(2012) 12 BOM CK 0142

In the Bombay High Court

Case No : Criminal Application No''s. 638, 639, 640, 772 and 773 of 2012

Shri Sada Vijay Kumar APPELLANT

Vs

State of Maharashtra and Another RESPONDENT

Date of Decision : 18-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 239, 252, 482
Negotiable Instruments Act, 1881 (NI) — Section 118(G), 123, 124, 125, 131

Citation : (2013) 1 ABR 691 : (2013) ALLMR(Cri) 430 : (2013) 2 BC 486 : (2013) 2 BomCR(Cri) 149

Hon'ble Judges : K.U. Chandiwal, J

Bench : Single Bench

Advocate : Dinesh Tiwari, for the Appellant; D.R. More, App for the State Mr. A.P. Mundargi with Mrs. Pravina Kanani a/w and Mr. Sunil D''souza, for the Respondent

Final Decision : Dismissed

Judgement

K.U. Chandiwal, J.—Heard finally. In proceedings u/s 138 of the Negotiable Instrument Act process is challenged by the Applicant.

2. Applicant had availed financial facilities from Respondents HDFC Bank Rs. 1.95 crore on 15th September, 2006 and Rs. 4.45 crore in 2007. Payment schedule was not adhere. Defence is, Bank had assured cash credit facility of Rs. 50 crore. Under a letter, addressed by the Applicant to the Bank dated 14th September, 2008, Applicant had issued five cheques with different quoted amounts. On presentation of said cheques, they were dishonored owing to insufficiency of funds. It was followed by statutory notice and then 5 complaints under Sections 138, 141 of the Negotiable Instrument Act was filed.

3. Learned Counsel says, whether in a cheque of such type when drawer and drawee is the same, could it be a liability of the Applicant to answer the claim or to face the prosecution in terms of Section 138 read with Section 141 of the Negotiable Instrument Act.

4. In all complaints, Applicant''s pleas are recorded, then in 4 complaints affidavit of evidence is tendered. Mr. Tiwari could not dispel this fact. Legal position is indicated in the matter of Subramaniam Sethuraman Vs. State of Maharashtra & Anr., reported in 2004 SCC 712 (equivalent to 2004 STPL(DC) 549 SC) in paragraph 16 which reads as under:-

16. The next challenge of the learned Counsel for the appellant made to the finding of the High Court that once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code which does not contemplates a stage of discharge like Section 239 which provides for a discharge in a warrant case. Therefore, in our opinion the High Court was correct in coming to the conclusion once the plea of the accused is recorded u/s 252 of the Code the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion.

5. In paragraph 19 of the said Judgment, import of Section 482 of the Code of Criminal Procedure is discussed which reads as under:-

19. We see that this Court while dismissing earlier SLP As withdrawn had left the question of legality of the notice open to be decided at the trial. Therefore, legitimately the appellant should raise this issue to be decided at the trial. Be that as it may, we cannot prevent an accused person from taking recourse to a remedy which is available in law. In Adalat Prasad''s case we have held that for an aggrieved person the only course available to challenge the issuance of process u/s 204 of the Code is by way of a petition u/s 482 of the Code. Hence, while we do not grant any permission to the appellant to file a petition u/s 482, we cannot also deny him the statutory right available to him in law. However, taking into consideration the history of this case, we have no doubt the concerned Court entertaining the application will also take into considerations i.e. raised by the respondent in this case as to delay i.e. being caused by the entertainment of applications and petitions filed by the accused.

6. The afore referred legal position in fact, does not allow to entertain these Petitions and only recourse available is to face trial. However, since an important question is raised, same needs to be dealt with.

7. The cheque was crossed issued to HDFC Bank Account M/s. K. Sada Vijay kumar Beedi Leaves Merchant against Account No. 3752790000051. The drawer of the cheque was M/s. K. Sada Vijay Kumar Beedi Leaves Merchant, by authorised signatories of cheque No. 414892 drawn on the said Bank, dated 30th September, 2009. The cheque returning memo refers to K. Sada Vijay Kumar Beedi Leaves Merchant dated 30th September, 2009.

8. Mr. Tiwari submits that the legal position in identically placed situation was indicated by this Court in the matter of M/s. Credential Finance Ltd. and Others Vs. State of Maharashtra and Another, . The learned Single Judge of this Court giving reference to the provisions of Sections 7, 123, 124, 125 and 131 of the

Negotiable Instrument Act, 1881 has held that there could not be any liability in terms of Section 138 of the Negotiable Instrument Act against the Payee of the cheque and the observations of the learned Additional Sessions Judge was disapproved.

9. The same learned Single Judge in the matter of Ramesh Deshpande Vs. Panjab and Sind Bank, reported in 2000 (0) AIJ-MH 123889 , by order dated 3rd April, 2000 explained the effect of drawee, drawer''s cheque, bills of exchange, dishonor of cheque for insufficiency of fund in the account and placed reliance on the aforementioned Judgment of M/s. Credential Finance Limited Later order was carried to Supreme Court and the Hon''ble Supreme Court in the matter of 2001 (3) ACR 2774 (SC) overruled the Judgment and order dated 3rd April, 2000.

10. The cheques were post dated cheques totally valued for Rs. 3.70 crores. There is non-compliance of decision of meeting with the officials of the HDFC Bank in discharging of liability. In banking system, a borrower issues a cheque to the financer Bank from his account and the same is credited to loan account. In such event the endorsement as above is not unusual or illegal. It was thus a payment made by the borrower to HDFC Bank in the loan account M/s. K. Sada Vijay Kumar and consequently, in terms of Section 9 of the Negotiable Instrument Act, the bank will be holder in due course of the said cheque.

11. Section 9 of Negotiable Instrument Act conceive "Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if (payable to order,) before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Thus, the three stipulations envisaged therein are necessarily carved out. These facts, are explained by the Hon''ble Supreme Court in the matter referred above.

12. The argument canvassed by Mr. Tiwari in respect of non-existence of drawee or the Payee M/s. K. Sada Vijay Kumar and drawer being the same could not be prosecuted, is unconceivable. Section 139 of the Act reveals that first factor to be satisfied for presumption is that, such person should be Holder of the cheque. The complainant has to be either a payee or holder in due course of the cheque. Legislative object behind the provisions has to be borne in mind and need not be defeated. The Bedrock of section 9 is entitlement of holder. The presumption available u/s 118(G) of the Negotiable Instrument Act comes into operation only at the time of the trial. In present case, presumption will prevail against the Applicant. The cheque was issued by Applicant in discharge of liability of loan to the Bank and naturally will have reference to his account where it was to be credited. Court has to presume a negotiable instrument to be for consideration unless existence of consideration is disproved. Taking survey of above facts, the view expressed by the learned Single Judge of this Court having not approved by the Supreme Court as recorded hereinabove, I find no force in the contentions of the Applicant.

13. Another facet in the matter is, statutory notice was served upon the Applicant. The Applicant did not file reply in four matters and reply is filed only in one matter i.e. Criminal Application No. 772 of 2012. He did not challenge contentions canvassed by the Bank and mutely accepted the notice. In the situation, the points raised by the Applicant will not be available to question the prosecution in terms of Section 138 of the Negotiable Instrument Act. Applications dismissed with costs. Observations are restricted primarily to the issues raised.

