

(2012) 01 GUJ CK 0063
In the Gujarat High Court
Case No : Criminal Appeal No. 249 of 2005

Patel Amrutbhai Narayandas

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-01-2012

Acts Referred:

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

Citation : (2012) 2 BC 183

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : Y.M. Thakore for Mr. Prakash K. Jani, for the Appellant; C.M. Shah, APP. For the Respondent No. 1, Mr. Pavan Barot for Mr. Amrisha S. Barot, Advocates For the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Bankim N. Mehta, J.—By filing this appeal, appellant - original complainant has challenged the impugned judgment and order passed by learned Additional Sessions Judge, Mehsana, on 25.7.2002 in Criminal Appeal No. 1 of 2001, acquitting the respondent accused for the offence u/s 138 of the Negotiable Instruments Act ("the Act" for short). According to the complainant, the respondent accused came to him as he was in need of finance and demanded Rs. 50,000/- for one month as hand loan. On account of relations, he gave Rs. 50,000/- in cash to the accused who gave cheque No. 375223 dated 20.7.1998 drawn on The Sarvodaya Nagarik Sahakari Bank Limited, Patel Market, Visnagar. He presented the cheque in the Bank on 18.8.1998 but said cheque returned unpaid with endorsement "fund insufficient". Therefore, he demanded unpaid cheque amount by giving notice dated 27.8.1998 through his Advocate. Despite receipt of the notice, the accused did not comply with the same. Therefore, complaint u/s 138 of the Act was filed.

2. The trial Court issued summons to the accused who appeared in the Court and

denied having committed the offence. Therefore, the prosecution adduced evidence. On completion of recording of evidence, further statement of the accused was recorded u/s 313 of the Code of Criminal Procedure. The accused in his further statement stated that Rs. 5,000/- were taken as hand loan from the complainant on 1.10.1993 and cheque was given against that amount. The said amount was returned in presence of Ambalal but the cheque was not returned to him and it has been misused by making alteration in the cheque. After hearing learned Advocate for the parties, the trial Court convicted the accused. Therefore, Criminal Appeal No. 1 of 2001 was preferred by the accused in the Court of learned Additional Sessions Judge, at Mehsana.

3. After hearing learned Advocates for the parties, the lower Appellate Court allowed the appeal and set aside the judgment and order of conviction passed by the trial Court. Therefore, the complainant has preferred this appeal.

4. I have heard learned Advocate Mr. Thakore for learned Advocate Mr. Jani for the appellant and learned Advocate Mr. Pavan Barot for learned Advocate Mr. Amrish Barot for the respondent accused and learned A.P.P. Ms. CM. Shah for respondent State at length and in great detail. I have also perused the impugned judgment and order of the trial Court.

5. u/s 138 of the Act where any cheque drawn by a person on an account maintained by him with a Banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the Bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account, such person shall be deemed to have committed an offence. It further provides that this provision shall not apply unless the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within 30 days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid.

6. It appears from the record that cheque Exh. 12 was returned unpaid by the Bank on account of insufficient fund by Bank memo dated 18.8.1998 produced at Exh. 18. Therefore, notice dated 27.8.1998 Exh. 50 was issued to the accused. It appears that the payee of the cheque made demand for the payment of unpaid cheque amount by giving notice in writing within 30 days of the receipt of information from the Bank regarding return of cheque as unpaid. Now the question is whether the accused received the notice.

7. The complainant in his evidence Exh. 11, deposed that he served notice on 27.8.1998 and it was served by registered post acknowledgement due. The complainant has produced acknowledgement due at Exh. 14. It appears from the acknowledgement due at Exh. 14 that it was received by Patel Ashaben Ganeshbhai. Therefore, it emerges that the accused did not receive the notice. In

the decision of M.D. Thomas Vs. P.S. Jaleel and Another, , Hon''ble Supreme Court ruled that Clause (b) of the proviso to Section 138 cast on the payee or the holder in due course of the cheque, as the case may be, a duty to make a demand for payment of the said, amount of money by giving a notice in writing to the drawer of the cheque, within thirty days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid and when the notice of demand was served upon the wife of the appellant and not the appellant, the complainant had not complied with the requirement of giving notice under the said provision. In the present case also notice is not served upon the accused but it was received by a family member of the accused. Therefore, the complainant has not complied with the requirement of giving notice in terms of Clause (b) of the proviso to Section 138 of the Act.

8. In view of above, as the complainant has not complied with the legal requirement, the lower Appellate Court was justified in acquitting the accused. Hence no interference is warranted in the impugned judgment.

9. As the appeal is dismissed on the ground of non-compliance of Section 138(b) of the Act, the other aspects of the matter are not required to be elaborately discussed as except bare words, the complainant did not produce any documentary evidence in support of his case that the amount was advanced to the accused as hand loan. In the result, the appeal fails and stands dismissed.