
(2022) 12 BOM CK 0114

In the Bombay High Court

Case No : Criminal Appeal No. 1630, 1631 Of 2011

M/S. Pinak Bharat And Company

APPELLANT

Vs

Anil Ramrao Naik And Others

RESPONDENT

Date of Decision : 02-12-2022

Acts Referred:

Negotiable Instruments Act, 1881 — Section 20, 87, 138, 139
Code Of Criminal Procedure, 1973 — Section 313
Indian Penal Code, 1860 — Section 415

Citation : (2022) 12 BOM CK 0114

Hon'ble Judges : S. M. Modak, J

Bench : Single Bench

Advocate : A. S. Khandeparkar, Prerak A. Sharma, Khandeparkar, Rohit Mahadik, Nihir U. Dedhia, Rushikesh Bhagat, Saurabh Mittal, Vaibhav Kulkarni, Prerak A. Sharm, Megha Bajoriya, H. J. Dedhia

Final Decision : Dismissed

Judgement

S. M. Modak, J

1. Heard learned Advocate Shri A. S. Khandeparkar for the Appellant-Complainant, learned Advocate Ms. Megha Bajoriya for the Respondent No.1 and learned APP Shri H. J. Dedhia for the Respondent No. 2-State.

2. Both these appeals are arising out of judgment of acquittal given by the Court of Metropolitan Magistrate 30th Court, Kurla, Mumbai on 30/08/2011. The complaint for the offence punishable under Section 138 of the Negotiable Instrument Act was filed by the Complainant as a Partner on behalf of the Firm. There was relationship of Financer and Developer in between the Appellant and the Respondent No. 1 (hereinafter they will be described as per their original status before the trial Court). The complainant have given loan of Rs. 1 Crore to the accused. They have entered into a Memorandum of Understanding on 09/05/2003. The complainant was given various options of re-payment.

3. The amount was advanced as accused wants to pay the consideration to owner of the property. Owner of the property situated at Bahadur S. K. Bole Marg, Dadar, Mumbai and owned by one Kishorebhai Karamsey Vikamsey. The said Kishorebhai has agreed to entrust that property for development to the accused. For some reason or other, the accused could not complete the construction of the building on the said plot.

4. Amongst various modes available as per the Memorandum of Understanding, the complainant has opted for refund of the amount of Rs. 1 Crore alongwith interest. When the Memorandum of Understanding was executed, the accused has issued two cheques to the complainant. Their details are given in para no. 11 of the Memorandum of Understanding. Those two cheques were not completed in all respect. The complainant deposited both these two cheques in their bank account Jankalayan Sahakari Bank Ltd., Sion (W). However, they were returned unpaid by the drawee bank, the Cosmos Co-op. Bank Ltd. Dadar (West) for the reason 'Refer to Drawer'.

5. The complainant called upon the accused to pay the amount of those two cheques within 15 days on the receipt of the notice. The accused denied the averments in the notice by sending reply. As such there was failure to pay the amount and hence two complaints were filed before the Court of Metropolitan Magistrate. The details of those cases are as follows:-

Sr. No.

Case No.

Cheque No.

Date

Amount

1.

Summary Criminal Complaint Case No. 3002996/SS/2007

904443

27/04/2007

Rs. 1 Crore

2.

Summary Criminal Complaint Case No. 3002997/SS/2007

904444

27/04/2007

Rs. 68,51,590/-

6. In both these cases, the accused was acquitted by separate judgments dated 18/06/2007. More or less, the contents of the judgments are same. The complainant has also adduced common evidence in both these cases. Criminal Appeal No. 1630 of 2011 is preferred against the judgment in Summary Criminal Complaint Case No. 3002996/SS/2007. Whereas Criminal Appeal No. 1631 of 2011 is preferred against the judgment in Summary Criminal Complaint Case No. 3002997/SS/2007.

7. The issue involved in these appeals is whether the learned Metropolitan Magistrate has rightly appreciated evidence. The issue is whether the presumption under Section 139 of the Negotiable Instrument Act can be drawn and whether the accused has successfully rebutted that presumption.

