

(2008) 10 BOM CK 0130
In the Bombay High Court
Case No : Criminal Appeal No. 20 of 2007

Patricio D'Souza	Vs	APPELLANT
Oscar D'Souza and Another		RESPONDENT

Date of Decision : 22-10-2008

Acts Referred:

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

Citation : (2009) 2 CivCC 669

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

Bench : Single Bench

Advocate : Marvin D'Souza, for the Appellant; E. Dias for Respondent No. 1 and None, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—By this appeal, the appellant/original complainant challenges the judgment and order dated 20.12.2006 passed by the IInd Additional Session Judge, Panaji in Criminal Appeal No. 22 of 2005 acquitting the respondent No. 1 of the offence punishable u/s 138 of Negotiable Instruments Act, 1881 ("The Act" for short) by setting aside the judgment and order of conviction dated 21.03.2005 passed by the Judicial Magistrate, First Class, Panaji in Criminal Case No. 200/OA/97/C. The parties shall, hereinafter, be referred to as per their status before the learned Magistrate.

2. The complainant filed above criminal case against the accused for dishonour of cheque of Rs. 3,20,000/- dated 13.08.1997 issued by the accused in favour of the complainant. It was the case of the complainant that on 04.01.1995, he had advanced the loan of Rs. 5 Lakhs to the accused repayable with interest @ Rs. 10,000/- per month per Lakh. According to the complainant, the accused had issued a cheque for Rs. 3,20,000/- towards part payment of the said loan amount. The complainant presented the cheque to the bank. The same was returned unpaid for insufficiency of funds. The complainant issued legal notice to

the accused which was duly received by him. However, no payment was made within the stipulated time. Accordingly, the complaint was filed against the accused. The accused pleaded not guilty. In the course of the trial, the complainant examined himself and also examined two bank managers namely Joquim Mario D'Souza PVV2, Salvador Pinto PW3. In the statement u/s 313 of Criminal Procedure Code, the accused stated that he had never obtained loan from the complainant nor he had issued the cheque and false case was filed against him. In defence, the accused examined himself and also examined two witnesses namely Dipak Govekar, DW2 and Uma Shankar Hirapeth DW3, Chartered Accountant and produced some documents. Upon consideration of the evidence, oral and documentary, led by the parties, the learned Magistrate by the judgment and order dated 21.03.2005, convicted the accused for the offence punishable u/s 138 of the Act and sentenced him to undergo simple imprisonment for 6 months and also ordered to pay compensation of Rs. 6.40 Lakhs. Against the judgment and order passed by the learned Magistrate, the accused preferred an appeal to the Sessions Court, Panaji which was made over to IInd Additional Session Judge, Panaji, who after hearing the parties by the impugned judgment and order dated 20.12.2006, allowed the appeal and acquitted the accused of the offence punishable u/s 138 of the Act.

3. The lower Appellate Court upon appreciation of the evidence led by the parties, held that the complainant had discharged the burden of proving that the amount of the cheque was not legally recoverable. It was further held that the complainant had failed to prove that he had given the loan of Rs. 5 Lakhs to the accused. It was also held that the complainant was a money lender and he had not obtained licence under the Goa Money Lenders Act, 2001. On these grounds, the lower Appellate Court acquitted the accused of the offence punishable u/s 138 of the Act.

4. Mr. D'Souza, learned Counsel appearing for the appellant/complainant submitted that the findings given by the lower Appellate Court, are contrary to the evidence on record and as such are perverse. He further, submitted that the lower Appellate Court did not take into consideration the fact that the accused had not replied to the notice issued to him prior to filing of the complaint and also it was proved that signature on the cheque was that of the accused and this aspect has not been considered by the lower Appellate Court. The learned Counsel further submitted that the presumption u/s 139 of the Act, has not been rebutted by the accused and the defence taken by the accused that the cheque in question was stolen from his office, is nothing but an afterthought. He further submitted that the lower Appellate Court has not taken into consideration the agreement dated 04.01.1995 (Exh. PWI/C) executed between, the complainant and the accused. The learned Counsel further submitted that the evidence led by the complainant and the accused, if considered in the right prospective, the only conclusion that can be drawn is that the complainant has proved his case beyond reasonable doubt against the accused. According to the learned Counsel, the finding of the lower Appellate Court that the Goa Money Lenders Act, 2001, is

applicable, is perverse finding in as much as the loan was advanced by the complainant in the year 1997 much prior to coming into force of the Act i.e. on 13.09.2001. He further submitted that the Court cannot go into the competence of the complainant to lend the amount to the accused and also the competence of the accused to receive the loan amount. In support of his submissions, Mr. D'Souza relied upon the following judgments:

