Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.24 OF 2017

Mr. Brahmanand Mamlekar
(since deceased through legal heirs)
a) Smt. Shanta Brahmanand Mamlekar,
49 years of age,
r/o H. No.158/2-1,
Behind Fish Market,
Ponda-Goa.
b) Shivanand Brahmanand Mamlekar,
s/o late Brahmanand Mamlekar,
21 years of age,
r/o H. No. 158/2-1,
Behind Fish Market,
Ponda-Goa. **..Appellants**

Versus

1. Mr. Kishor Suryakant Borkar,
Son of late Suryakant Borkar,
Major of age,
Residing at Uppar Bazar,
Near Vithoba Temple,
Above Indian Bank,
Ponda-Goa.

2. STATE,
Through PP, **..Respondents**

Mr. Ashwin D. Bhobe *with* **Mr. Chirag Angle, Ms. Kalpa Govekar** *and* **Ms. Annelise Fernandes, Advocates** *for the Appellants.*

Mr. Gaurish N. Agni *with* **Mr. Tanmay Gawas, Advocates** *for the Respondent No. 1.*

Mr. Pravin N. Faldessai, Additional Public Prosecutor *for the Respondent No.2.*

CORAM: M.S. JAWALKAR, J.

Reserved on: 14th October, 2021

Pronounced on: 16th November, 2021

JUDGMENT:

1. By this appeal the appellant impugns the judgment and order dated 12/10/2016 passed by the Additional Sessions Judge, Panaji sitting at Ponda Goa, by which the Appellate Court quashed and set aside the Judgment and Order dated 26/11/2014 read with 15/12/2014 passed by the Judicial Magistrate First Class 'A' Court Ponda. The Trial Court had convicted the Respondent No.1 for offence punishable under Section 138 of the Negotiable Instruments Act and sentenced the respondent No.1 to undergo imprisonment of 6 months and to pay fine of Rs.1.5 lakhs in addition to the cheque amount of Rs.4,00,000/- and in default to undergo simple imprisonment of 3 months.

2. Factual matrix can be summarised as follows:

The respondent No.1 herein had borrowed an amount of Rs.4,00,000/- from the appellant and in discharge of repayment of the said legal debt the respondent No.1 had issued a cheque bearing No.106953 dated 20.06.2006 for Rs.4,00,000/- drawn on HDFC Bank, Ponda Branch in favour of the appellant. When the cheque was presented by the appellant before his bankers, namely Bicholim Urban Co-operative Bank Ltd., Ponda branch it returned unpaid with the remark "Account closed". The appellant, therefore, issued a registered AD notice dated 23.06.2006 to the respondent No.1 informing him that the cheque issued by him has been dishonored and called upon him to pay the cheque amount within 15 days. Though the respondent No.1 received the notice, he failed to reply and pay the amount and, as such, the appellant filed complaint under Section 138 of the Negotiable Instruments Act.

3. Process under section138 of N.I. Act was issued to the respondent No.1. As the respondent No.1 pleaded not guilty, was ordered to face trial. The appellant to prove his case examined himself as PW1 who placed on record the cheque dated 20/06/2006, cheque return memo, forwarding letter and legal notice and on the strength of incriminating evidence found in his deposition, 313 statement was explained to the respondent No.1, who denied the allegations.

4. It was the case of the respondent No.1 that the appellant, had obtained blank cheque and blank receipt from him and promised to pay Rs.40,00,000/-. That the appellant also took Rs.4,00,000/- from him as 10% of the amount as margin and promised to pay the said Rs.40 lakhs within 15 to 20 days but did not advance the money and on the contrary misused and misutilized the cheque for filing the complaint. Thus, he alleged that the appellant cheated him. In defence, the respondent No.1 examined DW1 Shri Gitesh Naik, DW2 Shri Bhavani Parkar, DW3 Shri Raghuraj Ghate, DW4 Shri Narayan Kamat who produced Statement of Account and account opening form, specimen signature card, application for charge, cash deposit slip and cash withdrawal slip.