8. Learned Advocate Shri A. S. Khandeparkar relied upon the following judgments :-

(i) Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Limited(2016) 10 SCC 458

(ii) Sai Auto Agencies, Amravati Vs. Sheikh Yusuf Sheikh Umar (2010) 3 Mh. L. J. 702

(iii) Bir Singh Vs. Mukesh Kumar (2019) 4 SCC 197

(iv) M/s Sri Krishna Agencies Vs. State of A.P. and Anr. Cri. Appeal No. 1792 of 2008, dated 11/11/2008

(v) Cri. Appeal No. 1792 of 2008 M/s. Sri Krishna Agencies Vs. State of A.P. & Anr. (Arising out of SLP(Cri. No.6878/2007) Supreme Court of India

Presumption of Innocence

9. It is true that once the accused is acquitted, the presumption of innocence get strengthened. It is not the rule of law but rule of prudence not to interfere in the judgment of acquittal. It is important to note that the prosecution under Section 138 of the Negotiable Instrument Act is quasi criminal in nature. So as to say that burden not only lies on the complainant (just like on prosecution in criminal trial), but it also lies on the accused. In other words, the burden never entirely rests on the complainant. So, it cannot be said that "there is limited scope for interference in the judgment of acquittal particularly, when it is for the offence punishable under Section 138 of the Negotiable Instrument Act".

Judgment of the trial Court

10. It will be material to consider the reasonings given by the trial Court for arriving at conclusion of the acquittal.

(a) Though the contention was raised about the authority of the partner for filing the complaint, the trial Court has considered the answers given in the statement under Section 313 of the Criminal Procedure Code. Therein the accused has admitted that M/s. Pinak Bharat and Company is Partnership firm and

complainant is one of the partners. It was observed that facts are admitted need not be proved. (para no. 24)

(b) The cheques were deposited in Jankalyan Sahakari Bank Ltd., Sion Branch and hence the Court was having territorial jurisdiction. (para no. 26)

(c) Drawing of the cheques on account of the accused is not disputed (para no. 27).

(d) Cheque for Rs. 1 Crore was handed over without mentioning date on it. Trial Court has posed a question why date was put on the cheque and at whose instructions. (para no. 28)

(e) The cheque was deposited after filing of the Civil Suit by the accused against the complainant.

(f) That is why the Court found the theory put up by the accused that cheque was given for security purpose as a reasonable. (para no. 29)

(g) Putting up name of the payee and date on the cheque by the complainant particularly after filing of the Civil suit was not accepted by the trial Court. (para no. 30)

(h) Receipt of Rs. 19,00,000/- (by way of three cheques of Rs. 4,00,000/- on 19/03/2005, Rs. 5,00,000/- on 17/06/2005 and Rs. 10,00,000/- on 30/05/2005) was suppressed by the complainant. Whereas it is admitted during the cross-examination.

(i) The Memorandum of Understanding is silent from which date the interest is payable.

(j) Once the amount of Rs. 19,00,000/- is received by the Complainant in the year 2005, the demand of Rs. 1 Crore appears to be unreasonable and excessive. (para no. 31)

(k) Failure to pay existing liabilities when the cheques were presented.

(l) By way of cross-examination the accused was successful to offer probable and acceptable explanation so as to rebut the presumption under Section 139 of the Negotiable Instrument Act.

(m) When the cheques were handed over on 09/05/2003 without mentioning the date, there was no any legal and enforceable liability on the part of accused. (para no. 36)

(n) Cheques were handed over by way of security and hence it does not come within the four corners of Section 138 of the Negotiable Instrument Act. (para no. 37)

11. So far as the reason for dishonor and complying with the provisions of Section 138 of the Negotiable Instrument Act, the trial Court gave findings in

favour of the Complainant. So now the issue is whether the findings against the complainant are correct or not.

12. The conclusions drawn by the trial Court can be summarized as follows:

- (i) When the cheques were handed over on 09/05/2003 there was no liability.
- (ii) When the suit was pending how the accused can give an authority to the complainant to put name of the payee and the date on the cheques.
- (iii) Cheques were handedover by way of security.
- (iv) Once the complainant has admitted the payment of Rs. 19,00,000/- in the year 2005, there was no existing debt or liability when actually cheques were deposited on 27/04/2007.

Submissions

13. Whereas according to the learned Advocate Shri Khandeparkar, the trial Court has failed to consider the provisions of Sections 138 and 139 of the Negotiable Instrument Act as interpreted in various judgments. He read over the contents of the Memorandum of Understanding, various correspondence and also filed copy of the award dated 25/09/2015 delivered by learned Arbitrator. Whereas according to learned Advocate Ms. Bajoriya, in fact there was no criminal intention on the part of the accused to cheat the complainant and accused has shown his bonafides when he has paid Rs. 19,00,000/-. According to her, the date and name of the payee were blank and when the complainant has filled in those details. By way of civil suit the accused has prayed for extension of time for recovery of the amount by the complainant on the basis of the Memorandum of Understanding. She has taken me through various clauses of the Memorandum of Understanding, which gives various options to the complainant. She also submitted that there were various reasons why accused could not complete the construction and in fact there was stay granted by this Court. She also submitted that the complainant has received the entire amount as per the award of the learned Arbitrator and now nothing remains. She submitted that on this background, the prosecution under Section 138 of the Negotiable Instrument Act cannot be continued and according to her the Respondent-accused is aged about 82 years of old.

