

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

APPEAL NO. 329 OF 2021

C. Vijay Kumar Reddy ..Appellant

v/s.

M/s. S. P. Developers & Ors. ..Respondents

Mr. Chandrashekhar Yadav i/b. Hitesh P. Vyas for the Appellant .

Ms. P.N.Dabholkar APP for the Respondent-State.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 26th AUGUST, 2021.**

P.C.

1. The Appellant who was the Complainant in a SCC No.53163 of 2009, seeks leave to appeal against the judgment dated 16.08.2019, whereby the learned Magistrate has acquitted the Respondent-accused for the offence under Section 138 of the N.I.Act.

2. Heard learned Counsel for the Appellant. I have perused the records.

3. The Appellant herein claimed that he had entered into an agreement with the Respondent for purchase of a flat for sale consideration of Rs.6,00,000/-. It is the case of the Appellant that though he had paid the entire sale consideration, the Respondent failed to hand over possession of the flat. The Respondent therefore issued a cheque of Rs.6,50,000/- towards refund of the sale consideration of Rs.6,00,000/- with interest of Rs.50,000/-. The said cheque was dishonoured and the Respondent did not make the payment despite receipt of the notice. Hence the Appellant filed a complaint against the Respondent for offence under Section 138 of the Negotiable Instruments Act.

4. The Respondent pleaded not guilty and claimed to be tried. The Appellant-Complainant examined himself and CW2 Balram Reddy, who was a witness to the Agreement for Sale (Exhibit 17). The Complainant also produced the subject cheque (Exhibit 18), Cheque return memo (Exhibit 19) and Notice and postal acknowledgment (Exhibit 20 to 22). The Appellant had deposed that the Respondent was

unable to hand over possession of the flat even though he had paid the entire sale consideration of Rs.6,00,000/-. He has deposed that the Respondent had issued the subject cheque towards refund of the said sale consideration of Rs.6,00,000/- with interest of Rs.50,000/-.

5. It is to be noted that though the Respondent had denied execution of the Agreement (Exhibit 17), he had admitted having agreed to sell a flat to the Appellant for Sale consideration of Rs.6,00,000/-. The defence of the Respondent was that he had received only part payment of sale consideration. The Respondent denied having issued the cheque towards refund of the sale consideration and interest. The defence of the Respondent was that he had issued the cheque towards security of the money received towards part payment of sale consideration. In his statement under Section 313 the Respondent has stated that the Appellant-Complainant had procured the cheque forcibly. In his evidence he has stated that the contents of the cheque are not in his handwriting and has raised a defence that the

Appellant had misused the cheque despite refund of the money received towards part payment of sale consideration.

6. The learned Judge, upon considering the evidence adduced by the Appellant and Respondent, has held that having admitted issuance of cheque, burden was on the Respondent to rebut the presumption under Section 139 of the N.I.Act. The learned Judge held that the Appellant had come with a specific case that he had paid the entire sale consideration of Rs.6,00,000/- and that the subject cheque was issued towards refund of the sale consideration with interest. The learned Judge observed that the Agreement for Sale (Exhibit 17) relied upon by the Appellant indicates that as on the date of the execution of the agreement the Appellant had paid Rs.3,00,000/- and the balance amount of Rs.3,00,000/- was to be paid within one week from the date of the said Agreement. The Sale Deed was to be executed on payment of the entire sale consideration. Ld. Judge has taken note of the fact that though the Appellant had claimed that he had paid the balance consideration by cheques, he had not produced the bank statements to prove such

payment. The learned Judge therefore disbelieved the claim of the Appellant that he had paid the entire sale consideration of Rs.6,00,000/- and that the cheque was issued towards refund of the said sale consideration with interest. Ld.. Judge has held that the defence of the Respondent that the cheque was issued a security in respect of the money received towards part payment of the sale consideration is probable. The ld. Judge therefore concluded that the Appellant has failed to prove that the cheque was issued towards legally enforceable debt and hence acquitted the Respondent-accused of offence under Section 138 of the N.I.Act. The Appellant seeks leave to challenge this order of acquittal.

7. It is well settled that in an appeal against acquittal, powers of Appellate Court are as wide as that of the trial Court and it has powers to review, re-appreciate and re-consider the evidence upon which the order of acquittal is founded. It is equally well settled that an order of acquittal reinforces a presumption of innocence in favour of the

accused and that the Appellate Court should not disturb the finding of acquittal if two views are possible on the basis of the evidence on record. In this regard, reference can be made to the decision of the Apex Court in ***K. Venkateshwarlu vs. State of A.P (2012 Cri.L.J. 4388.)*** wherein it has been held thus:-

“ If the view taken by the trial court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of the accused is strengthened by his acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused, the Order of acquittal cannot be set aside. Unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal jurisprudence, no interference is called for with it. Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused

cannot be convicted on moral considerations.”

8. The present Appeal needs to be examined in the light of the above principles. It is pertinent to note that the Appellant has deposed that the Respondent had issued the cheque towards refund of the sale consideration. The Respondent has admitted having issued the cheque. Hence, as rightly held by the learned trial Judge, burden was on the Respondent to rebut the presumption under Section 139 of the N.I.Act. It is pertinent to note that the Respondent has admitted having agreed to sell the flat for sale consideration of Rs.6,00,000/- . He has denied having received the entire sale consideration. He has claimed that he had received only part payment of the sale consideration and as such there was no question of executing the sale deed in favour of the Appellant. It is his defence that the cheque was issued as security of money received towards part payment of sale consideration. He has deposed that the Complainant has mis-used the said cheque. He has stated that the cheque is not in his hand writing. This statement has gone unchallenged.

9. It may be noted that the Appellant had relied upon the Agreement for Sale (Exh.17) whereunder the Respondent had agreed to sell a flat for sale consideration of Rs.6,00,000/-. The Agreement indicates that the Appellant had paid Rs.3,00,000/- and the balance amount was to be paid within a week thereafter and the sale deed was to be executed upon payment of the entire sale consideration. The Appellant has deposed that he had paid the balance amount by cheques. As rightly observed by the learned Judge, the Complainant has not produced the bank statement to prove the payment of the said amount. The Appellant has not relied upon any receipt issued by the Respondent for having received the balance amount. There is nothing on record to indicate that the Appellant had called upon the Respondent to complete the sale transaction in view of payment of the balance amount or to cancel the Agreement and refund the entire sale consideration. It was in this fact situation that the learned Judge has held that the defence of the Respondent accused that the cheque was issued as security

towards the money received as part payment of sale consideration appears to be probable. The view taken by the trial court is a reasonably possible view. The order of acquittal is not perverse or in breach of settled principles underlying criminal jurisprudence. Hence the order of acquittal cannot be interfered with.

10. Under the circumstances, there is no merit in the Appeal. Accordingly the Appeal is dismissed.

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(ANUJA PRABHUDESSAI, J.)