5. The learned Judicial Magistrate, First Class, 'A' Court, Ponda, after hearing the learned Counsel for the parties and upon going through the evidence and the documents on record, sentenced the respondent No.1 as above vide judgment and order dated 26.11.2014.

6. Being aggrieved by the said judgment and order dated 26.11.2014 passed by the Judicial Magistrate First Class 'A' Court Ponda, the respondent No.1 filed Criminal Appeal No.4 of 2015 before the Court of Additional Sessions Judge, Panaji sitting at Ponda, Goa. The learned Additional Sessions Judge vide Judgment and Order dated 12.10.2016, quashed and set aside the judgment and order dated 26.11.2014 passed by the Judicial Magistrate First Class 'A' Court Ponda.

7. Aggrieved by the judgment and order dated 12.10.2016, passed by the learned Additional Sessions Judge, the appellant has filed the present appeal.

8. Learned Advocate Shri A. Bhobe for the appellant submitted that the main ground for filing this appeal is that the view taken by the Appellate Court on re-appreciation of evidence was not warranted at all. The Trial Court had duly considered material before it and assessed the evidence in terms of law. The conclusion arrived at, that respondent no. 1 was guilty of offence punishable under section 138 of the NI Act is perfectly justified. The learned Appellate Court failed to appreciate that the signature on the cheques was a relevant aspect to be considered while adjudicating proceedings under section 138 and the handwriting in the body of cheque would not be of much significance. Respondent no.1 admitted his signature on the cheque, bank statement and on the receipt of amount, duly established that amount of Rs. 4 lakh was advanced to the respondent no.1. The Appellate Court has erroneously dealt with the aspect of deposit of such amount and the withdrawal of the same on the same day, which was neither relevant nor necessary in the facts and circumstances of the case. The Appellate Court has given undue weightage to the issue of amount not being reflected in the income tax returns. Non-reflection of such amount in the income tax returns is not fatal to the case of the appellant. Though Appellate Court disbelieved the defence of the respondent no.1, which on the face of it suggested that an attempt was made by the respondent no. 1 to deny a legal right of the appellant. In such circumstances, the Appellate Court ought not to have interfered with the judgment and order of the learned JMFC. The finding of the Appellate Court that appellant is a moneylender is neither sufficient in terms of law nor do the finding of the Appellate Court refer to the ingredients for making a person a moneylender in terms of law. Evidence of witnesses examined by the respondent no. 1 is not at all of any assistance to the respondent No.1 and the reliance placed by the Appellate Court on the testimonies of these witnesses suffer from perversity. None of these witnesses stated that the amount, which was advanced by the appellant, is on interest basis.

9. As against this, learned Advocate Shri Gaurish Agni submitted that the order passed by the Appellate Court is perfectly justifiable in the facts and circumstances. The appellant failed to establish that the cheque was issued by the accused against the legally enforceable debt. The finding that the complainant is an unregistered moneylender is also perfectly legal and justified. In view of the fact that the writing in the body of the cheque and the handwriting on the receipt is not of the respondent No.1-accused, and the amount is not shown by the complainant in income tax returns, goes to show that complainant was not having the said amount as alleged to have been advanced to the present respondent No.1. Learned Counsel relied on the following judgments of the Hon'ble Apex Court:

a) ***Basalingappa v/s. Mudibasappa (2019) (5) SCC 418.***

b) ***Indus Airways Pvt Ltd., & Others v/s. Mangum Aviation Pvt. Ltd. & Another (2014) (12) SCC 539.***

c) ***M. S. Narayana Menon @ Mani v/s. State of Kerala & Anr. (2006) (5) Supreme 547.***

d) ***Sanjay Mishra v/s. Kanishka Kapoor @ Nikki (2009) (0) Supreme (Bom) 257.***

e) ***Domina De Souza v/s. Kamlakant Sawant. (2018) (0) Supreme (Bom) 2058.***

f) ***Sanjay Makode v/s. Suhas Dhote. (2018) (0) Supreme (Bom) 970.***

*g) **Mrs. Mercy Salve v/s. Cyril Arland & Ors. (2018) (0) Supreme (Bom) 1165.***

