

(2011) 03 BOM CK 0095

In the Bombay High Court

Case No : Criminal Writ Petition No. 40 of 2011

Ashish C. Shah

APPELLANT

Vs

Sheth Developers Pvt. Ltd., The State of Maharashtra and
Aparna Ashish Shah

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Companies Act, 1956 — Section 193, 194, 195, 196
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 4, 47, 65, 66, 85
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2011) 4 MhLj 288

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : Sanjay Jain, instructed by Priya V. Oswal, for the Appellant; Amit Desai, instructed by Pravina Kamani and Vidya Dongre for Respondent No. 1 and V.R. Bhosale, APP, for the Respondent

Final Decision : Dismissed

Judgement

J.H. Bhatia, J.—Rule. Rule made returnable forthwith. Heard the learned Counsel for the parties.

2. To state in brief, the Respondent No. 1 before this Court is the original complainant and the present Petitioner is the original accused No. 1 in Criminal Case No. 1171/SS/2009. Respondent No. 3 is the original accused No. 2 and wife of the present Petitioner. According to the complainant, the accused persons had represented to the complainant that they would acquire land to the extent of 1000 acres at Village Nandgaon and it could be developed jointly by the complainant and accused persons. Accused persons agreed to give inspection of the title deeds on the lands acquired till then subject to advance payment of Rs. 25 crore by the complainant. Accordingly, the complainant issued a cheque of Rs. 25 crore in the name of the accused No. 1 on 25.2.2008. That cheque was

encashed and credited to the account of the accused persons. For certain reasons, the parties could not proceed ahead with the development and the accused persons assured to repay amount of Rs. 25 crore with interest thereon. Accordingly, a cheque dated 7.1.2009 for the amount of Rs. 25 crore drawn on the joint account of both the accused with the Indian Overseas Bank, Wadala Branch was issued in favour of the complainant. The cheque was actually signed by the accused No. 1-Petitioner. However, the accused persons requested the complainant not to present the cheque for encashment till 30.1.2009 due to financial difficulties, but they assured to pay interest on the said amount. By letter dated 6.2.2009, the accused persons admitted the liability to pay the amount of Rs. 25 crore and also agreed to pay interest at the rate of 18% per annum on the said amount. The cheque was deposited by the complainant with its Banker IDBI, Cuffe Parade Branch on 5.2.2009 and the said Bank presented it to the Indian Overseas Bank for encashment. However, on 6.2.2009, the cheque was returned with the marks "insufficient funds". The intimation of the same was given by IDBI to the complainant on 7.2.2009. On 18.2.2009, the complainant issued a notice to the accused persons demanding the payment of the cheque amount. The notice was received by the accused persons on 20.2.2009 and they also replied to the same by letter dated 6.3.2009 through Advocate Prashant Chande denying the liability. Therefore, the complaint was filed u/s 138 of the Negotiable Instruments Act against both the accused.

3. After issuance of the process, the accused persons appeared before the trial Court. On 19.11.2009, Sharad Nathuram Doshi, Executive Assistant to the Chairman-cum-Managing Director of the complainant company and the constituted attorney of the complainant filed affidavit in lieu of examination-in-chief along with a list of documents. On the same day, the learned Magistrate directed to admit and exhibit those documents in evidence. That order as well as issuance of process were challenged by both the accused persons by filing two separate Writ Petitions. By the order dated 24.9.2010, this Court rejected the prayer to quash the issuance of process, but finding that the proper procedure was not followed in admitting and exhibiting the documents in evidence, direction was given to the trial Court to hear the parties and to pass appropriate order in accordance with law.. As per the said direction, the learned Magistrate heard the parties and passed the impugned order dated 6.12.2010 rejecting the the objections raised as per Ex.28 by the accused persons to exhibit the documents produced along with the complaint and evidence by the applicant. The learned Magistrate held that all the documents as already exhibited could be read in evidence. However, the accused are given liberty to bring the facts in respect of each and every document to challenge the probative value of the same. That order is sought to be quashed by filing this petition by the original accused No. 1.

4. In fact, the order admitting certain documents in evidence and giving exhibit number to the same is purely an interlocutory order and this petition could be dismissed on that count. However, as the learned Counsel for the parties argued

the matter at length, it will be appropriate to consider the objections raised by the Petitioner to admit the said documents in evidence and to give exhibit number to the same.

