

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.54 OF 2017

Mr. Umesh Naik, son of Mr. Ladu Naik major of age, resident of Laxmi Prasad, Opposite Chodankar Hospital, Porvorim, Bardez, Goa.	... Appellant/ Original Complainant
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Versus

1. Mr. Bonny Fernandes,
major of age, businessman, resident of Block
2/FF1, Prudential palm, Opposite Sapna
Garden, Chogm Road, Alto Porvorim, Bardez,
Goa.

2. Mr. Bradley Fernandes
major of age, businessman, resident of Block
2/FF1, Prudential palm, Opposite Sapna
Garden, Chogm Road, Alto Porvorim, Bardez,
Goa.

3. The Partnership firm "Expore" through its partner, Shri Bradley Fernandes, having office at Block 2/FF1, Prudential palm, Opposite Sapna Garden, Chogm Road, Alto, Porvorim, Bardez, Goa.	... Respondents/ Original Accused
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Mr. V. P. Thali, Advocate for the Appellant.

Mr. Aldrin Monteiro, Advocate for Respondents No.1 and 2.

CORAM : R.N. LADDHA, J.

DATE : 29th June, 2022

JUDGMENT

The appellant, who was the original complainant in N.I. Act Case No.14/2011/B on the file of the Judicial Magistrate, First Class, “B” Court, Panaji, is aggrieved by the dismissal of his complaint and acquittal of the accused/respondents of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as “the Act” for short).

2. The brief facts of the case which emanate from the record are that the respondents No.1 and 2 approached the appellant in the textile shop known as "Saroj Emporium" at Panaji and requested the appellant, who was one of the partners of that shop, to supply sarees, suitings, shirting, silk materials and bedsheet sets on credit. The "Saroj Emporium" being a partnership firm, the appellant required the consent of other partners and one of the partners, Mr Rupesh D. Naik present there was not willing to supply the aforesaid material on the strength of a postdated cheque. However, since the appellant knew the respondents, the appellant agreed to supply the textile material by accepting the cheque in his personal capacity and assured the partners who were present in the shop that he would transfer the amount in the account of the partnership firm, the moment the postdated cheque was realised. The appellant also accepted the responsibility for payment of the said

amount to the partnership firm "Saroj Emporium". Trusting the words and representations of respondents No.1 and 2, the appellant on 10/05/2010 supplied the aforesaid material to respondents No.1 and 2, worth ₹7,50,000/-. The respondent No.2 issued a postdated cheque bearing No.775820 of 29/05/2010 drawn on the Axis Bank Limited, Panaji Branch, in the name of the appellant, which is the subject matter of the present case.

3. On presentation, the said cheque was returned dishonoured with the remark "Account closed". The payment was not made despite demand through statutory legal notice and ultimately the complaint in question was filed on 19/01/2011 before the Trial Court.

4. The appellant, in order to prove his case against the respondents, examined three witnesses and placed reliance on documentary evidence which was duly exhibited and referred to in detail by the learned Trial Court. After concluding the recording of evidence led by the appellants, statements of the respondents No.1 and 2 were recorded under Section 313 of the Code of Criminal Procedure, 1973 by the learned Trial Court wherein the respondents claimed innocence and pleaded false implication. Respondents No.1 and 2 also led evidence in their defence. On completion of these proceedings before the Trial Court,

final arguments were heard. Consequently, the learned Trial Court acquitted the respondents.

5. The reasons for acquitting the respondent No.1 were that he was not partner of the firm “Expore” at any time nor was he a signatory to the cheque in question and as he was not the drawer of the cheque and the complaint under Section 138 of the Act would not lie against him. Insofar as the respondent No.2 is concerned, it is stated that though he had issued the disputed cheque, the cheque was issued on behalf of the partnership firm “Expore” but the same was issued after dissolution of the firm and that there cannot be any legally enforceable liability of a non-existent partnership firm. Further, there were no averments in the complaint that the accused were in charge of and were responsible to the firm for the conduct of the business of the firm.

6. Heard Mr. V.P. Thali, learned Counsel for the appellant and Mr. A. Monteiro, learned Counsel for the respondents. Perused the impugned judgment, evidence, grounds in appeal memo and material on record.

7. Before going into the rival contentions of the parties, it must be noticed that the respondent No.2 had admitted his signature on the cheque in question. It is also seen from record that the respondent No.2

had signed the cheque in question in the capacity of a partner of the respondent-firm “Expore”. Further, it is not in dispute that the statutory legal notice was duly served on the respondents but they neither replied to the notice nor made any payment pursuant thereto. It is also undisputed that the cheque in question was dishonoured due to closure of the account and since the statutory notice was not at all responded to, the appellant filed the complaint in question, before the Trial Court.

