
(2019) 08 BOM CK 0061

In the Bombay High Court

Case No : Criminal Revision Application No. 9 Of 2013

Rajendra Mahadeorao Chaudhary

APPELLANT

Vs

Gajanan Keshavrao Bore

RESPONDENT

Date of Decision : 16-08-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 7, 118, 138, 139, 141, 142
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 08 BOM CK 0061

Hon'ble Judges : Manish Pitale, J

Bench : Single Bench

Advocate : A.M. Ghare, Aditya Deshpande

Final Decision : Dismissed

Judgement

1. By this revision application, the applicant (original accused) has challenged the conviction and sentence imposed upon him by the two Courts below under Section 138 of the Negotiable Instruments Act, 1881. The applicant was sentenced by the Court of Judicial Magistrate First Class, Amravati, to suffer rigorous imprisonment for six months and to pay an amount of Rs.1,30,000/- to the non-applicant (original complainant) and in default of payment of such compensation, to suffer rigorous imprisonment for six weeks.

The Sessions Court, while dismissing appeal of the applicant, reduced the sentence to rigorous imprisonment of one month and maintained the other directions of the Court below.

2. The non-applicant had filed a complaint under Section 138 of the aforesaid Act against the applicant, alleging that a cheque for an amount of Rs.1,25,000/- issued by the applicant towards consideration for registered sale deed dated 17/09/2009, executed in respect of a shop purchased in the name of wife of the applicant, had been dishonoured, due to insufficiency of funds. The non-applicant had issued notice dated 17/03/2010, in respect of dishonour of the said cheque,

which was received by the applicant on 30/03/2019, and when the applicant failed to pay the cheque amount to the non-applicant within the time period specified under Section 138 of the said Act, he filed the aforesaid complaint against the applicant.

3. The non-applicant examined himself as witness in respect of his case while the applicant examined himself in support of his defence. The defence raised on behalf of the applicant before the Court of the Judicial Magistrate First Class, was that the aforesaid cheque had been issued as security for the price of the shop, which was in fact paid by cash to the non-applicant. It was claimed that the applicant had paid Rs.25,000/- cash on 10/09/2009 and Rs.1,00,000/- cash on 17/09/2009 to the non-applicant and the sale deed was executed on 17/09/2009. It was claimed that the cheque given by way of security to the non-applicant was misused by him and a false case was filed against the applicant.

4. By Judgment and order dated 14/01/2011, the Court of the Judicial Magistrate First Class, Amravati, rejected the defence raised by the applicant. It was found that the non-applicant had sufficiently proved his case against the applicant and that offence under Section 138 of the aforesaid Act was made out. It was found that the applicant had failed to rebut the presumption that arose against him under the provisions of the said Act and accordingly, the said Court convicted the applicant and sentenced him in the aforesaid manner.

5. Aggrieved by the same, the applicant filed criminal appeal before the Sessions Court at Amravati. By Judgment and order dated 05/01/2013, the Sessions Court dismissed the appeal, thereby confirming the conviction while reducing the sentence imposed against the applicant.

6. The applicant filed the present revision application, challenging the said concurrent Judgments and orders. The revision application was admitted on 08/1/013 and sentence was suspended on the condition that the applicant would deposit sum of Rs.98,000/- before the Trial Court within a period of 8 days from the date of the order, taking note of the fact that the applicant had already deposited Rs.27,000/- before the Appellate Court. Accordingly, the sentence stood suspended and the applicant was granted bail.

7. Mr. A.M. Ghare, learned Advocate appearing on behalf of the applicant submitted that the two Courts below failed to appreciate that the cheque in question had been issued by way of security. It was submitted that the admissions given in the cross-examination by the non-applicant demonstrated that he had adopted modus operandi of taking such cheques by way of security for transactions and thereafter returning the same after cash amounts were paid to him for such transactions. It was submitted that the Courts below also failed to appreciate that the complaint filed by the non-applicant was not maintainable because only the applicant was made a party to the complaint while the cheque had been signed by the applicant in the capacity of Proprietor of a proprietary firm called "Suraj Traders". It was further claimed that the sale deed in respect of

