
(2010) 11 BOM CK 0059

In the Bombay High Court

Case No : Criminal Appeal No's. 58 and 59 of 2010

Shri John Sebastian Dias

APPELLANT

Vs

Shri B. Abdul Kadar, Civil Contractor

RESPONDENT

Date of Decision : 26-11-2010

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2010) 11 BOM CK 0059

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : M. Amonkar, for the Appellant; A.P. Cardozo, for the Respondent

Final Decision : Allowed

Judgement

N.A. Britto, J.—Heard.

2. By consent and for convenience, both these appeals are being disposed off by this common Judgment.

3. Both the appeals are filed by the complainant and are directed against the acquittal of the accused u/s 138 of the Negotiable Instruments Act, 1881, by Judgments dated 19-3-2010 of the learned J.M.F.C., Valpoi.

4. The complaints were filed by the complainant for dishonour of two cheques, details of which are as follows:

1. Cheque No. 846325 dated 27-4-2004 for Rs. 2,44,500/- (in C. C. No. 11/OA/2004).

2. Cheque No. 846326 dated 22-4-2004 for Rs. 2,56,500/- (in C. C. No. 12/OA/2004).

5. The undisputed facts are that the complainant and the accused are both contractors and come from the same village of Valpoi. The cheques were duly signed by the accused and were given to the complainant. The complainant

presented the said cheques for payment but were dishonoured for insufficient funds. The complainant issued notices dated 28-5-2004 demanding the payment. The notices were replied to by the accused by reply dated 9-6-2004. The accused in the reply admitted having taken from the complainant a sum of Rs. 4,50,000/- when required. The complainant was given five blank cheques which includes two subject cheques and one bearing No. 84527 and two more cheques. The accused had further stated in the reply that the complainant had obtained the signature of the accused on a blank paper as well as on one stamp paper. The accused had stated that he had made a payment of Rs. 1,20,000/-by cash to the complainant on 18-9-2003 and Rs. 1,03,323/-on 10-12-2003 at the complainant's residence, and the accused owed the complainant only a sum of Rs. 2,26,677/-. In other words, the accused admitted having borrowed Rs. 45,00,000/-and admitted his liability to pay the balance of Rs. 2,26,677/-.

6. The case of the complainant was that the accused was in need of funds for completion of a work taken by him and as such had approached the complainant with a request to finance him and had assured extra 10% payment on the borrowed amount, and accordingly the complainant had advanced the said sums between April, 2003 to September, 2003. The complainant had stated, in relation to cheque dated 27-4-2004, that he had made payment by four cheques, and in relation to cheque dated 22-2-2004 he had made payment by six cheques drawn by him on his account No. 73945 held by him in the name of M/s. Maria Constructions. M/s. Maria Constructions is a firm of which the complainant, his wife and one Ashok Angle are the partners. The complainant gave the details of the said cheques along with their numbers by which payment was made to the accused and further stated that towards the repayment of the said sums the accused had issued the subject cheques on the account maintained by him with South Indian Bank, Panaji which cheques the complainant had presented for payment with his banker Goa State Co-operative Bank Ltd. only to be returned dishonoured for want of insufficient funds. As already stated, there is no dispute that both the cheques were dishonoured for insufficient funds and a notice issued to the accused was replied to by him. The complainant as well as the accused entered the witness box and gave evidence.

7. The learned J.M.F.C. acquitted the accused essentially because the complainant had paid the amount to the accused from the said firm named M/s. Maria Constructions, and, therefore the complainant had failed to prove that there was a legally recoverable debt towards the complainant as the amounts of the cheques was not due to the complainant but to the said M/s. Maria Constructions, and as the complainant had not produced any authority from the said firm. At the same time, the learned J.M.F.C. found that there were infirmities and contradictions in the evidence of the accused but held that it was for the complainant to prove his case and who had otherwise to stand or fall on the evidence led by him. The learned J.M.F.C. also rejected the plea of the accused that he had given blank cheques in favour of the complainant but nevertheless proceeded to acquit the accused in both the cases.