10. I have heard learned counsel for the parties at length. Now, rival contentions fall for my determination.

11. After going through both the judgments, i.e. JMFC as well as the district judge, I find that the learned Trial Court has rightly appreciated the evidence of the witnesses. As per the complainant, he advanced an amount of Rs.4 lakhs to the respondent No.1 for his chemical business as he was falling short of said amount. On the request of respondent no.1's father, he advanced Rs.4 lakhs by withdrawing from the bank. This withdrawal, is, substantiated from the passbook. The accused himself corroborated evidence of PW-1, i.e., the complainant, with regard to the chemical business. The defence of the accused is that complainant obtained the disputed cheque from the accused in order to given him loan of Rs.40lakhs (Rupees Forty lakhs) as margin of Rs.4 lakh and neither returned the cheque nor gave any loan. Instead, that he misused the said cheque for filing complaint. It needs to be noted here that the Appellate Court also disbelieved the defence raised by the accused that the accused handed over an amount of Rs.4 lakh to the complainant and the same was not returned. If the defence of the accused is disbelieved, the learned Appellate Court ought not to have disturbed the finding of the learned Trial Court. The learned Trial Court rightly appreciated the fact that if the complainant has not returned the amount of Rs.4 lakh of the accused and has not even given the finance that was required, no prudent person would have waited without taking any action. It is admitted fact that he neither responded to the notice nor filed any complaint or taken any action against the complainant herein. The accused failed to substantiate wherefrom he brought the amount of Rs.4 lakhs. As against this, the complainant through his passbook substantiated withdrawal of amount from the bank for such payment. The learned Trial Court also rightly appreciated the fact that accused admitted signature on the disputed cheque as well as on the receipt. As per opinion of handwriting expert, the contents written in the body of cheque or receipt is not in the handwriting of the complainant. Even if it would be in the handwriting of complainant, it is settled position of law that the admitted signature on cheque cast a liability of payment of cheque amount. It also needs to be noted that accused has not examined his father who allegedly accompanied him to the complainant when he handed over the alleged amount of Rs.4 lakh. As such, the defence of the accused is an afterthought and cannot be believed from any angle.

12. As far as the finding recorded by the Appellate Court that complainant is an unregistered moneylender is concerned, the same is totally erroneous. None of the witnesses examined by the accused has deposed that they obtained loan on interest or complainant advanced money on interest. On the contrary, DW-1 is silent about moneylending business by the complainant. He was convicted in a NI Act case filed by the complainant. DW-2 also admitted that he has been sentenced to imprisonment of 9 months in a case filed by the complainant. He also admitted that civil suit has been filed by the complainant for recovery of money. Similar type of version is found in the deposition of DW-3. Therefore, it appears that as conviction is there under NI Act, the said amount advanced by the complainant is held as legally enforceable debt. If the complainant is not earning any additional amount toward interest over the amount advanced to these witnesses, this finding of learned Appellate Court that he is unregistered moneylender is totally erroneous.

13. Not replying to the notice nor filing any police complaint against the complainant by the accused, not substantiating his defence of paying Rs.4lakhs as margin amount and admission of his signature on cheque as well as receipt clearly goes to show that the accused has received an amount of Rs.4 lakhs from the complainant and to discharge that liability he issued the cheque in question. It is settled position that if a blank cheque has been given towards a liability, and the cheque is filled up and presented to the bank, the person who has drawn the cheque cannot avoid the criminal liability under Section 138 of NI Act.

14. It is vehemently argued by the learned Advocate Shri Agni that the amount was deposited by the complainant in cash and withdrawn on the same day. He could have paid the accused in cash and therefore cash amount that was deposited is given by the accused as margin money and it is not of the complainant. However, in my considered opinion the accused failed to disclose the source of Rs.4lakhs as well as such payment and, therefore, this argument is having no substance.

