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(2009) 07 BOM CK 0032

In the Bombay High Court

Case No : Criminal Appeal No. 56 of 2009

Hindustan Coca Cola Beverages Pvt. Ltd., Plot No.M2 to MII, Phase II, Verna Industrial Estate, Verna-Goa	APPELLANT
Vs	
Muktabai Prabhudessai	RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Criminal Procedure Code, 1973 (CrPC) — Section 313, 315, 342
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2009) 07 BOM CK 0032

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : M.S. Usgaonkar, with Mr. Sudin M.S. Usgaonkar, for the Appellant; Arun Bras De Sa, Advocate for respondent no.1, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—This is a complainant''s appeal and is directed against the Judgment dated 8.12.2008 of the Learned Additional Sessions Judge, Margao, acquitting the accused u/s 138 of the Negotiable Instruments Act, 1881. The accused was earlier convicted by the Learned Magistrate by Judgment dated 30.8.2008. The subject matter of the complaint were four cheques given by the accused which were dishonoured on being presented for payment because the accused had issued instructions to the Bank to stop payment. The details of the cheques are as follows:

Cheque No.

Date

Amount

1.

2866833

20.10.2006

Rs.

60,000.00

2.

2866835

19.10.2006

Rs.

60,000.00

3.

2866836

25.10.2006

Rs.

40,000.00

4.

2866837

28.10.2006

Rs.

68,000.00

5.

2866838

28.10.2006

Rs.

40,000.00

Total

Rs.

2,68,000.00

The complainant is the manufacturer of Coca Cola having its factory at Verna and the accused was a distributor. There is no dispute that the last consignment which was received by the accused was on 28.10.2006 which was exhausted by the accused on the next day i.e. 29.10.2006 and according to the accused he

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had ordered a fresh consignment which was not supplied. The accused therefore wrote a letter to the complainant dated 31.10.2006 informing the complainant that he was leaving the distributorship for reasons mentioned therein, which are not relevant for our purpose and further informed the complainant that he had given instructions to his Banker to stop payment for the consignment received on 28.10.2006 and further requesting the complainant not to deposit the cheques for encashing the cheques until final settlement was made. Inspite of the said letter of the accused dated 31.10.2006 the complainant sent a legal notice dated 2.2.2007 informing the accused that all the five cheques were dishonoured on ground that the payment was stopped and calling upon the accused to make the payment of the said five cheques in the sum of Rs. 2,68,000.00 within fifteen days of the receipt of the notice.

2. The accused again replied to the notice informing about his letter dated 31.10.2006 and further informing that as he had left the agency final settlement should be made. The accused reiterated that the complainant was also informed that the said five cheques should not be encashed and the amount should be adjusted with the final settlement. In the said letter the accused also stated in para 4 as follows:-

The amount of Rs.2,68,000/-(Rupees Two lakh sixty eight thousand only) as claimed by you in the notice is not due and payable to your clients as the said amount has to be adjusted with the money due and payable by your clients to me which fact is to the knowledge of your client.

3. Again in para 6 the accused stated that by his letter dated 31.10.2006 the accused had shown his willingness for final settlement of the dues which your clients have not bothered to consider. The accused reiterated his intentions of settling the dues as and when the complainant was ready and willing to discuss. The accused further informed the complainant that only after such final settlement, the issue of payment could be finalized and further reiterated that until such time the complainant should take note that the complainant was not entitled to claim the said sum of Rs.2,68,000/-and that any action which the complainant makes would be defended at the risk and cost of the complainant.

4. Thereafter, the complainant proceeded to file a complaint and in support thereof examined its constituted attorney Shri Rajesh Bhat (for brevity sake shall be referred to as the complainant hereinafter). The accused did not examine any witnesses but a suggestion was put to the complainant that the subject cheques were handed over to the complainant on 12.10.2006 by one Vallabh Prabhu Dessai, a suggestion which was denied by the complainant. The accused in his statement recorded u/s 313 of the Code then produced a letter dated 12.10.2006 by which the said cheques were sent to the complainant as advance payment towards the consignment to be sent by the complainant from 29.10.2006. The said letter prima facie shows that it was received in the complainant''s office as it carries a signature and the rubber stamp of the complainant.

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5. At one stage when the complainant''s evidence was going on before the trial court, the accused had asked the complainant to produce the bills/invoices which were sent to the accused for the goods supplied when the complainant had stated that the subject cheques were issued in respect of the bills/invoices which were sent to the accused, and, the complainant at the request of the accused was directed to produce the said bills/invoices. That was on 24.7.2008. On the same day, in the course of further cross examination on behalf of the accused, the accused withdrew his request that the complainant should produce the said bills/invoices as a result of which the complainant did not produce the bills/ invoices which according to the complainant were sent by the complainant to the accused and in payment of which the subject cheques were issued by the accused to the complainant. In the course of cross examination the complainant had also stated that there was no agreement for the distributorship between the complainant and the accused and had further stated that in case of the accused, the complainant had taken blank cheques from the accused as security with respect of distributorship. He had further stated that in case the distributor intended to quit, such a distributor had to make an application/letter to the company and pay the dues and thereafter the distributor quits. The complainant had also admitted that a the time of withdrawal of the distributorship, final settlement of accounts is made. The complainant had also stated that no consignment of goods was supplied to the accused without cheques but sometimes the goods were sent against the claims which were discounted against the market expenses and the goods were supplied to the accused as per his requirement.