8. Now, the only submission urged by Mr. V.P. Thali, learned Counsel appearing on behalf of the complainant/appellant was that Section 45 of the Indian Partnership Act, 1932 cast an obligation upon the partners of the firm to issue public notice of the dissolution of the firm. According to him, no public notice of such dissolution was given nor the alleged fact of dissolution of the firm—respondent No.3, was stated by the respondents in their evidence nor in their statements recorded under Section 313 of the Cr.P.C., 1973. In his view, until the public notice is given of the dissolution, the partners continued to be liable as such to third parties for any act done by any of them which would have been the act of the firm if done before the dissolution. Therefore, the respondent No.2 cannot run away from his statutory

responsibility in view of the provisions of Sections 45 and 72 of the Indian Partnership Act, 1932.

9. The learned Counsel for the appellant has placed reliance on the judgments of the Hon'ble Supreme Court and this Court in *Katta Sujatha (SMP) v/s. Fertilizers and Chemicals Travancore Ltd. and another*, (2002) 7 SCC 655, *S. M. S. Pharmaceuticals Ltd. V/s. Neeta Bhalla and another*, (2005) 8 SCC 89, *Green Earth Asphalt and Power Pvt. Ltd. V/s. State of Maharashtra through PSO and others*, (2008) 8 SCC 278, *National Small Industries Corporation Ltd. V/s. Harmeet Singh Paintal and another*, (2010) 3 SCC 330, *Uttam Ram v/s. Devinder Singh Hudan and another*, (2019) 10 SCC 287, *Mainuddin Abdul Sattar Shaikh v/s. Vijay D. Salvi*, (2015) 9 SCC 622, *Orient Syntex Limited and others v/s. Besant Capital Tach Ltd., Akola*, 1999 (3) MhLJ 413, *V.P. Jain and company and others v/s. Green Earth Asphalt and Power Pvt. Ltd. And another*, 2006(5) MhLJ 705, *Suresh s/o. Keshav Dole v/s. Satpuda Urban Credit Co-Operative Society Ltd.*, 2006 (5) MhLJ 709, *Shivendra Sansguira v/s. M/s. Adineo and another*, 1996 SCC Online Bom 677.

10. In respect of the finding of the learned Trial Court that in absence of averments in the complaint that accused were responsible for the conduct of the business of the firm, it could not be said that they

were guilty of the offence punishable under Section 138 of the Act and no prosecution would lie against a partner on a simple accusation in a complaint that such person was the partner of the firm, Mr. Thali, learned Counsel for the appellant has pointed out that in the complaint it has specifically averred that the accused/respondents No.1 and 2 are the only partners of the respondent No.3-firm and on this representation the complainant supplied the textile material to them. He argued that since the respondents No.1 and 2 alongwith firm-respondent No.3, were impleaded as the accused, the necessity of stating that the respondents No.1 and 2 were in charge of and were responsible to the firm-respondent No.3, for the conduct of the business of the firm was inconsequential. He pointed out that it has been specifically averred in the complaint that they are the only partners of the respondent No.3-firm. Further, he pointed out that the respondent No.2 had issued the cheque in question and this fact remains absolutely undisputed. In his view, the complaint is required to be read as a whole and the pleadings made by the complainant in the complaint are sufficient to attract the provisions of Sections 138 and 141 of the Act.

11. The Trial Court has not examined these very vital aspects concerning the matter before it. The Trial Court needed to examine

whether the substance of the allegations made in the complaint fulfilled the requirement of Section 141 of the Act or not and record a definite finding on that point which it completely failed to do.

12. In the case of *S.V Muzumdar and others v/s. Gujarat State Fertilizer Co. Ltd. and another*, 2005 (3) Mh.L.J.754, it has been held as follows:

“8. We find that the prayers before the Courts below essentially were to drop the proceedings on the ground that the allegations would not constitute a foundation for action in terms of section 141 of the Act. These questions have to be adjudicated at the trial. Whether a person is in charge of or is responsible to the company for conduct of business is to be adjudicated on the basis of materials to be placed by the parties. Sub-section (2) of section 141 is a deeming provision which as noted supra operates in certain specified circumstances. Whether the requirements for the application of the deeming provision exist or not is again a matter for adjudication during trial. Similarly, whether the allegations contained are sufficient to attract culpability is a matter for adjudication at the trial.”

