
(2015) 02 BOM CK 0148

In the Bombay High Court

Case No : Criminal Revision Application No. 14 of 2015

Kashinath Balu Gaonkar

APPELLANT

Vs

Sunita Krishnajirao Dessai and Others

RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2015) 2 BomCR(Cri) 54 : (2015) 2 BomCR(Cri) 411

Hon'ble Judges : U.V. Bakre, J.

Bench : Single Bench

Advocate : Maurisa Monteiro, for the Appellant; A.D. Bhobe, Advocates for the Respondent

Final Decision : Dismissed

Judgement

U.V. Bakre, J.—Heard Ms. Monteiro, learned Counsel for the petitioner and Mr. Bhobe, learned Counsel for the respondent no. 1.

2. By order dated 12/02/2015, it was made clear to both the parties that the revision application shall be heard finally at the stage of admission itself.

3. Rule. Rule made returnable forthwith. Learned Counsel for the parties waive service of notice after admission. Heard finally.

4. By this revision application, the petitioner has challenged the judgment and order dated 29/01/2015 passed by the learned Sessions Judge, Panaji in Criminal Appeal No. 34/2014 and the judgment and order dated 15/03/2014 passed by the learned Chief Judicial Magistrate, Panaji in Criminal Case No. 800/OA/2007/A.

5. The respondent no. 1 was the complainant in the said Criminal Case, whereas the petitioner was the accused therein. Parties shall hereinafter be referred to as per their status in the said Criminal case.

6. The complainant had filed the said case against the accused for offence

punishable under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act, for short). Case of the complainant was as follows:- The accused had borrowed Rs. 22,500/- from the complainant for business purpose and towards repayment of the same, he had issued a cheque bearing no. 515354 dated 06/04/2007 for the said amount of Rs. 22,500/- drawn on "Development Credit Bank Ltd.", Panaji Branch. The complainant presented the said cheque to the Mapusa Urban Co-operative Bank of Goa Ltd., Sankhali Branch. By letter dated 31/07/2007, accompanied with a memorandum of Development Credit Bank Ltd., Panaji Branch dated 30/07/2007, the complainant was informed that the said cheque was dishonoured for reason "funds insufficient". The complainant, thereafter, telephonically informed the accused that the cheque was dishonoured, but the accused did not listen nor he did make any efforts to pay to the complainant the said amount. Thereafter, the complainant, through her Advocate, issued a legal notice dated 14/08/2007 by registered post A.D. to the accused. The said notice was duly received by the accused, but the accused neither replied to the same nor complied with the same. Hence, the complaint.

7. The complainant examined herself before the learned Chief Judicial Magistrate (C.J.M.). She produced the cheque, cheque return memo and legal notice along with A.D. Card. The statement of the accused under Section 313 of Criminal Procedure Code (Cr.P.C.) was recorded by the learned C.J.M. The accused did not examine any witness in defence.

8. Upon consideration of the entire material on record and upon the learned C.J.M. held that the complainant established her case beyond reasonable doubt and that the accused had failed to rebut the presumption under Section 139 of the N.I. Act which was in favour of the complainant. The accused was held guilty, convicted and sentenced for offence under Section 138 of the N.I. Act. to undergo imprisonment for six months and to pay an amount of Rs. 40,000/- to the complainant as compensation within two months from the date of the order. In default of payment of compensation, the accused was directed to undergo imprisonment for further period of three months. Aggrieved with the judgment, order and sentence of the learned C.J.M., the accused filed Criminal Appeal No. 34/2014. The learned Sessions judge, by judgment and order dated 29/01/2015, held that the appeal was devoid of merit and there was no material to interfere with the findings of the learned C.J.M. The appeal was rejected. The accused is, therefore, before this Court.

9. Ms. Monteiro, learned Counsel for the accused, submitted that the accused used to take delivery of milk products (lassi) from the complainant, but he had never taken any money as hand loan from the complainant. She submitted that on account of the said business of milk, the accused had given two blank cheques to the complainant, but since the business transaction had never materialised, there was no debt in favour of the complainant. According to the learned Counsel, the complainant himself filled the details in the cheque and deposited the same in the bank. She urged that there was no legally enforceable

debt. Learned Counsel relied upon the following judgments:

- (i) Village Panchayat Vs. Wasudeo Ramchandraj Mohod,
- (ii) Vithal @ Vithoba Gorakh Shinde Vs. Sangram Narsing Panchal,
- (iii) Vijay Power Generators Ltd. Vs. Sumit Seth-->
- (iv) Avon Organics Ltd. Vs. Poiner Products Ltd. and Others,
- (v) Bindu Vs. Sreekantan Nair, .

