

(2012) 02 GUJ CK 0021

In the Gujarat High Court

Case No : Special Criminal Application No. 313 of 2009

Bharatbhai Okhaji Padhier

APPELLANT

Vs

Jyotsanaban Purshottamdas Patel and 1

RESPONDENT

Date of Decision : 01-02-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 227
Criminal Procedure Code, 1973 (CrPC) — Section 243, 482
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2012) 02 GUJ CK 0021

Hon'ble Judges : Mukesh R. Shah, J

Bench : Single Bench

Advocate : Harshadray A Dave, Mr Hardik A Dave, for the Appellant; Rule Served for Respondent(s) : 1, Mr Nishith P Thakkar for Respondent(s) : 1 and Mr LB Dabhi, Assistant Public Prosecutor for Respondent(s) : 2, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice M.R. Shah

1. Present Special Criminal Application under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal procedure, 1973 (hereinafter referred to as "CrPC") has been preferred by the petitioner herein - original accused to quash and set aside the impugned common order dated 19.01.2009 passed by the learned Metropolitan Magistrate (NI Act), Court No. 4, Ahmedabad passed below Exhs.18 and 19 in Criminal Case No. 1088/2008 (old case No. 4314/2007).

2. Respondent No. 2 herein - original complainant had instituted the private complaint being Criminal Case No. 1088/2008 (old case No. 4314/2007) against the petitioner herein - original accused in the Court of learned Metropolitan Magistrate (NI Act), Court No. 4, Ahmedabad for the offence u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "NI Act"). That in the said criminal case, after completion of the prosecution evidence and further

statement of the present petitioner - original accused, the petitioner chosen to examine defence witnesses as well as to give evidence on oath. In the further statement it was the specific case on behalf of the petitioner that except signature on the cheque which has been dishonoured, nothing was written on the cheque by him and all other things were inserted on the cheque by the complainant or somebody else on instruction of the complainant. Therefore, the present petitioner preferred applications Exh.18 and 19 requesting the learned trial Court to send the said cheque for the purpose of examination of it by handwriting expert which has been rejected by the learned trial Court by the impugned order dated 19.01.2009. Being aggrieved and dissatisfied with the impugned common order passed by the learned trial Court passed below applications Exh.18 and 19 in Criminal Case No. 1088/2008) in rejecting the applications submitted by the petitioner to send the said cheque to the handwriting expert to prove the defence of the petitioner that the contents on the said cheque are not made by the petitioner, the petitioner - original accused has preferred the present Special Criminal Application under Article 227 of the Constitution of India read with Section 482 of the CrPC.

3. Shri Hardik Dave, learned advocate appearing on behalf of the petitioner has vehemently submitted that the impugned common order passed by the learned trial Court rejecting the application of the petitioner to send the cheque in question to handwriting expert to prove the defence of the petitioner that the contents on the said cheque are not made by the petitioner - accused, is absolutely illegal and contrary to the provisions of statutes and contrary to the decision of the Hon'ble Supreme Court in the case of T. Nagappa Vs. Y.R. Muralidhar, . It is submitted that as held by the Hon'ble Supreme Court in the aforesaid decision, for the defence of misuse of cheque by the complainant, opportunity must be granted to the accused for adducing the evidence. Therefore, making above submissions and relying upon above decision, it is requested to allow the present petition.

4. This petition is adjourned on number of occasions. However, the learned advocate appearing on behalf of the original complainant has chosen to remain absent. Today also, when the present petition is taken up for final hearing and called out twice, on both the occasions, the learned advocate appearing on behalf of respondent No. 2 has chosen to remain absent. Hence, this Court has no other alternative but to proceed further with the hearing of the present petition ex-parte.

5. Shri L.B. Dabhi, learned Additional Public Prosecutor has requested to pass appropriate order considering the facts and circumstances of the case and the decision of the Hon'ble Supreme Court in the case of T. Nagappa (Supra).

6. Heard Shri Hardik Dave, learned advocate appearing on behalf of the petitioner and Shri Dabhi, learned APP appearing on behalf of the State. At the outset it is required to be noted that it was the specific case / defence on behalf of the petitioner - accused that except the signature on the cheque, nothing was

written on the cheque by him and the contents on the cheque was inserted by respondent No. 2 - original complainant or somebody else on his instruction. Therefore, to prove his defence, the applications Exh.18 and 19 were submitted by the petitioner - accused requesting the learned trial Court to send the said cheque for the purpose of examination of it by handwriting expert and the said applications have been rejected by the learned trial Court by impugned common order by observing that both the sides do not prove in whose handwriting the contents of the cheque are. While rejecting the said applications, the learned Magistrate has observed that the petitioner - original accused can prove his defence by leading other evidence. It is not appreciable what other evidence can be lead by the accused and how the petitioner would prove his evidence by other evidence. It is required to be noted that it was the specific case on behalf of the petitioner that no amount was due and payable to the complainant and the cheque which was lying with her brother has been misused by the complainant by adding particulars on cheque.

6.1 Identical question came to be considered by the Hon''ble Supreme Court in the case of T. Nagappa (Supra) and in paras 7 to 9, the Hon''ble Supreme Court has observed and held as under:

7. When a contention has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised u/s 118(a) or 139 of the said Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places the burden on the accused, he must be given an opportunity to discharge it.

An accused has a right to fair trial. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India. The right to defend oneself and for that purpose to adduce evidence is recognized by the Parliament in terms of sub-section (2) of Section 243 of the Code of Criminal Procedure, which reads as under :

Section 243 -Evidence for defence. -(1)

(2) If the accused, after he had entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice."

8. It should be the nature of evidence is not a matter which should be left only to

the discretion of the Court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protracting the trial or summon witnesses whose evidence would not be at all relevant.

9. e learned Trial Judge as also the High Court rejected the contention of the appellant only having regard to the provisions of Section 20 of the Negotiable Instruments Act. The very fact that by reason thereof, only a prima facie right had been conferred upon the holder of the negotiable instrument and the same being subject to the conditions as noticed hereinbefore, we are of the opinion that the application filed by the appellant was bona fide.

The issue now almost stands concluded by a decision of this Court in Mrs. Kalyani Baskar Vs. Mrs. M.S. Sampornam, (in which one of us, L.S. Panta, J., was a member) wherein it was held :

12. Section 243(2) is clear that a Magistrate holding an inquiry under Cr PC in respect of an offence triable by him does not exceed his powers u/s 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them.

6.2. Under the circumstances and considering the decision of the Hon'ble Supreme Court in the case of T. Nagappa (Supra), the impugned order passed by the learned Magistrate rejecting the application Exh.18 cannot be sustained and the same deserves to be quashed and set aside.

7. In view of the above and for the reasons stated above, petition succeeds in

part and the impugned order dated 19.01.2009 passed below application Exh.18 in Criminal Case No. 1088/2008 (old case No. 4314/2007) by the learned Metropolitan Magistrate (NI Act), Court No. 4, Ahmedabad is hereby quashed and set aside and the said application Exh.18 is hereby allowed. So far as the application Exh.19 submitted by the petitioner - accused to draw adverse inference in case the complainant refuses to give specimen of her handwriting is concerned, it is kept open to be considered by the learned Magistrate subsequently in accordance with law and on merits. Even what will be the consequences if the contents on the cheque are not found to be in handwriting of the petitioner - accused are also kept open which be considered by the learned Magistrate in accordance with law and on merits and the present petition is allowed only qua application Exh.18. Rule is made absolute to the aforesaid extent.