
(2013) 12 BOM CK 0092

In the Bombay High Court

Case No : Criminal Miscellaneous Application No. 54 of 2013 in Stamp Number Main No. 292 of 2013

Mr. Anant Bondre

APPELLANT

Vs

Mr. Alfred David Fernandes and Another

RESPONDENT

Date of Decision : 04-12-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 401

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

Bench : Single Bench

Judgement

U.V. Bakre, J.—Heard Mr. D.J. Pangam, learned counsel appearing on behalf of the applicant and Mr. J. Godinho, learned counsel appearing on behalf of the respondent No. 1. Leave to appeal against the impugned judgment and order dated 29/11/2012 passed in Criminal Case No. 1117/OA/NI/O5/D is granted, as prayed for. Stamp Number Main No. 292/2013 be registered as appeal, forthwith.

2. Appeal admitted. Learned counsel appearing on behalf of the respondent No. 1 waives service of notice, after admission in the main appeal.

3. Heard forthwith with the consent of both the parties.

4. This appeal is directed against the judgment and order dated 29th November, 2012 passed by the learned Judicial Magistrate, First Class, (D-Court) Margao, in Criminal Case No. 1117/OA/NI/2005/D. The appellant is the complainant and respondent No. 1 is the accused in that case.

5. The parties shall hereinafter be referred to in the manner in which their names appear in the cause title of the said Criminal Case.

6. The complainant had filed the complaint u/s 138 of the Negotiable Instruments Act, 1881 ("the Act" for short). The case of the complainant, in short, was as follows:-

In the last week of January, 2005, the accused had agreed, by an oral

agreement, to sell to the complainant five trucks of Ashok Leyland make for a consideration of Rs. 16,00,000/- for each of the trucks. Towards part payment of the said agreement, the complainant paid to the accused a total sum of Rs. 7,50,000/-. During the time of the said oral agreement the accused did not disclose to the complainant that the said trucks were hypothecated with financial institution and made the complainant to believe that they were completely owned by the accused. In April, 2005, the complainant came to know that the said trucks were hypothecated with a financial institution due to which the complainant requested the accused to return the money paid to the accused towards part consideration of the amount of the said five trucks. Towards the part payment of the said amount of Rs. 7,50,000/-, the accused issued to the complainant two cheques:- one for Rs. 5,00,000/-, bearing No. 044604 dated 20th April, 2005 drawn on Saraswat Co-operative Bank Ltd., Panaji, Goa and the other for Rs. 1,00,000/- bearing No. 393998 dated 23rd May, 2005. The cheque which was for an amount of Rs. 1,00,000/- issued by the accused was encashed on presentation by the complainant. When the cheque for Rs. 5,00,000/- was presented for payment through banker of the complainant namely HDFC Bank, the same was returned on 22nd September, 2005 without being honored with an endorsement "Funds Insufficient". The complainant, through his Advocate issued statutory notice to the accused on 19th October, 2005. The notice was sent to the residential address of the accused and a copy of the same was sent to his office address. The said notice was received by the accused on 20th October, 2005 but the accused failed to make payment. Hence, the complainant filed the complaint which was registered as a Criminal Case No. 1117/OA/NI/2005/D.

7. The accused pleaded not guilty to the substance of accusation duly explained to him. In order to prove his case, the complainant examined himself as PW 1 and three more witnesses, namely Shri Elvis Rebello as PW 2, Cel(sic)o Afonso as PW 3 and Savio D'Souza as PW 4.

8. In the statement u/s 313 of Criminal Procedure Code, the accused admitted the agreement between him and the complainant but denied that the complainant had paid to him Rs. 7,50,000/- and that the cheques were given by him towards part repayment of the said amount.

9. According to the accused, he had given the cheque of Rs. 5,00,000/- as security and the cheque of Rs. 1,00,000/- towards settlement. Accused examined himself as DW 1, and three witnesses, namely Shri Noel Noronha as DW 2, Shri Mario D'Souza as DW 3 and Shri Stanley Fernandes as DW 4.