(i) Vasudeo Ramchand Ahuja v. Vilas Shripati Kamble & Anr., 2006 AMR 3203. (ii) Shri Wilson Fernandes v. Shri Nitin Pandurang Chodankar, 2004 (4) CCC 433 (Bom): 2004 (2) GLR 439. (iii) Prabhakar D. Naik v. Jerry S. Viegas & Anr., 2002 BCR 623. (iv) Shree Hemant Pavel Gracias v. Shree Socorro Santan Fernandes, 2008 (1) CCC 743 (Bom): 2008 (1) CCC 977 (Bom) : 2007 AMR 3425.

5. Per contra, Mr. Dias, learned Counsel for the accused submitted that the Goa Money Lenders Act, 2001, is clearly attracted in the present case. In support of his submission, he placed reliance upon several provisions of the Act. The learned Counsel further submitted that the accused has discharged the burden of proving that the complainant had not advanced any loan to the accused and that the cheque was not issued for legally enforceable debt or liability. According to the learned Counsel, the transaction alleged to have been entered into by the complainant with the accused, is illegal and, therefore, no fault can be found with the acquittal of the accused. He further submitted that the evidence of the complainant, is full of contradictions and omissions and he has not been able to establish that on 04.01.1995, he had advanced a sum of Rs. 5 Lakhs to the accused. He, therefore, submitted that since no loan was advanced to the accused, the question of issuing cheque for an amount of only 3,20,000/- to the complainant did not arise. He further submitted that till date, the complainant has not taken any steps to recover the balance amount of Rs. 1,80,000/- out of the total loan amount of Rs. 5 Lakhs and this is highly improbable. In support of his submissions, the learned Counsel relied upon the following judgments : &

(i) Shri Wilson Fernandes v. Shri Nitin Pandurang Chodankar, 2004 (2) G.L.R 439. (ii) Krishna Janardhan Bhat v. Dattatraya G. Hegde, 2008 ACJ 412 (S.C.) : 2008 (1) CCC 716 (S.C.) : 2008 (1) CCC 983 (S.C.) : AIR 2008 SCW 738 . (iii) K. Prakashan Vs. P.K. Surenderan, . (iv) Krishnam Raju Finances, Hyderabad v. Abida Sultana & Anr., 2004 (2) DCR 1.

6. I have carefully considered the submissions made by the learned Counsel for the* parties and perused the record and judgments relied upon by the Counsel appearing for both the parties.

7. The main question which arises for consideration, is whether the cheque was issued by the accused for legally enforceable debt or liability and whether the complainant advanced the loan of "Rs.5 Lakhs to the accused on 04.01.1995. In order to answer this question, it would be appropriate to analyze the evidence led by the complainant. It is the case of the complainant that on 04.01.1995, he advanced the loan of Rs. 5 Lakhs to the accused. In his evidence, the

complainant has stated that the loan was advanced for purchase of flat and shop at Panaji for him. In the complaint, this fact has not been stated. The witness has been confronted with the complaint and omission has been duly proved. In the cross-examination, he stated that he had account with the bank and he obtained an amount of Rs. 5 Lakhs, but he did not remember whether he had removed cash from the bank. He further stated that he had accounts in two to four banks namely Mapusa Urban Co-operative Bank, Margao Urban Co-operative Bank, Syndicate Bank, Bank of India and Goa Urban Co-operative Bank. He further stated that he did not remember on which date, he had withdrawn the amount from the bank. He further stated that he was not giving any loans to others, but he gave loan only to the accused, who promised to give him a flat and shop. He further stated that the accused had entered into an agreement in the year 1995 subsequent to receipt of Rs. 5 Lakhs from him. He produced Xerox copy of the said agreement which was taken on record (Exh.PW1/C) after comparing with original. In further cross-examination, he stated that he had given loan to the accused on 05.01.1995, but he did not recollect on which day he had given the loan. He did not remember in what denomination, he had given the amount. He further stated that out of Rs. 5 Lakhs, he had borrowed from his friend an amount of Rs. 2.20 Lakhs which was sent by his friend as N.R.A. Deposit. He had taken the said amount from Caji when he was in Goa. The Caji had paid him an amount of Rs. 2.20 Lakhs on 05.01.1995. He further stated that he took the cash of Rs. 1 Lakh on the same day and paid the said amount by cash. He had borrowed Rs. 50,000/- from August D'Mello on the same day and thereafter all the amount of Rs. 5 Lakhs was handed over to the accused. In further cross-examination, the complainant admitted that besides the accused, he had given loans to other persons also. He admitted that in the same financial year, he claimed that he had given an advance of Rs. 15 Lakhs to M/s. Khan Realtors and there was dispute between him and M/s. Khan Realtors in respect of said amount of Rs. 15 Lakhs.

