

(2012) 02 GUJ CK 0046
In the Gujarat High Court
Case No : Criminal Appeal No. 633 of 2011

Monolith Investment Co. Ltd.

APPELLANT

Vs

State of Gujarat and 2

RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

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

Citation : (2012) 02 GUJ CK 0046

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : M.B. Gohil, for the Appellant; Manish J. Patel for Respondent Nos. 2-3, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Bankim N. Mehta"

1. The appellant - original complainant has preferred this appeal u/s 378 of the Criminal Procedure Code, 1973 and challenged the judgment and order of acquittal dated 28.03.2011 passed by the learned 6th Additional Chief Judicial Magistrate, Ahmedabad (Rural) in Complaint Case No. 350/2005 acquitting the respondents No. 2 and 3 for the offence punishable u/s 138 of the Negotiable Instruments Act (for short "the Act"). According to the complainant, the Company is incorporated under the provisions of the Company Act conducting the business of investment. The accused approached the complainant for financial assistance by way of loan for their business. The complainant provided financial assistance to the accused. As per the books of accounts maintained by the complainant Rs. 7,55,520.63 was due and payable by the accused. Despite repeated request, the accused did not care to clear the outstanding amount. Hence, the complainant served the notice dated 22.06.2005 and called upon the accused to make the payment of outstanding amount. Therefore, the accused No. 2 in the capacity of the Director of accused No. 1 and incharge of the liability

issued account payee cheque No. 568952 dated 12.09.2005 for Rs. 7,55,520.63 drawn on Indian Overseas Bank, Chowringhee branch, Kolkata. The said cheque was presented in the bank, but it returned unpaid with endorsement "insufficient funds". The complainant was informed about the return of cheque unpaid by the Bank by cheque returned memo dated 24.09.2005. The complainant by way of demand notice dated 10.10.2005 called upon the accused to make the payment of the amount of unpaid cheque. The notice was sent by registered post A.D at the last known address supplied by the accused, but the accused neither paid the amount nor gave reply to the notice. Therefore, the complaint u/s 138 of the Act was filed in the Court of learned Chief Judicial Magistrate, Ahmedabad (Rural) and it was registered as Complaint Case No. 350/2005.

2. The Trial Court issued summons. Pursuant to the summons, the accused appeared and denied having committed the offence. Therefore, the prosecution adduced evidence. At the end of recording of evidence, trial Court explained to the accused the incriminating circumstances appearing in the evidence against it. The accused explained the incriminating circumstances in his further statement recorded u/s 313 of the Criminal Procedure Code.

3. After hearing the learned advocates for the parties, the Trial Court by impugned judgment acquitted the accused. Being aggrieved by the said decision, the complainant has preferred this appeal.

4. I have heard learned advocate Mr.M. B. Gohil for the appellant and learned advocate Mr.Manish J. Patel for the respondents No. 2 and 3. I have also perused the impugned judgment and Record & Proceedings of the trial Court.

5. Learned advocate Mr.M. B. Gohil for the appellant submitted that under the provisions of the Act, the Court is required to conduct the trial in summary manner and accordingly, the learned Magistrate tried the case as a summary trial. He further submitted that part of the evidence was recorded by one learned Magistrate and on his transfer, remaining part of the evidence was recorded by his successor who also delivered the judgment and hence, as the case was being tried as summary case, the learned Magistrate, who succeeded, was required to record the evidence afresh but he did not record the evidence afresh and proceeded from the stage left by his predecessor. Therefore, the trial is vitiated and hence, the impugned judgment is required to be set aside and the case is required to be remanded to the trial Court. He relied upon the decision in the case of Nitinbhai Saevatilal Shah & another Vs. Manubhai Manjuibhai Panchal and another, reported in (2011) 9 SCC 638.

6. Learned advocate Mr.Manish Patel for the respondents No. 2 and 3 opposed the submissions and submitted that this contention is taken for the first time before this Court and, therefore, it cannot be accepted. He submitted that there is nothing on record to show that the learned Magistrate conducted the trial in summary manner as voluminous documentary as well as detailed evidence was recorded by him. He submitted that the ratio laid down in the said decision

cannot be made applicable in the present case. He relied on the decisions in the case of State of Gujarat Vs. Bachubhai Naginbhai Shah and Others, and in the case of Reserve Bank Employees Association, Nagpur Vs. State of Maharashtra and Others, .