10. By the Judgment and order dated 6th February, 2010, the learned Magistrate acquitted the accused mainly relying upon the judgment of the Apex Court in the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, . The complainant filed Criminal Appeal No. 54/2010 against the said judgment and order dated 6th February, 2010. The learned Single Judge of this Court, vide judgment and order dated 13th September, 2012, quashed and set aside the judgment and order dated 6th February, 2010 passed by the trial Magistrate and remanded the

matter to the trial Magistrate for fresh decision in the light of the ratio laid down by the Apex Court in the case of Rangappa Vs. Sri Mohan, .

11. Accordingly, the trial Magistrate heard the matter a fresh. By judgment and order dated 29th November, 2012, the trial Magistrate held that the complainant failed to prove the liability of the accused and also failed to prove the guilt of the accused for the offence punishable u/s 138 of the Act. The accused therefore, came to be acquitted. Aggrieved by the impugned Judgment and order dated 29th November, 2012, the complainant has filed the present appeal.

12. Mr. Pangam, learned counsel appearing on behalf of the complainant invited my attention to the affidavit-in-evidence filed by the accused and more particularly to paragraph 14 thereof wherein he has admitted of having received Rs. 4,70,000/- from the complainant. He submitted that the accused has nowhere alleged that he has repaid the said amount. He further pointed out that as per the statement made in paragraph 14 of the affidavit-in-evidence of the accused, the transaction started from September, 2004 but the accused says that he gave trucks to the complainant in January, 2005. Learned Counsel therefore questioned as to why the accused would give the cheque dated 20/4/2005 of Rs. 5,00,000/- as security. Learned counsel further submitted that there is absolutely no evidence on record to establish that the trucks were given to the complainant on monthly rental of Rs. 2,50,000/-. He pointed out that along with the cheque of Rs. 5,00,000/- which bounced, the accused had given one more cheque of Rs. 1,00,000/-, which could be readily encashed. Therefore, according to him by invoking presumption under Sections 118 and 139 of the Act, the complainant can be said to have established that there was legally enforceable debt of Rs. 5,00,000/- which is the cheque amount. He submitted that though the trial Court has held that payment of Rs. 4,70,000/- by the accused to the complainant has been proved it has however gone further to hold that there is no cogent evidence regarding the balance amount which is only Rs. 30,000/-. He submitted that the entire transaction was carried out through documents by means of issuing cheques and there are statements of the witnesses proving the said transaction. He submitted that the evidence on record clearly establishes that the complainant had paid to the accused an amount of Rs. 7,50,000/- and the accused had repaid only sum of Rs. 1,00,000/- due to which the balance was more than Rs. 5,00,000/-. He submitted that if really as per the agreement, the complainant had to pay Rs. 2,50,000/- per month to the accused and that the complainant had utilised the trucks for three months and had to pay Rs. 7,50,000/- to the accused then how is it that the amount was settled only for Rs. 1,00,000/-. According to the learned counsel for the complainant, the above cannot be probable defence. He further urged that since admittedly Rs. 4,70,000/- was paid by the complainant to the accused, the question arises as to why a cheque of Rs. 5,00,000/- as security would be given. He submitted that insofar as the balance amount of Rs. 30,000/- there is appropriate explanation in the evidence for having paid Rs. 2,80,000/- to the brother of the accused but at the instance of the accused. He submitted that on account of the presumptions

