

(2008) 08 BOM CK 0109

In the Bombay High Court

Case No : Criminal Revision Application No. 379 of 1998

Ghanshyam Garje

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 423, 435, 439
Penal Code, 1860 (IPC) — Section 420, 468, 471

Citation : (2008) 110 BOMLR 2648

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : Joydeep Chatterji, for the Appellant; Dilip Patil Bankar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Kingaonkar, J.—By this Petition, Petitioner impugns Judgment rendered by learned Sessions Judge, Beed, in Criminal Appeal No. 2/1995, whereby and whereunder conviction and sentence rendered by learned Chief Judicial Magistrate, Beed in Criminal Case bearing (RCC No. 478/1993), to the extent of offences punishable Under Sections 420, 471 of the I.P.C. came to be confirmed.

2. The Revision Petitioner is a contractor for Civil works. He was prosecuted for commission of offences Under Sections 420, 468 and 471 of the I.P.C. He was tried before learned Chief Judicial Magistrate on such charges in RCC No. 478/1993. He was convicted for the offence punishable u/s 420 of the I.P.C. and was sentenced to undergo simple imprisonment for one year and to pay fine of Rs. 5,000/- (Rupees five thousand), in default to suffer simple imprisonment for three (3) months. He was also convicted for the offence u/s 468 of I.P.C. and sentenced to undergo simple imprisonment for six (6) months and to pay fine of Rs. 5,000/-, in default to undergo simple imprisonment for three (3) months. He was further convicted for the offence u/s 471 of the I.P.C. and sentenced to undergo simple imprisonment for six (6) months and to pay fine of Rs. 5,000/-

(Rupees five thousand), in default to suffer simple imprisonment for three (3) months. The substantive sentences were directed to run concurrently.

3. Feeling aggrieved, the petitioner preferred Criminal Appeal No. 2/1995 which was partly allowed. The learned Sessions Judge, acquitted the Petitioner for the offence punishable u/s 468 of the I.P.C. The conviction and sentence for offences punishable Under Sections 420 and 471 of the I.P.C. as rendered by the learned Chief Judicial Magistrate, however, came to be confirmed by the appellate Court. Hence, the Revision Petition.

4. Indisputably, the petitioner was working as contractor of A-1 grade. A tender submitted by him for construction of a percolation tank at Pimparkhed was accepted by the Zilla Parishad, Beed. The works contract was given to him in 1988. The total estimated value of the said Civil work was of Rs. 20,569-10 Ps. Though, the works contract was given in his name, yet, the actual work was being executed by another contractor, namely, Nana Parthe. The Petitioner was name-lender because said Nana Parthe had no license to work as a contractor. The petitioner use to allegedly receive certain commission for allowing use of his name as tenderer and the works contractor.

5. There is no dispute about the fact that the first bill was drawn and payment of Rs. 10,624/- was given to the petitioner by way of cheque issued by the office of Zilla Parishad, Beed. There is also no dispute about the fact that the remaining amount was only of Rs. 2,314/- which was paid through a cheque. The cheques were scribed by the P.W. Vasant Warpe, Junior Clerk attached to the Minor Irrigation Department of Zilla Parishad, Beed. This cheque (Exh.22) was tampered with.

6. The prosecution case is that the cheque (Exh.22) was issued only for Rs. 2,314/- payable to the petitioner but was forged by interpolating the figure "6" preceding the figure "2" and words "sixty two thousand" instead of "two thousand". The initials of the drawee were also forged at the place of interpolation. Thus, the cheque in question was altered, doctored and fabricated with intention to obtain unlawful gains by encashing the same.

7. There is no dispute about the fact that the petitioner presented the said forged cheque at District Central Cooperative Bank, Branch Ashti alongwith the collection slip. The accountant of the concerned Bank allowed withdrawal under a cheque simultaneously given by the petitioner for Rs. 60,000/-. The bearer cheque (Exh.60) given by the petitioner was allowed to be encashed on his furnishing an undertaking that if the altered cheque (Exh.22) presented by him on 5.2.1989 would not be cleared then he would refund the said amount. This undertaking was obtained from him in writing by the Cooperative Bank inasmuch as there was no sufficient amount at his credit in the Bank account. The altered and doctored cheque (Exh.22) was a cross account payee cheque issued in name of the petitioner. The amount of Rs. 62,314/- was withdrawn from the account of the Zilla Parishad during clearance of the cheque by the State Bank of

