Shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 30 OF 2022

VISHNU RAMCHANDRA NAIK,
PRESENTLY IN JUDICIAL
CUSTODY, THR. HIS WIFE
RANJANA VISHNU NAIK .....APPLICANT

VERSUS

NILKANTH RAJARAM NAIK .....RESPONDENT

Mr. L. Joseph Deva, learned counsel for the Applicant.
Mr. P. A. Kamat, learned counsel for Respondents

CORAM: BHARAT P. DESHPANDE, J.

RESERVED ON: 08th May, 2024

PRONOUNCED ON: 11th June, 2024

ORDER

1. Applicant by way of present revision is challenging the concurrent findings of the Courts below wherein the applicant was found guilty for the offense punishable under Section 138 of Negotiable Instruments Act and accordingly, sentenced to pay the compensation and to suffer imprisonment.

2. Heard Mr. L. Joseph Deva, learned counsel for the appellant and Mr. P.A. Kamat, learned counsel for the respondent.

3. Apart from oral submissions, written arguments are filed on behalf of the applicant.

4. Mr. Joseph Deva, learned counsel appearing for the applicant would submit that first of all both the Courts below failed to consider that there was no legally recoverable debt existing at the time of filing of the complaint and that part payment was made by the applicant/accused which has not been considered at all. He submits that the applicant made it very clear while answering statement recorded under Section 313 of Criminal Procedure Code (Cr.P.C.) that he made part payment. He would submit that unfortunately the applicant/accused failed to lead any evidence to that effect, however, this Court could consider of granting opportunity to the applicant to lead additional evidence in order to do substantial justice. He submits that there were two more complaints filed by the respondents in respect of the same transaction, however, the same has not been considered by the Courts below. He then claimed that the respondent would be clearly dealing with money lending business and hence, in absence of any license the case of the respondent/complainant ought to have been dismissed.

5. In support of the submissions, the Applicant placed reliance on the following decisions ***(a) Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works Ltd.,1997 (6) SCC 450; (b) Angu Parameswari Textiles(P) Vs. Sri Rajam & Co. 2001 Company Cases Vol. (105) 186; (c)Shiju K Vs. Nalini, MANU/KE/2737/2015; (d)Pawan Enterprises Vs. Satish H. Verma, 2003 (2) ALD Cri 20; (e) M/s Alliance Infrastructure Project Pvt. Ltd. And Ors. Vs. Vinay Mittal in Crl.M.C.No.2224/2009 dated 18.01.2010; (f) Joseph Sartho Vs. Gopinathan Nair, 2009 (2) Crimes 463 (Kerela); (g) Rahul Builders Vs. Arihant Fertilizers & Chemicals and Anr.(2008) 2 SCC 321; (h)Damodar Prabhu Vs. Sayyed Babalal H., 2010 (5) SCC 663***

6. Per contra, Mr. P. A. Kamat learned counsel for the respondent would submit that the findings of the Courts below needs no interference, as the case was established with regard to the transaction and supported by the agreements executed by the parties. A demand notice was issued to the accused when the cheque was return unpaid, however, there was no response. He submits that there is absolutely no defence raised by the applicant before the Trial Court. In fact, he admits about the loan transaction and that there is no material brought on record with regard to money lending activities.

7. Rival contentions fall for consideration.

8. The respondents/complainants filed a complaint under Section 138 of Negotiable Instruments Act claiming therein that the accused requested for financial help to the tune of Rs.5,00,000/-(Rupees Five Lakhs only) somewhere in October 2016 and accordingly, the complainant transferred the said amount by cheque dated 10.10.2016 into the account of the accused. At that time, the accused along with his wife executed consent terms agreement dated 10.10.2016, thereby agreeing to repay the said amount. Similarly, the accused handed over two cheques as collateral security amounting to Rs.3,00,000/-(Rupees Three Lakhs only) and Rs.2,00,000/- (Rupees Two Lakhs only), respectively, in favour of the complainant. The wife of the accused also handed over two cheques as additional collateral security as reflected in the agreement. The accused and his wife expressly agreed in the agreement dated 10.10.2016 that incase of failure on part of the accused to repay the said amount of Rs.5,00,000/-(Rupees Five Lakhs only) within one year, the complainant is authorised to deposit both the cheques issued by the accused as also that of the wife of the accused for the purpose of recovery of the loan.

9. The accused failed to repay the said amount within the stipulated period and accordingly, the complainant deposited the cheques issued by the accused as collateral security and the same were returned unpaid for funds insufficient. On intimation to the accused, he immediately approached the complainant and executed an agreement dated 04.03.2018 and requested for extension of time till 30.04.2018. At the same time, accused issued two fresh cheques amounting to Rs.5,00,000/-(Rupees Five Lakhs only) in favour of the complaint, however, on one cheque there was some error in the writing of the amount. The complainant then again tried to contact the accused after the expiry of said date i.e. 30.04.2018 and finally, the accused issued another cheque dated 14.05.2018 for an amount of Rs.5,00,000/-(Rupees Five Lakhs only) towards the repayment of the entire amount. The earlier two cheques were returned to the complainant.

10. The complainant then deposited the cheque of

Rs.5,00,000/-(Rupees Five Lakhs only) dated 14.05.2018 for encashment, however, it was returned unpaid. A legal notice was issued to the accused dated 25.05.2018 asking him to pay the amount within a period of 15 days. There was no response and accordingly, the complaint was lodged before the concerned Magistrate.