6. The Learned Additional Sessions Judge, in acquitting the accused stated, inter alia, as follows:

The complainant has thus, admitted that there was an understanding between the parties that the blank cheques without filling the amount will be issued to the complainant and that the said cheques in question were issued as per said understanding. In other words the complainant has admitted that the accused has issued blank cheques. In his cross examination, Shri Rajesh has categorically stated that the accused was to pay against the goods supplied on delivery by way of cheques which were dated on the date when goods were received and no loads of goods were supplied without cheques. However, he has then admitted that some times the goods were sent against claims which are discounted against market expenses. He has also categorically stated that the suit cheques were issued with respect to the bills/invoices sent to the accused for the goods supplied. He has also stated that he can produce the records showing the accounts tallying with the suit cheques". As discussed hereinabove, it is suggested that the cheques were sent towards goods to be supplied after 29.10.2006. In support of said defence, the accused has produced duly acknowledged covering letter dated 12.10.2006. The said letter has gone unrebutted. The witness has admitted that on account of festival sometimes the accused could send a request letter with cheques towards future supplies. The

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witness has therefore, admitted that under certain circumstances the Company was accepting the cheques with a request letter for future supply. There is therefore, no reason to doubt that the accused had sent suit cheques with such a request.

7. The Learned A.D.J. also observed as follows:

Once the accused showed probability of the defence, onus shifted on the complainant to prove that the cheques were issued towards discharge of liability. Accused cannot be expected to help the complainant in discharging said onus. Shri Rajesh/Pw1 had stated that he can produce the records showing the accounts tallying with the suit cheques. Subsequently a direction was given by the Court to him to produce said accounts. Later the accused submitted that he does not require said records and therefore, the Court withdrew the direction. Obviously, the direction was given as per the request of the accused. May be later the accused felt that he does not require said accounts to prove his defence. There was therefore, nothing wrong in accused requesting for cancellation of the direction. Onus to prove the fact that cheques were issued towards discharge of a liability was on the complainant. The complainant was therefore, required to produce and prove said accounts. The complainant cannot take advantage of cancellation of direction and urge that the accused has turned around. The complainant has failed to prove that the cheques were issued towards discharge of a liability in view of the probability of defence shown by the accused.

8. Shri M.S. Usgaonkar, Learned Senior Counsel appearing on behalf of the complainant has submitted that the admission by the complainant''s witness that in the case of the accused the complainant had taken blank cheques from the accused as security in respect to the distributorship does not relate to the subject cheques but relate to cheques other then the subject cheques which the complainant had taken at the time of appointing the accused as distributor initially. Learned Senior Counsel has further submitted that the accused had given no evidence in his case and therefore the letter dated 12.10.2006 produced by the accused would not be treated as evidence to come to the conclusion that the subject cheques were given by the accused alongwith the said letter in as much as the accused has also not examined the said Vallabh Prabhu Dessai alongwith whom the said letter was sent. Learned Counsel has placed reliance on the case of State of Maharashtra V/s. Dr. R. B. Chowdhari and others (AIR 1968 Supreme Court 110), in support of his said submission wherein the Apex Court has stated that although the statement of an accused u/s 342 can be taken into consideration in an inquiry or trial, it is not strictly evidence in the case, since the accused, when he makes his statement u/s 313 the accused does not depose as a witness because no oath is administered to him though the code enables the accused to give evidence on his own behalf u/s 315 and that is when the accused offers in writing to give evidence on his own behalf (reference is made to sections of the Code of 1973). The Learned Senior

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Counsel has further submitted that the initial direction to the complainant to produce the bills/invoices was given at the request of the accused to produce the records showing the accounts tallying with the suit cheques and later the said direction was cancelled at the instance of the very accused and this would mean that the accused wished to waive the benefit of cross examination of the complainant and accept that the cheques were issued towards the consignment of the goods already supplied. In support of this submission Shri Usgaonkar, the Learned Senior Counsel has placed reliance on the case of A.E.G Carapiet V/s. A.Y. Derderia (AIR 1961 Calcutta 359) and the Learned Senior Counsel has submitted that the view held therein has been followed by this Court in Ishtiyaq Ali Farad Ali (D) by LRs V/s. Abdul Shakoor Mohammed Hassan (D) by LRs (2006 (1) AIR Bom R 117 (DB) and according to the Learned Senior Counsel that view has also the approval of the Apex Court in the case of Shri Ravinder Kumar Sharma Vs. The State of Assam and Others, . The Learned Senior Counsel therefore submits that when the Learned Sessions Judge held that the letter dated 12.10.2006 produced by the accused under his statement u/s 313 of the Code stood admitted, it was a wrong finding not only because the said Vallabh Prabhu Dessai with whom it was sent was not examined but the accused also did not examine himself.