which are in favour of the complainant, the Court will have to see as to whose case is probable, whether it is of the complainant or whether it is of the accused. He pointed out from the evidence that there is no dispute that the cheque has been issued for the amount which is mentioned therein. He submitted that the accused has only suggested that the date on the cheque was filled by the complainant. He further questioned, if the accused owes money to the financial institution, then what is the need to give cheque to the complainant as security. He pointed out the date as to when the said cheque is given as security, has not at all being disclosed by the accused. He therefore contended that defence of security is inherently improbable. He submitted that the learned trial Magistrate while holding that presumption u/s 139 of the Act has been rebutted, has not actually kept in mind the said presumption. According to the learned Counsel, the trial Magistrate has gone in detail to say as to how the complainant has not established his case and has then held that presumption is rebutted. Learned counsel submitted that after the complainant deposed about the transaction and produced the cheque on record the presumption u/s 139 of the Act had come into play and it was then for the accused to rebut the said presumption. He submitted that there is nothing in the impugned judgment and order to show as to how the accused has rebutted the said presumption. He submitted that unless the accused proves that the cheque was given as security, the case of the complainant cannot be thrown out. He took me through the statement of account of Goa State Co-operative Bank Ltd and showed the entries of the amounts credited in the account of the accused from September 2004 to January 2005, making a total of Rs. 2,70,000/-. He further submitted that there is admission with respect to the amount of Rs. 2,80,000/-. He therefore urged that the complainant had accounted for the cheque amount. Lastly, the learned counsel for the complainant submitted that even if it is taken for granted for the time being that the cheque was given as security even then the same can be considered as liability u/s 138 of the Act. In this regard he has relied upon Mrs. Neeta Mukesh Jain Vs. The State of Maharashtra and Mr. Chandresh K. Nishar, . He submitted that the impugned judgment and order of acquittal is perverse and is liable to be quashed and set aside. He therefore, urged that the accused be held guilty of the offence u/s 138 of the Act and be convicted and sentenced for the same accordingly.

13. Per contra, Mr. Godinho, learned counsel appearing on behalf of the respondent No. 1 submitted that the presumption under Sections 118 and 139 of the Act have been fully rebutted and this is evident from the cross examination of the complainant and his witnesses. He submitted that the complainant is not at all certain about his own case and that he has taken changing stands. He pointed out from the evidence that at one instance the complainant says that the accused had borrowed Rs. 8,00,000/- from the complainant, at other stage, he says that the accused had borrowed Rs. 7,50,000/- and at yet another stage he says that the accused had borrowed Rs. 2,80,000/-. He submitted that learned trial magistrate, on remand, in detail, discussed the evidence on record and has

held that the complainant cannot be held to have been successful in bringing home the guilt of the accused u/s 138 of the Act. He submitted that the case of the complainant as set out in the statutory notice and in the complaint is totally different from that which came in the oral evidence. He further submitted that admittedly statutory notice was not served personally on the accused and that it was served on the family member and the accused was not available for about three months due to which he did not get the notice and also did not get opportunity to reply to the said notice.

14. Learned counsel appearing on behalf of the accused relied upon following judgments:-

i. Mr. Kishore Shankar Singapurkar Vs. State of Maharashtra and Mafatlal Finance Company Ltd., .

ii. Harman Electronics (P) Ltd. and Another Vs. National Panasonic India Ltd.,

iii. M.D. Thomas Vs. P.S. Jaleel and Another,

iv. Laximikant D. Naik Karmali Vs. Shri Santosh V. Naik and Ors. (2006 (2) Goa L.R. 251)

v. Vividha Urban Co-operative Credit Society Limited Vs. Gurudas Krishna Fatrekar and others, (2010 (2) Goa L.R. 1) : (2010 ALL MR (Cri) 1792)

vi. Vijay Vs. Laxman and Another,

vii. M.S. Narayana Menon @ Mani Vs. State of Kerala and Another,

viii. Kumar Exports Vs. Sharma Carpets,

ix. Krishna Janardhan Bhat Vs. Dattatraya G. Hegde,

15. I have gone through the entire material on record with the assistance of the learned counsel for the parties. I have considered the submissions made by the learned Counsel for the parties and all the judgments relied upon by them.

16. The point that arises for determination is whether the accused has been able to rebut the presumptions arising under the Act.

17. Let us first see as to what the authorities relied upon by the learned counsel for the accused and for the complainant, lay down.