10. On the other hand, Mr. Bhole, learned Counsel for the respondent no. 1 submitted that admittedly, the cheque has been executed by the accused. He submitted that there is nothing in the cross-examination to prove that the details in the cheque were not filled by the accused. He further submitted that the complainant had sent a statutory notice to the accused which was received by the accused, but no reply was sent by him. He further submitted that the accused did not produce any evidence at all to rebut the presumption arising out of Sections 118 and 139 of the N.I. Act. Learned Counsel further submitted that there are concurrent findings of the Lower Courts and no jurisdictional error has been shown in the said judgment and order. No interference with the said judgment is called for. He urged that the revision application deserves to be dismissed and, therefore, the same be dismissed.

11. I have gone through the material on record. I have considered the arguments advanced by the learned Counsel for the parties. I have also considered the judgments, which have been relied upon.

12. Admittedly, the cheque has been signed by the accused. The complainant had sent statutory notice dated 14/08/2007 to the accused wherein it was specifically mentioned that the accused had borrowed the said amount of Rs. 22,500/- and towards the repayment of the said amount, had issued the said cheque for the amount of Rs. 22,500/-. The accused was called upon to pay the cheque amount within the period of 15 days from the date of receipt of notice. There is a copy of legal notice and the A.D. Card on record. Mere denial that such a notice was received by the accused, is not sufficient to prove that the notice was not received by him. The accused did not send any reply to the said notice thereby denying the averments made therein. Hence, adverse inference is bound to be drawn as against the accused. In his cross-examination, PW1 specifically stated that the details in the cheque were recorded by the accused. No doubt, PW1 has admitted that the accused only knows Marathi language. However, such a suggestion is not sufficient to prove that the details were not recorded by the accused. Except putting a suggestion to PW1 that the details of cheque were filled by him, which suggestion has been duly denied by PW1, there is nothing on record to establish that the details in the cheque were not written by the accused.

13. In the case of "Avon Organics Ltd." (supra), admittedly, the accused had issued a blank cheque without mentioning the date and amount to the appellant.

Therefore, there was absolutely no dispute that a blank cheque was given by the accused to the complainant. The High Court held that filling up the amount portion in words and figures and put date of his own choice by the complainant amounts to alteration and such alteration cannot be done without the consent of the accused. The above judgment is not applicable to the present case.

14. In the case of Hiten P. Dalal Vs. Bratindranath Banerjee, , the Apex Court has held that it is obligatory upon the Court in terms of Sections 138 and 139 of the N.I. Act, to raise the presumption in every case where the factual basis of the raising of presumption has been established.

15. In the case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, , the Hon"ble Supreme Court has held that once the signature on the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the N.I. Act, can legally be inferred that the cheque was drawn for consideration on the date, which the cheque bears.

16. In the case of K.N. Beena Vs. Muniyappan and Another, , the Hon"ble Supreme Court has held that in view of the provisions contained in Sections 118 and 139 of the N.I. Act, the Court has to presume that the cheque has been issued for discharging a debt or liability and said presumption could be rebutted by the accused by proving the contrary. In paragraph 7, the Apex Court has observed thus:-

"In this case admittedly the 1st Respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials/averments in his reply dated 21st May, 1993 were sufficient to shift the burden of proof onto the Appellant/Complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The 1st Respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The 1st Respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st Respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction."

17. From the above, it can be said that once the execution of the cheque was admitted by the accused, it was for him to first rebut the presumption arising out of Section 139 of the N.I. Act. It was for him to prove that the contents of the cheque, except the signature, were filled in by the complainant without his consent. In the present case, the accused has not taken any probable defence which could rebut the said presumption. As has been rightly observed by the learned C.J.M., the accused, during the cross-examination of PW1, has only resorted to denial of the statements made by the complainant in his affidavit in evidence. Mere denial was not sufficient to rebut the presumption that had arisen in favour of the complainant.

18. In the case of "Prabhakar Xembhu Vs. Surendra V. Pai and another", [2006

(2) DLR 351], it has been held that it is not mandatory and no law prescribes that the body of the cheque should also be written by the signatory to the cheque. A cheque can be filled by anybody, provided it is signed by the account holder of the cheque thereby accepting the amount mentioned therein. In the present case, the accused had put a suggestion to PW1 that since the transaction never materialised, there was no question of depositing the cheque. This suggestion itself shows that the details of the cheque were known to the accused. The learned C.J.M. has relied upon the judgment in the case of Johnson Scaria Vs. State of Kerala, , wherein, it has been held that the foundation of liability under Section 138 of the N.I. Act is the issue of the cheque for consideration and not the existence of the original consideration. The significance of efficacy of Section 138 of the N.I. Act will be lost, if Courts were to insist on proof of the original transaction and original consideration in every indictment under Section 138 of the N.I. Act.