8. From the above evidence, it is clear that the complainant is not consistent as to the purpose for which the loan of Rs. 5 Lakhs was given by him to the accused. In the complaint, it is the case of the complainant that the loan of Rs. 5 Lakhs was advanced for business purpose whereas in the substantive evidence, he has stated that the loan was given for purchase of flat and shop. Moreover, the complainant has given different versions as to from where he got Rs. 5 Lakhs by cash which he advanced by way of loan to the accused. The amount of Rs. 5 Lakhs, is a substantial amount and the complainant claimed that he had advanced the said amount by way of loan to the accused by cash. Once the accused came with a specific case that he had never taken any loan from the complainant, it was for the complainant to lead cogent evidence to prove as to from where he advanced such a substantial sum to the accused by way of loan. The complainant has given different versions as to how and from where he got Rs. 5 Lakhs which he advanced to the accused. Moreover, in the cross-examination, he stated that he had given loan on 05.01.1995, but further stated

that he did not recollect on which date, he had given loan. The witness categorically stated that Caji had paid him Rs. 2.20 Lakhs on 05.01.1995 and he took cash of Rs. 1 Lakh on the same day after borrowing Rs. 50,000/- from August D'Mello and paid Rs. 5 Lakhs to the accused. This is contrary to his statement in the complaint that the loan was advanced on 04.01.1995. Moreover, August D'Mello and Mr. Caji from whom the complainant claimed to have borrowed Rs. 50,000/-, have not been examined.

9. Thus, close scrutiny of the evidence of the complainant himself, discloses that he has not been able to establish that on 04.01.1995, he had advanced the loan of Rs. 5 Lakhs to the accused. The other two witnesses examined by the complainant, are Branch Managers of the Bank and as such their evidence does not help the complainant to prove that he had advanced any loan to the accused.

10. The accused, who stepped in the witness box, has clearly denied that he had received any loan from the complainant. The document Exh. PWI/C which was brought on record during the cross-examination of the complainant, also does not support the case of the complainant. I do not deem it necessary to refer in detail to the evidence of the accused as well as his witnesses which has come by way of rebuttal. No doubt, the version of the accused that the cheque was stolen by the complainant, cannot be accepted. But this fact by itself, is not sufficient to hold that the complainant has been able to establish that the cheque was issued towards legally enforceable debt. Upon a close scrutiny of the evidence led by the complainant and the accused, the findings given by the lower Appellate Court that the complainant had not proved that he had given loan of Rs. 5 Lakhs to the accused and that the accused had proved that the amount of the cheque was not legally recoverable, cannot be faulted. In my considered opinion, the lower Appellate Court was right in holding that the accused had successfully rebutted the presumption u/s 139 of the Act. The lower Appellate Court was right in holding that the learned Magistrate had clearly erred in convicting and sentencing the accused for the offence punishable u/s 138 of the Act.

11. I do not deem it necessary to deal with the submissions made regarding the applicability of the Goa Money Lenders Act, 2001 since the appeal is liable to be dismissed on the grounds stated above. I also do not deem it necessary to refer to several authorities cited by both sides in view of the findings given by me that the accused has discharged the burden of rebutting the presumption u/s 139 of the Act.

12. For the aforesaid reasons, the appeal is dismissed. The bail bond executed by the respondent No. 1, shall stand discharged.