
(2009) 12 BOM CK 0005

In the Bombay High Court

Case No : Criminal Application No. 2140 of 2009

Pandurang and Another

APPELLANT

Vs

Babulal

RESPONDENT

Date of Decision : 15-12-2009

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 142, 20, 9

Citation : (2010) 3 BC 586

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : N.V. Gaware, for the Appellant; N.C. Garud and K.M. Suryawanshi, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Borkar, J.—This is Criminal Application for leave to file Appeal against the order of acquittal passed by the learned Judicial Magistrate First Class. Court No. 1, Ahmednagar in S.T.C. No. 5575 of 2007 decided on 8.5.2009, whereby the present respondent No. 1 was acquitted of the offence punishable u/s 138 of the Negotiable Instruments Act, 1881.

2. Heard Mr. Gaware for the applicant, Mr. Garud for respondent No. 1 and Mr. Suryawanshi, A.P.P. for the respondent-State.

3. It is the case of present applicant who was original complainant that he had lent Rs. 4,50,000/- to the respondent No. 1 in February, 2006 as a hand loan for purchasing a plot. Respondent No. 1 agreed to repay the amount within six months and thereafter avoided to make payment. Therefore, at the persuasion of complainant, the respondent No. 1 issued cheque dated 1.8.2007 of Rs. 4,50,000/- on the Nagar Urban Co-operative Bank Ltd., Ahmednagar. The cheque was presented by the present applicant and it was dishonoured and, therefore, the applicant issued notice on 17.10.2007 to the respondent. Since no payment was made within 15 days, the complaint was filed.

4. The finding of acquittal was recorded mainly on two grounds. Firstly that the complaint was time-barred and secondly considering the cross-examination of the complainant and the defence evidence on record, it was held that the actual giving of hand-loan of Rs. 4,50,000/- was not proved. The case of the respondent No. 1 that only Rs. 50,000/- was lent in 2003 at the interest of 3% and only as the security for loan, the blank cheque given, was accepted.

5. So far as the first point is concerned, it is admitted by the complainant-applicant in his cross-examination that he had issued notice on 16.8.2007 and reply Exhibit 33 was given to the said notice. He further admitted that thereafter, he issued another notice on 17.10.2007. The accused in his defence evidence proved his reply to the first notice at Exhibit 40. Exhibit 41 is the acknowledgement of the reply notice. In view of this, the Trial Court has held that the complaint was not filed within one month from day of cause of action on 16.8.2007 and therefore it was barred u/s 142 of the Negotiable Instruments Act. The copy of the complaint is filed at Exhibit "A" with this application. It does not appear that there was any reference to the earlier notice dated 16.8.2007 and any attempt to bring the case within the proviso to Section 142(b) of the Negotiable Instruments Act. So it is not that the complainant attempted to satisfy the Court that for sufficient reasons there was delay in making complaint and as such delay should be condoned and the Court should take cognizance after condoning the delay. So on the face of the record the order of acquittal is justified. In support of the proposition that no cognizance of the complaint which is time-barred, can be taken, reliance was placed by the learned Counsel for the applicant on the judgment of the Supreme Court in the matter of Krishna Exports and Ors. v. Raju Das 2006(2) Mh.LJ. 742.

6. So far as second point is concerned, we find necessary discussion in the judgment of the trial Court in paragraph Nos. 11 to 15 and it is observed by the Trial Court that in the cross-examination, complainant-applicant admitted that his annual income from agriculture is Rs. 2 lakh to 2.5 lakh and from rent, annual income is Rs. 24,000/-. He was not paying any income tax. It is observed that considering daily transactions, it was difficult to believe that cash amount of Rs. 4,50,000/- would be available on one day with the complainant-applicant. Moreover, it is admitted in cross-examination that respondent No. 1 was not in a position to repay such a huge amount of Rs. 4,50,000/-. Therefore, it was disbelieved that without obtaining any document or without there being any witness or guarantor, amount of Rs. 4,50,000/- would be paid. On the other hand, respondent No. 1 examined himself on oath and also examined P.W.3 Subhash Chunnilal Parakh and proved that in the presence of P.W.3 Parakh, Rs. 50,000/- were paid as interest and a blank cheque was issued as security for the loan amount. In the facts and circumstances of the case, it was held that defence has proved its case and therefore the case u/s 138 of the Negotiable Instruments Act is not tenable,

7. Learned Counsel for the applicant Shri Gaware relied upon judgment in the

matter of M/s. General Auto Sales Vs. Vijalakshmi D., , In that case it is held that prosecution u/s 138 of the Negotiable Instruments Act is maintainable even if the instrument is given by way of security. This is judgment of the Single Bench of the Kerala High Court and in paragraph No. 6 following observations are made:

6. In the decision of the Apex Court in ICDS Ltd. v. Beena Shabeer 2002(3) KLT 218 : 2002 Cri.LJ 3995, the cheque given by a guarantor when bounced was found to be within the fold of Section 138 of the N.I. Act. Necessarily, the cheque given as a security, if bounced, shall be the subject-matter of a prosecution u/s 138 of N.I. Act. So the contention of the accused that Ext. P-I cheque was given only as a security will not enable him to escape from the clutches of law.