5. Along with the affidavit in evidence filed by Sharad Doshi, the constituted attorney of the complainant, in all 12 documents were produced as per list annexed to the same. At the time of arguments before this Court, the learned Counsel for the Petitioner did not press the objection to the admission of the document No. 3 i.e. original cheque dated 7.1.2009 which was allegedly signed by accuse Nos. 1 and 2. He also did not object to exhibiting the documents at Sr. Nos. 6, 7, 8, 10, 11 and 12. Document No. 6 is the office copy of the cheque deposit slip. Document No. 7 is the memo dated 6.2.2009 whereby the original cheque was returned, Ex.8 is the original advice note dated 7.2.2009 from the banker of the complainant about return of the cheque. Ex.10 is the original certificate of posting and receipts of registration of the notices sent by Regd. Post A.D. (colly). Ex.11 are the two registered A.D. cards with acknowledgment of receipt of the notice. Ex.12 is the original reply dated 6.3.2009 sent by the accused persons to the statutory notice dated 18.2.2009. During the arguments before this Court, the objection was restricted to document Nos. 1, 2, 4, 5 and 9.

6. Document No. 9 is the office copy of the statutory notice dated 18.2.2009 sent by the complainant to the accused persons demanding the payment of the cheque amount after the cheque was returned dishonoured. It is material to note that this very notice was replied by the accused persons on 6.3.2009 and that original reply is the document No. 12 in the said list. In fact, by the said reply the accused admitted that the notice dated 18.2.2009 was received by them and this is further corroborated by the two original registered A.D. Cards showing that that the said notice was received by the accused persons. Those two registered A.D. cards are collectively document No. 11 in the said list. Naturally, the original notices issued by the complainant and received by the accused persons must be in possession of the accused persons.

7. Section 65 of the Evidence Act provides that secondary evidence may be given of the existence, condition or contents of the document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved. In the present case, original notice appears to be in the possession and power of the accused persons and therefore secondary evidence of the said notice may be given to prove existence, condition and contents of the said document by the complainant. Section 65 further requires that secondary evidence of such document can be led when after the notice mentioned in Section 66 such person does not produce the same. The learned Counsel for the complainant/Respondent pointed out that in the affidavit in evidence filed by Sharad N. Doshi, a detailed mention was made about the issuance of statutory notice dated 18.2.2009 to the accused persons and he also stated that said notices were received by the accused persons. In the same para, he also stated "I hereby call upon the accused to produce before this Hon"be

Court the original of the demand notice received by them." He also stated that he was producing and tendering in evidence the office copy of the same demand notice. Mr. Desai, learned Senior Counsel, vehemently contended that no specific form of the notice to be issued u/s 65 or Section 66 is prescribed. According to him, when the affidavit in evidence was submitted by the witness of the complainant and in that affidavit, the accused were called upon to produce the original notices which are in their possession and power and which are sought to be proved by the secondary evidence, it was sufficient notice to produce the original.

8. Besides that by the said affidavit, the complainant had given a notice to the accused persons to produce the original notices, in view of Clause (1) to proviso to Se.66 such notice was in fact not essential. Section 66 provides for the rules to issue notice to produce the original documents as per provisions of Section 65 Clause (a). However, the proviso to Section 66 provides that such notice shall not be required in order to render secondary evidence admissible when the document to be produced is itself a notice. The learned Counsel for the Petitioner contended that his provision will not be applicable to the facts of the present case. In the Law of Evidence by Rattanlal & Dhirajlal (22nd Enlarged Edn. revised by Mr. Justice Y.V. Chandrachud, Former Chief Justice of India), the following observation is made:

Notice shall not be required to be given (under this section) when the document to be proved is itself a notice. When a party sends a notice to the opposite party and it is received by him, a copy of the notice is admissible, and it is not obligatory to issue notice calling upon the opposite party to produce the original notice.

PHIPSON on Evidence (15th Edn. (2000), para 41-31, page 1120) observes: "Notice to produce the original is not necessary:

(a)....

(b) When the document to be proved is itself a notice which has been served on the adversary; though not on a third, e.g. a notice to produce or to quit, or of action, or of the dishonour of a bill, when the action is brought upon the bill, or of intention to remove a building, pursuant to a by-law under the Public Health act, 1875 (now the Highways Act, 1980).

