

(2010) 02 BOM CK 0036
In the Bombay High Court
Case No : Criminal Appeal No. 31 of 2008

Shri M. Ibrahim

APPELLANT

Vs

Shri Gurudas H. Borkar and The State of Goa

RESPONDENT

Date of Decision : 02-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 114
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2010) 4 BC 482

Hon'ble Judges : U.D. Salvi, J

Bench : Single Bench

Advocate : R.G. Ramani, for the Appellant; A.A. Agni, for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

U.D. Salvi, J.—The appellant/ complainant has preferred this appeal against the order of acquittal of the respondent /accused passed by the Chief Judicial Magistrate, Margao in Criminal Case No. 213/OA/NI/2005/A u/s 138 of N.I. Act,1881 on 16.01.2008.

2. The complaint u/s 138 of the N.I. Act,1881 (hereinafter referred to as the Act) was lodged by the complainant on the allegation that four cheques bearing Nos. 787540, 787541, 787542 and 787543 all dated 18.12.2004 for the amount of Rs. 90,000/- each issued and drawn by the respondent / accused on Vijaya Bank Margao, Goa as a security towards the repayment of the amount of Rs. 3,60,000/- borrowed by his nephew Mr. Vishnath Bakal, resident of Dongri, Neura were returned dishonoured and the respondent/ accused failed and neglected to pay the amount/s due under the said cheques despite the demand made there for vide notice dated 6.1.2005.

3. To substantiate the substance of accusation made against the respondent/ accused pursuant to the said complaint, the appellant / complainant examined

himself and Senior Branch Manager of Vijaya Bank PW2 - Vishwanath Rai; and further adduced in evidence the said cheques undertaking dated 18.12.2003, memorandum dated 18.12.2004 of Vijaya Bank returning the unpaid/dishonoured cheques with remark "referred to drawer", copy of notice dated 6.1.2004, registered post acknowledgment and reply dated 14.1.2005 of the respondent/ accused given to the said notice.

4. Besides denial of the prosecution case, the respondent / accused in his examination u/s 313 of Cr.P.C. revealed that he was forced to give the cheques and undertaking by putting him in fear that his nephew Mr. Vishwanath Bakal would be arrested by Police, put behind the bars and made to face termination of his employment with the bank. The respondent and his nephew P.W.2 - Vishwanath Bakal stepped in the witness box to further the defence in the said case.

5. After hearing the parties and upon considering the evidence adduced in the said case, the learned JMFC, Margao accepted the defence plea and held that the complainant failed to prove the existence of legally enforceable debt of the respondent/ accused and that the said cheques were issued towards the discharge of such debt.

6. Controversy in the present appeal veers around this issue regarding the existence of legally enforceable debt allegedly owed by the respondent / accused to the appellant. Learned Advocate Ramani for the appellant pointed out from the evidence that with the admission of execution of the cheques in question the respondent/ accused took upon himself the burden of proving the contrary to the presumption of the debt or other liability arising in favour of the appellant u/s 139 of the Act. Theory of the use of force for obtaining the cheques and undertaking, he argued, was a later innovation as it did not figure in the reply dated 14.1.2005 Exh.17 to the notice of demand dated 6.1.2004 Exh.16. He rhetorically questioned as to why the respondent/ accused was called in the office of the Notary and not in the police station; and if the release of his nephew was at stake, why the respondent/ accused, who knew the ways of business, chose to carry cheque book with him; and why without asking for the nephew he had issued the cheques; and why did he neither stop the payment of the cheques nor take any action against the "culprits", who happened to threaten him, after his nephew revealing the facts to him. Lack of answers to such pertinent questions, he argued, signifies unnatural conduct on the part of the respondent/ accused. He submitted that the respondent/ accused has to prove at least by preponderance of probabilities the fact that the said documents were obtained by use of force and in that regard the respondent/ accused had not examined Mr. Nishikant Kanekar - Surety quoted in the undertaking or set out in the cross-examination of P.W.1- Ibrahim and PW2 Vishwnath Rai - Senior Manager of Vijaya Bank. Pressing the provisions of Section 114 of the Evidence Act, he further argued that examination of the Notary or the witnesses to the undertaking was not necessary as wrongly held to be so by the Trial Court, as

execution of the said undertaking was not in dispute. In his view, the learned Trial Court did not consider the evidence in proper perspective and proceeded to hold in favour of the respondent / accused.