Hyderabad, Branch Beed. The reconciliation statement of the Bank revealed such payment made to the petitioner. The reconciliation statement was received by the Zilla Parishad on 11.11.1989. The Executive Engineer noticed that the amount of the cheque dated 30.9.1989 was only of Rs. 2,314/- but the actual payment made to the petitioner was of Rs. 62,314/-. So, he made necessary inquiry. He came to know that the cheque in question was forged before it was presented to the Cooperative Bank at Ashti. Hence, he lodged F.I.R. Consequent upon certain investigation, the petitioner was prosecuted for commission of the offences as stated earlier.

8. At trial, the prosecution examined ten (10) witnesses in support of its case. The petitioner examined himself on oath and adduced evidence of two other witnesses, namely, D.W.1 Khushal and D.W.3 Eknath Shekde, advocate. He also placed on record written acknowledgment obtained from Nana Parthe on a stamp paper (Exh.81) pertaining to payment of Rs. 60,000/- to him towards the amount of the cheque (Exh.22) which was encashed by him. The defence of the petitioner was that he did not commit forgery of the cheque in question. He asserted that the interpolations were not made by him. He feigned knowledge about forgery of the cheque (Exh.22). Consequently, he stated that he could not know that the cheque (Exh.22) presented by him was being used to gain unlawful money. Hence, he urged to acquit him from the charges.

9. The learned Sessions Judge came to the conclusion, and rightly so, that in the absence of opinion of handwriting expert, it was difficult to hold that the petitioner is author of the alleged forgery of the cheque in question. The learned Sessions Judge, however, noticed certain circumstances which indicated complicity of the petitioner in respect of the offences Under Sections 420, 471 of the I.P.C. Therefore, the conviction and sentence for such offences came to be confirmed.

10. Mr. Chatterji, would submit that the petitioner could not be convicted for offences Under Sections 420, 471 of the I.P.C. when he was unaware of the alleged forgery. He would submit that the petitioner was only name-lender and, therefore, his pecuniary interest in the works contract was limited to the extent of 4% payment and hence, it was improbable that he could have presented the forged cheque at the Cooperative Bank, Branch at Ashti with the knowledge that it was interpolated and fabricated by someone. It is argued that there is no tangible evidence to infer knowledge of the petitioner in respect of the alleged forgery of the cheque (Exh.22). It is further contended that the petitioner could have no criminal intention to cheat the Zilla Parishad for the amount shown under the cheque in question inasmuch as the actual payment was to go in the hands of Nana Parthe. Mr. Chatterji, would also submit that the defence versions of D.W. Khushal and D.W. Eknath Shekde, advocate are not taken into account by the appellate Court and, therefore, erroneous finding is rendered in respect of guilt of the petitioner. He would submit that the findings of the appellate Court are perverse and liable to be set aside. Per contra, learned A.P.P. supports the

impugned judgment.

11. Before I proceed to consider merits, in the context of the contentions raised by Mr. Chatterji, it would be useful to embark upon scope of Section 401 of the Cr.P.C. The Revisional Court cannot reappreciate the evidence in the exercise of Revisional jurisdiction. The Apex Court in *Duli Chand Vs. Delhi Administration*, , held that the jurisdiction of the High Court in Criminal Revisional jurisdiction is severely restricted. It is held that the High Court cannot embark upon reappreciation of evidence in the exercise of Revisional jurisdiction. It is also well settled that the Revisional jurisdiction is normally to be exercised only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error or patent error committed in ignorance of law which has resulted in flagrant miscarriage of justice. The concurrent findings of facts cannot be disturbed, ordinarily, in the exercise of Revisional jurisdiction unless it is demonstrated that the findings are based on perfunctory appreciation and the process of finding is without well grounded reasoning. The Apex Court in *State of Karnataka Vs. Appa Balu Ingale and others*, , held that generally speaking, concurrent findings of facts arrived at by the two Courts below are not to be interfered with by the High Court in absence of any special circumstances or unless they are perverse.