18. In the case of Mr. Kishore Shankar Singapurkar Vs. State of Maharashtra and Mafatlal Finance Company Ltd., , where the order issuing process was challenged, it has been observed that it is the bounden duty of every complainant to narrate full details of the transactions, including the past history and the litigations arising out of it, whenever he files a complaint in Criminal Court and that if he does not do that, the Court is very much likely to be misled. It is further observed that one who does not come with clean hands has to suffer.

19. In the case of M.D. Thomas Vs. P.S. Jaleel and Another, , the notice of

demand was served upon the wife of the appellant and not the appellant. The Apex Court held that there is no escape from the conclusion that the respondent-complainant had not complied with requirement of giving notice in terms of clause (b) of Proviso to Section 138 of the Act.

20. In the case of "Laximikant D. Naik Karmali" (supra), the learned Single Judge of this Court has held that presumption has to be rebutted by proof and not by a bare explanation which is merely plausible. It is observed that a fact is said to be proved when its existence is directly established. It is further observed that since the complainant's case is of criminal nature, it is for the complainant to prove his case on his strength and not on the weakness of the defence. It has been held that the complainant failed to prove that there was any debt or liability on the part of the accused and when a cheque is for an amount more than due, Section 138 of the Act is not attracted.

21. In the case of "Vividha Urban Cooperative Credit Society Limited", (2010 ALL MR (Cri) 1792) (supra), learned Single Judge of this Court has held that where the subject cheque was issued for more amount than due to the complainant, the acquittal of the accused on that count cannot be faulted.

22. In the case of Vijay Vs. Laxman and Another, , the Hon"ble Supreme Court has held that standard of proof required for rebutting the presumption under Sections 118 and 139 of the Act is not as high as that required of the prosecution and is rebuttable on the preponderance of probabilities.

23. In the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, , the Apex Court has held that the onus of proof on the accused is not as heavy as that on the prosecution and such onus is that of a defendant in civil proceedings. It has been also held that while exercising appellate powers against a judgment of acquittal, where two views are possible, the appellant Court should not interfere with the findings of acquittal recorded by the Court below.

24. In the case of Kumar Exports Vs. Sharma Carpets, , the Apex Court held that the standard of proof for rebuttal of presumption under Sections 118 and 139 of the Act does not require proof beyond reasonable doubt and that something probable has to be brought on record and burden of proof can be shifted back to the complainant by producing convincing circumstantial evidence. It has been held that in order to rebut the said presumptions the accused can also rely upon presumptions under the Evidence Act, 1872, Section 114 (common course of natural events, human conduct and public and private business.)

25. In the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, , the Apex Court has held that in order to discharge the burden of proof he need not examine himself and he may discharge the same on the basis of material already brought on record. It has been held that whereas prosecution must prove guilt of the accused beyond reasonable doubt, standard of proof required on the part of the accused is preponderance of probabilities and that inference of preponderance of probabilities can be drawn not only from the materials brought

on record by the parties but also by referring to the circumstances upon which the accused relies.

26. In the case of Mrs. Neeta Mukesh Jain Vs. The State of Maharashtra and Mr. Chandresh K. Nishar, , relied upon by the learned counsel for the complainant, the learned Single Judge of this Court has observed that the word "security" does not mean that it was not issued for discharge of debt and that the cheque was issued as security of some other transaction or contract between the parties.

