA VIKAS NAIK Date: 2021.11.27 17:37:39 +05'30'