15. So far as not showing the amount in income tax returns is concerned, considering the other evidence on record, it does not rebut the statutory presumption available to the complainant. This amount is very much due from the accused to the complainant and the accused has admittedly signed the cheque. The cheque has to be considered as issued towards legally enforceable debt given by the accused to the complainant. Even evidence of accused is not sufficient to meet the standards of preponderance of probabilities. Even if the execution of cheque is admitted, section 139 of the Act mandates the presumption that the cheque was for the discharge of any debt or other liability. The presumption under section 139 is a rebuttable presumption and the onus is on the accused who raised the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities. Where the learned Appellate court disbelieved the defence, no question of rebuttal by the accused would arise. So far as showing the said amount in income tax returns is concerned, as the amount is duly reflecting in bank account, the same will be taken care of by the Income Tax Department and consequences/procedure will follow as per provisions of law. For that reason accused cannot be absolved, specifically when both the learned lower courts disbelieved his defence.

16. Reliance placed by the learned Advocate Shri Agni on ***Basalingappa v/s. Mudibasappa (2019) (5) SCC 418*** (supra), however, the facts involved in the matter are differentiable than the facts involved in the present case. In the matter before the Apex Court, the complainant deposed that he did not remember whether transaction amount was Rs.25,000/-. The debt on which the sum of Rs.6 lakh was paid was not mentioned in the complaint. In the present matter, the accused admitted his signatures on the cheque as well as on the receipt. His defence is disbelieved by the Trial Court as well as the Appellate Court. The complainant is very specific about the amount and date.

17. So far as ***Indus Airways Pvt Ltd., & Others v/s. Mangum Aviation Pvt. Ltd. & Another*** (supra) is concerned, the point involved in the said matter is totally different. It is in respect of issue that advance payment for supply of goods not supplied, not covered within the meaning of legally enforceable debt or liability as deal between parties got cancelled as goods were not supplied. So far as the judgment relied on in ***Domina De Souza v/s. Kamlakant Sawant*** (supra) is concerned, it is in respect of issuance of process against the petitioner and, as such, cannot be considered in the present case.

18. Another citation relied on in ***Sanjay Makode v/s. Suhas Dhote*** (supra), the facts are totally different. In the said matter, the complainant failed to produce his accounts statement and there was no material to support the basic facts. Here, both the courts recorded finding that defence of the accused cannot be believed, as against, in the matter before this Court, Bench at Nagpur the Court arrived at the conclusion that probable defences are made out by the accused. Similarly, in ***Mrs. Mercy Salve v/s. Cyril Arland & Ors.*** (supra), there was reply notice issued by the respondent and he denied the claims made by the complainant in a statutory notice but defence of the respondent accused was clearly indicated in the reply notice. Despite the respondent calling upon the appellant/complainant not to deposit the remaining two cheques, complainant went ahead to deposit the same. It is admitted fact in the said matter that accused raised objection in respect of the receipt and signature on the same. In the matter before me, the accused has admitted signature on the cheque as well as on the receipt.

19. Thus, there is no dispute with the principle laid down in the above citations. However, they are differentiable on facts and are of no help to the respondent. In my considered opinion the judgment and order passed by the learned JMFC is well founded and the conclusions arrived at are on proper appreciation of evidence. As such, the order passed by the learned Appellate Court is liable to be set aside. Accordingly, I pass the following order:

O R D E R

a) The Appeal is allowed.

b)The judgment and order passed by the learned Additional

Sessions Judge, Panaji in Criminal Appeal No. 4/2015 dated 12.10.2016 is hereby quashed and set aside.

c) The Judgment and order passed by learned JMFC 'A' Court Ponda in Criminal Case No. 500/OA/NIA/2006/A dated 26/11/2014 and 15/12/2014 is hereby confirmed.

(M. S. JAWALKAR, J)