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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 28 OF 2019

Hrushikesh Transport, Represented by
its Proprietor, Mr. Dinesh N. Bhonsale,
Major in age of 52 years, Married,
Businessman, Indian National, r/o H.
No. 91, Volvoi, Ponda, Goa. ... APPELLANT

Versus

Aryadurga Enterprises, Represented by
its Proprietor, Mr. Chandrakant B.
Bhatkande, Major of age, about 55 years,
Married, Businessman, Indian National,
Resident of Shivolkar Wada, Mulgao,
Bicholim, Goa. ... RESPONDENT

Mr. Anthony Joe D'Silva with Ms. Kimberley Gracias,
Advocates for the Appellant.

Mr. Arjun Naik with Ms. Sneha D. Shetye, Advocates for
the Respondent.

CORAM: B.P. DESHPANDE, J.

DATED: 22nd JUNE 2023

ORAL JUDGMENT:

1. The Appellant/Complainant is challenging the impugned judgment passed by the learned Magistrate in Criminal Case No. 260/OA/NIA/2016/A dated 03.05.2018 whereby Respondent/

Accused was acquitted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, the N.I. Act).

2. The parties are hereinafter referred to as Complainant and Accused as arrayed before the Trial Court.

3. Heard Mr. Anthony D'Silva, the learned Counsel for the Appellant-Complainant and Mr. Arjun Naik, the learned Counsel for the Respondent-Accused.

4. With the assistance of the learned Counsel for the parties, I have perused the entire paper book and more specifically, the cross examination of the Complainant and the findings in the impugned order.

5. The learned Counsel for the Appellant would submit that the only ground on which the Accused/Respondent was acquitted is that the Complainant failed to disclose in his statement of Account the amount which was due to him from the Accused for the year ending 31.03.2015. The learned Counsel for the Appellant submitted that the statement of Account along with the Income

Tax Returns for the year ending 31.03.2015 was produced and that, in such statement, an amount of Rs.3,80,650/- is mentioned as Sundry Debtors. He submits that such term “Sundry Debtors”, in the Balance Sheet de-notes the amount which the Appellant was supposed to receive from his debtors at the end of such financial year. He submitted that the said amount of sundry debtors mentioned therein is more than the cheque amount and therefore, the learned Magistrate ought to have considered this.

6. The learned Counsel for the Appellant further submitted that apart from cross examining the Complainant, the Respondent/Accused failed to step into the witness box and the presumption under Section 139 of the N.I. Act has not at all been rebutted.

7. The learned Counsel appearing for the Respondent/Accused vehemently submitted that the Complainant has failed to prove his case beyond all reasonable doubts and the cross examination of the Complainant would submit that the cheque in question was in fact misused by the Complainant, which he was having with him in connection with the partnership business between the Complainant and the Accused and in connection with

the supply of material. He invited my attention to the delivery challans and more specifically, the letter dated 07.08.2014 and the observations of the learned Magistrate that these challans and the letter appear to be a forged document.

8. The points for determination are as under, together with my findings against it:-

(i) Whether the Respondent/Accused succeeded in rebutting the presumption under Section 139 of the N.I. Act ?

(ii) Whether the learned Magistrate erred in shifting such burden on the Complainant ?

9. The complaint was filed under Section 138 of the N.I. Act claiming therein that the Complainant supplied construction material/raw material to the Accused and a cheque of Rs.2 lakhs was issued towards such material supplied. When the cheque was presented for encashing, the same was returned unpaid. A notice was issued to the Accused to pay the amount mentioned in the cheque, however, inspite of receipt of such notice, no payment was forthcoming.

10. The Accused replied to the said notice and denied about the supply of the building material and issuance of cheque towards the payment of such material. In the said reply, it is the case of the Accused that he along with the Complainant floated a partnership firm and undertook its first project of construction of the building. Since a dispute arose between the partners, the Accused retired from the said partnership and asked for the Accounts. A perusal of this reply dated 07.10.2014 shows that there is no whisper about the denial of the signature on such cheque on behalf of the Accused. It is only contended that the cheque was not issued towards the supply of construction material. Even there is no allegation in the reply that the cheque was misused by the Complainant, as tried to be projected while arguing the Appeal.

11. The Complainant filed his affidavit in evidence and produced relevant documents including the Income Tax returns, delivery challans and letters. The Complainant was cross examined at length. The Accused failed to step into the witness box. While answering the question put to the Accused in his statement under Section 313 of the Cr.P.C., he admitted that the Complainant has produced the cheque dated 09.07.2014 at

Exhibit-8 along with the memo of the Bank dated 13.09.2014 and the legal notice dated 18.09.2014. When asked the specific question as to whether he wants to examine any witness in defence, he answered in the negative. The Accused failed to disclose the specific defence with regard to the said case while answering the last question.