which the cheque was allegedly issued was executed between the wife of the applicant and the non-applicant and, therefore, there was nothing to really connect the applicant with the said offence. The learned counsel further submitted that the non-applicant was required to prove that the applicant was indeed proprietor of "Suraj Traders" and in the absence of such proof, the applicant could not have been convicted for offence under Section 138 of the aforesaid Act. The learned counsel further submitted that in view of the passage of time and the fact that the applicant is the only bread winner of his family, a lenient view could be taken in the matter and sentence could be reduced to the period already undergone. The learned counsel for the applicant relied on the judgments of the Hon'ble Supreme Court in the cases of Milind Shripad Chandurkar .vs. Kalim M. Khan reported in 2011(4) SCC 275, Priyanka Nagpal .vs. State (NCT of Delhi) reported in 2018(2) SCC 249 and judgments of this Court in the cases of Philip J. vs. Ashapura Minechem Ltd. & Anr. reported in 2016 ALL MR (Cri) 1802 and A.C. Narayanan Vs. The State of Maharashtra & Anr. reported in 2017 ALL MR (Cri) 4925.

8. Per contra, Mr. Aditya Deshpande, learned Advocate appearing on behalf of the non-applicant submitted that the signature on the cheque was never denied by the applicant and, therefore, presumption that arose against the applicant under Sections 118 and 139 of the aforesaid Act applied in full force in the present case. It was further submitted that the applicant failed to lead cogent evidence in support of his defence that the cheque was issued by way of security while payments in cash were made to the non- applicant and that, therefore, the applicant had failed to rebut the said presumption that arose against him. It was further submitted that the sale deed dated 17/09/2009 was very much on record. It was specifically stated that consideration amount was paid to the non-applicant for the shop in question by way of aforesaid cheque for an amount of Rs.1,25,000/- and the details of the cheque, including the cheque number, were specifically stated in the sale deed. It was submitted that the shop in question was not only purchased in the name of the wife of the applicant, but the applicant himself had signed as a witness to the aforesaid sale deed. On this basis, it was submitted that the applicant could not escape liability in the present case, only on the basis that the signature on the cheque was on behalf of one Suraj Traders. It was further submitted that the complaint filed by the non-applicant could not be said to be defective because Suraj Traders was not made a party, because the applicant as the signatory of the cheque was very much a party to the complaint. It was further submitted that answers given by the applicant to the questions put to him under Section 313 of the Code of Criminal Procedure clearly demonstrate that he had conceded to various aspects indicating his guilt. As regards the Judgments relied upon by the learned counsel for the applicant, it was submitted that they were inapplicable to the facts of the present case, because the complaint in the present case was clearly maintainable and the applicant could not escape the liability by raising technical arguments.

9. Heard counsel for the parties and perused the material on record. In the

present case, there is no dispute about the fact that the cheque in question at Exh.46 was signed by the applicant herein. A perusal of cheque shows that the rubber stamp of Suraj Traders has been affixed on the said cheque. There is also no dispute about the fact that the aforesaid cheque finds mention in the registered sale deed dated 17/09/2009, executed in respect of shop premises in favour of wife of the applicant, wherein the applicant has signed as witness to the said document. There is also no dispute about the fact that the said cheque for an amount of Rs.1,25,000/- was dishonoured and that there was compliance on the part of the non-applicant as regards the service of statutory notice to the applicant. Accordingly, the requirements of Section 138 of the aforesaid Act stood satisfied, pursuant to which the non-applicant filed such complaint against the applicant.

10. Since, there is no dispute about the fact that the applicant had signed on the said cheque, the presumption under Sections 118 and 139 of the aforesaid Act came into operation in the present case. The said provisions read as follows :

"118. Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made :-

(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date - that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance - that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer - that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements - that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereupon;

(f) as to stamp - that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course - that the holder of a negotiable instrument is a holder in due course :

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

139. Presumption in favour of holder :- It shall be presumed, unless the contrary

is proved, that the holder of a cheque received the cheque, of the nature referred to in section 138, for the discharge, in whole or in part, of any debt or other liability."

11. A perusal of above quoted provisions shows that unless the contrary is proved, the presumption operated against the applicant and it was for him to prove that the cheque was not issued in discharge of legal debt or liability.

