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In the Bombay High Court

Case No : Criminal Appeal Nos. 823 and 824 of 2009

Pandurang Ramchandra Ghorpade APPELLANT

Vs

Vijay Gopala Lohar and Others RESPONDENT

Date of Decision : 28-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378(4)
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 420

Citation : (2015) ALLMR(Cri) 4806 : (2016) 1 Crimes 16 : (2016) 2 MhLj 29

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : Dilip Bodake and Sharad Bhosale, for the Appellant; H. Noronha, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.

1. These two appeals can be conveniently disposed of by this common Judgment, as the parties are the same, the facts are common, and the points needing determination are also the same.

2. The appellant is the original complainant. He had, based on the dishonour of two cheques issued in his favour by the respondent No. 1 herein, filed two different complaints, alleging the commission of two distinct offences, both punishable under Section 138 of the Negotiable Instruments Act (N.I. Act hereinafter) by the respondent No. 1. After holding two different trials in respect of the said two cheques, the learned Magistrate found the respondent no. 1 not guilty and passed an order of acquittal in both the cases. The appellant is aggrieved by the said orders of acquittal. He has, therefore, after obtaining special leave of this court, as contemplated under Section 378(4) of the Code of Criminal Procedure (Code hereinafter) filed the present two appeals, challenging the said orders of acquittal.

3. I have heard Mr. Dilip Bodake, the learned counsel for the appellant. I have heard Mr.H.Noronha, the learned counsel for respondent no. 1. I have heard Mrs.S.V. Gajare, the learned APP for the State. I have carefully gone through the impugned judgments.

4. For the sake of convenience and clarity, the appellant shall hereinafter be referred to as ''the complainant'' and respondent no. 1 as ''the accused.''

5. It is not necessary to refer to the facts of the two cases separately, as both the cases arose out of one and the same transaction. The case of the complainant, as put forth before the trial court, was that, in the month of June 2001, the accused had requested to the complainant to give him a hand loan of Rs. 50,000/-to meet his family needs. That, since the complainant had very close and intimate relations with the accused, he immediately advanced an amount of Rs. 50,000/-in cash, as and by way of ''hand loan'' to the accused. The accused had promised to repay the said amount within six months. However, the accused did not pay the amount as promised. The complainant demanded the amounts on a number of occasions, but the accused always avoided to repay the same. Ultimately, as the complainant kept on persistently demanding the repayment of the loan amount, the accused, in the month of January 2004, gave two postdated cheques to the accused, each in the sum of Rs. 25,000/-. Both the cheques were presented for payment, but they were dishonoured with a remark, that there was "insufficient balance" in the drawer''s account. That, the complainant thereafter, on 4th March 204, sent two separate notices to the accused by registered post, demanding the payment of the amount in question. Both these notices were received by the accused on 11th March 204, but in spite of having received the notices, the accused did not repay the amounts in question, and therefore, the complaints were lodged. Since there were two cheques, the complainant chose to lodge two different complaints.

6. The complaints had been lodged alleging commission of offences punishable under Section 420 of Indian Penal Code (IPC) and Section 138 of N.I. Act. The process, however, came to be issued only in respect of an offence punishable under Section 138 of the N.I. Act. As aforesaid, the accused was acquitted in both the cases by two separate but absolutely identical judgments. There is no change in the facts of the case, except that they relate to two different cheques one bearing no. 924620 and the other bearing 924621.

7. During the trial, the complainant examined himself as a witness. He also examined one more witness, i.e. a bank officer Jagannath Adke. A number of documents were placed on record and tendered in evidence by the complainant during the trial.

8. The learned Magistrate framed four points for determination. Those points, together with the findings recorded by the learned Magistrate, are reproduced below :

9. Thus, the Magistrate held, in both the cases, that the cheques had been issued

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in discharge of a legally enforceable debt or other liability. The Magistrate rejected the defence of the accused that nothing was actually due and payable by him to the complainant. The Magistrate also held that the cheques in question had been dishonoured and though the Magistrate did not frame a point for determination to the effect as to ''whether the cheques were dishonoured "for want of sufficient funds" -which ought to have been done it is clear that he had come to that conclusion. The Magistrate, however, came to the conclusion that the complainant failed to prove that he had demanded the cheque amount by issuing a notice in writing to the accused. Thus, all the other findings necessary to prove the charge against the accused were in favour of the complainant, but according to the Magistrate, there was no proper notice of demand as contemplated by clause (b) of the proviso to Section 138 of N.I. Act. It is on this finding, that the order of acquittal came to be passed in both the cases.

