Meena

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO. 26 OF 2015

Mr. Maximos Ekka, ... Applicant
Major in age, c/o. St. Anthony Bakery,
Near Power House, Aradi, Candolim, Bardez, Goa.
(At present in Aguada Jail)

V/s.

1. Mr. SantoshKumar S. Singh,
Son of Mr. Sridevi Prasad Singh,
Aged 30 years, resident of House No.1917/E Aradi,
Candolim, Bardez, Goa.

2. Public Prosecutor,
High Court Building,
Panaji, Goa. ...Respondent

Mr. J.J. Mulgaonkar, Advocate for the applicant.

Mr. Ryan Menezes with Mr. Nigel Fernandes and Ms. Gina Almeida, Advocates for respondent No.1.

Mr. Nikhil Vaze, Additional Public Prosecutor for respondent No.2.

CORAM: BHARAT P. DESHPANDE, J

DATED: 6th February, 2024

ORAL JUDGMENT:

1. Heard Mr. J.J. Mulgaonkar, learned Counsel for the applicant, Mr. Ryan Menezes with Mr. Nigel Fernandes and Ms. Gina Almeida, learned Counsel for the respondent No.1 and Mr. Nikhil Vaze, learned Additional Public Prosecutor for respondent No.2.

2. Present revision is filed challenging concurrent orders of the Courts below thereby holding the applicant guilty for the offences punishable under Section 138 of Negotiable Instruments Act (N.I. Act, for short) and to suffer imprisonment for a period of three months and to pay compensation of Rs.3,80,000/- and In default of payment of compensation the applicant shall further suffer imprisonment for six months.

3. Respondent No.1 filed a complaint under Section 138 of the N.I. Act before the learned Magistrate claiming therein that he agreed to purchase the bakery of the applicant/accused for a sum of Rs.5,00,000/- somewhere in December, 2007. Since the complainant was not having the entire amount with him, he arranged the amount of Rs.3,20,000/- which he handed over to the accused towards advance. When the complainant insisted upon execution of the agreement, the accused told him that it is not necessary and it will be a waste of money for preparing documents. However, the accused handed two cheques as security to the complainant. It was agreed between the parties that in case the deal is not materialized, the complainant would present such cheques for encashment.

4. It is further the case of the complainant that somewhere in the month of March, 2008 the accused informed that he has dropped the plan of selling the bakery and accordingly requested the complainant to

present both the cheques. Upon presenting both the cheques with the banker of the complainant, the same got dishonoured for "fund insufficient". The complainant informed the accused who requested him to grant him sometime and assured return of the said amount. Subsequently in August, 2009 the accused handed over one cheque amounting to Rs.3,20,000/- towards repayment of advance. On presentation of such a cheque it got dishonoured for "funds insufficient". A legal notice was issued by the complainant which was returned unclaimed. Accordingly, the complaint was lodged for the offence punishable under Section 138 of the N.I. Act.

5. During the course of trial, the complainant stepped into the witness box and deposed in support of his contentions. His wife also stepped into the witness box as Pw2 and corroborated the case of the complainant.

6. In defence the accused stepped into the witness box and filed his affidavit in evidence.

7. The learned Magistrate after considering the entire material on record found that there is no probable defence and the accused failed to rebut presumption under Section 139 of N.I. Act. Accordingly, the accused was found guilty and punished as found in the impugned order.

8. An appeal filed against such order by the accused was rejected thereby confirming the findings of the learned Magistrate, which is challenged in the present revision.

9. Mr. Mulgaonkar appearing for the applicant would submit that first of all the evidence of the complainant would go to show that he had no capacity to pay the amount of Rs.3,20,000/-. Similarly, the valuation of the property was much more than the one which has been agreed upon as claimed. He submits that the complainant used to visit the house of the accused frequently and in that process he took away the signed blank cheques which the accused kept for the purpose of paying to the creditors.

10. Mr. Mulgaonkar would submit that since the source of income of the complainant itself is in doubt, the presumption under Section 139 of the N.I. Act stands rebutted. Secondly, he claimed that the valuation of the property was admittedly much more than mentioned in the complaint and/or agreed between the parties as alleged and hence there is a clear doubt with regard to such transaction.

11. While assailing the judgment of the learned trial Court as well as the First Appellate Court he would submit that material aspects have been ignored by both the Courts thereby committing error in the eyes of law and thus both the orders are perverse. He would submit that the

defence raised by the accused is a probable defence which rebuts the presumption under Section 139 of N.I. Act, however, the learned Courts failed to consider this aspect and arrived at a perverse findings. He would then submit that when the accused realised that the cheques were missing from his house, the accused went to the police station for lodging of the complaint. However, such a complaint was not registered by the police on the ground that it is a civil dispute. He would therefore submit that the impugned judgment requires interference.