8. Shri M. Amonkar, learned Counsel appearing on behalf of the complainant submits that the complainant is a partner along with his wife and another in the said M/s. Maria Constructions. Learned Counsel further submits that the money was paid to the accused by cheques signed and given by the complainant from the account of the said M/s. Maria Constructions. Learned Counsel submits that whether he had authority to issue the said cheques to make payment to the accused is an internal matter between the complainant and other partners of the said firm and the accused has nothing to do with it. Learned Counsel further submits that the plea of the accused that because the cheques were issued by the complainant from the account of M/s. Maria Constructions and on that count there was no legally recoverable debt is a plea which was not taken by the accused in the reply sent to the complainant, and, therefore has got to be considered as an afterthought. Learned Counsel further submits that the accused who admitted part of the liability in the notice, disowned the same in his evidence before the Court. Learned Counsel further submits that there is no dispute that the accused had given the subject cheques to the complainant, and not to M/s. Maria Constructions, and, therefore the complainant was entitled to the benefit of the presumptions available to the complainant by virtue of Sections 138 and 139 of the Negotiable Instruments Act, 1881 which presumptions were not rebutted by the accused. Learned Counsel further submits that the cheques were signed by the accused is also a fact which has been admitted by him in his cross-examination apart from the fact that it was also not denied in the reply to the notice. Learned Counsel submits that the complainant was not at all required to file any returns of M/s. Maria Constructions in support of his case, as observed by the learned J.M.F.C.

9. On the other hand, Shri A. P. Cardozo, learned Counsel on behalf of the accused submits that the accused had given blank cheques to the complainant. Learned Counsel admits the issuance of the cheques by the accused but submits that the accused had given them in blank and particularly points out that the second cheque has a prior serial number. Learned Counsel submits that the money was given to the accused not by complainant but by the firm M/s. Maria Constructions, and, therefore there is no debt to be paid to the complainant, and in case there was any debt that would be in favour of the said firm M/s. Maria Constructions. Learned Counsel then submits that both the cheques if at all were given, they were given in blank towards the repayment of Rs. 50,000/-, which the accused owed to M/s. Maria Constructions. Learned Counsel further submits that the complainant had failed to prove that he had advanced the money to the accused. Learned Counsel also submits that the complainant did not produce any authority to prove that he was authorized to pay any amount from the account of the said firm. Learned Counsel submits that M/s. Maria Constructions could even file a suit against the accused for the recovery of the amount which was given to the accused. Learned Counsel also submits that the cheques which were given by M/s. Maria Constructions were bearer cheques and that the complainant has not proved that the accused has withdrawn the amount due thereon.

10. Firstly, it must be observed that learned Counsel Shri Cardozo, on behalf of the accused has no explanation whatsoever, if the accused owed money to the said firm M/s. Maria Constructions, why the accused gave the cheques in the name of the complainant. Secondly, it must be observed that there is no explanation that in case the accused owed only Rs. 50,000/-to the said M/s. Maria Constructions why the accused gave two cheques. There is also no explanation, in case the money was lent by the said firm, why the accused had to pay to the complainant Rs. 1,20,000/-on 18-9-2003 and Rs. 1,03,323/-on 10-12-2003 as suggested or as stated by the accused. Thirdly, it must be stated that the accused has admitted that he had signed the subject cheques and given to the complainant, and, therefore the Court was bound to draw the presumption in favour of the complainant as stipulated by Sections 138 and 139 of the Negotiable Instruments Act, 1881. The law on the subject is very clear. The Apex Court in the case of Hiten P. Dalal Vs. Bratindranath Banerjee, has held that it is obligatory upon the Court in terms of Sections 138 and 139 to raise the presumption in every case where the factual basis of the raising of presumption has been established. The Apex Court in K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, has held that once the signature on the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date of which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden is on the accused to rebut such presumption. Again, in Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal, the Apex Court has held that the position of law which emerges is that once execution of the promissory note is admitted, the presumption u/s 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The Defendant can prove the non-existence of a consideration by raising a probable defence. If the Defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the Plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the Defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the Plaintiff is entitled under law to rely upon all the evidence led in the case including that of the Plaintiff as well. In case, where the Defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the Plaintiff would invariably be held entitled to the benefit of presumption arising u/s 118(a) in his favour.

11. The question therefore is whether the accused by his own evidence or that of the complainant had discharged the onus which was on him to show that consideration was improbable?

12. The accused has sought no explanation either from the complainant nor has given his own why the cheque dated 22-4-2009 carried a subsequent number i.e. 846325 instead of 846326 and therefore in the absence of any explanation which could have been secured but was not, it cannot be said that the accused had given blank cheques. The accused was cross-examined on the so-called plea taken by him that the subject cheques were taken by force, and in that regard he stated as follows:

I have not written any letter to the complainant asking back the hundi and stamp paper saying that those were obtained forcefully from me. I have not filed any police complaint against the complainant for forcefully taking the said hundi and stamp paper.

