
(2012) 10 BOM CK 0073
In the Bombay High Court
Case No : Criminal Appeal No. 336 of 2008

Shri Krushnaji

APPELLANT

Vs

Amol

RESPONDENT

Date of Decision : 08-10-2012

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) ALLMR(Cri) 12 : (2013) 2 MhLj 120

Hon'ble Judges : A.R. Joshi, J

Bench : Single Bench

Advocate : M.V. Masodkar, for the Appellant; S.N. Mariyar, h/f Mr. F.T. Mirza, for the Respondent

Judgement

A.R. Joshi, J.—Heard rival arguments on earlier dates on this appeal preferred by original complainant challenging the judgment and order of acquittal. Perused the evidence led before the Trial Court and also perused the citations referred on behalf of the appellant. The present respondent-accused was acquitted of the offence punishable u/s 138 of the Negotiable Instruments Act, vide order dated 14/1/2008 passed by the Judicial Magistrate First Class, Maregon in Summary Criminal Case No. 521/2007.

2. Prior to discussing the rival submissions and in order to ascertain whether the impugned judgment and order is required to be altered and set aside, the case of the complainant is narrated as under:-

During the relevant time of the year 2007 there were business relations between the complainant and the respondent-accused. One Annapurna Krushi Kendra was being run and conducted by the accused jointly with his father. Being a customer of the said shop, the complainant used to purchase fertilizers and insecticides from the said shop every year on cash payment. At times, the complainant used to book said articles with the accused on advance payment before the start of agriculture season. The complainant, though retired teacher had other sources of income by way of agricultural produce and is well to do person having sound

financial background. Some time in January 2007 the complainant had been to the shop of the accused booking some seeds. That time the accused and his father proposed to the complainant for giving hand loan of Rs. one lac to the accused. The accused and his father assured to refund the amount to the complainant after selling the material from their shop such as fertilizers, insecticides and bags of seeds. Relying on such understanding, the complainant advanced a sum of Rs. 78,000/- to the accused and in discharge of said liability, the accused issued a cheque dated 15/1/2007 for Rs. 78,000/- drawn on Yavatmal District Central Cooperative Bank, Yavatmal, Branch at Maregaon.

3. Similar loan was asked by the accused and his father for Rs. 30,000/- with same assurance of refund the same along with earlier taken loan. On this, the complainant gave loan of Rs. 27,000/- to the accused. In discharge of this liability, the accused issued another cheque dated 19/2/2007 for Rs. 27,000/- drawn on the same bank as in the first case. The respective cheques are bearing nos. 177216 and 177217. The said cheques were presented to the banker of the complainant, however, were returned by the bank with the endorsement "funds insufficient and present again". On this, mistakenly, believing that the cheques were under the signatures of the father of the accused, a demand notice was issued in the name of the father of the accused on 5/6/2007. It was duly received but no compliance from the father of the accused.

4. After the above, instead of proceeding further with the matter for lodging complaint etc., the complainant again re-deposited the said cheques with his banker on 28/6/2007. Again the cheques were dishonoured and returned unpaid on the same date with the same endorsement. This time, it was noticed by the complainant that the drawer of the cheque was accused himself and not his father. Consequently, demand notice dated 3/7/2007 was sent to the accused for the amount. Said notice remained unclaimed and was returned to the complainant when it was sent to the business premises of the accused. However, service was effected on the accused on his residential address on 12/7/2007. There was no reply to the said notice, so also no payment was made by the accused. Hence, the complainant lodged complaint for the offence punishable u/s 138 of the Negotiable Instruments Act against the accused. Said complaint was dealt with by the concerned Court and after recording the evidence of sole witness PW 1 complainant, came to the conclusion of non-establishing of the offence punishable u/s 138 of the Negotiable Instruments Act and thus, acquitted the respondent-accused. This is the judgment and order challenged in the present appeal.

5. Certain admitted position is required to be mentioned as under:-

(a) Entire case of the complainant-present appellant is based on his sole testimony and documents produced before the trial Court.

(b) The respondent-accused did not enter into witness box and also did not examine any witness in his defence. He also did not file any documents in

support of his defence of total denial and giving of the cheques as and by way of security and not towards legally enforceable liability.

(c) Demand notice secondly issued against the respondent-accused was duly served on him and he accepted the same as received. However, he did not reply to the same by putting forth his defence. He also did not comply the demand.

(d) Giving of both the cheques is not disputed by the respondent-accused, but his only contention is that the cheques were towards security as accepted by the complainant during his cross-examination.

6. Bearing in mind the above factual position, the reasoning given by the Trial Court is required to be scrutinized. What weighed with the trial Court was a sort of admission given by the complainant during his cross-examination, which has been recorded in vernacular Marathi in notes of evidence and marked as Exhibit 22 by the trial Court. The gist of the said cross-examination, which is relevant for the purpose of point in controversy as to what is mean by "Security", is mentioned as under:-

It is accepted by the appellant-accused that prior to the said transactions in two cheques, he had business/money transactions with the respondent-accused and he used to pay advance money to the accused for booking the articles and he used to accept the cheques towards such advance as and by way of security. The appellant-accused has also accepted that he had accepted the said cheques as security for the loan advanced to the accused. The accused also accepted that on the respective dates of advance of loans given to the accused, the respective cheques were given bearing the respective dates. However, at the end of the cross-examination, apart from the above referred admissions, the appellant-complainant had categorically denied the suggestion made to him on behalf of the accused. He had denied that the accused had given blank cheques towards security of the advanced money. This last answer to the suggestion is very significant enough, which has not been dealt with by the trial Court in proper perspective and it must be said that the trial Court was swayed away by the earlier answers given as to the cheques were given as security for the advanced amounts. On this aspect, actual words used by the appellant-complainant that the cheques were given as security towards the loan advanced to the accused.

