

(2012) 03 GUJ CK 0023
In the Gujarat High Court
Case No : Criminal Appeal No. 2593 of 2009

Anilbhai Chimanlal Vithlani	Vs	APPELLANT
State of Gujarat and Another		RESPONDENT

Date of Decision : 13-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 262, 263, 264, 265, 313
Negotiable Instruments Act, 1881 (NI) — Section 138, 143

Citation : (2012) 3 Crimes 389

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : Parth S. Tolia, for the Appellant; C.M. Shah, APP for the Opponent No. 1 and Mr. Ajay L. Pandav, Advocate for the Opponent No. 2, for the Respondent

Final Decision : Allowed

Judgement

Bankim N. Mehta, J.—The appellant, original complainant, has preferred this appeal u/s 378 of the Code of Criminal Procedure, 1973 and challenged the judgment and order of the acquittal passed by learned 3rd Additional Civil Judge and Judicial Magistrate First Class, Surat, on 10.8.2009 acquitting the respondent accused for the offence u/s 138 of the Negotiable Instruments Act, 1881 ("the Act" for short). According to the complainant the accused was his friend and was connected with jewellery business. As the accused was in need of finance of Rs. 1,00,000 for his business, the accused made request to advance the amount. Therefore, he advanced Rs. 25,000 on 6.2.1999 and another Rs. 25,000 on the same date in cash. The accused gave receipt for the amount received by him. Thereafter on 7.2.1999 another Rs. 25,000 and further Rs. 25,000 were obtained by the accused as hand loan and receipt was passed in that regard. Thereby, the accused obtained. Rs. 1,00,000 towards hand loan. The accused gave cheque No. 221541 dated 16.10.2002 for Rs. 50,000 and cheque No. 221542 dated 17.10.2002 for Rs. 50,000 against the amount obtained by him. Cheques were presented in the bank on 18.10.2002 but both the cheques returned unpaid on

account of insufficient funds. Therefore, notice was served to the accused making demand of the unpaid cheques. The accused received the notice but did not pay the amount of unpaid cheques. Therefore, complaint u/s 138 of the Act was filed in the Court of learned Chief Judicial Magistrate at Surat and it was registered as Criminal Case No. 170 of 2002.

2. The trial Court issued summons and the accused appeared and denied having committed the offence. Therefore, prosecution adduced evidence. At the end of recording of evidence, incriminating circumstances appearing in the evidence against the accused were explained to him. The accused explained the incriminating circumstances in his further statement recorded u/s 313 of the Code of Criminal Procedure, 1973. After hearing learned advocates for the parties, the trial Court by the impugned judgment acquitted the accused. Being aggrieved by the said decision, the complainant has preferred this appeal.

3. I have heard learned advocate Mr. Parth Tolia for the appellant and learned advocate Mr. Ajay Panday for the respondent accused at length and in great detail. I have also perused the impugned judgment and record and proceeding of the trial Court.

4. Learned advocate Mr. Tolia mainly submitted that cases u/s 138 of the Act are tried in summary manner and therefore learned Magistrate cannot rely on the evidence recorded by his predecessor. He also submitted that in the present case, part of the evidence was recorded by one Magistrate and remaining part of the evidence and judgment was delivered by his successor Magistrate.

Therefore, the trial is vitiated and hence the case is required to be remanded to the trial Court for retrial. He relied on the decision of Hon''ble Supreme Court in the case of Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another, .

5. Learned advocate Mr. Pandav appearing for the respondent accused submitted that the present case is of the year 2009 and the decision of Hon''ble Supreme Court is delivered in the year 2011. Therefore, the said decision cannot be made applicable to the present appeal. He further submitted that the appellant has not raised this question in the memorandum of appeal and therefore, this Court cannot rely on the decision and remand the case. No other submissions are made by learned advocate Mr. Pandav for the respondent accused.

6. Section 143 of the Act provides that the offences under Chapter XVII of the Act shall be tried in a summary manner and provisions of Sections 262 to 265 of the Criminal Procedure Code shall, as far as may be apply to such trials.

7. On perusal of the record it appears that part of the evidence was recorded by one Magistrate and his successor Magistrate recorded the remaining part of the evidence and delivered the judgment. Therefore, it is clear that the Magistrate delivered the judgment relying on the evidence recorded by his predecessor. In the decision of Nitinbhai Saevatilal Shah v. Manubhai Manjibhai Panchal (supra),

Hon"ble Supreme Court has observed as under:

14. The mandatory language in which Section 326(3) is couched, leave no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-sections (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witnesses. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. Section 326(3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice.

8. In view of above, it is clear that learned Magistrate delivered the judgment relying on the evidence recorded by his predecessor. Therefore, as the case was tried as a summary case, the successor Magistrate had no authority to proceed with the trial from a stage at which his predecessor had left it. In a summary trial only substance of evidence has to be recorded. Therefore, the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Magistrate cannot appreciate the evidence recorded by his predecessor. The successor Magistrate is not in a position to appreciate such evidence effectively and there will be a serious prejudice to the party against whom an order is passed.

9. In the present case, as observed earlier, learned Magistrate delivered the judgment relying on the evidence recorded by his predecessor. Therefore, he was not in a position to appreciate the evidence effectively and serious prejudice was caused to the complainant as the accused was acquitted and hence learned Magistrate failed to do substantial justice. Therefore, the impugned judgment is required to be set aside and the case is required to be remanded to the trial Court for retrial in accordance with law.

10. As regards submission of learned advocate Mr. Pandav for the respondent accused that the decision is rendered by Hon"ble Supreme Court in the year 2011 and the present appeal is of the year 2009, the said decision cannot be applied, cannot be accepted. As regards the other contention that this point is not taken by the appellant, in view of the fact that the question is a question of law which can be agitated at the time of making oral submissions, this

submission also cannot be entertained. In view of above, the appeal succeeds. The impugned judgment is set aside and the case is remanded to the trial Court for retrial in accordance with law. Parties are directed to appear before the trial Court on 9.4.2012. If the accused fails to appear before the trial Court as directed by this Court, the trial Court is at liberty to take effective steps to secure his presence.

Record and proceedings be sent back forthwith to the trial Court.