12. Mr. Menezes appearing for respondent No.1/complainant would submit that once presumption exists, which appears in the present case, the complainant need not prove other things and the accused is required to rebut such presumption. He submits that in the present matter the accused failed to rebut such presumption even though he stepped in the witness box. The cross-examination of the complainant and his witnesses is in fact cogent and convincing and there is no dent or any infirmity to claim rebuttal of presumption. He submits that the defence raised by the accused is improbable as the action of the accused clearly goes to show that no such incident happened in his house. The conduct of the accused itself shows that the story put forth by him is only an afterthought.

13. Mr. Menezes would then submit that there are concurrent findings of facts by two Courts and the jurisdiction of this Court while entertaining revision is very limited. He submits that when there is no error of law

committed by the Courts below, this Court while exercising revisional jurisdiction is not bound to interfere for the simple reason that the jurisdiction of this Court cannot be equated with a jurisdiction of Appellate Court.

14. Mr. Menezes would submit that the complainant has sufficiently disclosed about the source of money collected by him to be handed over to the accused as part payment which has not been denied at all. The suggestions cannot rebut the presumption. He submits that part payment was made on an oral contract and accordingly the accused agreed to refund it when he decided not to sale the property.

15. Rival contentions fall for determination as under.

16. Since this revision is challenging concurrent findings of two Courts and the jurisdiction of this Court is in fact limited, the Apex Court in the case of **Bir Singh v/s. Mukesh Kumar** [(2019) 4 SCC 197] discussed the scope of the jurisdiction in a revision from para 13 to 17 which reads thus:

> *"13. The short question before us is whether the High Court was right in reversing the concurrent factual findings of the trial court and of the appellate court in exercise of its revisional jurisdiction. The questions of law which rise in this appeal are, (i) whether a Revisional Court can, in exercise of its discretionary jurisdiction, interfere with an order of conviction in the absence of any jurisdictional error or error of law and (ii) whether the payee of a cheque is disentitled to the benefit of*

the presumption under Section 139 of the Negotiable Instruments Act, of a cheque duly drawn, having been issued in discharge of a debt or other liability, only because he is in a fiduciary relationship with the person who has drawn the cheque.

14. The trial court, on analysis of the evidence adduced by the respective parties arrived at the factual finding that the respondent-accused had duly issued the cheque in question for Rs 15 lakhs in favour of the appellant complainant, in discharge of a debt or liability, the cheque was presented to the bank for payment within the period of its validity, but the cheque had been returned unpaid for want of sufficient funds in the account of the respondent-accused in the bank on which the cheque was drawn. Statutory notice of dishonour was duly issued to which there was no response from the respondent-accused.

15. The appellate court affirmed the aforesaid factual findings. The trial court and the appellate court arrived at the specific concurrent factual finding that the cheque had admittedly been signed by the respondent-accused. The trial court and the appellate court rejected the plea of the respondent-accused that the appellant complainant had misused a blank signed cheque made over by the respondent-accused to the appellant complainant for deposit of income tax, in view of the admission of the respondent-accused that taxes were paid in cash for which the appellant complainant used to take payment from the respondent in cash.

16. It is well settled that in exercise of revisional jurisdiction under Section 482 of the Criminal Procedure Code, the High Court does not, in the absence of perversity, upset concurrent factual findings. It is not for the Revisional Court to re-analyse and re-interpret the evidence on record.

17. As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbHJ. it is a well-established principle of law that the Revisional Court will not interfere even if a wrong order is passed by a court having

jurisdiction, in the absence of a jurisdictional error. The answer to the first question is therefore, in the negative."

17. Keeping in mind the above settled proposition of law and the fact that this Court is dealing with a revisional jurisdiction against concurrent findings of fact, the only aspect needs to be discussed is whether there is any perversity in the findings of the learned trial Court and Appellate Court so as to interfere with it.

18. The matter in hand clearly goes to show that the accused raised a specific defence that blank signed cheques from his house were stolen. Thus it shows that first of all the cheques were duly signed by the accused. Secondly, the cheques were kept in the house and in connection with the bank account standing in the name of the accused.

19. At the revision stage, it is not necessary to go into and appreciate the evidence of the parties, however, the reasons disclosed by the learned Magistrate and confirmed by the First Appellate Court are found to be reasonable and convincing. At this stage, the conduct of the accused is relevant. Even though he claimed that the cheques were stolen from his house, no such complaint was lodged with the police. His statement that he went to the police station however his complaint was not recorded by the police is again an excuse since he did not approach the higher authorities of the police or even the Court by filing an application under Section 156 (3) of CrPC.