13. So far as the second contention of the appellant, that Public Notice as mandated by Section 45 of the Indian Partnership Act, 1932, was never given before the date on which the cheque in question was signed by the respondent No.2, is concerned, the Certificate of Registration of the partnership firm “Expore”- respondent No.3, demonstrates that the respondent No.3-firm was registered on

23/07/2008 and the respondent No.2 was shown as one of the partners of the firm. It is not in dispute, that the firm was dissolved on 09/04/2010 and the transaction had taken place on 10/05/2010 when the firm had already stood dissolved.

14. Section 45 of the Indian Partnership Act, 1932 provides that, notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been and an act of the firm if done before the dissolution, until public notice is given of the dissolution. The mode of giving public notice has been prescribed by Section 72 of the Partnership Act, 1932, in no uncertain terms. It says that a public notice has to be given by intimation to the Registrar of Firms and by publication in the Official Gazette and in at least one vernacular newspaper circulative in the District where the Firm to which it relates, has its place of business. In short, the clear object of Section 45 of the Partnership Act, 1932, is to protect third parties who did not have any prior notice of the dissolution of a firm while dealing with an erstwhile partner of such a surreptitiously dissolved firm would not be affected by such dissolution of the firm of which no public notice was given unless they themselves had acknowledged such dissolution.

15. However, on perusal of the record including the evidence led by the parties, it is seen that neither the respondents had filed any document to show that they had complied with the mandate of Sections 45 and 72 of the Partnership Act, 1932, by issuing public notice nor this issue was raised by the appellant before the Trial Court. Even the Trial Court failed to deal with the said issue. However, this being a question of law, there is no prohibition against raising the said contention in appeal.

16. Mr. A. Monteiro, the learned Counsel for the respondents No.1 and 2, fully supported the reasons given and the findings recorded by the learned Trial Court. He submitted that the question of publication of the notice as required by Section 45 of the Indian Partnership Act, 1932, would arise only when any liability is incurred by an erstwhile partner in respect of a third party after the dissolution of the Partnership Firm in question. I have already indicated earlier that the respondent No.2 had admitted his signature on the cheque in question and therefore, the presumptions under Sections 118 and 139 of the Act would come into play. Merely stating that on the basis of the alleged promise of the complainant to deliver the iron ore, the respondent No.2 had issued the cheque in question, is not sufficient to rebut the statutory presumption which arose in favour of the appellant. The cheque in

question does clearly indicate that it was issued by the respondent No.2, in the capacity of the partner of the respondent No.3-firm, after the said firm was dissolved. Though the statutory notice was served on the respondents, they did not choose to reply to the said notice. In this backdrop, it cannot lie in the mouth of the respondent No.2 to say that he had incurred no liability on behalf of the dissolved firm towards the appellant when he had drawn and issued the cheque in question, posing as a partner of the firm which had already stood dissolved on that day, in favour of the appellant on an account which had stood in the name of the respondent No.3- firm.

17. Next, Mr. A. Monteiro submitted that the attempt on the part of appellant to wriggle out of the situation by submitting that “Public Notice” as required by Section 45 of the Indian Partnership Act, 1932, was not given, is untenable as the appellant had not raised or urged the same before the Trial Court and therefore, it cannot be raised or taken up in the Appeal.

18. I am, however, unable to agree with the submission. The question of applicability of Section 45 of the Indian Partnership Act, 1932, is only a question of law and such a question could be raised at any stage of the case and also in appeal. In fact, the learned Trial Court

itself should have considered this aspect of the matter, even though it was not raised by or on behalf of the present appellant because it is the duty of any Court of Law to find out the truth and to that end, examine the applicability of the relevant provisions of the Law to the facts of the particular case which it is called upon to decide. In the circumstances, I am not inclined to hold that the failure of the appellant to raise the issue of non-compliance or the provision of Section 45 of the Indian Partnership Act, 1932, before the Trial Court, bars the appellant from raising the same before this Court.

19. In the light of the above analysis and discussion, the impugned judgment and order is set aside and the matter is remitted to the Trial Court with a direction to permit the parties to lead the evidence on the aspects as discussed hereinabove. After obtaining such further evidence, as may be adduced by the parties, the case shall be decided afresh in accordance with law preferably within three months from the date of the appearance of the parties before the learned Trial Court. The parties shall appear before the learned Trial Court on 04/07/2022.

R.N. LADDHA, J.