7. By pointing out the above cross-examination of the appellant-complainant, it is submitted on behalf of the appellant that even such acceptance as to receiving of cheques as security of repayment, must attract the penal provisions of Section 138 of the Negotiable Instruments Act. In support of this submission, the ratio of the following authority was taken shelter of on behalf of the appellant:-

K. Venugopalan Vs. Moosa K.B.,

8. In the matter in hand before the Kerala High Court, there was a word used as "guarantee" in the complaint and this aspect was dealt with in detail by the Court and it was held that the use of word, "guarantee" in the complaint does not

convey that the cheque was not issued for due discharge of legally enforceable debt or liability. Para No. 7 of the said authority, on which much reliance was placed by the appellant is reproduced as under:-

The above averments very clearly convey that though the word "guarantee" is used, the cheque was, in fact, issued only for the due discharge of a loan/liability. In common parlance when an amount is advanced on the promise that the cheque issued by the drawer can be presented in bank and repayment secured, it is said that the cheque is a guarantee for repayment and is received as guarantee or security for repayment. The loan is paid on the security or guarantee of the cheque, the laity might say. This cannot persuade the Courts to jump to the conclusion that the cheque is not issued for the due discharge of any legally enforceable debt/liability. It would be puerile to read into Ext. P7 any such conclusion. I do not, in these circumstances, agree with the approach made by the learned Magistrate.

9. In the opinion of this Court, the admissions given by the appellant-complainant during his cross-examination cannot be construed, as there was no legally enforceable debt or liability, as it has already accepted position that the loan was advanced to the respondent-accused and respective cheques were given towards the repayment of said loan. Moreover, once giving of cheques was accepted by the respondent-accused, even on preponderance of probability, there was nothing brought on record to establish that there was no enforceable debt or liability. This is more so, in view of the factual position mentioned above, as to not replying the demand notice issued against the respondent-accused and not giving any evidence either by himself or through his witnesses before the trial Court, by the accused. In that event, in the considered opinion of this Court, the trial Court had fallen in error in acceptance of defence of the accused that the cheques were given not for legally enforceable liability.

10. Counter to the above authority cited on behalf of the appellant, shelter of the following two authorities was taken on behalf of the respondent-appellant. Said authorities are as under:-

(i) Sudhir Kumar Bhalla Vs. Jagdish Chand, etc. etc., and

(ii) Ramkrishna Urban Cooperative Credit Society Ltd. Vs. Shri Rajendra Bhagchand Warma, .

11. By pointing out the ratio of the first authority mentioned above, it is submitted that when the cheque is issued by way of security then the action u/s 138 of the Negotiable Instruments Act shall not lie even on bouncing of said cheque. There cannot be different opinion on the proposition mentioned in the said decision. However, if it is established that the cheque is issued in discharge of liability or debt, then the argument as advanced on behalf of the respondent/accused will not sustain. In other words, not only the aspect as to the cheque given as and by way of security is to be seen but what is also to be seen is whether it has been issued in discharge of debt or liability. In the matter at hand

before the Apex Court as cited firstly above on behalf of the respondent/accused, there was a complaint for dis-honour of cheque. However, other side has filed cross criminal case that the complainant had interpolated and manipulated the figures in the cheque. Thus, making the figures Rs. 30,000/- and Rs. 40,000/- to Rs. 3,00,000/- and Rs. 4,00,000/- respectively. So far as the present accused is concerned as mentioned earlier, considering the cross-examination of the complainant, it is admitted by him that the cheque was given to him as security towards the loan advanced. Moreover, the complainant had denied that the said cheques were given in blank and he also denied the suggestion that the accused had never taken any loan from the complainant. As such, the submission on behalf of the respondent/accused cannot stand.

12. So far as the second authority mentioned above is concerned, again the facts of that matter before the Hon"ble Bench of the Bombay High Court were different inasmuch as the blank cheques were issued prior to disbursement of loan as collateral security for the loan, which was sanctioned and under those circumstances, it was held that there was no existing debt or liability when the cheques were issued and hence it was further held that the case does not fall within four corners of Section 138 of the Negotiable Instruments Act. Again the shelter of the said authority cannot be taken in favour of the present respondent/accused.

13. In the result, this Court has held that the trial Court had fallen in an error in appreciating the evidence led before it and also ignored the effect of the admitted position, which has been enumerated in para 6 in the present judgment. Consequently, the appeal is allowed and the impugned judgment and order dated 14/1/2008 is quashed and set aside. The respondent/accused is held guilty of the offence punishable u/s 138 of the Negotiable Instruments Act.

14. At this time, none present for the respondent-accused. Considering the case against the respondent-accused for offence punishable u/s 138 of the Negotiable Instruments Act for dishonour of cheques given in the year 2007, the following order would meet the ends of justice. The respondent-accused is sentenced to suffer imprisonment till rising of the Court and he is sentenced to pay fine amount of double the amount of two dishonoured cheques, in default of payment of fine, he shall suffer imprisonment for one month. If the amount is recovered, the same shall be given to the appellant-original complainant. The Trial Court to issue appropriate process against the respondent-accused for compliance of the present order.