

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.34 OF 2017

Mr. Lyndon Rodrigues,
Son of Shri Leonard Rodrigues,
Major of age, married, Business, Indian National,
Residing at 7, Our Lady of GUIA Building, F.L.
Gomes Road, Vasco da Gama, Goa – 403 802. ... Appellant

Versus

1. Shri Anil Thakur,
Son of Shri L. Thakur,
Major of age, business,
Residing at Morgaon,
Sawantwadi, Sindhudurg District,
Maharashtra

2. State
Through Public Prosecutor,
Panaji – Goa. ... Respondents

Shri Shivan Desai along with Shri Jonathan George and Ms. Maria Viegas, Advocates for the Appellants.

Shri Sanjay Mangeshkar, Advocate for respondent No.1.

Shri Pravin Faldessai, Additional Public Prosecutor for respondent No.2.

CORAM: BHARAT P. DESHPANDE,J.

RESERVED 7th JANUARY 2023
ON :
PRONOUNCED 12th JANUARY,2023
ON :

JUDGMENT:

1. The appellant/ original complainant, being aggrieved by the dismissal of his complaint filed under Section 138 of the Negotiable Instruments Act (N.I. Act, for short) by the learned Magistrate, preferred present appeal on grounds as mentioned in the memo of appeal.
2. On 10/07/2017 appeal was admitted and action under Section 390 of the Code of Criminal Procedure was directed to be complied.
3. Heard learned Counsel Shri Shivan Desai who appears along with Mr. Jonathan George and Ms. Maria Viegas for the appellants, learned Counsel Shri Sanjay Mangeshkar for respondent No.1 and Shri Pravin Faldessai, Additional Public Prosecutor for respondent No.2.
4. Shri Shivan Desai submitted that the learned Magistrate had committed grave error in rejecting the complaint though there was no reply filed by the respondent/accused to the legal notice and for the first time, the accused came with a totally different story of paying part of the amount. He would submit that the defence raised by the accused was not at all probable to consider rebutting of the presumption arising in favour of the complainant. He submitted that according to the defence raised by the accused, three cheques were issued out of which one cheque was of ₹10,00,000/-, another for ₹5,00,000/- and the third was ₹12,00,000/-. The question as to why the accused issued three cheques

is also required to be considered while appreciating the so called defence of the accused. The explanation given by the complainant is that the cheque of ₹10,00,000/-which was realised, was in relation to a different transaction. The learned trial Court failed to accept such explanation from the complainant and thereby committed an error which needs to be corrected in the present appeal.

5. Shri Desai would submit that the conduct of the accused is also doubtful as he never demanded the so called cheque issued by him for the purpose of security as tried to be projected in defence and therefore, the present cheque issued by the accused is certainly for the legally recoverable debt. If such defence of the accused is not considered as probable, the complaint ought to have been allowed. He submitted that the defence raised by the accused is not an honest one and contrary to each other. The complainant was not having any opportunity to deal with the defence as the accused did not submit any reply to the Show Cause Notice, which is the first point the accused needs to set up in defence in case the accused is not complying with the conditions mentioned in the notice. He placed reliance in the decision of *Dr. Srushti Ashutosh Prabhu Desai v/s. Mr. Dadamiyan M. Bagewadi*¹ decided by this Court on 03/10/2022.

6. Per contra, the learned Counsel appearing for respondent No.1 Mr. Mangeshkar while supporting the findings of the learned Magistrate, would submit that the complainant has admitted about the

¹ Criminal Appeal No. 23 of 2015

receipt of ₹10,00,000/- and that too by way of cheque and therefore the accused was liable to pay only ₹5,00,000/- as the balance amount since parties were unable to fulfill the agreement in connection with sale of property. He then submitted that once the complainant admitted about the receipt of ₹10,00,000/- out of total amount of ₹15,00,000/-, by no stretch of imagination, the accused was liable to pay ₹12,00,000/- to the complainant and therefore, presumption under Section 139 of the N.I. Act stands rebutted. The complainant was therefore required to establish beyond all reasonable doubt that such cheque was issued towards legally recoverable debt. In absence of any such evidence, findings of the learned trial Court cannot be faulted with. He then submitted that the accused examined himself and probalised his defence which needs to be accepted for want of any further evidence in favour of the complainant. He then submitted that observations of this Court in the case of *Dr. Srishti Ashutosh Prabhu Desai* (supra), are not at all applicable. However he submits that this Court in the case of *Tanveer Khatib v/s. Oscar Vaz*² decided on 22/11/2022 observed that once the presumption is rebutted, the complainant will have to prove beyond all reasonable doubts that the cheque was issued towards legally recoverable debt.