12. But, before examining as to whether the applicant was able to rebut the presumption that operated against him under Sections 118 and 139 of the aforesaid Act, it would be necessary to first analyse as to whether the contention raised on behalf of the applicant that the complaint itself was not maintainable in the absence of "Suraj Traders", a proprietary concern being made party to the complaint, is sustainable. While raising the said contention, the learned counsel for the applicant placed reliance upon Sections 141 and 142 of the aforesaid Act. It was claimed that since the cheque in question was signed by the applicant as proprietor of Suraj Traders, in the absence of the said proprietary concern being made a party, the complaint was not maintainable.

13. A perusal of Section 141 of the aforesaid Act shows that it refers to "Company" and it is explained that the said term means any body corporate and includes a firm or other association of individuals. A Director in relation to a firm is clarified to mean a partner in the firm. The said provision specifies the liability when offences are committed under Section 138 of the said Act by a Company, a firm, a body corporate or other association of individuals. There is no mention of a proprietary concern in the said provision.

14. In this context, much emphasis has been placed on behalf of the applicant on judgment of the Hon'ble Supreme Court in the case of Milind Shripad Chandurkar .vs. Kalim M. Khan (supra). A perusal of the said judgment shows that when a proprietary concern is a complainant, as a payee in the context of Section 142 of the aforesaid Act read with Section 7 thereof, it has been held that the person filing the complaint must necessarily establish his/her connection with the sole proprietary concern. In the said judgment, on facts, the Hon'ble Supreme Court found that the appellant had miserably failed to prove any nexus or connection with the sole proprietary concern and, therefore, the complaint could not be said to be filed by a competent person. Such are not the facts in the present case. The applicant herein is the accused and the cheque in question was issued under his signature for payment of consideration towards purchase of a shop in the name of his wife by way of registered sale deed. Not only did the applicant sign on the cheque but he also signed as a witness to the aforesaid registered sale deed. The admissions given by the applicant in his cross-examination show that it was in fact the applicant himself who had purchased the said shop, but in the name of his wife. The relevant portion of the cross-examination reads as follows:-

"It is correct to say that on 17/09/09 I purchased one shop from the complainant

in the name of my wife under registered sale deed. The said sale deed is produced at exh.19, its contents are true and correct. I also put my signature on the sale deed as witness."

15. The applicant has also not disputed that he has signed the cheque. In this situation, merely because there is rubber stamp of Suraj Traders on the cheque in question, it would not lead to the applicant escaping liability in the present case, in view of specific admissions given by him. In any case, there is not a whisper in the evidence of the applicant that he has nothing to do with the said proprietary concern, despite statements in the complaint filed by the non-applicant that the cheque in question was specifically mentioned with cheque number in the registered sale deed, that it was signed by the applicant in the present case and that it showed the applicant as a proprietor of the said Suraj Traders. The fact that the complaint was filed against the applicant himself who never denied his signature on the cheque, shows that there is no substance in the said contention raised on behalf of the applicant. The reliance on Section 141 of the aforesaid Act is wholly misplaced because it concerns only company and firm or a body corporate or an association of individuals.

16. Due to the said reasons, it becomes clear that the reliance placed on judgment of the Hon'ble Supreme Court in the case of Aneeta Hada .vs. Godfather Travels & Tours (P.) Ltd. reported in (2012) 5 Supreme Court Cases 661, as also judgments of this Court in the cases of Philip J. vs. Ashapura Minechem Ltd. & Anr. (supra) and A.C. Narayanan Vs. The State of Maharashtra & Anr. (supra) is also wholly misplaced, because the said judgments specifically pertain to a situation where the offence was committed by a Company. The Hon'ble Supreme Court in the case of Raghu Lakshminarayanan .vs. M/s Fine Tubes reported in (2007) 5 Supreme Court Cases 103, in the context of Sections 138 and 141 of the aforesaid Act, specifically held that a proprietary concern is not covered under the said provisions and that the distinction between a partnership firm and a proprietary concern is very well known. Therefore, the said contention raised on behalf of the applicant that the complaint in the present case was not maintainable due to the proprietary concern Suraj Traders not being made a party, is found to be wholly unsustainable and it is rejected.