19. In the case of "Vijaya Kundanlal Sharma" (supra), a learned Single Judge of this Court found that the amount was given to the accused in cash and there was no evidence to show whether the complainant had sufficient source of income to give Rs. 5,00,000/-. Besides the disputed cheque, there was no other evidence to show that she had advanced the said amount of Rs. 5,00,000/- in cash as loan. Admittedly, the disputed cheque was a blank cheque, wherein the amount was not mentioned. The learned Single Judge held that it could not be believed that the complainant had given the amount of Rs. 5,80,000/- which she had received by way of chit funds. Even the complainant had failed to establish the date of extending the loan. Mainly, relying upon the judgment of this Court in the case of Sanjay Mishra Vs. Kanishka Kapoor @ Nikki and Another, , since the amount advanced by the complainant was unaccounted for and not disclosed in the Income Tax Returns, it was held that the complainant had failed to prove that the disputed cheques were issued towards legally enforceable debt. In my view, merely because the amount of hand loan was given in cash, it cannot be said that the same was unaccounted cash and hence, Section 138 of the N.I. Act was not applicable. In the present case, there is nothing on record to prove that the complainant had not included the transaction in the Income Tax Returns, etc. There is absolutely no evidence to prove that the cash was unaccounted for. In such circumstances, the judgment in the case of "Sanjay Mishra "(supra), is not applicable. Even otherwise the observations in the case of "Sanjay Mishra "(supra) with regard to unaccounted cash are based on the judgment of the Hon"ble Supreme Court in the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, in which case, it was otherwise held that the existence of legally enforceable debt was not a matter of presumption under Section 139 of N.I. Act. However, the above observation in the case of "Krishna Janardhan Bhat"(supra), has been overruled by a three Judge Bench of the Supreme Court in the case of Rangappa Vs. Sri Mohan, . In the said case of "Rangappa "(supra), decided by three Judge Bench of the Apex Court, an advance of Rs. 45,000/- was made in cash in spite of which, the Hon"ble Supreme Court proceeded to uphold the

conviction. Thus, the judgment in the case of "Krishna Janardhan Bhat "(supra) with regard to the advance of cash amount of Rs. 20,000/- without showing the same in Income Tax Returns, has been impliedly overruled. Therefore, it cannot be said that merely because the amount was advanced in cash and was not shown in the Income Tax Returns, Section 138 of N.I. Act is not applicable. Vide judgment dated 19/07/2013, passed in Criminal Appeal No. 6/2012, (Krishna P. Morajkar Vs. Mr. Joao Ferrao and another), a learned Single Judge of this Court (Shri R.C. Chavan, J.) has dealt with in detail the judgment in case of "Sanjay Mishra "(supra). It has been observed that the observations in "Sanjay Mishra "(supra) based on "Krishna Janardhan Bhat "(supra) may be safely excluded from consideration. No doubt, the above judgment dated 19/07/2013, passed in Criminal Appeal No. 6/2013 has been set aside by the Hon"ble Supreme Court in Criminal Appeals No. 614- 615/2014, but setting aside was because the appellant (accused) had already paid the sum of Rs. 4,00,000/- in favour of the complainant. The findings of the learned Single Judge in the said Criminal Appeal No. 6/2012 have not been set aside. I am in respectful agreement with the observations made by the learned Single Judge (Shri R.C. Chavan, J.) in Criminal Appeal No. 6/2012. I am of the view that the provisions of Section 138 of N.I. Act do apply to present transaction.

20. In the of case of "Bindu" (supra), a learned Single Judge of the Kerala High Court has held that admission of signature in cheque is not equivalent with admission of execution of the same and right of the accused to contend that a blank signed cheque was misused by the payee cannot be taken away by the said mere admission of signature. In the case of "Vithal @ Vithoba Gorakh Shinde" (supra), the complainant had not produced any cogent evidence to prove and establish that he had handed over the amount to the accused and had also failed to establish that there existed legal enforceable debt against the accused. The judgments in the cases (supra), are not at all applicable to the facts and circumstances of the present case.

21. In view of the above, the Lower Courts have rightly dealt with the matter and have held the accused guilty of the offence punishable under Section 138 of the N.I. Act. I do not find any jurisdictional error committed by the Lower Courts. No interference is called for with the impugned judgment. Hence, the Revision Application is dismissed.

22. Rule stands discharged.