9. The Division Bench of Calcutta High Court in the decision cited supra observed that wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side, of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent''s witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff''s account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly because such subsequent testimony has no chance of being tested and corroborated. The Division Bench of this Court in the case cited supra quoted with approval that the aforesaid decision of the Division bench of the Calcutta High Court and the Apex Court in the case of Ravinder Kumar Sharma (supra) held that under Order 41, Rule 22, it was open to the respondent-defendant who has not taken any cross-examination to the partial decree passed against him, to urge, in opposition to the appeal of the plaintiff, a contention which if accepted by the trial court would have resulted in the total dismissal of the suit.

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10. Another submission of the Learned Senior Counsel was with reference to para 4 of the reply of the accused sent to the demand notice 14 dated 7.2.07 sent by the complainant which according to the Learned Senior Counsel disclosed that the accused had admitted his liability. This submission requires to be rejected outright because the reply of the accused to the demand notice dated 7.2.07 which is to be read as a whole and having so read it is clear that the accused informed the complainant that they were not entitled to claim the said sum of Rs.2,68,000/-until final settlement was made and admittedly no final settlement of account was taken between the complainant and the accused.

11. On the other hand, Shri Arun Bras De Sa, Learned Counsel on behalf of the accused, has submitted that the admission by the complainant that the cheques were taken by the complainant in blank as security is relatable to the subject cheques and in this context Learned Counsel has referred to para III of the complaint wherein the complainant had accepted the position that the complainant and the accused had agreed that the accused will give cheques by putting his signature and name of the complainant on the said cheques to ensure payment of the outstanding to the complainant. Learned Counsel has submitted that in case the accused had given the subject cheques to the complainant only signed and by putting the name of the complainant as payee, it is but obvious that the amount payable to the complainant was left in blank and therefore the complainant had to prove that the amount written on the subject cheque by the complainant was due and payable by the accused to the complainant by producing the vouchers/bills which the complainant had failed to prove by producing the same. Learned Counsel further submits that the accused by his said letter dated 12.10.2006 had substantially rebutted the presumption available to the complainant and therefore the complainant was required to prove that the amount due on the said cheque was actually due to the complainant towards the supplies made.

12. Be that as it may, this is a case where wrong principle is sought to be invoked and applied to the facts and circumstances of the case. It is not necessary to enter into the controversy with what has been said by the Division Bench of the Calcutta High Court in the decision cited hereinabove. That principle is not at all applicable to the facts of this case. First of all, it must be observed that the complainant was woefully silent in mentioning in the complaint as to when the accused had handed over the said cheques to the complainant and on the contrary the complainant had clearly stated in the complaint that the subject cheques were given by the accused only signed and the name of the complainant written on it and therefore as rightly pointed out by Learned Counsel Shri Arun Bas De Sa, the admission of the complainant had to be read in the context of the averment in para III of the complaint and when so read it was quite clear that the subject cheques were given without having written on them the amount which was due by the accused and only with the name of the complainant written on them and the signature of the accused. That is also evident from the fact that all the cheques were completed at one time and this is evident from the fact that

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cheque having later number bears 19.10.06 as the date of the cheque and the cheque having prior number, bears the date 20.10.06.

13. As per the complaint itself, the complainant had extended goods on credit to the accused on demand and the accused made periodical part payments in form of cheques with regard to the said supplies. The complainant filled in the amounts as reflected on the cheques. No final accounts were drawn between the complainant and the accused. The complainant therefore had to prove that the complainant had authority implied or otherwise to fill the cheques in the amount reflected on the cheques and that could be done only by producing the invoices of supplies or a statement of account. That was a requirement of the complainant and not of the accused. The complainant took a risk and if I may use an expression " fell into the trap of the accused" when the accused chose to withdraw the direction given by the trial Magistrate to the complainant to produce the said bills/vouchers which would support the case of the complainant that the said cheques were issued towards the supply made by the complainant to the accused. As rightly observed by the Learned Sessions Judge, the accused was not expected to help the complainant in discharging his onus. Moreover, in the absence of any evidence to show as to when the subject cheques were given by the accused to the complainant, the Learned trial Court was justified in relying on the letter dated 12.10.06 given by the accused which shows that the subject cheques were sent by the accused towards the supply to be made from 29.10.06 which supply was admittedly not made by the complainant.

14. Secondly, the accused had produced the letter dated 12.10.06 in his statement recorded u/s 313 of the Code, after having put a suggestion to the complainant that the cheques in question were handed over to the complainant by letter dated 12.10.06 by one Vallabh Prabhudessai, a suggestion which was denied by the complainant. The said letter prima facie shows that the same was received by the complainant, for it is seen signed and stamped with rubber stamp of the company. A statement u/s 313 of the Code of the accused is recorded on the principle of audi alteram partem to enable him to explain the circumstances appearing against him. The Apex Court in Basavaraj R. Patil and Others Vs. State of Karnataka and Others, has stated that there are cases where the accused during the course of his examination u/s 313 may place on record any clinching evidence which may not even require him to produce any defence. Viewed from any angle, the complaint was bound to fail. There is no merit in this appeal and consequently the same is hereby dismissed with costs of Rs.5,000/- to be paid by the complainant to the accused.

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