27. The contents of the statutory notice given to the accused by the complainant u/s 138(b) of the Act and the contents of the complaint which followed the said notice can certainly be relied upon by the accused to show that the presumptions stand rebutted. In the said statutory notice and in the complaint, the complainant has stated that in the last week of January, 2005, the accused agreed to sell to the complainant five trucks for consideration of Rs. 16,00,000/- for each of the trucks and towards part payment of the said oral agreement, the complainant paid to the accused a total sum of Rs. 7,50,000/-. The averments made in the complaint are the foundation for leading evidence in the matter. Though in his affidavit-in-evidence the complainant (PW 1) stuck to his complaint, however in his cross-examination, he created a lot of confusion which creates doubt about truthfulness of the case of the complainant. Here, he has stated that in September, 2004, initial talks regarding sale of five trucks took place. Neither in the statutory notice nor in the complaint, it has been averred that there were initial talks regarding the sale of five trucks, in September 2004. In the statutory notice, complaint and affidavit-in-evidence, it is nowhere mentioned that "Siddhi Enterprises" a proprietary concern fully owned and managed by the wife of the complainant was also involved in the transaction and giving of money to the accused. In his cross-examination, initially, PW 1 specifically stated that there is no connection between the business of Siddhi Enterprises and the transaction of sale of trucks between him and the accused. But subsequently, in his cross examination, PW 1 brought in Siddhi Enterprises in the transaction as having given Rs. 3,20,000/- to the accused, towards the transaction of the trucks. The complainant clarified that besides the transaction pertaining to the trucks, he and/or Siddhi Enterprises did not have any other transaction with the accused. He further stated that he had directly given to the accused a total sum of Rs. 8,00,000/-. There was no doubt in the mind of the complainant about the said amount. He has clarified that of the said amount, an amount of Rs. 3,20,000/- was directly paid to the accused from the account of Siddhi Enterprises; amount of Rs. 1,80,000/- was paid to J.K. Tyres which is the proprietorship firm of brother of the accused; a sum of Rs. 2,00,000/- was directly paid to the accused from his own account and that he had given another Rs. 1,00,000/- to the brother of the accused. That makes the total of Rs. 8,00,000/-. All the above is totally contrary to the case as has been set out in statutory notice, the complaint and the affidavit-in-evidence. First of all, the total amount allegedly paid by the complainant towards the transaction of the trucks, which was Rs. 7,50,00/- only as per the notice, complaint and affidavit-in-

evidence became Rs. 8,00,000/- in the cross-examination of the complainant. Next though the entire amount of loan, as per the notice, complaint and the affidavit-in-evidence was paid to the complainant, in the cross-examination the stand changed and it was alleged by the complainant that an amount of Rs. 1,80,000/- was paid to J.K. Tyres, which he alleged to be the proprietorship concern of the brother of the accused and further amount of Rs. 1,00,000/- was also given to the brother of the accused. At one stage it was "J.K. Tyres", a proprietorship firm and at the other stage it was J.K. Industries Ltd., a company. There is no convincing evidence on record to establish the nexus of the accused to this firm or company, as the case may be. Then, as already stated above, Siddhi Enterprises, a proprietary concern fully owned and managed by his wife also landed into the transaction. Therefore first of all, there is no certainty as to whether the amount that was advanced as loan to the accused was Rs. 7,50,000/- or Rs. 8,00,000/- and also there is no certainty as to who had given that amount and to whom. Apparently, in order to come out of this confusion, a suggestion was later on put to DW 1 (accused) that he and his brother Stanley Fernandes are doing business together and had purchased tyres from J.K. Enterprises at Panaji and that the amount due to be paid to said J.K. Enterprises was Rs. 1,80,000/- and the accused had instructed PW 1 to issue a cheque in the name of J.K. Enterprises, for an amount of Rs. 1,80,000/-. Thus, the third name "J.K. Enterprises" came in. As has been rightly held by the trial Court, there is no evidence to show the connection between J.K. Tyres and J.K. Industries or to connect them with the accused. There is also no evidence to show connection of J.K. Enterprises with the other two concerns or to connect the same with the accused. The above infirmities are not minor to be discarded on the strength of presumption u/s 139 of the Act. They ably shake the said presumption to lead the Court to hold that the same is rebutted.

28. DW 4, Stanley Fernandes, the brother of the accused, has stated that he had received from the complainant an amount of Rs. 1,00,000/-, in exchange of tyres which he had given to the complainant. He has specifically stated that this amount of 1,00,000/- has no connection with his brother, the accused. In his cross-examination, DW 4 has denied the suggestion that Stanley Enterprises is partnership business of him and the accused. It is to be kept in mind that the accused, in order to rebut the presumption, may establish his case only on preponderance of probabilities but the complainant has to prove his case beyond doubt. There is no evidence to establish any connection between Stanley Enterprises and the accused.