7. The rival submissions fall for consideration.

8. Point for determination is as under:

² Criminal Appeal No.25 of 2017

“Whether the accused/respondent No.1 succeeded in rebutting presumption under Section 139 of the N.I. Act?”

9. In nutshell, it is the case of the appellant/complainant that the accused/ respondent No.1 approached him for purchase of the property of the accused situated as Banda, Maharashtra and after perusing the title document as well as visit to the site, complainant accepted such offer to purchase the said property. The respondent No.1 accordingly visited the office of the complainant on two occasions and at that time the earnest amount of ₹15,00,000/- was paid by way of two cheques to the respondents, which he encashed. The respondent No.1 was supposed to obtain necessary certificates for sale of his property. Since respondent No.1 failed to obtain such a certificate, he agreed to refund the earnest money. Accordingly, he issued the subject cheque amounting to ₹12,00,000/- towards part payment. The complainant presented the said cheque with his bankers, however, it was dishonored for the reason “funds insufficient”. A legal notice dated 08/12/2010 was issued to respondent No.1 demanding the amount mentioned in the cheque. Respondent No.1 received such legal notice on 04/12/2010 but failed to comply with it.

10. Respondent No.1 appeared before the learned Magistrate and contested the matter. The complainant stepped into the witness box and produced relevant documents. He was cross-examined at length.

11. Rajesh Sawant was examined as Pw2 and Krishna Das was examined as Pw3 by the complainant who were then cross-examined at length.

12. Statement of the accused was then recorded under Section 313 of CrPC.

13. The accused stepped into the witness box and though filed an affidavit in evidence, such affidavit was withdrawn and examination in chief of the accused was recorded in the Court itself. It is specific case of the accused/respondent No.1 herein that he approached the complainant for sale of his property at Dodamarg and he quoted the price of ₹45,00,000/-. Accordingly, the complainant paid ₹10,00,000/- and thereafter ₹5,00,000/- by cheques. The complainant promised to pay the balance amount of ₹30,00,000/- at the time of execution of Sale Deed. After the payment of ₹15,00,000/-, the complainant obtained from the accused one blank cheque as security. Since there was no written agreement, the name of the complainant was mentioned on the cheque along with the amount and signature of the accused with the understanding that the cheque shall be destroyed after execution of the Sale Deed.

14. The accused then claimed that the sub-registrar asked for the certificate from the complainant as to whether the complainant is an agriculturist, since the property in question is agricultural land. Before executing Sale Deed in favour of the complainant, he was supposed to

produce such a certificate in order to show that he is an agriculturist. Since the complainant informed the accused that he is unable to procure such a certificate, the said agreement could not be materialised. The complainant then started demanding money and even issued legal notices. Thereafter, the accused issued a cheque of ₹10,00,000/- towards part repayment of the said earnest amount and contacted the complainant to return his documents. The accused admitted that he is liable to return only ₹5,00,000/- since the cheque of ₹10,00,000/- was encashed by the complainant.

15. Thus, it is a specific case of the accused that out of ₹15,00,000/-, he paid ₹10,00,000/- by way of cheque and remaining ₹5,00,000/- are due to be paid.

16. With this specific case of the accused, though initially presumption under Section 139 of the N.I. Act stands attracted in favour of the complainant as the accused admitted of issuing a cheque along with his signature on it though as security, burden is on the accused to rebut such presumption. It is well settled that such a burden on the accused is by showing preponderance of probability. The complainant was cross-examined on all these aspects and apart from admitting that the complainant paid ₹15,00,000/- as earnest money to the accused by two cheques, he clearly admitted that by way of cheque issued by the accused for ₹10,00,000/-, he received such amount by encashing the said cheque. However, the complainant tried to project, and that too unsatisfactorily, that such amount of ₹10,00,000/- paid by the accused

by way of cheque was towards repayment of additional amount paid by him to the accused. First of all neither such case is made out in the complaint itself nor in the affidavit in evidence. It is not the case of the complainant that he was not knowing about encashment of such cheque by him issued by the accused. The accused specifically deposed that cheque of ₹10,00,000/- was issued by him after notices dated 08/09/2010 were received by him from the complainant. Such notices are produced on record at Exh.89(colly). Admittedly, these notices were issued by the Advocate for the complainant. It is clear that two separate notices were issued to the accused in connection with two different cheques of ₹10,00,000/- and ₹5,00,000/- respectively. Though the dates of the issuance of the cheques are not mentioned, however, the cheque numbers are disclosed. Therefore in these notices also there is absolutely no reference in regard to any additional payment and that too any cash payment made by the complainant to the accused as tried to be projected during cross-examination.