10. During the trials, the copies of the notices sent by the complainant to the accused were placed on record. The notices are identical, except that there is a difference in the number of the cheque. The fact of having issued notices and / or of the accused having received the same, on the given date, was also not in dispute. However, the view of the Magistrate was that, that the notices were not valid notices.

11. The learned counsel for the appellant contended that there was nothing wrong in the demand notices, in either of the cases, and the Magistrate has taken an unreasonable and hypertechnical view with respect to the notice of demand and has wrongly acquitted the accused. The learned counsel for the accused on the other hand, supported the view taken by the learned Magistrate.

12. I have carefully gone through the reasoning of the learned Magistrate, as reflected in the judgments. The Magistrate reproduced a part of the notice of demand in the judgment and to understand the controversy, it would be proper to reproduce the same here also :

13. The Magistrate observed -

"On careful perusal of contents of the notice by me, it significantly pinpoints that, the demand was made not for the cheque amount but only the hand loan as though it is a demand of loan amount and not the demand for payment of the cheque amount. Therefore, it cannot be said that it was the demand for the cheque amount, and in addition thereto, only for the demand of hand loan is made."

Thus, according to the Magistrate, the complainant had demanded only the amount of hand loan by issuing the said notices and had not demanded the amount of the cheques.

14. I have, therefore, carefully examined the notices in both the cases, which as aforesaid, are absolutely identical, except for the cheque number.

15. No particular form of notice has been prescribed under clause (b) of the

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proviso to Section 138 of N.I. Act. There is no prescribed form or format for such a notice. The object, of providing that the drawer can be prosecuted only after such a notice of demand has been made, and is not complied with, is to give an opportunity to the drawer to make the payment of the amount in question.

16. It may now be necessary to refer to the notice. The notice says that the accused had demanded an amount of Rs. 50,000/-as and by way of loan from the complainant and due to the good relations between the complainant and the accused, the complainant gave the amount of Rs. 50,000/-as a hand loan to the accused. That, after the persistent demands by the complainant to the accused to repay the amount, the accused gave post dated cheques to the complainant. In the two separate notices, two separate numbers of the cheques have been mentioned, that is, in one notice there is mention only of one cheque, and in the other notice, there is mention of the other cheque. Then, the notices speak of the cheques being dishonoured and make a reference to the offence punishable under Section 138 of the N.I. Act, claiming that the accused had committed the said offence. It is thereafter, that the portion of the notice reproduced by the Magistrate in his judgment, which has been reproduced above, finds place.

17. The question is, whether these notices can be said to be invalid, so as to absolve the accused of the criminal liability, in the event of non-payment of the amounts mentioned therein.

18. The learned counsel for the accused contended that what the accused demanded was ''loan amount'' which was more than the amount of the cheques. He submitted that the complainant could have demanded only an amount of Rs. 25,000/- in each of the two cases. According to him, since he has made a demand of the ''loan amount'' in both the cases, and since the claim is that the ''loan amount'' is Rs. 50,000/-, the complainant had actually demanded double the amount of what was due and payable by the accused to the complainant. It is contended that, therefore, the Magistrate is right in holding the notices to be not in accordance with law.

19. It is not possible to accept this contention. It is true that in the demand notices, there is a reference to the loan amount and not the cheque amount. However, there is no demand of Rs. 50,000/-. Had there been a demand to pay Rs. 50,000/-in each of the two notices, there would have been substance in the contention that has been raised and the question of the validity and legality of the notices would have needed further consideration. Fifty thousand plus fifty thousand would make it Rs. 1 Lac, and had the demand been made accordingly, there would have been some basis for treating the notices as bad. However, what has been demanded, is ''loan amount'' in both the notices. Simply because the ''loan amount'' is demanded in two notices, it does not become a claim for double the amount of loan. Nobody can understand the notice in that sense. It is absurd and unreasonable to hold that since in both the notices, there was a reference to the ''loan amount'', the complainant had demanded double the amount of loan. On a reading of the notices in these cases, it is impossible to come to such a