In the same commentary, reference is made to Lokchand Prithisingh Vs. Union of India (UOI), where in a suit against Union of India, a copy of notice u/s 80 of CPC was sought to be produced by the Plaintiff, but it was objected on behalf of the Defendant on the ground that copy was not admissible. It was held that Section 65 read with Section 66 of the Evidence Act permits the Plaintiff to produce the copy of the notice without summoning the original. It was also held that it was for the Defendant to show by production of the original that the document did not amount to a notice as per Section 80 of Code of Civil Procedure

9. In the present case, after the cheques were returned dishonoured, the complainant issued a statutory notice to the accused persons demanding payment of the cheque amount as required by Clause (b) of the proviso to Section 138 of Negotiable Instrument Act. As pointed out earlier, the documents, showing that the statutory was received by the accused and was also replied, go to establish that the said notice was in fact issued and the original is in possession of the accused persons. As the document to be proved is itself a notice, in view of Clause (1) of the proviso to Section 66, it was not necessary for the complainant to give any notice to the accused to produce the original notice before the Court. In view of the legal position and the affidavit of Sharad Doshi no objection could be taken to the admission and exhibition of the copy of the notice as the secondary evidence of the original.

10. Document No. 2 is the original power of attorney tendered in evidence along with affidavit of evidence. The said power of attorney appears to have been executed on behalf of the complainant company by its director Ashwin Sheth. The affidavit appears to have been sworn in before and has been notarized by the Notary Public. Section 85 of the Evidence Act provides that the Court shall presume that every document purporting to be a power of attorney and to have been executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, Indian Counsel or Vice Counsel or representative of the Central Government, was so executed and authenticated. Section 4 of the Evidence Act provides that whenever it is directed by the Evidence Act that the Court shall presume a fact, as it shall regard such fact as proved unless and until it is disproved. In view of Section 85 read with Section 4 of the Evidence Act, the power of attorney purporting to have been executed and authenticated before the Notary Public shall be presumed to have been executed and so authenticated unless and until it is disproved. Therefore, the burden lies on the accused to establish that the said power of attorney was not duly executed and authenticated by the person by whom it purports to have been executed. In view of this legal position, no objection could be taken to the admission and exhibition of the original power of attorney.

11. Next are the document Nos. 4 and 5. Document at Sr. No. 4 are the original letters dated 30.1.2009 and 6.2.2009 sent by the accused Nos. 1 and 2 and addressed to the complainant. Both these documents purport to have been signed by the accused Nos. 1 and 2. These letters were received by the complainant first letter at Sr. No. 4 does not bear the date of sending. However, it purports to have been received on 30.1.2009 by Ashwin Sheth, the Managing Director of the complainant company. The letter was addressed to him. By this letter, the accused persons admitted to have received amount of Rs. 25 crore on 25.2.2008 vide cheque No. 820140 drawn on ICICI Bank. In the second para, it was stated that as the negotiation in respect of the property did not materialize, both the accused had handed over a cheque of Rs. 25 crore dated 7.1.2009 drawn on Indian Overseas Bank to the complainant for repayment of the said amount. In the last para, they requested to deposit the said cheque on 5.2.2009.

The document No. 5 is the original letter dated 6.2.2009. It was issued in continuation of the earlier letter whereby the accused persons agreed to pay to the complainant interest at 18% per annum on the amount of Rs. 25 crore till repayment. Both these original letters are on the letterhead of accused No. 1 Ashvin C. Shah to the Petitioner and both these letters purport to have been signed by both the accused persons. It is to be noted that before these letters were issued, the accused No. 1 had issued a cheque dated 7.1.2009 in favour of the complainant and that original cheque is admitted. As stated earlier, no serious objection is taken to admission and execution of that cheque in evidence. The above referred two letters purporting to have been sent by the accused persons and addressed to the Managing Director of the complainant were received by the Managing Director. Not only this, in response to the statutory notice dated 18.2.2009, the accused had sent the reply dated 6.3.2009. The original reply of accused dated 6.3.2009 is at Sr. No. 12. u/s 47 of the Indian Evidence Act, when the Court has to form an opinion as to person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was or was not written or signed by that person, is a relevant fact. Explanation to Section 47 provides that a person is said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents purporting to be written by that person in answer to the document written by himself or under his authority and addressed to that person or when in the ordinary course of business the document purporting to be written by that person have been habitually submitted to him. In the present case, the two letters referred above, were received in the office of the complainant in the ordinary course of business and in respect of the transaction which had taken place between the complainant and the accused. The complainant's witness Sharad Doshi was the Executive Assistant to the Chairman-cum-Managing Director of the complainant company. In this capacity, he was expected to have received and seen the letters received from the accused persons by his boss ie. Managing Director. In paras 11 and 12 of his affidavit in evidence, witness Sharad Doshi specifically stated that the said letters were duly signed by both the accused Nos. 1 and 2 and he knows the signature of the accused Nos. 1 and 2 and could identify the same. In view of this statement on affidavit, and the provisions of Explanation to Section 47, the original letters purporting to have been signed by and received from the accused Nos. 1 and 2 could be admitted in evidence.

