
(2008) 12 BOM CK 0037

In the Bombay High Court

Case No : Criminal Appeal No's. 73 and 74 of 2007

Nishith M.P. Verlekar

APPELLANT

Vs

Ashpaque Marfani, Proprietor of "Mustafa" Collection

RESPONDENT

Date of Decision : 08-12-2008

Acts Referred:

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

Citation : (2008) 111 BOMLR 199

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : S.G. Bhobe, for the Appellant; Umesh Rao, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—Both these appeals are being disposed of by common judgment and order since the parties are the same and the evidence led in both the matters, is almost identical.

2. The appellant in both the appeals, is the complainant in Criminal Case Nos. 532/P/2006/C and 490/P/06/C filed against the respondent in the Court of Judicial Magistrate, First Class, Mapusa.

3. In Criminal Appeal No. 73/2007, the complainant filed Criminal Case No. 532/P/2006/C against the accused for the offence u/s 138 of the Negotiable Instruments Act ("The Act" for short) alleging that the accused had issued a cheque dated 10.06.2006 in the sum of Rs. 2,15,000/- drawn on Jammu and Kashmir Bank Limited, Panaji Branch. The same was presented and returned dishonoured for the reason "Exceeds Arrangement". Thereafter, the complainant sent registered notice to the respondent dated 23.06.2006 calling upon the accused to make the payment. In spite of receipt of the said notice, the accused did not make the payment. The accused pleaded not guilty. In his statement u/s 313 of Criminal Procedure Code, the accused stated that he had paid the whole

amount of loan which he had obtained from the complainant. He further stated that he had issued a blank cheque in favour of the complainant as a security. To prove the case, the complainant examined himself and produced several documents. The complainant also examined Milind Bhende as P.W.2. The accused examined himself in defence and produced several documents. The learned Magistrate, upon appreciation of the evidence led by the parties, held that the complainant had not been able to prove the offence u/s 138 of the Act beyond reasonable doubt. The learned Magistrate held that the complainant had stated that when the accused received money from him he always used to issue him a receipt and whenever the accused issued cheque in his favour, the accused used to take back the said receipt. Since the complainant had not produced original receipt or copy of the receipt, the contention that the accused used to take financial assistance from him, could not be believed. The learned Magistrate held that the notice issued to the accused prior to filing of the complaint, addressed on his shop, was received by one Joanita, who was not examined nor her signature was identified nor any evidence was led to show that the said Joanita was working for the accused at the time of service of notice. The learned Magistrate further held that the evidence of Milind Bhende P.W.2 that the accused had told him about the receipt of notice, was hearsay. The learned Magistrate placed reliance upon the evidence of the accused that the accused has stated in his deposition that he has borrowed the sum of Rs. 50,000/- @ Rs. 5 % per month and when he borrowed the said amount, the complainant had asked him to keep a blank cheque as a security and, accordingly, he had handed over a blank cheque and the entire loan amount was paid to the complainant, but the cheque was not returned and every time, the complainant pretended that he does not remember whether he had kept the said cheque. He further stated that he did not receive the legal notice and that signature on the acknowledgment card, was not his. The learned Magistrate held that the complainant had not proved that the notice was served on the accused since Joanita was not examined.

4. In Criminal Appeal No. 74/2008, the complainant filed Criminal Case No. 490/P/2006/C on the allegation that the accused had issued, in favour the complainant, a cheque dated 25.05.2006 for the sum of Rs. 1 Lac drawn on H.D.F.C., Bank Limited, Panaji which was upon presentation, returned with endorsement "Account Closed". Thereafter, registered A.D. notice dated 30.05.2006, was sent to the accused calling upon him to make payment within 15 days. The said notice was received by the accused on 01.06.2006. Since no payment was effected, the complaint was filed. In the said case, the complainant examined himself as P.W.1 and also examined Milind Bhende as P.W.2 and produced several documents on record. The accused examined himself in defence and produced several documents on record. The accused also took the same defence as in criminal case No. 532/P/2006/C and the learned Magistrate recorded similar findings and consequently, acquitted the accused of the offence u/s 138 of The Act.