13. This is certainly not a conduct of a normal person in case the cheques were taken by force. The accused in the reply to notice admitted his liability to the extent of Rs. 4,50,000/-but stated that he was required to pay only a balance of Rs. 2,26,677/-but in his evidence before the Court the accused made a turn around and stated that he was liable to pay only Rs. 50,000/-to the complainant, and further stated that it is his advocate who made a mistake in the reply to notice when he had admitted having received Rs. 4,50,000/-, but was due only a balance amount of Rs. 2,26,677/-. The accused did not examine the advocate in support of his case, in case there was a mistake made by him. This is a clear case to draw adverse inference against the accused for non examination of the said advocate. If there was any mistake made it was in adding Rs. 2,44,500/-to Rs. 2,56,500/-which comes to Rs. 5,01,000/-and not Rs. 4,50,000/-. The learned J.M.F.C. found that the case of the accused was one with infirmities and contradictions, and it is indeed so. The case of the accused as set out in the reply to the notice and the evidence given by him was completely inconsistent, therefore unreliable and the evidence given by the accused taken as a whole was not sufficient at all to rebut the presumptions which the complainant had in his favour by virtue of Sections 138 and 139 of the said Act. The complainant did make an attempt to produce the cheques by which payment was made to the accused signed by him from the account of the said M/s Maria Constructions but the accused denied his signature on the authenticated copies produced by the complainant and as a result the said cheques were not taken on record but the very fact that the complainant gave the details of the said cheques both in his complaint as well as in his affidavit in evidence inspires confidence that the complainant indeed had made the payment to the accused by cheques drawn from the account of the said M/s. Maria Constructions of which he was one of the partners and in whose name he was carrying on the business as stated by him regarding which there was no denial. It would be immaterial from which account the complainant had paid the amount to the accused. The complainant could have either begged, borrowed or stolen the said amount as the said expression goes, when he advanced money to the accused but the fact remains that it is the accused who gave the subject cheques to the complainant and not to the said M/s Maria Constructions and the plea that the money was advanced to the accused

by the said M/s. Maria Constructions is only a lame excuse put forward by the accused to avoid the payment due on the cheques issued to the complainant. The complainant had given evidence in support of his complaint and that evidence is consistent and reliable. On the other hand, the accused has taken inconsistent pleas with a view to avoid the payment due on the subject cheques and in fact, the learned trial Court had come to this conclusion that the evidence of the accused had infirmities and contradictions and being so ought to have rejected the evidence of the accused as inconsistent and unreliable, and, therefore not sufficient to rebut the presumptions which the complainant had in his favour by virtue of Sections 138 and 139 of the said Act. At one stage, the accused had admitted having received from the complainant Rs. 4,50,000/-. At another stage, the accused admitted having borrowed Rs. 2,00,000/-at 37% interest. At one stage, the accused had admitted his liability to pay Rs. 2,26,667/-and then changed it to Rs. 50,000/-. The accused had thus proved himself to be unreliable.

14. Consequently, both the appeals deserve to succeed. The Judgments of the learned trial Court are hereby set aside and the accused convicted in both the cases for dishonour of the said two cheques u/s 138 of the Negotiable Instruments Act, 1881.

15. As regards sentence, on behalf of the accused, Shri Cardozo, submits that the accused is an elderly person, and, therefore a lenient view be taken. Learned Counsel on behalf of the complainant submits that a substantive sentence of at least six months be imposed upon the accused, and I am inclined to accept the said submission.

16. The N. I. Act by virtue of Section 138 thereof, initially provided punishment which could extend to one year, but the same was amended in the year 2002 to provide for punishment which may extend to two years. In Suganthi Suresh Kumar Vs. Jagdeeshan, the Apex Court observed that if the amount had been paid to the Complainant, there perhaps would have been justification by imposing a flea bite sentence as had been chosen by the trial Court in that case but in a case where the amount covered by the cheque remained unpaid, it should be the look out of the trial Magistrates that the sentence for the offence u/s 138 should be of such a nature as to give proper effect to the object of legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light heartedly. The very object of enactment of provisions like 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount at least during the pendency of the case. Sentence is said to be the public face of the criminal justice system. It should have a deterrent effect and be of such nature as to give proper effect to the object sought to be achieved. Though no formula of full proof nature is possible to be laid down in awarding appropriate sentence, the sentence to be imposed should be appropriate and proportionate to the crime committed and should be awarded by taking into consideration the

facts of each case.

17. The accused has deprived the complainant of his money, most dishonestly, for over seven years. Considering the facts of the case, therefore, the accused is hereby sentenced for a period of six months S.I. in each of the cases. The sentences will not run concurrently but consecutively. The accused shall also pay to the complainant a sum of Rs. 7,50,000/-in both the cases by way of compensation, and in default shall undergo Simple Imprisonment for six months. It is clarified that substantive sentence imposed will be for one year and compensation ordered to be paid to the complainant will be Rs. 7,50,000/-

18. At the request of Shri A. P. Cardozo, learned Counsel sentence imposed is hereby stayed for three weeks to enable the accused to prefer an appeal.