20. That apart, the story of removing blank signed cheques from the house of the accused is again considered to be an afterthought for the simple reason that initially the accused gave two cheques to the complainant for Rs.2,00,000/-and Rs.1,20,000/- respectively on two different dates as discussed in the complaint. Para 6 of the complaint specifically disclose that on 06/04/2008 the accused handed the cheque of Rs.2,00,000/- as a security. The second cheque was handed over on 09/04/2008 Rs.1,20,000/-. Admittedly, both these cheques were postdated cheques as claimed in the complaint itself.

21. The complainant further disclosed that since the accused changed his mind and decided that he will not go ahead with the sale transaction, requested the complainant to deposit both the cheques. Accordingly, the complainant presented both these cheques with his banker, however, the same were returned unpaid somewhere in the second week of April,2008. The complainant then approached the accused who assured him of the payment and after about one year the accused issued one cheque of Rs.3,20,000/- somewhere in September, 2009. Thus, the contention of the accused that such cheques were stolen from his house is highly unbelievable for the simple reason that earlier two cheques were dishonoured somewhere in April 2008 and the accused was informed about it, however, he issued another cheque in September 2009 for the amount of Rs.3,20,000/-. No person will issue another cheque if the

earlier cheques are misused or stolen. Thus so called defence raised by the accused fallflat and having rightly rejected by the Courts below.

22. The second contention is about rebutting of the presumption under Section 139 of the N.I. Act. In this case, on perusal of the cross-examination of the complainant and his wife, one thing is clear that the complainant clearly gave explanation as to how he managed the amount and handed over it to the accused. Such a stand of the complainant is consistent and has not been shaken at all. Thus the submissions about the source of income or the money qua the complainant has clearly established.

23. Another contention has been raised that the valuation of the said property and the equipment therein was much more than Rs.5,00,000/- which the complainant has admitted in his cross-examination. There is a statement made by the complainant during cross-examination that machinery available in the bakery was around Rs.3,00,000/-. However, a specific contention of the complainant that the accused agreed to sell the bakery for Rs.5,00,000/- has not been rebutted at all. It is well settled that an oral agreement for sale could be specifically performed. The complainant in his complaint as well as in the affidavit disclosed the reason as to why no agreement for sale was executed. It is his contention in the complaint and also in the affidavit that the accused insisted not to execute any document on the premise that it would be a waste of money.

Except giving suggestion, there is no other material brought on record to that effect.

24. Mr Mulgaonkar placed reliance in the case of **Ramdas s/o. Khelu Naik v/s.Krishnanand s/o. Vishnu Naik** [(2014)12 SCC 625. He submits that in the absence of any corroboration and source, the presumption stands rebutted.

25. In the case of **Ramdas**(supra), the complainant claimed that the accused issued a cheque of Rs.5,00,000/- which was subsequently dishonoured and after issuing notice, the complaint was filed. During the course of evidence the complainant claimed that he gave a hand loan of Rs.1,50,000/- to the accused and thereafter Rs.25,000/- and in discharge of such liability, the accused issued a cheque of Rs.5,00,000/-. The Apex Court found that there is no break up disclosed in the complaint as to how the amount of Rs.1,75,000/- became Rs.5,00,000/-. In that context, the Apex Court observed that the presumption stands rebutted. The matter in hand is on different facts and circumstances. Thus, the said decision in the case of **Ramdas**(supra) will not be of any help to the applicant.

26. Mr. Mulgaonkar placed reliance in the case of **Krishna Janardhan Bhat v/s. Dattatraya G. Hegde** [(2008) 4 SCC 54] and more specifically to paragraph Nos.31 and 32 wherein the Court has observed that the burden to disprove the presumption under Section 139

of the N.I. Act on the accused is by way of preponderance of probabilities. There is no quarrel with regard to such proposition which is settled by way of various judicial pronouncements. However, the fact remains that such a case will have to be looked into on the basis of facts to come to the conclusion as to whether such presumption is displaced successfully by the accused.

27. In **Sumeti Vij v/s. Paramount Tech Fab Industries** [2021 SCC OnLine SC 201], the Apex Court reiterated the proposition with regard to rebutting of the presumption under Section 139 and by placing reliance in the case of **Rangappa v/s. Sri Mohan** [(2010) 11 SCC 441 and other various decisions.

28. The reasoning of the learned Magistrate on the aspect of rebuttal of presumption are found to be reasonable and acceptable as such reasoning are on the basis of settled propositions of law. Only raising some defence which is found to be only an excuse, cannot be considered as rebutting presumption under Section 139 of N.I. Act.

29. The First Appellate Court in a reasoned order confirmed the findings of the learned Magistrate. Such findings of both the Courts need not interference in the revisional jurisdiction for the simple reason that the applicant failed to show any perversity or illegality in such findings. Accordingly, the revision stands dismissed.

30. The applicant to surrender before the learned Magistrate within a period of one week to serve the sentence. If the applicant fails to surrender, the learned Magistrate to take recourse to execute its own order.

BHARAT P. DESHPANDE, J