12. The Apex Court in *State of Orissa Vs. Nakula Sahu and Others*, , observed as follows:

So far as the first point is concerned, it is to be emphasised that although the revisional power of the High Court u/s 439 read with Section 435 of the Code of Criminal Procedure, 1898 is as wide as the power of Court of Appeal u/s 423 of the Code, it is now well settled that normally the jurisdiction of the High Court u/s 439 is to be exercised only in exceptional cases when there is a glaring defect in the procedure or there is a manifest error on the point of law which has consequently resulted in flagrant miscarriage of justice, reference in this connection may be made to the decisions of this Court in *Amar Chand Agarwalla Vs. Shanti Bose and Another*, etc., and *Akalu Ahir and Others Vs. Ramdeo Ram*, . In the latter case viz. *Akalu Ahir v. Ramdeo Ram* (supra) this Court following its earlier decision in *Amar Chand Agarwalla v. Shanti Bose* (supra) held that in spite of the wide language of Section 435 of the Code of Criminal Procedure, 1898 which empowered, it to satisfy itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed by any inferior Court situate within the limits of its jurisdiction and as to the regularity of any proceedings of such inferior court and in spite of the fact that u/s 439 of the Code it can exercise inter alia the power conferred on a Court of appeal u/s 423 of the Code the High Court is not expected to act u/s 435 or Section 439 as if it is hearing an appeal. The power being discretionary, it has to be exercised judiciously and not arbitrarily or lightly. Judicial discretion, as has often been said, means a discretion which is informed by tradition, methodised by analogy and disciplined by system.

13. Considering the limited scope of the Revisional jurisdiction, it is essential to examine whether the concurrent findings of the facts are required to be interfered with. Mr. Chatterji, would submit that the petitioner could not have mens rea when the forged cheque was presented for encashment. He would point out that the petitioner is educated only upto VIth standard.

14. So far as the findings of the appellate Court are concerned, it may be mentioned that the petitioner was acquitted for offence u/s 468 of the I.P.C. because the version of D.W. Khushal seems to have been considered. The appellate Court took cognizance of the fact that the petitioner may not be the forger of the cheque (Exh.22) inasmuch as it changed hands before he received the same. The forged cheque (Exh.22) was handed over by P.W. Warpe to D.W. Khushal Garje. Said D.W. Khushal was known to P.W. Warpe due to his cordial relations with Nana Parthe. One cannot be oblivious of the fact that previously too an amount of Rs. 10,624/- was withdrawn pursuant to the first bill of the works contract. The next running bill was of Rs. 12,986/-. Out of next running bill, the previous amount alongwith Income Tax was deducted and, therefore, the second cheque only of Rs. 2,314/- was issued in name of the petitioner.

15. The ingredients of Section 471 of the I.P.C. required to be established by the prosecution are as follows:

- (a) That the document was fabricated or forged;
- (b) That, the person using such fabricated document had knowledge or had reason to believe that it was concocted; and
- (c) That the document was fraudulently or dishonestly used by such person.

16. In the present case, it is proved beyond doubt that the forged cheque (Exh.22) was used by the petitioner and that the forgery thereof was committed before it was tendered by him. Obviously, the only question is whether he fraudulently used the forged cheque having reason to believe or with knowledge that it was a forged document. The expression "having reason to believe" does imply state of mind which a prudent man can have in view of the attending circumstances. The human mind cannot be fathomed. The presence for reasons for belief may be inferred from the attending circumstances.

17. The circumstances which are brought on surface of the record may be recapitulated as follows:

- (i) The petitioner is a seasoned contractor of A-1 grade;
- (ii) The forged cheque (Exh.22) was an account payee cheque issued in the name of the petitioner;
- (iii) Though works contract was executed by Nana Parthe, may be as a subcontractor or real contractor, yet, the tender was filled by the petitioner. The total estimated Civil work of the percolation tank was only of Rs. 20,569-10 Ps.