11. The complainant was examined and accordingly, notice was issued to the accused who appeared and then he was allowed to cross examine the complainant. The statement of accused was recorded under Section 313 Cr.P.C. wherein the accused admitted that he took a loan of Rs.5,00,000/-(Rupees Five Lakhs only) from the complainant. He also admitted that there was an agreement executed between the parties wherein cheques were issued for collateral security. Infact, most of the questions put to the accused in connection with evidence of the complainant are admitted. However, with regard to the cheque in question dated 14.05.2018, accused gave a strange answer that he is not aware of the same. He admitted about the receipt of notice issued by the complainant to him and finally claimed that he made part payment.

12. The complainant has placed on record the agreements, the cheque in question, the legal notice. The cross examination of the complainant nowhere suggests about the denial of any transaction or even the signature of the accused on the cheque. Admittedly, the accused failed to step into the witness box.

13. Though, it is claimed by the accused while answering questions put to him under Section 313 Cr.P.C. that he made part payment, no such questions were put to the complainant during cross examination. It is also clear that no evidence has been brought on record by the accused regarding such part payment, except his statement made to the questions put to him under Section 313 Cr.P.C. The accused could have stepped into the witness box in order to prove such part payment, if any.

14. Once the signature on the cheque is not disputed and specifically the agreements executed between the parties as well as loan transaction is admitted by the accused, presumption arises under Section 139 of the Negotiable Instruments Act in favour of the complainant. It is well settled that such presumption cannot be rebutted only by denial or by answering questions put to the accused under Section 313 Cr.P.C.

15. The contentions of the learned counsel for the applicant is that on the day of the offence the accused was not liable to pay Rs.5,00,000/-(Rupees Five Lakhs only) to the complainant and therefore, the complainant has failed to prove the aspect of legally recoverable debt, cannot be accepted for the simple reason that cross examination of the complainant no where suggests that any part payment was made prior to filing of the complaint.

16. Once the agreement is admitted which clearly speaks about advancement of loan by the complainant to the accused, there was no further need for the complainant to establish anything else. The loan amount was handed over to the accused by a cheque which was encashed by the accused and the same has been acknowledged in the first as well as second agreement executed between the parties. Thus, the onus was on the accused to rebut such presumption under Section 139 of Negotiable Instruments Act. By only saying that he made part payment, in answering to question put to him under Section 313 of Cr.P.C. is not sufficient enough to rebut such presumption. First of all such questions were not put to the complainant and secondly, no evidence has been brought on record by the accused about such part payment. Thus, when the accused admit that he obtained loan from the complainant and failed to reply to the legal notice, it appears that there is no probable defence raised by the accused in order to rebut such presumption.

17. The written submissions filed on behalf of the applicant is admittedly discussing about aspects which are not raised before the Trial Court or even before the First Appellate Court. Therefore such grounds, in absence of any material placed on record cannot be entertained in the revisional jurisdiction which is otherwise limited.

18. It is contended by the applicant that other cases were filed by the complainant, however, during cross examination of the complainant no such material has been brought on record. The accused who failed to step into the witness box, cannot now be allowed to agitate such grounds including the contentions regarding provisions under the of Money Lenders Act. Under such circumstances, the observations of the Apex Court in the case of ***Damodar Prabhu Vs. Sayyed Babalal H., 2010 (5) SCC 663*** will not be of any help to the applicant.

19. It is further claimed in the written arguments that the complainant forced the accused to issue cheque of Rs.5,00,000/-

(Rupees Five Lakhs only) instead of Rs.4,25,000/-(Rupees Four Lakhs Twenty Five Thousand only) which was actually due and payable and therefore, the said cheque was invalid. Unfortunately, no such material was brought before the Trial Court or even the First Appellate Court and thus, such contention cannot be looked into for the first time in the revisional jurisdiction.

20. Another contention is that during the pendency of the present case, accused paid Rs.50,000/-(Rupees Fifty Thousand only) which has not been considered by the Courts below. Again this aspect cannot be considered for the first time as subsequent payment will not absolve the accused from the liability as the offence stands completed on the expiry of 15 days period from the date of legal notice. Therefore, subsequent payment, if any, could be adjusted in the compensation awarded by the Courts below. This aspect was considered by the First Appellate Court and rightly so and accordingly such arguments is of no substance.

21. In ***Govind Prabhu Gaonkar Vs. Rajendra Warik, 2023, (1) Goa Law Times 230***, this Court discussed about the provisions of Money Lending Act and observed that the transaction cannot be labelled as money lending activity unless, the condition as found in Section 2(k) of the said Act are fulfilled and the case is not covered under the exceptions. In the present matter, there is absolutely no material brought on record before the Trial Court that the loan transaction was infact coming within the ambit of Money Lender's Act. The agreements executed by the parties would clearly go to show that it was a friendly loan of Rs.5,00,000/-(Rupees Five Lakhs only) and the accused agreed to repay it within a period of one year even without any interest. Even the cheque in question is of Rs.5,00,000/-(Rupees Five Lakhs only) i.e. the initial loan amount.

22. The learned Trial Court as well as the First Appellate Court discussed presumption under Section 139 of Negotiable Instruments Act and rightly so, since there is material to rebut such presumption. Accordingly, no case is made out for any interference with the findings of the Courts below.

23. Revision Application, stands dismissed.

BHARAT P. DESHPANDE, J.