17. The accused then produced his passbook, which is at Exh.89 (Colly) and the entry dated 21/10/2010 shows that an amount of ₹10,00,000/- by way of cheque No.585208 was paid to the complainant. The said amount is shown as withdrawn from the account of the accused. The complainant in his cross-examination admitted that he received an amount of ₹10,00,000/- by way of cheque from the accused. Thus it is crystal clear that out of ₹15,00,000/-, ₹10,00,000/- was paid by the accused to the complainant vide cheque No. 585208 and cheque

was encashed on 21/10/2010. Therefore, as on 30/11/2010, which is the date mentioned in the cheque in question for ₹12,00,000/-, the complainant was not entitled to recover such amount from the accused. At the most the accused was liable to pay ₹5,00,000/- i.e. the balance amount and not ₹12,00,000/-.

18. Since both parties agreed and admitted that there was no written agreement between them with regard to sale of agricultural property of the accused while accepting earnest amount, it is clear that the complainant cannot come up with a separate contention that the amount which he received as ₹10,00,000/- was in connection with different transaction or in connection with additional amount of ₹10,00,000/- paid by him in cash as tried to be projected.

19. In sum and substance the accused by extracting an admission from the complainant himself clearly established that the amount mentioned in the cheque was not legally recoverable debt entirely. Only an amount of ₹5,00,000/- was due from the accused to the complainant.

20. The contention of the learned Counsel Shri Desai that why the accused issued a cheque of ₹12,00,000/-, has no substance at all. The question here is about whether the accused succeeded in rebutting the presumption under Section 139 of the N.I. Act. Since on the basis of admission of the complainant himself which is best evidence, presumption under Section 139 of the N.I. Act stands completely rebutted. The onus then again shifted on the complainant to prove

beyond all reasonable doubt that the accused was liable to pay ₹12,00,000/-. Such onus on the complainant has not been discharged at all. The only contention of the complainant that such amount of ₹10,00,000/- which he received from the accused was in regard to cash payment, has no substance at all and more so there is no corroboration or evidence to that effect. The answer of the complainant is only an after-thought and to avoid such admission. Since the amount of ₹10,00,000/- was received by the complainant by way of cheque which he encashed, the question of further payment of ₹12,00,000/- as shown in the cheque cannot be considered as legally recoverable debt. The accused never agreed to pay over and above the earnest money of ₹15,00,000/-. It is also not a case of the complainant that such ₹12,00,000/- was over and above ₹10,00,000/- which he received by way of another cheque.

21. Since, the present appeal is against the acquittal, it is well settled proposition of law that the appellant has to demonstrate that findings of the learned trial Court are perverse and against settled propositions of law. In case another view is possible which is a probable view, the appellate Court must be slow in disturbing such findings.

22. The observations of this Court in the case of *Dr. Srushti Ashutosh Prabhu Desai and Tanveer Khatib* (supra) are in fact supporting the case of the respondents. Once the respondent/accused succeeded in rebutting presumption and that too on the admission of the complainant himself, Section 139 of the N.I. Act is no more helpful to

the complainant and onus again shift on the complainant to prove the case and this time beyond all reasonable doubt. The findings of the learned trial Court in the impugned judgment are therefore considered to be probable as no further evidence have been brought on record by the complainant to discharge such burden. The contention of learned Counsel Shri Desai that there was no opportunity for the complainant to deal with defence since the accused failed to reply to the legal notice, is of no substance. First of all the fact that the complainant received ₹10,00,000/- by way of cheque even prior to presentation of the present cheque for encashment is very much to the knowledge of the complainant himself. It is not the case that for the first time this aspect has been brought to the notice of the complainant. Admittedly, such cheque of ₹10,00,000/- was issued in the name of the complainant by the accused. It also presumes that the complainant himself deposited such cheque for encashment. Thus subsequently claiming during cross-examination that such amount mentioned in the cheque was towards another transaction, is only an after-thought. The complainant ought to have anticipated such defence at the time of the filing of the complaint for a simple reason that all these facts were to the knowledge of the complainant himself. Therefore, even if, no reply was sent by the accused to the legal notice, the question put to the complainant during cross-examination and his admission on receipt of ₹10,00,000/- by way of cheque out of ₹15,00,000/-, clearly goes to show that the complainant had no other explanation to give and thus, the cheque in question for ₹12,00,000/- was not issued in connection of legally recoverable debt.

At that time and as admitted by the accused, he was only liable to pay ₹5,00,000/-.

23. having said so, the findings of the learned Magistrate cannot be faulted with. The appellant failed to demonstrate that the cheque in question was issued for legally recoverable debt. Once the accused successfully rebutted the presumption under Section 139 of the N.I. Act during the proceedings, the appeal deserved to be rejected.

O R D E R

1. The appeal stands rejected.
2. The parties to bear their own costs.

BHARAT P. DESHPANDE, J.