7. Learned Advocate Agni for the respondent No. 1 / accused pointed out that the Civil Court - learned Ad hoc District Judge- II, South Goa at Margao- had dismissed special civil No. 157/2007 instituted by the appellant against the respondent/ accused for recovery of unpaid amounts due under the said dishonoured cheques and as such the Criminal proceedings in the present appeal are required to be dropped. Citing judgments reported in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, and (2006)3 SCC Cri. 30- M.S. Narayan Menon @ Mani v. State of Kerala and Anr. she submitted that presumption u/s 139 of the Act has notional value so as to merely raise presumption in favour of the holder of the cheque that same has been issued for discharge of any debt or other liability, but the existence of legally recoverable debt is not established by such presumption; and onus of proof on the accused to rebut such presumption by raising the probable defence is not as heavy as that on the prosecution/ complainant, but can be compared with that of the defendant in civil proceedings; and once the accused discharges the said burden the onus, thereafter, shifts on to the complainant to prove his case.

8. Learned Advocate Agni for the respondent/ accused further pointed out from the complaint and evidence of the appellant/ complainant that there was switch over from the initial case of borrowing of money to the misuse of money allegedly entrusted to the respondent/ accused as a contribution to Pigmy account. With this switch over, she argued, the onus of proving the case of misuse of funds lies squarely on the shoulders of the appellant/ complainant, and the appellant/ complainant had completely failed in proving such case of misuse and, therefore, the probable defence put up by the respondent/ accused, became more pronounced. Adverting to the undertaking Exh.14, she submitted that mere execution of the said document does not connote proof of its contents and the undertaking made no reference to the liability incurred by the AW2 Vishwanath Bakal on account of misuse of funds entrusted to him. Commenting on the words "borrowing", "borrower" and "lender", she submitted that the said words had embodied specific meaning and its meaning cannot be stretched too far to connote misuse of funds. In support of these submissions, she relied on the judgments reported in K.M.S. Lakshmanier and Sons Vs. The Commissioner of Income Tax and Excess Profits Tax, ; Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, In view of the probable defence and its acceptance by the Trial Court, she argued, the acquittal of the appellant/ accused deserves no reversal in the present appeal.

9. Examination of the complaint and the affidavit in evidence of the complainant Exh.11 shows that the cheques were issued towards the repayment of the amount borrowed by the nephew of the accused Mr. Vishwanath Borkar (AW2 Vishwanath Bakal correctly). A notice dated 6.1.2004 Exh.16 also reveals this

theory of borrowing of money by AW2 Vishwanath Bakal - nephew of the respondent / accused. However, in the cross-examination, the complainant - Maulana Ibrahim made an assertion that AW2 Vishwanath Bakal had not borrowed any money from him, but he had misused his money. He deposed in his cross-examination that Vishwanath as collector for the Vijaya Bank, had been collecting amounts from him for depositing the same in his Pigmy A/c. No. 1066 with the bank, and Vishwanath had not deposited all the amounts so collected by him from him running into 7 Lacs or more in his account. He further deposed that on enquiry, he had realised that Vishwanath used to give one slip for collection to him and another slip to the bank with different amount. He added that when he was about to make a police complaint, the respondent accused and one Shrikant Kanekar undertook the responsibility for paying the defaulted amount and on that day some amount was paid by the accused and for the remaining amount undertaking Exh.14 and four cheques Exh.15 collectively were issued in his favour by the respondent / accused. With these averments in the cross-examination, the appellant/ complainant threw overboard his initial theory of "borrowing" of money by AW2 Vishwanath Bakal- nephew of the respondent/ accused and in the process took upon himself onerous task of proving the misuse of his money by the nephew of the respondent/ accused - AW2 Vishwanath Bakal. Undertaking Exh.14 does not speak about the misuse of money by the nephew of the respondent/ accused - AW2 Vishnath Bakal. Clearly it appears to be the undertaking to pay the amount borrowed by AW2 Vishwanath Bakal. Borrowing implies loan and consequently, the existence of the borrower and lender. In context with interpretation of the phrase "borrower of money" within the meaning of Rule 2A of Schedule 2 of Excess Profits Act, 1940 the Hon"ble High Court of Judicature at Madras in M/s. KMA Lakshmaniyar and son's case asked question to itself as to what constitutes borrowing of money from the customers, and proceeded to hold that the security deposits made by the customers with the assessee firm were not borrowed money. Similar question can be asked in the instant case as to whether the monies collected for depositing in the Pigmy account can be called as the money borrowed by the nephew of the respondent/ accused.

