

(2012) 02 GUJ CK 0098
In the Gujarat High Court
Case No : Criminal Appeal No. 224 of 2011

Bipinbhai Vadilal Soni

APPELLANT

Vs

Suhas Aswinkumar Doshi and Another

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 326, 326(3), 378
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 1 BC 315 : (2013) 1 RCR(Civil) 596

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : Hemant K. Makwana, for the Appellant; Shaili A. Kapadia, Advocate for the Respondent No. 1 and Ms. C.M. Shah, Assistant Public Prosecutor for the Respondent 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 acquittal passed by Sixth Additional Senior Civil Judge and Additional Chief Judicial Magistrate, Dahod, in Criminal Case No. 937 of 2005 acquitting the respondent accused for the offence u/s 138 of the Negotiable Instruments Act, 1881 ("the Act" for short). According to the complainant as the accused was in need of finance, he demanded money from him and therefore Rs. 1,51,000/- were advanced to the accused who gave cheque No. 010706 dated 1.3.2005 for Rs. 1,51,000/- drawn on the Dahod Urban Co-operative Bank Limited towards repayment of the amount. On presentation of the cheque in the Bank, it returned unpaid with the endorsement "title of the account required". Therefore, notice through Advocate was served to the accused who gave false and evasive reply but did not pay the unpaid amount of the cheque. Therefore, complaint was filed in the Court of learned Chief Judicial Magistrate, Dahod and it was registered as Criminal Case No. 937 of 2005. The trial Court issued summons and the respondent accused appeared and denied having committed

offence. Therefore, prosecution adduced evidence. On completion of recording of evidence, further statement of the respondent accused was recorded. After hearing learned Advocates for the parties, by the impugned judgment the trial Court acquitted the respondent accused. Being aggrieved by the said decision, the complainant has preferred this appeal.

2. I have heard learned Advocates for the parties at length and in great detail. I have also perused the record and proceedings of the trial Court.

3. Learned Advocate for the appellant Mr. Makwana submitted that the cases u/s 138 of the Act are required to be tried in summary manner and accordingly the present case was also tried in summary manner wherein only substance of evidence was recorded. He submitted that the evidence was recorded by two different learned Magistrates and their successor Magistrate who did not record the evidence, delivered the judgment. Therefore, in view of the decision of Hon''ble Supreme Court in the case of Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another, the judgment is required to be set aside and matter is required to be remanded to the trial Court for de novo trial.

4. Learned Advocate Ms. Shaili Kapadia for the respondent accused could not dispute the fact that the evidence was recorded by two different learned Magistrates and the judgment was delivered by their successor Magistrate.

5. On perusal of the record and proceedings, it emerges that evidence was recorded by two different learned Magistrates and the judgment was delivered by the successor Magistrate who did not record the evidence.

6. It appears from the record of the trial Court that learned Magistrate who delivered the judgment did not record evidence in the case but relied on the evidence recorded by his predecessor and delivered the judgment acquitting the accused. In the decision of Nitinbhai Saevatilal Shah v. Manubhai Manjibhai Panchal (supra), Hon''ble Supreme Court has ruled that when a case is tried as summary case a Magistrate who succeeds who had recorded part or whole of the evidence cannot act on the evidence so recorded by his predecessor. In summary proceedings the successor Judge or Magistrate has no authority to proceed with the trial from the 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 witness. 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 it would be

difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice.

7. In light of the law laid down by Hon''ble Supreme Court, as observed earlier, in the present case the Magistrate who recorded the evidence did not deliver the judgment but his successor Magistrate relying on the evidence recorded by his predecessor passed order of acquittal of the accused. Therefore, serious prejudice is caused to the complainant as the succeeding Magistrate was not in a position to appreciate the substance of evidence recorded by his predecessor and decide the matter effectively and 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 re-trial. In the result, the appeal is allowed. The judgment and order of acquittal passed by the trial Court in Criminal Case No. 937 of 2005 on 24.11.2010 is set aside and the case is remanded to the trial Court for re-trial in accordance with law. The parties are directed to appear before the trial Court on 2.4.2012. If the accused fails to appear before the trial Court as directed by this Court, learned Magistrate is at liberty to take effective steps to secure his presence. Record and proceedings be sent back to the trial Court forthwith.