
(2010) 09 BOM CK 0069
In the Bombay High Court
Case No : Criminal Appeal No. 53 of 2010

Deepakrao Yadavrao Gudadhe	Vs	APPELLANT
Prashant Premsing Kachwe		RESPONDENT

Date of Decision : 07-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Negotiable Instruments Act, 1881 (NI) — Section 118, 138

Citation : (2011) 1 MhLj 355

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : I.S. Charlewar, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

A.P. Bhangale, J.—This appeal is filed challenging judgment and order dated 5th April 2009 passed by the Judicial Magistrate, First Class, Amravati in Summary Criminal Case No. 4426 of 2004 whereby the learned Magistrate has acquitted the respondent of the offence punishable u/s 138 of the Negotiable Instruments Act.

2. Heard. Admit. Taken up for final hearing forthwith as per order dated 30th August 2010.

3. Out of cordial relations, respondent demanded hand loan of Rs. 60,000/- from the appellant which the appellant gave. Though promised, respondent did not repay the amount within three months. Respondent issued post-dated cheque of the date 15.7.2004 drawn on State Bank of India, Rajapeth Branch, Amravati for Rs. 60,000/- in favour of appellant for discharge of liability. Appellant deposited the said cheque with his banker on due date, but it was returned unpaid under memos dated 16.7.04 and 17.7.04 on account of the fact that the respondent had closed the account. Appellant sent legal notice dated 29.7.2004 by RPAD as well as under Postal Certificate calling upon the

respondent to make payment within fifteen days. Respondent accepted the notice which was sent under postal certificate, but the notice sent by RPAD was returned on 10.8.2004 since the respondent did not claim it. Since the respondent failed to comply with the demand made in the notice, appellant filed complaint u/s 138 of the Act before the learned Magistrate on 15.8.2004.

4. Respondent in his statement recorded u/s 313 Cr.P.C. denied the claim and in his defence stated that he had obtained hand loan of Rs. 7000/- from the complainant in 1997 agreeing to pay interest @ 7% p.a.; he repaid the entire amount together with interest thereon from time to time. According to the respondent, he had given one blank cheque to the complainant by way of security; there was dispute between them on the point of interest and complainant had threatened him that he would settle score and, therefore, false complaint had been filed.

5. Learned Counsel for the appellant contends that impugned judgment and order is not sustainable on account of non-application of mind by learned trial Magistrate to the essential ingredients to constitute offence punishable u/s 138 of the Negotiable Instruments Act. He further criticised the impugned judgment on the ground that findings written against the points framed are contrary to the conclusion drawn by the learned Magistrate.

6. None appeared for respondent. On some dates, Mr. S.J. Kadu, Advocate appeared for respondent, but today he is absent. Learned Counsel for the appellant makes a statement at the bar that he had conveyed to Mr Kadu about the Court's intention to dispose of the matter finally as per order dated 30th August 2010.

7. In *Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd.* reported in (2002) 2 SCC 745 the Apex Court has laid down the following ingredients:

(i). a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any legally enforceable debt or other liability;

(ii). That the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(iii). That the cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by any agreement made with the bank;

(iv). The payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v). the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 30 days of the receipt of the said notice.

Needless to say, as to the presumption relating to consideration available u/s 118 of the Act until the contrary is proved, is that every negotiable instrument was made or drawn for consideration and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration and as to the date, the presumption available is that every negotiable instrument bearing a date was made or drawn on such date.

8. It is obvious that the learned Magistrate did not frame the points and deal with the matter properly. Without observing anything on merits of the matter, therefore, it needs to be remanded for its disposal according to law and in view of the ratio laid down by the Apex Court in Kusum Ingot's case (supra).

9. In the result, impugned judgment and order is quashed and set aside. The matter is remitted back to the learned Magistrate for its disposal afresh according to law and in accordance with the judgment of the Apex Court in Kusum Ingot's case (supra) after giving opportunity to the parties to lead additional evidence, if any. Parties shall appear before the learned Magistrate on 24th September 2010.