
(2013) 08 BOM CK 0026

In the Bombay High Court

Case No : Criminal Application Nos. 796 and 797 of 2012

Bhausahab Shravan Kumawat

APPELLANT

Vs

Santosh Madhavrao Vyavhare and Another

RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 907

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Judgement

Sadhana S. Jadhav, J.—Applicant herein is seeking leave to appeal against the Judgment and Order of acquittal passed by Judicial Magistrate First Class Yeola in S.C.C. No. 10/2010 thereby acquitting the respondent No. 1 u/s 138 of Negotiable Instruments Act. The facts of the case in nutshell are like that: Present applicant happens to be the original complainant in S.C.C. No. 10/2010. It is the case of the complainant that the accused i.e. Santosh Madhavrao Vyavhare was acquainted with the applicant as they both were in the same business. Accused had demanded an amount of Rs. 65,800/- as a hand loan from the complainant and the complainant had obliged him by paying the said amount of 08/02/2009. Accused had assured the complainant that the said amount would be repaid within one month. However, he did not fulfill the assurance which he made in spite of repeated demands. On 20/11/2009, the accused had issued a cheque to be drawn on Yeola Merchant Co-operative Bank for an amount of Rs. 45,800/-. The said cheque was dishonored on 25/11/2009 due to "Insufficient Funds". The complainant had issued statutory notice. Since no payment was made, the complainant filed a complaint in the Court of Judicial Magistrate First Class, Yeola.

2. The complainant has examined himself on oath. The complainant has also filed documentary evidence. The accused had replied the notice which is at Exhibit 23. The accused i.e. present respondent had examined his wife Anita.

3. It is the case of the accused that the cheque was given to the complainant by

way of security. After taking into consideration the role as well as documentary evidence, learned Magistrate has acquitted the accused u/s 138 of Negotiable Instruments Act.

4. Learned counsel appearing for the applicant submits that the fact that the accused has admitted his signature on the cheque and that it was issued in favour of the complainant is sufficient in the ordinary course of nature to hold that there is presumption in favour of the complainant. It is further submitted that only in the eventuality that the presumption is rebutted by the accused then the complainant needs to prove that there was legally enforceable debt and that the accused was liable to pay an amount to the complainant.

5. In the present case, it is pertinent to note that the complainant has stated that the said disputed cheque was issued for repayment of the hand loan. The contentions in the complaint are vague. It is not stated in the complaint as to when the demand was made. Contentions are inconsistent. In the cross-examination, the complainant has feigned ignorance about the actual business of the accused on that he had also stated that they were in the same business. The complainant has not disclosed the identity of the person in whose presence he had advanced the hand loan to the accused and therefore the complainant cannot rely upon the evidence of P.W. 2 as an eye witness. It is not mentioned in the complaint or the affidavit that the transaction had taken place in presence of P.W. 2. Hence learned Magistrate has rightly held that P.W. 2 is a got up witness. His presence at the time of transaction is neither stated in the complaint nor in the affidavit of evidence. The Magistrate has therefore rightly observed that the contention of the complainant in respect of mentioning the name of P.W. 2 in the complaint is due to over sight. The Magistrate has also rightly observed that the complainant has failed to prove that on 08/02/2009 he had cash of Rs. 65,800/- readily available with him. The complainant has not substantiated his source of income. The complainant has admitted before the Court that his annual income is 48 thousand to 50 thousand and therefore it cannot be believed that he had the capacity to advance the loan of Rs. 65,800/-.

6. It is the case of the complainant that the accused had issued two cheques. One of the cheque for Rs. 45,800/- and the complaint by way of S.C.C. No. 58/2010 was pending in respect of another cheque. It is not the case of the complainant that the accused had issued these two cheques on different occasions. Both the cheques were issued on the same day to be honored on two different dates. Cheque bearing No. 012337 is dated 20/11/2009 whereas the cheque bearing No. 012336 is dated 25/11/2009. The Magistrate has rightly observed that the sequence of cheques would not inspire the confidence of the Court to believe the complainant. Complainant had admitted before the Court that on 25/11/2009 he was fully aware that there were insufficient funds in the account of the accused and in spite of the same he had deposited the second cheque. Upon taking into consideration the evidence adduced by the complainant, the Magistrate has recorded justifiable reasons for acquitting the

accused. The findings recorded by the Magistrate do not warrant any interference.

ORDER

i) Application seeking leave to appeal is rejected with no order as to costs.