10. Evidence of AW2 Vishwanath Bakal reveals that as a Pigmy collector working with Vijaya Bank, he used to collect money from the appellant/ complainant Ibrahim for being deposited in the account under Pigmy scheme with Vijaya Bank and was also having partnership business with him for the purchase of fish on wholesale and in course of his business has remitted an amount of Rs. 9,15,000/- by telegraphic transfer through bank of Baroda for the purchase of fish on wholesale and, thereafter, requested the complainant to pay his profits in the business and to refund Rs. 9,15,000/- remitted by him by telegraphic transfer at the instance of the appellant/ accused; and in order to pressurize him for giving up his claim in the profits of the partnership business, the appellant/ complainant had brought about the execution of the undertaking and issuance of cheques by the respondent/ accused. He further deposed that the appellant/

complainant succeeded in procuring the said documents from the respondent/ accused by putting him under fear that his nephew was arrested by police for misappropriation of Pigmy account and the documents were needed for his release from detention at Margao Police Station. Weakness of the testimony of AW2 Vishwanath Bakal vis-a-vis the testimony of P.W.2 Vishwanath Rai - Senior Branch Manager has been pointed out by learned Advocate Ramani for the appellant/ complainant. An independent witness PW2 Rai deposed that in the afternoon of 18.12.2003 Advocate Kakodkar, AW1 Gurudas Borkar, AW2 Vishnath Bakal came to his chamber with their undertaking to settle the matter of misappropriation of money in the account of the appellant/ complainant and as per the notarised undertaking, AW1 Gurudas Borkar - the accused agreed to pay sum of Rs. 3,60,000/- by way of four post dated cheques dated 18.12.2004 for Rs. 90,000/- each drawn on his Saving bank Account with Vijaya Bank, Margao, and the said cheques were delivered to the appellant/ complainant Ibrahim in his presence. He added that cheques were written by him at the request of the accused to ensure that the cheques were correctly written. Nowhere in the cross-examination of P.W.2 Rai there is utterance of the case of obtaining the said documents, undertaking and the cheques from the respondent / accused upon the threat of putting AW2 Bakal behind the bars or AW2 Vishwanath Bakal being put behind the bars and procurement of the said documents for seeking release of AW2 Bakal from the police custody.

11. Though, it may appear from the testimony of PW2 Rai that monies were being borrowed by the bank in the Pigmy account through its agent AW2 Bakal, the testimony of PW2 Rai is inadequate to suggest that liability arising out of misappropriation in the Pigmy account was to the extent of Rs. 3,60,000/- or thereabout. Weakness of the defence" evidence certainly cannot be considered by the prosecution and the prosecution must stand on its own legs.

12. PW2 Rai did not adduce in evidence certified copy of extracts of the ledger maintained in the bank in respect of J & D account (Pigmy account) maintained by the appellant/ complaint at the bank. He merely deposed that on 18.12.2003, the complainant came to the bank to close his J & D account and found less balance in the J & D account than that what he had remitted through AW2 Vishnath Bakal. The extent of alleged misappropriation i.e. the amount in deposit in the J & D account of the appellant by AW2 Bakal remains mystery in the evidence of P.W.2 Rai. This mystery could have been resolved by production of deposit slips issued by AW2 Bakal at the time of collecting the amount and other slips deposited with the bank or statement of account in respect of the said J & D account. However, this remains the mystery even if one looks for answer in the evidence of PW1 Ibrahim PW1 Ibrahim revealed in his cross-examination that AW2 Bakal did not deposit in the bank an amount of Rs. 7.7 Lacs. His evidence, however, offers no answer to the question as to why then undertaking for Rs. 3,60,000/- was taken from the respondent / accused. In the crossexamination, PW1 Ibrahim dithered in as much as he was not certain as to the amount transferred from Pigmy account to his S.B. Account on 20.12.2003. In one

breathe PW1 Ibrahim averred that he was not having any other business relation with AW2 Bakal besides the collection of amount by AW2 Bakal as Pigmy agent of the bank. In another breathe PW1 Ibrahim yielded to the suggestion that Vishwanath Bakal had sent Rs. 9,15,000/- by telegraphic transfer to one Kasam Mohammad, fish dealer from Bombay at his instance i.e. the said amount was sent by him. He further deposed that the monies collected for pigmy account were separate from the amount sent by telegraphic transfer. All these makes the defence version of partnership business between PW1 Ibrahim and AW2 Bakal look probable. Consequently, the view taken by the learned Trial Court for acquitting the respondent/ accused cannot be lightly brushed aside, particularly when the possibility of settling the partnership dispute between the complainant and AW2 Bakal in favour of the complainant under the garb of the undertaking and the cheques issued thereunder is not completely ruled out through the evidence of the complainant.

13. In the result, the appeal deserves to be dismissed and is, accordingly, dismissed with no order as to costs.