12. The learned Counsel for the Petitioner vehemently contended that the document could not be admitted in evidence unless author of the same was examined before the Court and in support of this contention, he relied upon Bishwanath Rai Vs. Sachhidanand Singh, . In that case, witness of one party deposed that a letter written by one S to him had been received by him. The Supreme Court held that burden lies on other side to prove its allegation that the letter was not written by S or that it was written in collusion with S and the

witness. However, the Supreme Court also held that the letter is relevant and admissible to the extent of the fact that S wrote such a letter to the witness with its contents. However, correctness of the contents of the letter would be proved only by examining S as a witness because he was the author. In the present case, the author and signatories of the above referred two letters are accused Nos. 1 and 2. The letters purporting to have been signed and sent by them were received by the Managing Director of the complainant and this fact is deposed to by witness Sharad Doshi. In view of this, if the accused persons allege that the said letters were not signed and sent by the accused persons, burden lies on them to prove the same. The contention of the learned Counsel that the contents of this document and the truth for the same cannot be proved without examining the author of the same is against the basic principles of criminal jurisprudence, because prosecution can never ask the accused to enter into witness box as a witness of prosecution. In fact, the accused cannot be called in the witness box even as defence witness unless he makes a written request for the same. Not only this, even in the statement u/s 313 Code of Criminal Procedure wherein the incriminating circumstance are required to be put to the accused to enable him to explain the same, the accused is not bound to answer those questions, though the Court may draw adverse inference against him if he keeps quiet. In such circumstances, to suggest that the document written by and signed by the accused could not be proved without examining the accused as witness of the prosecution is against the settled position of law and therefore this contention of the learned Counsel for the Petitioner is liable to be rejected.

13. In *Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import*, , the Supreme Court observed thus in para 16:

Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue.

14. In view of this, it is clear that mere proof of handwriting of a document would not be tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue, the same would have to be proved by admissible evidence. In the present case, the above referred two letters purport to have been signed and sent by the accused persons and therefore the documents can be admitted in evidence. About the truth and otherwise if any doubt arises, it can be proved independently and because these letters were authored and signed by the accused, the burden may lie on them to establish the circumstances in which those letters were written, if the contents are not correct. The same thing would be applicable to the original reply dated 6.3.2009 sent by the accused in response to the statutory notice

dated 18.2.2009.

15. Next comes the document No. 1 -the certified true copy of the resolution dated 16.2.2009, whereby the complainant company had allegedly resolved to give consent of the Board of Directors to execute power of attorney in favour of Ashwin Sheth, Managing Director and/or Sharad Doshi, Executive Assistant to the Managing Director to institute or defend any suit or criminal proceedings. The learned trial Court observed in the impugned order that there is no clear-cut provision about issuance of certified copy of extract of minutes book but if Sub-section (2) of Section 196 of the Companies Act is read, it may be stated that certified copy of the minutes can be given. The learned trial Court observed that the witness Sharad Doshi in his affidavit had deposed about the said document and thereby he has proved the genuineness of the document. u/s 195 of the Companies Act, where minutes of the proceedings of any general meeting of the company have been kept in accordance with the provisions of Section 193, then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place. Section 194 of the Companies Act provides that the minutes of meetings kept in accordance with the provisions of Section 193 shall be evidence of the proceedings recorded therein. However, no provision in the Companies Act is brought to my notice which provides that the certified copy or extract of the minutes would be admissible in evidence without proof of the original. Section 65(f) of the Evidence Act provides that secondary evidence may be given of the existence, condition and contents of the document when the original is the document of which a certified copy is permitted by the Evidence Act or by any other law in force in India to be given in evidence. As no provision from the Companies Act is brought to my notice under which the certified copy of the minutes of the meetings of the board of directors is admissible in evidence without proof of the original, it must be said that the copy of the minutes cannot be admitted in evidence directly unless the original is proved or the copy is admitted by opposite party. Therefore, even though that document is given exhibit number, it cannot be treated to have been proved, unless the complainant leads appropriate evidence to prove the minutes.

16. For the aforesaid reasons, the petition stands dismissed, except in respect of the document No. 1 in the index filed with the affidavit in evidence of Sharad Doshi. The complainant shall be at liberty to lead evidence to prove the original of that document.

17. The trial Court shall expedite the hearing and dispose of the case as early as possible.

Rule made absolute accordingly.