12. The learned Trial Court framed the points for determination which are found in paragraph 8. First of all, it is necessary to note that even though there is no denial on the part of the Accused about the signature, date and other details on the cheque, the learned Trial Court failed to consider the presumption under Section 139 of the N.I. Act which ought to have been drawn in favour of the Complainant. By ignoring such mandatory presumption, the learned Magistrate framed point no. 1 thereby putting the burden on the Complainant himself, to prove that the cheque in question was issued in discharge of legally enforceable debt and liability and surprisingly, answered it in the negative.

13. There are catena of decisions showing the settled proposition of law that once the signature on the cheque is not disputed and when conditions imposed under Section 138 of the

N.I. Act are fulfilled while presenting the cheque and thereafter, by issuing legal notice, the Magistrate is duty bound to draw a presumption under Section 139 of the N.I. Act in favour of the Complainant that such cheque is issued towards legally enforceable debt. This Court, in the following decisions considered various judgments of the Hon'ble Apex Court and observed that presumption has to be drawn if the signature on the cheque is admitted by the Accused.

(i) **Dr. Srishti Ashutosh Prabhu Dessai Vs. Mr. Dadamiyan M. Bagewadi & Another** (Criminal Appeal No. 23 of 2015 dated 03.10.2022);

(ii) **Mr. Tanveer Khatib Vs. Mr. Oscar Vaz & Another** (Criminal Appeal No. 25 of 2017 dated 22.11.2022).

14. By ignoring such presumption, the learned Magistrate has committed serious error. Similarly, by shifting such burden on the Complainant as shown in paragraph 8 and more specifically in point no. 1 for determination, the learned Magistrate has ignored the settled proposition of law and unnecessarily shifted the burden on the Complainant to prove otherwise.

15. The cheque in question was issued by the Accused, which is not at all disputed. The question which the Accused tried to raise is that such a cheque is not issued towards the supply of material. The burden of this aspect in order to rebut the presumption under Section 139 of the N.I. Act is certainly on the Accused.

16. The cross examination of the Complainant shows only suggestions given to the Complainant to that effect. The delivery challans are produced by the Complainant, which were disbelieved by the Trial Court on the precise ground that the signature on the said delivery challans are not matching with the signature of the Accused. First of all, it has to be taken into account that in normal business transactions, the delivery challans are issued and handed over to the person who is present at the site. The person who receives the material at the site normally signs such delivery challans. Therefore, comparing the signature of the Accused where there is no denial to show that he personally did not receive such material at the site was completely unwarranted.

17. The other aspect which the learned Trial Court has completely missed is the fact that the Income Tax returns along

with the Balance Sheet, and the Profit & Loss Account duly certified by the Chartered Accountant show the amount of more than Rs.3 lakhs due under the caption of “Sundry Debtors”. This clearly shows that the Complainant is entitled to recover such an amount from his debtors. This amount is more than the cheque amount and it is shown by the documentary evidence that the Complainant was entitled to recover more than Rs.3 lakhs as on 31.03.2015. Thus, the amount of the cheque which is Rs.2 lakhs is clearly included in the sundry debtor's column.

18. The observations of the learned Magistrate in paragraph 36 of the impugned judgment are therefore clearly perverse and against the documents produced on record since there is no other material which has been brought on record on behalf of the Accused and of rebutting presumption under Section 139 of the N.I. Act, dismissal of the complainant and acquittal of the Accused by the Trial Court needs to be interfered.

19. The Appeal, therefore, stands allowed. The impugned order dated 03.05.2018 in Criminal Case No. 260/OA/NIA/2016/A is hereby quashed and set aside. The Respondent/Accused is found guilty of the offence punishable under Section 138 of the N.I. Act.

20. After hearing the learned Counsel for the Respondent/
Accused on the point of sentence, I pass the following order:

O R D E R

(a) The Respondent/Accused stands convicted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and is sentenced to suffer imprisonment for a period of 15 days and to pay compensation of double the amount of the cheque i.e. Rs.4,00,000/- (Rupees Four Lakhs only), which shall be deposited within a period of one month from today, failing which, the Accused shall undergo simple imprisonment for a period of 10 days.

(b) The Respondent/Accused shall surrender before the learned Magistrate within a period of ten days for undergoing the sentence. If the Respondent/Accused fails to surrender within the above time, the learned Magistrate shall take necessary steps.

21. The Appeal stands disposed of in the above terms.

B.P. DESHPANDE, J.

VAIGANKAR
ESHA SAINATH

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VAIGANKAR ESHA SAINATH
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