14. By way of reply, the learned Advocate Shri Khandeparkar submitted that an action for recovery of money under the Civil law and prosecution under Section 138 of the Negotiable Instrument Act can simultaneously be prosecuted and intend to cheat is not required.

Simultaneous proceedings

15. On these aspects, I agree to his submission. There are different acts which constitute cause of action for prosecution under Section 138 of the Negotiable Instrument Act. It starts from deposit of cheques and ends with failure to make payment within 15 days from the receipt of the notice and intention to deceive

which is required for offence under Section 415 of the Indian Penal Code is not required for the offence under Section 138 of the Negotiable Instrument Act. About simultaneous prosecution, the Hon'ble Supreme Court has clarified in case of M/s Sri Krishna Agencies Vs. State of A.P. and Anr (supra) as referred above.

Cheques given as security

16. It will be material to consider the contents of the Memorandum of Understanding which is undisputed document. Giving of a loan of Rs. 1 Crore by the complainant to the accused is admitted. Execution of the Memorandum of Understanding is admitted. Issuance of the two cheques having the numbers as mentioned above by the accused to the complainant is also admitted. That finds place in clause no. 11 of the Memorandum of Understanding. So, when these cheques were issued on 09/05/2003, admittedly there was liability of Rs. One crore in between the developer and financier, and developer owes that amount to the financier.

17. The Hon'ble Supreme Court in case of Sampelly Satyanarayana Rao Vs. Indian Renewable Energy Development Agency Limited (supra) has clarified the validity of the prosecution under Section 138 of the Negotiable Instrument Act and in respect of cheques which are issued as a security. If cheque is issued towards discharge of the existing debt or liability, the prosecution is maintainable (para nos. 11 and 12).

18. So, I am not inclined to agree with the observations of the trial Court that cheques were issued by way of security. Even when second cheque for Rs.68,6=51,590/- was deposited, the liability towards interest has accrued.

Legally recoverable debt or liabilities

19. There is much emphasis on payment of Rs. 19,00,000/-by accused to the complainant. It is not disputed by the complainant. Only issue was on her own she has not brought it on record but it is by way of cross examination. According to learned advocate for the Respondents this payment is towards repayment of the principal. Whereas according to the learned Advocate Khandeparkar, it is for the payment of the interest. Both the learned Advocates has read over the correspondence in between the parties. They are as follows:-

Sr. No

Letter Dated

Sent by whom

Subject

1.

09/02/2007

Complainant to the accused

Thereby communicating her first preference to receive the premises but informing that as it is not available. She has requested to pay Rs. 3. 50 Crores immediately

2.

14/02/2007 (wrongly typed as January)

Accused to the complainant

Wherein the accused has admitted liability to pay Rs. 3.50 Crore and also asking for further maximum grace period of one year.

3.

26/02/2007

Accused to the complainant

Informing her that accused is in process of arranging the funds

4.

27/02/2007

Complainant to the accused

Asking him to pay amount immediately.

20. In order to ascertain the intention of the parties, this Court can also peruse the contents of the mandatory notice and the reply. They are dated 22/05/2007 and 07/06/2007. The accused has disputed the right of the complainant to deposit the cheques which were given as a security. He has clarified that the suit is pending and complainant is aware about the same. He has criticized the act of the complainant in depositing the cheques without informing him. So, it is pertinent to note that in his reply, the accused has not clarified that an amount of Rs. 19,00,000/- paid in installments in the year 2005 was towards the principal. To that extent, the learned Metropolitan Magistrate was not correct in observing that there was no liability of Rs. 1 Crore. The correspondence referred above do suggest that accused has admitted the liabilities and even not said that Rs. 19,00,000/- is to be appropriated towards the principal. I do not agree those findings.

