

(2012) 03 GUJ CK 0137
In the Gujarat High Court
Case No : Criminal Appeal No. 2146 of 2010

Hemant Kumar Bhagubhai Patel	Vs	APPELLANT
Shailesh Bhai Dahya Tandel and Others		RESPONDENT

Date of Decision : 27-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 262, 263, 264, 265, 313
Negotiable Instruments Act, 1881 (NI) — Section 138, 143

Citation : (2012) 4 BC 269

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : Bharat K. Dave, No. 1, for the Appellant; R.E. Variava, Advocate, for the Respondent No. 1 and Ms. C.M. Shah, APP, 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 judgment and order of acquittal passed by learned 4th Additional Chief Judicial Magistrate, Navsari, on 27.7.2010 in Criminal Case No. 4397 of 2008 acquitting the respondent accused for the offence u/s 138 of the Negotiable Instruments Act, 1881 ("the Act" for short). According to the complainant, accused was doing business of fishing and used to obtain hand loan for business purpose. On 9.10.2007 accused obtained Rs. 4,50,000/- for one month as hand loan. After one month, he made demand for the outstanding amount. Therefore, the accused gave cheque No. 603211 dated 9.11.2007 for Rs. 2 lakh and cheque No. 603212 dated 9.12.2007 for Rs. 2,50,000/- drawn on ICICI Bank, Limited, Sayaji Road, Navsari, towards the outstanding amount. Both the cheques returned unpaid with the endorsement "funds insufficient" when presented in the Bank. Therefore, notice was served to the accused demanding the amount of unpaid cheques but the accused did not pay the amount. Therefore, complaint u/s 138 of the Act was filed.

2. The trial Court issued summons and the accused appeared and denied having committed the offence. Therefore, prosecution adduced evidence. On completion of recording of evidence, further statement of the accused u/s 313 of the Code of Criminal Procedure was recorded. After hearing learned Advocates for the parties, the trial Court by the impugned judgment acquitted the accused. Being aggrieved by the said decision, the appellant original complainant has preferred this appeal.

3. I have heard learned Advocate Mr. Dave for the appellant and learned Advocate Mr. Variava for the respondent accused at length and in great detail. I have also perused record and proceedings of the trial Court.

4. Learned Advocate Mr. Dave submitted that the case was tried as summary case and learned Magistrate who delivered judgment cannot rely on the evidence recorded by his predecessor but in the present case learned Magistrate relied on the evidence recorded by his predecessor. Therefore, trial is vitiated and hence the judgment of acquittal recorded by the trial Court is bad in law and the case is required to be remanded to the trial Court for retrial. He relied on the decision *Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another*, .

5. Learned Advocate Mr. Variava for the respondent accused did not dispute the fact that learned Magistrate who delivered the judgment did not record the evidence and relied on the evidence recorded by his predecessor.

6. It appears from the record and proceedings that the evidence of the complainant Hemantbhai Patel was recorded by learned 3rd Additional Senior Civil Judge and Judicial Magistrate, First Class, Navsari Thereafter, evidence of Bharat Bhulsankumar Bathla was recorded by learned 2nd Additional Senior Civil Judge and Additional Chief Judicial Magistrate, Navsari and the judgment was delivered by learned 4th Additional Chief Judicial Magistrate, Navsari. These proceedings clearly indicate that learned Magistrate who delivered the judgment did not record the entire evidence but relied on part of the evidence recorded by his predecessor. In the decision of *Nitinbhai Saevatilal Shah v. Manubhai Manjibhai Panchal* (supra), Hon''ble Supreme Court has observed as under:

Para 14--The mandatory language in which Section 326(3) is couched, leave no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge has no authority to proceed with the trial from a 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 witnesses. 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 indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice.

7. In view of the law laid down by Hon"ble Supreme Court, when a case is tried as summary case, a Magistrate who succeeds the Magistrate who had recorded the evidence, cannot act on the evidence so recorded by his predecessor as only substance of evidence has to be recorded in summary trial. Therefore, the successor Magistrate would not be in a position to appreciate the evidence led before his predecessor and this would cause serious prejudice to a party against whom any order is passed. In the present case it is tried as summary case as provided u/s 143 of the Act and, therefore, provisions of Sections 262 to 265 of the Criminal Procedure Code shall apply. As observed earlier, in this case, learned Magistrate delivered the judgment relying on the evidence recorded by his predecessor. Therefore, he was not in a position to appreciate the evidence properly. Therefore, serious prejudice is caused to the complainant as order of acquittal was passed. The successor Magistrate who delivered the judgment was not in a position to 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 retrial in accordance with law. In the result, the appeal is allowed. The impugned judgment dated 27.7.2010 passed by learned 4th Additional Chief Judicial Magistrate, Navsari, in Criminal Case No. 4397 of 2008 is set aside and the matter is remanded to the trial Court for fresh trial in accordance with law after giving opportunity to the parties. The parties are directed to appear before the trial Court on 1.5.2012. if the accused fails to appear as directed by this Court, the trial Court is at liberty to take appropriate action to secure his presence.

Record and proceedings be sent back to the trial Court forthwith.