Assuming that he was to receive only 4% of the amount as commission, yet, even for such purpose he could have knowledge of the estimated cost of the civil work;

(iv) The petitioner had encashed the previous cheque of Rs. 10,624/- and, therefore, it was but natural that as a prudent man, he could not have believed that the remaining amount of payment could be of Rs. 62,314/-. At the first blush itself he ought to have suspected the forgery if the amount shown under the cheque was not due at all;

(v) The petitioner was made aware by the Manager of the Cooperative Bank, Branch Ashti that the encashment of the cheque was not free from doubt because the Manager obtained an undertaking from him while permitting withdrawal of Rs. 60,000/- against the personal cheque (Exh.60) issued by him on the same day. The withdrawal of the amount was made by the petitioner. He received the cash amount of Rs. 60,000/- on presentation of the bearer cheque (Exh.60), the day he presented the forged cheque (Exh.22) at the Cooperative Bank, Branch at Ashti; (vi) The forged cheque is dated 30.9.1989 and an amount of Rs. 60,000/- was withdrawn by the petitioner on 5.10.1989 after depositing the forged cheque in his account. Thereafter, he made no further efforts to take anything in writing from Nana Parthe in the context of the payment made to the latter. It was only on 15.11.1989 that he obtained an agreement (Exh.81) on stamp paper from said Nana to the effect that if any complaint is received about the cheque dated 30.9.1989, the executant i.e. Nana would be responsible for the same. This appears to be post complaint action taken by the petitioner. For, the complaint (F.I.R.) was lodged on 13.11.1989 by the Executive Engineer of Irrigation Department. Thus, the petitioner apparently got prepared the written agreement by way of defence after the Criminal law was set in motion;

(vii) Being A-1 grade contractor of Civil works, the petitioner can be imputed with knowledge of the estimated cost of the work for which the tender was submitted by him. He can be imputed with the knowledge of such cost of the Civil work when first running bill was cleared and the cheque of Rs. 10,624/- was received by him. It does not stand to reason that he could not know that the amount shown under the forged cheque (Exh.22) was not due towards the said civil work. In fact, Nana Parthe was a petty contractor. He was working without appropriate licence. He would have lost the entire business if he master minded forgery in order to gain easy money.

18. The petitioner did not call said Nana Parthe in the witness box to prove his defence. The agreement (Exh.81) purportedly executed by said Nana Parthe cannot, therefore, be used to absolve the petitioner from Criminal liability. The versions of D.W. Khushal, and D.W. Eknath Shekde, advocate only show that the cheque was obtained by D.W. Khushal and that it was presented to the Bank in presence of D.W. Eknath Shekde, advocate. Their versions do not wipe out the deducible inferences which emanate from the proved facts as mentioned above. The attending circumstances are sufficient to establish the fact that the petitioner

must have reasonable ground to believe that the forged cheque (Exh.22) was being used by him as genuine one, so as to obtain unlawful gains. He was not entitled to receive such amount shown under the cheque. It is duly proved that he committed the offence of cheating by misusing the cheque in order to defraud office of Zilla Parishad.

19. Mr. Chatterji, seeks to rely on AIR 1940 360 (Nagpur) , A Single Bench of Nagpur High Court, held that to justify prosecution of a pleader u/s 471 it must be shown that he had knowledge that the document was concocted. The mere fact that the suspicion of a pleader ought to have been aroused by the sight of the document is not prima facie evidence that he knew or had reason to believe the document to be forged. The present case stands on different footing. Herein it is not only the circumstance that the petitioner's suspicion ought to have aroused at the sight of the forged cheque (Exh.22) but it is in view of the other circumstances that he ought to have reason to believe the same to be forged one, particularly when it was within his knowledge that the amount was not payable for the works contract in question. Mr. Chatterji, also invited my attention to certain observations in Dasrathlal Chandulal Joshi Vs. State of Gujarat, . The Apex Court held that when there was no evidence to show that the accused No. 2 therein could know that the receipts were forged, in respect of the donations collected by the accused No. 1, the High Court was wrong in reversing acquittal of the said accused No. 2. With due respects, the fact situation in the present case is altogether different. Herein, there are concurrent findings of facts. Both the Courts drew logical inference that the petitioner had the reason to believe that the cheque (Exh.22) was forged one. In spite of such sufficient reason to notice the forgery of the cheque, he encashed the same and thereby committed the offences punishable Under Sections 420 and 471 of the I.P.C.

20. For the aforestated reasons, I am of the opinion that the attending circumstances duly clinch the issue of culpability and the petitioner was rightly convicted by both the Courts. There is nothing redeeming about the petitioner so as to reduce the quantum of sentence awarded to him. Consequently, the Revision Petition is dismissed. The petitioner shall surrender to the bail immediately. The learned Chief Judicial Magistrate, Beed, shall issue arrest warrant and report this Court about the compliance within four (4) weeks. R & P be remitted to the trial Court without delay.