29. The amount allegedly given to the brother of the accused is Rs. 1,00,000/-. Then there is further admission that cheque No. 393998 dated 23/5/2005 of Rs. 1,00,000/- given by the accused has been encashed by the complainant. Lastly, an amount of Rs. 1,80,000/- has been allegedly paid by the complainant to J.K. Tyres or J.K. Industries or J.K. Enterprises, whatever the name may be. That makes the total of Rs. 3,80,000/-. In that event, the liability would not be Rs. 5,00,000/- as alleged, but would be only Rs. 3,70,000/-.

30. Merely because in paragraph 14 of the affidavit-in-evidence, the accused has admitted of having received an amount of Rs. 4,70,000/- that cannot be correlated with the amount of Rs. 7,00,000/- allegedly received by the complainant in or after the month of January, 2005, i.e. after the agreement to purchase the trucks was entered into in the last week of January, 2005, which is the case of the complainant. In paragraph 14, an amount of Rs. 70,000/- has been stated to have been received on 11th September, 2004, an amount of Rs. 1,00,000/- has stated to have been received on 5th January, 2005 and an amount of Rs. 1,00,000/- has been stated to have been received on 9th January, 2005. These amounts being the amounts totaling to Rs. 2,70,000/- were received by the accused prior to the week ending the month of January, 2005, they cannot be taken into consideration, as part of the transaction as alleged in the complaint. This payment has to be considered along with the entire case of the accused. Hence, it cannot be said that there is some admission on the part of the accused.

31. It is the case of the accused that the trucks were hypothecated to Ashok Leyland Finance Ltd. and the total outstanding loan was about Rs. 52 to 55 lakhs. In his affidavit-in-evidence, the accused specifically stated that there was an agreement between him and the complainant in which the complainant agreed to purchase the said trucks knowing that the said trucks were hypothecated and that the accused had to pay monthly loan installments. He stated that it was agreed that the loan should continue to exist in the name of the accused and complainant should pay to the accused monthly installments and he should in turn continue to pay monthly loan installments of the financial institution. According to him, the consideration price for each trucks was fixed at Rs. 16,00,000/- and since the complainant was unable to pay the entire consideration, he had offered to pay consideration amount in monthly installments of Rs. 2,50,000/- to Rs. 3,00,000/-. The accused stated that bonafidely believing that the complainant would honor his commitments, in the month of January, 2005, he transferred possession of the five trucks to the complainant. He has stated that between September 2004 to March 2005, he had received from the complainant an amount of Rs. 4,70,000/- only. According to the accused, the complainant used the said trucks for about three months, but failed to pay to him monthly installments as agreed, due to which he had difficulty in paying the loan amount. He further stated that in the month of April, 2005, the complainant returned the trucks to him after using them for about three months and as a final settlement between him and the complainant, the accused agreed to pay an amount of Rs. 1,00,000/- to the complainant and accordingly, issued cheque of that amount which has been encashed by the complainant. According to the accused, the cheque for an amount of Rs. 5,00,000/- was earlier given only as a security since he had to pay the loan installments to the financial institution and since the complainant was apprehending that he may not pay the loan amounts. No doubt there are dents created to the above case of the accused.

32. Based on the entire evidence on record the learned trial court has come to

the conclusion that the complainant could not prove his case beyond doubt and the accused could rebut the presumption. Considering the case of the accused and testing the same on the touchstone of entire evidence on record, I am of the view that by preponderance of probabilities, the accused has been able to prove that the cheque amount is more than the actual debt. In such circumstances, it cannot be said that the trial Court committed an error in holding that the complainant could not prove his case. The accused has therefore, been rightly acquitted of the offence punishable u/s 138 of the Act. No interference with the impugned judgment and order is called for, even if it is felt that another view is possible. In the result, the appeal is dismissed.