Another case cited is Purushottam Maniklal Gandhi v. Manohar K. Deshmukh 2007(2) Bom.C.R. (Cri.) 38. In paragraph Nos. 14, 15 and 19 following observations are made:

14. Ordinarily, the presumption in respect of date would be rebutted by showing that the instrument, from several instruments serially numbered, was handed over by one party to another on a date corresponding with the dates of previous and subsequent instruments. The learned Counsel for the appellant however submitted that the fact that the cheque is from a cheque book in which subsequent signed cheques are of earlier dates is not relevant, when a party handed over a signed cheque which is wholly blank, giving the holder the authority to complete the blank. Therefore, according to the learned Counsel even if it is taken for a while that the cheque was already handed over in the year 1993 as alleged, it does not follow that the accused had not given the complainant the authority to put appropriate date. Therefore, the presumptions as to the dates mentioned in the cheques would not stand rebutted on the bare consideration of counter-foil of the cheque book. Hence, it cannot be contended that the instrument was not intended to bear the date 5.12.1996.

15. The learned Counsel for the accused also questioned as to how the sum of Rs. 2,22,000/- came to be typed on the cheque when, even according to the complainant, the sum of only Rs. 1,08,000/- had been paid to the accused. She submitted that the complainant had failed to give any calculation as to how he arrived at the figure of Rs. 2,22,000/-. The complainant has stated that cheque bears figure of Rs. 2,22,000/- because it is inclusive of the interest. Considering the passage of time and rates of interest then prevailing it may not be necessary to go into actual calculation.

19. The learned Counsel for the respondent next submitted that the implication of Section 20 of the Act had been duly considered by Andhra Pradesh High Court (Cement Agencies v. V. Vijaya Babu and Anr.) 1997(4) Crimes 273. In that case by the end of financial year 1993-94 an amount of Rs. 16,790/- was payable by the accused and the accused issued cheque on 26.7.1993. It was dishonoured on 30.7.1994 with an endorsement that it exceeds arrangements. The defence taken by the accused was that blank cheques were issued on 4.10.1991 and the

complainant had acknowledged on the counter-foil on the said cheques. First, question as to whether Section 20 of the Negotiable Instruments Act enables a holder in due course of inchoate instrument to put a date of his choice is not addressed in the judgment of the Andhra Pradesh High Court. When a drawer of a cheque delivers a signed cheque he obviously gives an authority to the holder to put a date of his choice. Therefore, there would be no question of the instrument becoming time-barred. Since it would become time-barred only from the date of issue which in view of provision 118 would be the date on the cheque, which, u/s 20, the holder had the authority to fill. Hence the decision of the Andhra Pradesh High Court in M/s. Cement Agencies may also be not helpful to the respondent.

8. As per Section 20 of the Negotiable Instruments Act, no doubt whenever an incomplete negotiable instrument is handed over, the drawer prima facie gives authority to the holder thereof to complete the negotiable instrument. Section 20 of the Negotiable Instruments Act reads as follows:

20. Inchoate stamped instruments-Where one person signs and delivers a paper stamped in accordance with the law relating to negotiable instruments then in force (India) and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be upon it a negotiable instrument, for any amount specified, therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount:

Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

As per Section 20 of the Negotiable Instruments Act the holder is to specify amount not exceeding the amount covered by the stamp and the person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount. However, the holder is important. Proviso makes it clear that no person shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder. So prima facie so far as original holder is concerned, drawer is liable to the only amount intended by him to be paid thereunder. Only the holder in due course to recover the entire amount mentioned in the cheque may be in excess of the amount intended by drawer thereunder, from the drawer and in such case drawer is entitled to recover excess amount from the holder. "Holder in due course" is defined in Section 9 of the Act. Section 20 as quoted above is very clear that holder is not entitled to amount more than intended by the drawer to be paid under the instrument.

9. Learned Advocate for the respondent relied upon the case of M.S. Narayana

Menon @ Mani Vs. State of Kerala and Another, . In that case, Their Lordships considered in paragraph 32 the presumption u/s 118(a) of the Negotiable Instruments Act and held that applying the principle of "proved" or "disproved", the Court shall presume a negotiable instruments for consideration unless and until after considering the matter before it either believes that consideration does not exist or considers the non-existence so probable. So. the presumption is rebuttable presumption. In that case, in paragraph 58, it is observed as follows:

58. We in the facts and circumstances of the case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be a part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therefore cannot be held to have been issued in discharge of the debt as, for example if a cheque is issued for security or for any other purpose the same would not come within the purview of Section 138 of the Act.

10. In the facts and circumstances of the case, in my opinion, this is not a case where leave to file appeal can be granted. In the result, Criminal Application is dismissed. Leave refused.