7. On perusal of the Record & Proceedings of the trial Court, it emerges that the part of the evidence was recorded by the 7th Additional Senior Civil Judge and Judicial Magistrate First Class, Ahmedabad (Rural) (Mr. S. G. Brahmbhatt) and on his transfer, his successor 6th Additional Senior Civil Judge and Judicial Magistrate First Class, Ahmedabad (Rural) (Mr. Kamlesh S. Patel) recorded remaining part of the evidence and delivered the judgment. In the decision of Nitinbhai Saevatilal Shah & another Vs. Manubhai Manjuibhai Panchal and another (Supra), the Hon''ble Supreme Court has ruled that in summary trial only substance of evidence instead of entire evidence is recorded which a successor Magistrate is not in a position to appreciate properly. Therefore, conviction recorded by successor Magistrate relying upon the evidence recorded by his predecessor was bad in law. The Hon''ble Supreme Court in paragraph No. 17 in the case of Nitinbhai Saevatilal Shah & another Vs. Manubhai Manjuibhai Panchal and another, reported in (2011) 9 SCC 638 observed as under:

17. The mandatory language in which Section 326 (3) is couched, leaves 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 or Magistrate 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-Section (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 witness. 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.

8. In view of this, it is clear that when a successor Magistrate decides a case in summary trial on the basis of substance of evidence recorded by his predecessor, he would not be in a position to appreciate the evidence properly and this may cause prejudice to a party against whom order is passed. In the present case, it appears that the learned Magistrate, who delivered the judgment did not record the evidence but relied upon the evidence recorded by his predecessor. Learned

advocate for the appellant failed to point out that the case was not tried as summary trial. Simply because voluminous documentary evidence was produced before the trial Court it can not be said that it was not tried as summary trial. Even there is nothing on record to indicate that detailed oral evidence was recorded by the trial Court. Section 143 of the Act provides that Sections 262 to 265 of Criminal Procedure Code shall apply to the trial under the Act and in course of summary trial if it appears to the Magistrate that it is undesirable to try the case summarily, the Magistrate shall, after hearing the parties, record an order to that effect and proceed to hear the case in the manner provided by Criminal Procedure Code. In the present case, there is nothing on record to show that the Court, after hearing the parties recorded an order to the effect that it was not desirable to try the case summarily and tried the case in the manner provided in Criminal Procedure Code. Therefore, as the successor Magistrate decided the case on the basis of the evidence recorded by his predecessor, the learned Magistrate was not in a position to appreciate the evidence properly and hence the case was not effectively decided and it caused serious prejudice to the complainant. In order to do substantial justice, the successor Magistrate was required to record the evidence afresh. In the decision relied upon by the appellant, the Hon''ble Court ruled that serious prejudice was caused to the accused as he was convicted. In the present case, serious prejudice is caused to the complainant as order of acquittal is passed. It is true that this contention of de novo trial was not taken before the trial Court but this contention being a contention of law, it can be taken in appeal. Therefore, submission in that regard cannot be accepted.

9. As regards the decisions relied upon by learned advocate for the respondents in the case of State of Gujarat Vs. Bachubhai Naginbhai Shah and Others, and in the case of Reserve Bank Employees Association, Nagpur Vs. State of Maharashtra and Others, , in the facts of this case, in view of the judgment of the Apex Court, the decisions do not render any assistance to the respondents.

10. In view of the above, the present appeal deserves to be allowed and the case is required to be remanded to the Trial Court for retrial. In view of the above, the present appeal is allowed. The impugned judgment and order of acquittal dated 28.03.2011 passed by the learned 6th Additional Chief Judicial Magistrate, Ahmedabad (Rural) in Complaint Case No. 350/2005 is set aside. The case is remanded to the Trial Court for retrial in accordance with law. The parties are directed to appear before the Trial Court on 30th March 2012. If the accused fails to appear on the date fixed before the Trial Court, the learned Magistrate trying the case is at liberty to take appropriate action to secure presence of the accused. Registry is directed to send back the Record & Proceedings to the trial Court, immediately.