5. Mr. Bhobe, the learned Counsel appearing for the appellant submitted that the findings recorded by the learned Magistrate, are perverse and, therefore, the impugned orders of acquittal, are liable to be set aside. He further submitted that in the judgment in Criminal Case No. 532/P/2006/C, the learned Magistrate has mentioned that the notice was received by Joanita when actually notice was received by one Linda as is evident from acknowledgment card produced by the complainant. According to the learned Counsel, the notice in Criminal Case No. 490/P/2006/C was received by Joanita, but the learned Magistrate has mentioned the name of Joanita in Criminal Case No. 532/P/2006/C also, which shows non-application of mind on the part of the learned Magistrate. Mr. Bhobe submitted that the acquittal recorded by the learned magistrate, is patently unsustainable since the findings have been arrived at without properly marshalling the evidence on record on merits. Mr. Bhobe submitted that the defence taken by the accused is neither probable nor he has probabalised his defence by leading cogent evidence. According to learned Counsel, the learned Magistrate has neither marshalled the evidence nor addressed herself to the real questions involved in the matter, therefore, the matters are liable to be remanded for afresh decision in accordance with law.

6. Per contra, Mr. Rao, learned Counsel appearing for the respondent/accused supported the impugned orders of acquittal. The learned Counsel submitted that in the complaint, it has been mentioned that the cheques were issued in a commercial transaction without specifying the nature of the transaction and it is only in the cross-examination, the accused stated that the amounts were collected by the accused for his financial assistance. He further submitted that the complainant is a money lender and, therefore, the complaint is not maintainable under the provisions of the The Goa Money Lenders Act. The learned Counsel further submitted that the accused has probabalised his defence that he had repaid the amount of Rs. 50,000/- each, along with interest, taken by him by way of loans and that the cheques were given by way of security. According to the learned Counsel, the findings recorded by the learned Magistrate that the notices were not served upon the accused, cannot be faulted since the persons Joanita and Linda, who have received the notices, have not been examined by the the complainant to prove that they were serving with the accused at the relevant time nor postman was examined by the complainant. In support of the submission that before filing the complaint, notice must be served on the accused, the learned Counsel relied upon the judgment in the case of Shakti Travel and Tours Vs. State of Bihar and Another, and Rajiv Kumar v. State of U.P. Reported in 1993 (78) C C 507. The learned Counsel submitted that the fact that at the relevant time, the complainant was not paying tax, rules out the probability of the complainant lending the sum of Rs. 3,60,000/- to the accused. According to the learned Counsel, the transaction is hit by the Goa Money Lenders Act 2001. In support of this submission, the learned Counsel relied upon the judgment in the case of Krishnam Raju Finances v. Abida Sultana and Anr. reported in 2004 All M.R. 131. The learned Counsel further urged that the

complainant has not been able to prove that the cheques were issued in discharge of legally enforceable debt and, therefore, the acquittal recorded by the learned Magistrate, cannot be faulted. In so far as the evidence of Milind Bhende, P.W.2 is concerned, the same is hearsay and in any case, his version is highly improbable. According to the learned Counsel, the documents produced by the accused in his evidence, clearly establish that he had repaid the amount taken by way of loan to the complainant.

7. Mr. Bhobe, in reply to the submissions made by Mr. Rao that documents produced by the accused clearly prove the repayment of the loan amount, submitted that the bank statement produced by the accused, has not been marked as exhibit, but on the contrary, it is marked "X" for identification and, as such, cannot be taken into consideration.

8. I have considered the submissions made by the learned Counsel for the parties and perused the record and the judgments relied upon.

9. In view of the rival submissions, following point arises for my determination:

(i) Whether the cheques were issued by the complainant in discharge of legally enforceable debt?