Putting date and name of the payee on the cheques

21. It is not disputed that when the cheques were handed over on 09/03/2005, date and name of the payee were not mentioned on it. But it is admitted that they were drawn in the favour of the financier. It is also admitted that they were handed over to the financier complainant at the time of executing Memorandum of Understanding. So, certainly the complainant is possessor of those two cheques. In the record of the trial Court there is an opinion given by the Central Forensic Science Laboratory dated 21/10/2010 on the point of the examining of

those two cheques. However, it seems that it was not tendered in the evidence and also not considered by the trial Court. In the evidence even complainant has admitted that she has filled in name of the payee i.e. Firm name and date 27/04/2007.

22. So, material question is whether the complainant was justified in putting name of the payee and date on the cheques. According to the trial Court when the suit was pending, the complainant was not justified in completing it without authority of the accused. In case of *Bir Singh Vs. Mukesh Kumar* (supra) as referred above the Hon'ble Supreme Court had an occasion to make certain observations on this issue. The observations are as follows:-

"33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted."

It is further observed that

"34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This is itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence."

23. Learned Advocate Shri Khandeparkar heavily relied upon these observations.

24. It will be material to consider under which background these observations are made. There was conviction for the offence under Section 138 of the Negotiable Instrument Act. There was conviction and it was confirmed by the Appellate Court. In a revision, the High Court has reversed the findings of the conviction and acquitted the complainant. The Hon'ble Supreme Court has restored the conviction. It is observed that the presumption under Section 139 of the Negotiable Instrument Act can be rebutted by adducing evidence. The onus is on the accused to prove that cheque was not in discharge of debt or liability by adducing evidence. It is further observed that payee may fill up the amount and other particulars and it will not invalidate the cheque.

Provisions of Negotiable Instruments Act

25. Section 20 of the Negotiable Instrument Act talks about giving the authority to the holder to make inchoate stamped instrument complete. Even though the cheque is negotiable instrument, it does not require stamp.

26. Section 87 of the Negotiable Instrument Act talks about the effect of the material alteration. The ingredients are as follows:-

- (i) The material alterations render the negotiable instrument void.
- (ii) As against the person who was party at the time of making alterations.
- (iii) If he does not consent thereto.
- (iv) Even if he does not give consent, it is not void, if the alteration is made to carry out the common intention of the original parties.

27. In the case in our hand, the name of the payee and date were put on the cheque. There is no dispute about the handing over the cheques by the accused to the complainant. Even I have concluded that the debt or liability is also proved by the complainant at the time of handing over the cheques. Even it is proved at the time of depositing the cheques. So, putting a date whether was in pursuance to the common intention of the parties is a question. Putting the name of the payee also cannot be held to be objectionable. It is for the reason that they were handed over to the complainant only.

28. Section 87 of the Negotiable Instrument Act authorises alteration in two contingencies: -

- (a) If it is with the consent of the parties.
- (b) Even if party does not given consent if the alterations is done in order to carry out common intention of the parties.

29. If we apply this test, it can be said that neither of these contingencies exist so as to authorize to the complainant to put in dates on the cheques. They were handedover in the year 2003 and they were deposited in the year 2007. The complainant has not stated that those dates were put in as instructed by the accused. In fact, the circumstances brought on record suggest that there was dispute filed in Civil Court by way of suit. The accused has sought for extension of the time.

30. The facts of Bir Singh (supra) does not involve interpretation of section 87 of the Negotiable Instruments Act.

31. As per clause no. 5, the financier is prohibited from calling the developer to repay to secured loan with interest for a period of 36 calendar months next to execution of the Memorandum of Understanding. Whereas clause no.7 gives discretion to the financier to demand immediate repayment of the secured loan with interest. Whereas the prayer in the plaint says that the period of 36 calendar months be calculated from a month next to the January 2007. The suit was also contested. Even the correspondence dated 14/02/2007, by the accused to the complainant says that he has asked for grace period of one year. So, under such circumstances, it is difficult that the accused has consented the complainant to deposit those cheques.

32. On that aspect, only I agree with the findings given by the trial Court. No doubt cheque is negotiable instrument which is transferable and negotiable,

presumption under Section 138 of the Negotiable Instrument Act can be drawn only when the pre-conditions are satisfied. The complainant unilaterally has put in dates on the cheques without the authority of the accused and even by not informing him. So, it amounts to material alterations. If it is so such negotiable instrument becomes void. Hence prosecution under Section 138 of the Negotiable Instrument Act cannot be initiated. On that aspect the complainant has failed to satisfy the requirement of valid cheque.

33. I have not considered the observations made by the learned Arbitrator in the award that is to say whether the accused is fastened with certain liabilities and how much he has paid.

34. For the above discussion, I find no merit in both these appeals and they are dismissed. Applications, if any, also disposed of.