

(2022) 09 GUJ CK 0183
In the Gujarat High Court

Case No : R/Criminal Misc. Application No. 12644 Of 2022, In R/Criminal Appeal No. 1364 Of 2022

Gupta Maheshkumar Kalikaprasad

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 29-09-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 378
Negotiable Instruments Act, 1881 — Section 118(a), 138, 138(b), 139

Citation : (2022) 09 GUJ CK 0183

Hon'ble Judges : Dr. Ashokkumar C. Joshi, J

Bench : Single Bench

Advocate : Nauman S Qureshi, Shakeel A Qureshi, Pareshkumar B Trivedi, Piyush B Trivedi, Ronak Rawal

Final Decision : Disposed Of

Judgement

Dr. Ashokkumar C. Joshi, J

1. This application under the provisions of Section 378 of Criminal Procedure Code, 1973 (CrPC) is filed by the applicant – original complainant assailing the judgment and order dated 25.02.2022 passed in Criminal Case No. 5031 of 2008 by the learned Judicial Magistrate First Class, Viramgam recording the acquittal from the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (NI Act).

2. Heard, learned advocate Mr. Nauman S. Qureshi for the applicant and learned advocate Mr. Piyush B. Trivedi for the respondent No. 2 as well as learned Additional Public Prosecutor for the respondent No. 1 – State.

3. The learned advocate for the applicant has mainly submitted that the learned Magistrate ought to have convicted the accused inasmuch as the cheque in question was duly signed by the respondent No. 2 and came to be dishonoured when presented before the bank with an endorsement "Fund Insufficient".

Furthermore, in his submission, the learned Magistrate ought to have appreciated the fact that the cheque was issued for discharge of legal liability towards complainant. Further, it is submitted that the learned Magistrate ought to have appreciated the facts that the cheque in question was deposited in the bank in time; legal notice upon the respondent No. 2 was also issued within the stipulated time; the notice was replied and the signature of the respondent No. 2 on the cheque in question was not disputed; the cheque was returned unpaid with an endorsement "Fund Insufficient" and that, the respondent No. 2 had not arranged to repay the money within the notice period.

3.1 The learned advocate for the appellant further submitted that the learned Magistrate ought to have held in view of the evidence on record that the accused had failed to rebut the onus of proof and statutory presumption against him under Sections 118(a) and 139 of the NI Act.

3.2 The learned advocate, taking this Court through the impugned judgment and order, submitted that though the case against the accused was proved beyond reasonable doubt, the learned Magistrate has not properly appreciated the evidence on record and thereby, has committed an error in recording acquittal and therefore, the impugned judgment and order suffers from material illegality, perversity and contrary to the facts and evidence on record. Accordingly, he urged that this application seeking leave to appeal may be allowed and the appeal may be heard on merit.

4. Per contra, learned advocate Mr. Piyush Trivedi for the respondent No. 2 – accused, while supporting the impugned judgment and order of the trial Court, submitted that the learned Magistrate has, after due and proper appreciation and evaluation of the evidence on record, has come to such a conclusion and has acquitted the accused, which is just and proper. He submitted that it is trite law that if two views are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court. Further, while exercising the powers in appeal against the order of acquittal, the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality.

4.1 The learned advocate for the respondent No. 2 - accused submitted that for invoking the provisions of Section 138 of the NI Act, the debt or other liability means a legally enforceable debt or other liability, which the complainant has failed to prove and accordingly, the learned Magistrate has rightly recorded the acquittal.

4.2 The learned advocate for the respondent No. 2 has submitted that as per the case of the applicant – complainant, the respondent No. 2 had given a cheque against an amount lent by him of Rs.8.50 lakh, however, there is a reference of different cheque numbers in the so-called notice issued to the respondent No. 2 and in the complaint filed by the complainant. Further, the said statutory notice

is not produced on record by the complainant and therefore, the learned Magistrate has rightly acquitted the accused of the charges levelled against him. Accordingly, it is urged that no interference is required at the hands of this Court in an order of acquittal and hence, it is requested that leave to appeal may not be granted.

5. The Court has also heard the learned APP for the respondent No. 1 – State.

6. Regard being had to the submissions made and considering the impugned judgment and order of acquittal and the papers available on record, following aspects have been weighed with the Court:

i) the statutory notice, required to be issued under Section 138(b) of the NI Act by the complainant making a demand for the payment of the said amount of money for which the cheque in question was issued and dishonoured on account of insufficiency of fund, appears to have not been admitted in evidence as not exhibited nor, as per the learned trial Judge, the complainant made any attempt to get the same exhibited and thereby, admitted in evidence;

ii) further, the complaint in question is filed for the Cheque No. 908224, whereas, from a bare perusal of reply to the statutory notice refers different cheque number i.e. 908236. Moreover, a copy of notice dated 04.07.2008 stated to have been issued by the complaint and produced at Mark 3/4, also refers the said cheque number only i.e. 908236. Thus, it appears that the notice was issued for the different cheque, which is replied by the respondent - accused;

iii) the complainant had admitted in his cross-examination that he had shown such an entry in the income tax return filed by him, however, no such documents/accounts appears to have been produced on record;

iv) after due evaluation and appreciation of the evidence on record, the learned trial Judge has come to the conclusion that the complainant has failed to prove the debt, to be precise, the legally enforceable debt;

v) the learned trial Judge has observed that the respondent No. 2 has successfully rebutted the presumption under Sections 139 and 118(a) of the NI Act.

7. Thus, it transpires that the complainant has failed to prove the case against the accused beyond reasonable doubt inasmuch as the ingredients of the offence alleged are not fulfilled. The Court has gone through in detail the impugned judgment and order and found that the learned Magistrate has meticulously considered the evidence on record and came to such a conclusion and in the considered opinion of this Court, the learned trial Judge has rightly come to such a conclusion, which do not call for any interference at the hands of this Court.

8. In view of the aforesaid discussion and observations, in the considered opinion of this Court, the findings recorded by the learned trial Judge do not call for any interference. Resultantly, the application fails and leave to appeal is refused.

Notice is discharged.

8.1 In view of leave is refused, Criminal Appeal No. 1364 of 2022 does not survive and the same is disposed of accordingly.