17. As regards the merits of the case, the applicant has contended that the aforesaid cheque was handed over to the non-applicant by way of security and that the sale consideration for the said shop of Rs.1,25,000/- was actually paid to the non-applicant by cash. It was also contended that the modus operandi of the non-applicant was that he used to take such cheques by way of security for transactions and upon receiving cash amount, he used to return the cheques, but in the present case due to a dispute between the parties, the non-applicant allegedly misused the cheque deposited by way of security. In this regard, particularly emphasis was placed on statements given by the non-applicant in the cross-examination that he had indeed returned certain cheques to an individual named Satish Pund upon receiving cash amount from the said person,

thereby confirming the aforesaid way of functioning of the non-applicant.

18. A perusal of the evidence on record shows that the registered sale deed, whereby the shop in question was sold to the wife of the applicant, specifically mentions in its contents that the entire consideration amount was paid to the non- applicant by way of the cheque in question. The cheque number was also specifically mentioned and the amount was stated. The applicant signed as a witness to the aforesaid registered sale deed. The evidence also shows that the applicant failed to adduce any cogent evidence in support of his contention that the consideration amount for the shop was actually paid by cash, on two different dates to the non- applicant. The non-applicant in the present case specifically denied in cross-examination that he had received cash amount from the applicant. Although the non-applicant did state in cross-examination that he had returned certain cheques to the said Satish Pund upon receiving cash, but a perusal of the evidence of the applicant shows that in cross-examination he conceded that the said Satish Pund did not purchase shop from the non-applicant in his presence and further that he had no knowledge about the nature of transaction between the said person and the non-applicant.

19. The applicant further conceded in cross- examination that he neither issued any notice to the non- applicant demanding return of the cheque in question, in view of alleged cash payments and that he did not even issue instructions to his Bank to stop payment in respect of the cheque in question. He further conceded that he did not make any police complaint in the present matter. A perusal of the cheque in question also does not show any difference in ink or otherwise to raise suspicion about a blank cheque having been given by the applicant to the non-applicant by way of security. In these circumstances, it becomes evident that the defence raised by the applicant that the cheque in question was issued by way of security, is wholly unsustainable. Even in the answers to questions put to the applicant under Section 313 of the Cr.P.C., the applicant stated that he had indeed issued the cheque under his own signature and that he admitted the aforesaid sale deed.

20. Such material on record clearly demonstrates that there is no substance in the contention raised on behalf of the applicant on merits in the presence case. The presumptions that arose in full force against the applicant under Sections 118 and 139 of the aforesaid Act have not been rebutted in any manner by the applicant and, therefore, it cannot be said that the Courts below committed an error in convicting and sentencing the applicant.

21. After the arguments in the present case were over and the case was closed for judgment, along with the notes of arguments, the learned counsel for the applicant has sought to rely upon judgment of the Hon'ble Supreme Court in the case of Priyanka Nagpal .vs. State (NCT of Delhi) (supra), to contend that the applicant is the only bread winner of his family and, therefore, leniency be shown towards him. A perusal of the said judgment of the Hon'ble Supreme Court shows that it was in peculiar circumstances where the appellant before the

Hon'ble Supreme Court was a lady who was the sole earning member of her family and further that her father was unwell and physically incapable of work, that leniency was shown. In the present case, no such facts are available on record and, therefore, the applicant cannot rely upon the same while seeking leniency in the matter. In any case, in the present matter, the Sessions Court has already shown leniency by reducing the sentence imposed by the Magistrate and awarded sentence of imprisonment of one month instead of six months. Therefore, the aforesaid contention raised on behalf of the applicant is rejected.

22. In view of the above, since no error is found in the concurrent orders of conviction passed by the two Courts below, the present revision application is dismissed.

23. Upon pronouncement of the judgment today, the learned counsel appearing for the applicant requested that the interim order granted by this Court of suspension of sentence may be continued for further period of three weeks. The learned counsel appearing for the non-applicant has opposed the said request. But, in the facts and circumstances of the present case, interim order granted by this Court is extended for a period of three weeks. It is made clear that no further extension shall be granted.