10. Before dealing with arguments on merits, I would like to deal with the submissions of Mr. Bhobe that both the matters be remanded to the learned Magistrate for fresh decision since the learned Magistrate has not marshalled the evidence in both the cases and has not applied her mind and the judgments disclose non-application of mind. No doubt, the learned Magistrate has not marshalled the evidence led by the complainant as well as the accused in proper manner. However, since this is an appeal from acquittal, I am not inclined to remand the matters to the learned Magistrate. It is settled law that in appeal against the order of conviction or acquittal, the Appellate Court, ordinarily, should not remand the matter and only in the exceptional circumstances that the matter should be remanded for decision of the Magistrate. I would, therefore, deal with both the appeals on merits.

11. The complainant in both the complaints has stated that the cheques were issued by the accused to him in the commercial transaction and only in the cross-examination, it is stated that the amounts mentioned in the cheques, were collected by the accused for its financial assistance. No doubt, the complainant in a complaint u/s 138 of the Act, is not bound to mention the nature of the transaction, pursuant to which the cheque was issued in his favour by the accused. But once the accused pleads not guilty, it is expected from the complainant to state in examination-in-chief as to what was the nature of the debt or liability for which the cheque was issued. The complainant also has not stated in his evidence as the date on which he advanced the amounts mentioned in the cheque. The evidence of the complainant himself discloses that at the relevant time, he was not paying income tax although at some prior point of time, he was paying income tax. I find it difficult to accept the version of the

complainant that within a period of 15 days, he was in a position to advance the loan of Rs. 3,55,000/- to the accused. The accused has deposed on oath that he had taken Rs. 50,000/- on two occasions and had issued the cheques signed by him by way of security. It is further his case that he had repaid the entire amount to the complainant. It is not the case of the complainant that he had advanced the cheque amount to the accused by way of cheques. Therefore, the version of the accused that he had repaid the amount taken by him on two occasions and that he had given two cheques by way of security, cannot be just brushed aside. In my considered opinion, the accused, by leading his own evidence, has discharged the burden u/s 139 of the Negotiable Instruments Act. One more important aspect which is to be borne in mind it is the case of the accused that he had only signed the cheques and had not mentioned the amounts in the said cheques. Perusal of both the cheques discloses that the amounts and the signatures on the two cheques, are in different handwritings. This fact supports the defence taken by the accused that he had taken the amount of Rs. 50,000/- each on two occasions from the complainant and that he repaid the same. In my considered opinion, in order to ascertain as to whether the accused has discharged the burden cast on him u/s 139 of the Act, the probabilities of the case including the probability that the complainant was in a position to advance the large sums of money, has to be taken into consideration. In the present case, admittedly, the complainant and the accused, are businessman and both of them claimed that the amounts were advanced by way of financial assistance, though there is difference as to the amounts advanced. In this factual background, the version given by the accused, cannot be rejected outright. Therefore, considering the evidence led by the complainant and the accused on the probability factor, I am of the considered opinion that the accused has been able to discharge the burden cast on him u/s 139 of the Act. The version given by the accused that the cheques were issued by way of security, deserves to be accepted.

12. In so far as the findings given by the learned Magistrate that the complainant has not been able to prove the services of notices in both the cases is concerned, I find myself unable to accept the same. Undisputedly, the notices were issued at the correct address where the accused was carrying on the business. The notices were signed by Joanita and Linda. In this factual background, the complainant could not be expected to lead evidence that Linda and Joanita were in the service of the accused at the relevant time. The accused cannot be expected to examine either Linda and Joanita or the postman to prove that service was effected on Linda and Joanita and they had accepted the notices on behalf of the accused. I, therefore, find that the finding given by the learned Magistrate that notices were not served on the accused, are patently unsustainable in law. However, the same does not advance the case of the complainant in view of the finding that the accused has discharged the burden cast on him u/s 139 of the Act.

13. In view of the findings given above, it is not necessary for me to give a finding as to whether the complainant is a money lender more particularly having

regard to the fact that such a contention was not raised before the learned Magistrate. I also deem it not necessary to refer to the authorities relied upon by the learned Counsel for the respondent/accused.

14. For the reasons aforesaid, I find no merit in the both the appeals. Consequently, the appeals are dismissed. Bail bonds executed by the respondent in both the appeals, stand discharged.