

(2012) 04 GUJ CK 0032

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 1224 of 2012

Nileshkumar Ashwinbhai Joshi

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 24-04-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Income Tax Act, 1961 — Section 124, 127

Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2013) ALLMR(Cri) 102

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : N.P. Chaudhary and Mr. Tushar Chaudhary, for the Appellant; C.M. Shah, APP for the Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

Bankim N. Mehta, J.—The applicant, original complainant, has filed this application with a prayer to grant leave to appeal against judgement and order dated 22.11.2011 passed by learned 3rd Additional Chief Judicial Magistrate, Palanpur, in Criminal Case No. 9363 of 2009 acquitting the opponent accused for the offence u/s 138 of the Negotiable Instruments Act, 1881 ("the Act" for short). According to the complainant, he is working as RTO agent. The accused is also carrying out the work of RTO office and is an agriculturist. As the accused was in need for finance for his business, demanded Rs. 5 lakh as loan from him. As he could arrange for Rs. 2,08,000/-, he paid the same in presence of family members and one Rafiq Rasool Qureshi. Thereafter the accused demanded Rs. 1,50,000/- as loan for his business purpose. Therefore, he gave Rs. 1,44,000/- on 6.3.2009. Thus, he advanced Rs. 3,52,000/- as hand loan to the accused. On making demand of the amount, the accused gave cheque No. 203382 dated 14.9.2009 for Rs. 3,52,000/- drawn on Shree Deesa Nagarik Sahkari Bank Limited, Palanpur Manila Branch. The cheque returned unpaid with endorsement "funds insufficient" when presented to the bank. Therefore, notice was served

through advocate to the accused and despite that the accused did not pay the amount of unpaid cheque. Therefore, complaint u/s 138 of the Act was filed.

2. The trial Court issued summons and the accused appeared and denied having committed the offence. Therefore, the prosecution adduced evidence. On completion of recording of evidence, further statement u/s 313 of the Code of Criminal Procedure, 1973 was recorded. After hearing learned advocates for the parties, the trial Court by the impugned judgement acquitted the accused. Being aggrieved by the said decision, the complainant has preferred the appeal and filed this application to obtain leave to appeal.

3. I have heard learned advocate Mr. Chaudhary for the applicant at length and in great detail. He submitted that the complainant was cross-examined by the accused and when he did not appear for further cross-examination, the accused could have given an application to the Court to call the witness but the accused failed to move the Court. Therefore, the trial Court committed error in recording that the complainant did not offer himself for cross-examination. He also submitted that the accused did not give reply to the statutory notice and therefore presumption is required to be drawn against the accused. He further submitted that the accused has not explained the circumstance under which the cheque was issued to the complainant. Therefore, the trial Court committed error in acquitting the accused and hence the impugned judgement is required to be set aside.

4. It appears from the impugned judgement that the complainant failed to prove that the amount as stated in the complaint was advanced to the accused and the cheque in question was given towards discharge of such liability. u/s 139 of the Act, presumption is rebuttable presumption. It also appears that except the oral evidence of the complainant, he did not produce any evidence to show that he had sufficient fund to advance to the accused. The complainant stated that he paid Rs. 61,000/- after withdrawing from the investment made in Mutual Fund, Rs. 50,000/- from the amount received on maturity of postal investment, Rs. 94,000/- borrowed from his friend, Rs. 71,000/- were obtained from his brother and Rs. 20,000/- were withdrawn from money back policy of LIC but such evidence was not produced in the trial Court. In the cross-examination the complainant stated that he has recorded the amount advanced to the accused in his diary and stated that he would produce the diary on the next date. As the complainant sought time to produce documentary evidence in support of his case, the accused gave application on 29.3.2011 for adjournment and the cross-examination was deferred. Thereafter, the complainant neither appeared in the Court for further cross-examination nor produced documentary evidence in support of his case. The application Exh. 33 for adjournment given by the complainant was rejected. Thereafter, the complainant gave pursis Exh. 37 closing his evidence. These sequence of events clearly indicate that the complainant in his cross-examination gave details of the source of his fund and sought time to produce them in the Court but thereafter did not appear in the

Court for further cross-examination but closed his evidence. Therefore, cross-examination of the complainant remained incomplete as he did not remain present for further cross-examination nor produced documentary evidence in support of his case. Therefore, prejudice was caused to the accused. Even the complainant did not produce documentary evidence to show that he had funds to advance to the accused. By cross-examining the complainant, the accused was able to bring on record circumstances upon consideration of which this Court is of the view that the accused was able to raise probable defence that legally recoverable debt did not exist. The complainant failed to discharge the burden shifted on him to prove the existence of debt. Therefore, the trial Court was justified in recording acquittal.

5. Learned advocate Mr. Chaudhary for the applicant failed to point out that trial Court committed error in recording the finding of acquittal. He failed to bring on record any ground to support his case for leave to appeal. Therefore, the application for leave to appeal is required to be rejected. In the result, the application fails and stands dismissed. Leave to appeal is refused. Consequently, the appeal also stands disposed of.