

(2010) 07 BOM CK 0080

In the Bombay High Court

Case No : Criminal Application No. 4188 of 2009

Ghanshyam Kisan Ukirade

APPELLANT

Vs

Sou. Suman Krishna Pawar and Another

RESPONDENT

Date of Decision : 29-07-2010

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2011) 1 BC 3 : (2011) 1 MhLj 465 : (2011) 7 RCR(Criminal) 1817

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : Amol S. Gandhi, for the Appellant; Sanjay V. Mundhe and S.D. Kaldate, APP for R2, for the Respondent

Final Decision : Dismissed

Judgement

Shrihari P. Davare, J.—Heard learned respective counsel for the parties.

2. This is an application preferred by the applicant, seeking leave to file appeal against the judgment and order of acquittal dated 22.09.2009 passed by learned Judicial Magistrate First Class, Ahmednagar, acquitting the respondent No. 1/ original accused for the offence u/s 138 of Negotiable Instruments Act.

3. I have perused the impugned judgment and order of acquittal dated 22.9.2009 and record and proceedings with the assistance of learned Counsel for the parties.

4. In short, it is the case of the complainant that he gave amount of Rs. 1,40,000/- to the husband of the accused towards sale transaction on 24.1.2005, of land bearing gat No. 160, situated at Kukan, at the residence of the accused and thereafter they went to the office of Sub-Registrar for registration of the sale deed, but it was revealed that since said land was of new tenure, sale deed could not be executed and thereupon husband of accused assured that he would procure permission for the sale of said land and if, such permission is not obtained within the period of one year, he would return the said amount.

However, it is the contention of the complainant that inspite of lapse of one year, accused did not return amount accepted by him towards aforesaid sale transaction and, therefore, complainant insisted for the repayment of said amount. Thereupon, it is the contention of the complainant that accused issued cheque No. 643783 dated 30.12.2007 for the amount of Rs. 1,40,000/- towards repayment of the above referred amount. The complainant presented said cheque for encashment, however, said cheque was dishonoured and was returned unpaid with the endorsement "funds insufficient". Hence, complainant issued statutory notice to the accused through advocate on 4.2.2008 and same was received by the accused. However, accused did not comply with the requisitions, contained in the said notice nor even replied it. Hence, after observing necessary formalities, complainant filed complaint before learned Judicial Magistrate First Class, Ahmednagar against accused u/s 138 of Negotiable Instruments Act.

5. After verification, process was issued against the accused and accordingly accused appeared in the said matter. Plea of the accused was recorded. Accused pleaded not guilty and claimed to be tried. Evidence was adduced by the parties and complainant examined himself, but accused neither examined himself nor examined any defence witness.

6. After appreciating evidence, learned trial judge arrived at the conclusion that accused is not guilty for the alleged offence and consequently acquitted him.

7. Being aggrieved and dissatisfied by the said judgment and order of acquittal, applicant/original complainant has preferred present application seeking leave to file appeal against the same.

8. Learned Counsel for the applicant submitted that accused did not even reply to the statutory notice dated 4.2.2008 nor he examined himself or examined any defence witness and therefore defence put up by the accused in the cross examination of the complainant was surprising and new to the complainant and, hence, it is urged that matter be remanded back to the trial court by giving opportunity to complainant to adduce necessary evidence to meet the defence of the accused. Learned Counsel further submitted that similar view was taken by this Court (Nagpur Bench) in the case of Hinganghat Nagari Sahakari Patsanstha Maryadit v. Gulab s/o Krushnaji Pimpalshende reported at 2008 ALL MR (Cri) 1929 wherein it is observed that:

Complaint was filed by the complainant for dishonour of cheque wherein existing debt and liability was admitted but demand notice was not replied by the accused and defence of the accused was that he was not a member of complainant credit society raised for first time in cross-examination and then in oral arguments and therefore it is observed that complainant has no opportunity to know the defence and was taken by surprise in absence of reply to demand notice. Inference drawn by trial court that loan given to a non member is an illegality and such loan would not be recoverable was also not supportable. Hence case was remanded

for fresh disposal.

9. Learned Counsel for the respondent countered said arguments and opposed present application vehemently and submitted that the respondent/accused has rebutted the presumption raised against her u/s 139 of Negotiable Instruments Act through cross examination of the complainant since the respondent/accused has put up her defence that complainant has obtained blank cheques at the time of sale transaction and had misused the same and to substantiate said contention accused has produced certified copies of documents along with Exh.32 which discloses that number of persons have filed complaints against the complainant herein and mediator to aforesaid sale transaction namely Mr. Dattatraya Gaware and, therefore, it is submitted that although no reply was sent to the statutory notice by the accused, he has put up his defence through cross examination of complainant as aforesaid and complainant had every opportunity to examine further witnesses, if any, and more particularly, Dattatraya Gaware who was allegedly present at the time of aforesaid sale transaction but the complainant did not choose to examine him for the reason best known to him and, hence, it is submitted that remand of the matter to trial court, as prayed for, by the applicant is not warranted. It is submitted that there is no application of the afore cited case and observations made therein are not applicable to the present case, since facts of the present case and cited case differ from each other.