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conclusion, because the complainant had specifically stated in both the notices that the loan amount was Rs. 50,000/-only. In both the notices that the cheque was of Rs. 25,000/-has been specifically mentioned. The Magistrate has ignored the other parts of the notices, which clearly indicate that though there has been a reference in both the notices to the entire loan amount of Rs. 50,000/-, the amount of cheque has been specifically mentioned in each notice as Rs. 25,000/-only. Though, two separate notices have been issued, they were issued on the same date. The cheques had also been deposited on the same date and were dishonoured on the same date. There has been a specific reference to the particular cheque and the amount thereon, namely, Rs. 25,000/-, in both the notices. In the concluding portion of the notice, there is a demand for the ''loan amount'' and simply because there were two demand notices, it cannot be said that the complainant was demanding double the amount of loan. As already observed, the ''loan amount'' was clearly stated to be only Rs. 50,000/-by the complainant and, therefore, there could be no question of the reference to ''loan amount'' in the demand notices being construed as a reference to double the amount of loan. At the cost of repetition, it may be observed that the demand in any of the notices is not that ''an amount of Rs. 50,000/-should be paid'' but the demand is that ''the loan amount should be paid''.

20. Upon reading the notices as a whole, and keeping in mind that both the notices were issued together and received together, it is not possible to hold that there was any such defect in the notices, or in any of them, so as to hold that there had been no compliance with clause (b) of the proviso to Section 138 of the N.I. Act, before prosecuting the accused. The reasoning of the Magistrate in that regard cannot be accepted.

21. As that was the only point on the basis of which the orders of acquittal came to be passed by the Magistrate, they cannot be sustained.

22. I have, however, made it clear to the learned counsel for the accused that he was free to argue before this court that the findings recorded by the Magistrate on the other points for determination were not proper. In other words, it was made clear that the accused could point out to this court that there was no satisfactory evidence to hold that the cheque in question had been issued in discharge of a legally enforceable debt or other liabilities or that it has not been dishonoured for want of sufficient funds etc. However, no such arguments were advanced by the learned counsel for the accused, and no challenge to the findings of the Magistrate with respect to the other points for determination framed by him, was given.

23. I do not find that the notices issued in these two cases were not in accordance with the clause (b) of the proviso to Section 138 of the N.I. Act. It is, therefore, not possible to hold that the complainant had failed to make a demand for the payment of the amount of the cheque by giving a notice in writing to the accused. If the notices are properly read, it becomes clear that by each notice the amount of the cheque mentioned therein, was being demanded and by both

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the notices together, the loan amount was being demanded. It can be said that the complainant could have done better by not referring to the ''loan amount'' at all, in the concluding part of any of the two notices, and that the complainant should have mentioned only of the cheque amount, in each of the two notices. However, this lack of precision on the part of the complainant, cannot result in holding the notices to be invalid in either of the cases, so as to treat that there had been no demand for the payment of the amount of the cheque in either of these cases.

24. The view of the Magistrate about the notices of demand not having been proved in either of the cases is patently incorrect. The order of acquittal passed by the Magistrate based on this view is contrary to law and needs to be interfered with, in the interest of justice. I find the appellant guilty. He, therefore, needs to be sentenced, in accordance with Law.

25. After hearing the learned counsel for the complainant and the accused, I find that a sentence of fine, with a direction that a substantial part of the amount that would be realized to be paid to the complainant as compensation, will meet the ends of Justice.

26. The appeals succeed.

OPERATIVE ORDER IN CRIMINAL APPEAL No. 823 OF 2009

1. The appeal is allowed.

2. The impugned judgment and order of acquittal, as delivered by the Magistrate, is set aside.

3. Respondent no. 1 is convicted of an offence punishable under Section 138 of Negotiable Instruments Act and sentenced to pay a fine of Rs. 40,000/-, in default, to suffer Simple Imprisonment for Two months.

If the fine is realized, an amount of Rs. 38,000/- therefrom shall be paid to the appellant as compensation.

4. The appeal is disposed of accordingly.

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