10. Mr. Mundhe, learned Counsel for the respondent further submitted that according to the complainant, he allegedly gave amount of Rs. 1,40,000/- to the husband of the accused whereas cheque in question was allegedly issued by the accused namely Sumanbai and complainant has not produced any document on record in respect of transaction between the accused and complainant and learned Counsel for respondent relied upon the view taken by this Court in the case of Hiten Sagar and Anr. v. IMC Ltd and Anr. reported at 2001 (5) Bom. C.R. 890 wherein it is observed that:

3. Para 7 of the complaint also makes it clear that in discharge of the liability of the petitioners 2 and 3, the cheque in question was drawn by the petitioner No. 1. In order to maintain the complaint u/s 138 of NI Act, the cheque must be issued in discharge of any liability. The question posed therefore is whether A can issue a cheque in discharge of the liability of B, has been taken over by A. In the absence of any documents, creating the liability of petitioners 2 and 3 in favour of petitioner No. 1, mere statement that the cheque was issued by petitioner No. 1 for an on behalf of the petitioners 2 and 3 will not sufficient to give the cause of action for a complaint u/s 138 of N.I. Act. Even in the notice sent to the petitioner it has not been mentioned that the drawer of the cheque has taken over the liability of the petitioners 2 and 3. "Any liability" occurred in the Sections is only to mean that any kind of liability of the drawer; and not any other's liability, unless the payee, the drawer and the original debtor entered into any agreement to that effect. In order to entertain a complaint, the

Magistrate should have material before him to the effect that there is tripartite agreement in the above nature sometime a surety of debtor will also issue a cheque. In that case also Section 138 will attract in the case of dishonour. Here in this case we have only a unilateral lawyer notice which says that the petitioner had undertaken the liability of his brother Mr. Jignesh Sagar. It is well settled principle of criminal law that a penal provision of a statute has to be strictly construed and if in a wider connotation it will amount disadvantage to the accused, such a wider connotation cannot be accepted. On a reading of Section 138 of N.I. Act it is clearly spelt out that a cheque must be drawn for discharge of the liability of the drawer of the cheque. In other words, if he has drawn a cheque for the discharge of the liability of another person without creating any document, it will not and it would not come u/s 138 of the N.I. Act.

11. Considering rival submissions advanced by both learned respective counsel for the parties, initial presumption was raised against the accused since cheque of Rs. 1,40,000/- was issued by her, u/s 139 of Negotiable Instruments Act, however, although accused did not reply to the statutory notice dated 4.2.2008, the accused had put up her defence through the cross examination of complainant that complainant obtained blank cheque from the accused at the time of sale transaction and same was mis-used and even accused has produced certified copies of complaints filed against the complainant and Dattatraya Gaware i.e. mediator to sale transaction, by different persons and, accordingly, accused has probalitized her defence through said cross examination. Hence, it was not necessary for the accused to examine her self or to examine any other witness in support of her contention. Accordingly, accused rebutted said presumption and, therefore, it was incumbent upon the complainant to prove and establish that cheque in question was issued by the accused towards legally enforceable liability.

12. In the said context, it is pertinent to note that, complainant admitted in his cross examination that he cannot state gat number of land at Kukan, nor he perused the 7/12 extracts of the land of sale transaction. Learned trial judge observed that complainant has not produced any documentary evidence to prove and establish that amount of Rs. 1,40,000/- was given to the husband of the accused since it was admitted by the complainant in his cross examination. Apart from the documentary evidence, although complainant has averred in his complaint that Dattatraya Gaware was present at the time of sale transaction, it is curious to note complainant has not examined said material witness for the reasons best known to him and no explanation has been given by the complainant in that respect. Accordingly, complainant even has not adduced any oral evidence in respect of the said sale transaction and more particularly in respect of giving amount of Rs. 1,40,000/- by the complainant to the husband of the accused. Hence, it is apparently clear that complainant has failed to prove and establish that cheque in question was issued by the accused towards legally enforceable liability and conclusion drawn by the learned trial court after scrutinizing and appreciating evidence on record, in that respect, cannot be

faulted with.

13. Moreover, after scrutinizing and analyzing evidence on record, the view adopted by learned trial judge is a possible view to be adopted and no perversity is found therein. Hence, no interference therein is called for and therefore present application deserves to be rejected.

14. In the result, present application being sans merit, stands dismissed. Leave to file appeal stands refused.

15. Record and proceeding be sent back to the concerned court.