

(2009) 08 BOM CK 0074
In the Bombay High Court
Case No : Criminal Appeal No. 27 of 2009

Shri Vilas R. Naik

APPELLANT

Vs

Shri Uday Shivaji Vast

RESPONDENT

Date of Decision : 14-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2009) 08 BOM CK 0074

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

Bench : Single Bench

Advocate : S.D. Lotlikar and P.S. Lotlikar, for the Appellant; D. Pangam, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—This appeal is filed by the complainant and is directed against Judgment dated 14.11.2008 of the Learned J.M.F.C., Ponda, acquitting the accused u/s 138 of the Negotiable Instruments Act, 1881.

2. The complainant and the accused are neighbours. The complainant is a businessman and the accused is a bank employee. The case of the complainant is that the complainant advanced to the accused in the month of April, 2006 a sum of Rs. 20,000/- by a bearer cheque bearing No. 0055983 dated 22.4.06. However, due to typing mistake the number 0055984 was wrongly typed instead of 0055983. The case of the complainant is that the accused again approached him in May, 2006, for another advance of Rs. 1,00,000/- and the complainant obtained a gold loan of Rs. 1,00,000/- from Dhavli Urban Co-Operative Credit Society Limited and paid the said amount to the accused and the accused promised to pay back the amount within a month.

3. The case of the complainant was also that the accused issued to the complainant a cheque dated 30.6.06 for Rs. 60,000/- towards part payment of the advance and requested him not to immediately deposit the said cheque for

encashment since the accused was unable to arrange funds for the same and therefore the complainant did not present the said cheque immediately. The case of the complainant was also that pending the said encashment, the accused issued another cheque dated 5.9.06 for Rs. 60,000/-drawn on the same bank towards the balance repayment but when the complainant deposited both the cheques, the same were returned on 6.9.06 with endorsement that the payment was stopped by the drawer. The complainant, therefore, issued a notice to the accused dated 16.9.06 but the accused did not reply to it and hence the complainant filed the complaint on 26.10.06 and examined himself in support of the same. The complainant also examined a friend by name Vallabh Vinayak Madkaikar who instead of supporting the case of the complainant, destroyed it to a great extent.

4. The case of the accused was that there was an enmity between the complainant and the accused who are neighbours. The case of the accused was also that he had lost three cheques from his cheque book which he had kept to be given to the insurance company, bearing Nos. 687611, 687612 and 687613 but when he came to know that the said three cheques were misplaced on 26.6.06 he gave a letter to the bank dated 29.6.06 which was inwarded under No. 8167 to stop payment of the said cheques. According to the accused two of the said cheques were mis-utilized by the complainant and the third cheque lost by him was not presented for payment.

5. The Learned trial Court acquitted the accused observing that the complainant had denied the suggestion that both the cheques were in his handwriting and had further stated that the cheques were handed over to him by the accused but the said version of the complainant was thoroughly exposed by complainant's witness Shri Vallabh Madkaikar when he deposed that the handwriting on the body of both the cheques was that of the complainant and this position cast a doubt on the case set out by the complainant. The Learned trial Court also observed that nothing prevented the complainant to substantiate that the cheque amount of Rs. 20,000/-was actually handed over to the accused. The Learned trial Court also came to the conclusion that it was difficult to digest that the complainant would take a gold loan of Rs. 1,00,000/which would be otherwise on payment of interest, and lend money to another person, interest free and therefore the Learned Trial Court came to the conclusion that the presumption available to the complainant u/s 138 was sufficiently rebutted.

6. Various submissions have been made by Shri Lotlikar, Learned Senior Counsel on behalf of the complainant. Learned Senior Counsel submits that the defence taken by the accused was vague and that the accused who was bank employee would not keep three signed cheques to pay insurance premium when he had already paid the insurance premium, and further the accused did not produce the third or the remaining cheque to probabalize his defence. Learned Senior Counsel further submits that the accused gave no details of enmity nor the accused gave details as to how or when the said three cheques came to be lost by him.

Learned Senior Counsel further submits that in case the accused came to know that the cheques were lost on 26.6.06 the accused would not have waited till 29.6.06 to intimate the bank with instructions to stop payment. Learned Senior Counsel further submits that there was no reason for the complainant to put two different dates on the subject cheques. Learned Senior Counsel has further submitted that the Learned trial Court has accepted the principle *falsus in uno, falsus in omnibus* and has disbelieved the entire story of the complainant, only on one point.

7. On the other hand, Shri. Pangam, the Learned Counsel on behalf of the accused has submitted that the trial itself is vitiated because the complainant was not examined by the Learned trial Court as required u/s 200 of the Code of Criminal Procedure, 1973, and in lieu of the examination only an affidavit was accepted and in this regard Learned Counsel has placed reliance on a Division Bench Judgment of this Court in *Maharaja Developers and Anr. v. Udaysing Pratapsinghrao Bhonsle and Anr.* 2007 (2) Bom. C.R. (Cri.) 630 . Learned Counsel further submits that the case set out by the complainant in the complaint is different from the one deposed to by the complainant. Shri Pangam further submits that as per the complaint the two cheques were given on 30.6.06 and 5.9.06 but in his evidence the complainant has stated that both the cheques were given on the very day itself i.e. 30.6.06. Learned Counsel further submits that the stop payment instructions were given by the accused on 29.4.06 i.e. before the second cheque dated 5.9.06 was issued by the accused and that would make the defence of the accused more probable. Learned Counsel further submits that the complainant's witness had admitted that both the subject cheques were filled in by the complainant and that again fortifies the defence of the accused that the accused had misplaced the cheques and that they were found by the complainant who completed the same and presented them for payment. Learned Counsel has placed reliance on the case of *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde*, .

8. I must remind myself that this is a case of an appeal against acquittal of the accused u/s 138 of Negotiable Instruments Act, 1881, and, in case the view held by the Learned trial Court is reasonably possible then it will not be justified for this Court to interfere with the acquittal. That the accused did not reply to the statutory notice could be only one of the circumstances going against the accused but there are two other formidable circumstances brought out by the accused from the evidence of the complainant as well as his own evidence which make the existence of consideration doubtful. The Apex Court in *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde*, has observed that an accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the material already brought on record. The Apex Court referred to *Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal*, and again reiterated the view that 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 the complainant 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.

9. In the said case of Krishna Janardhan Bhat the Apex Court has also observed that inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to circumstances upon which he relies and the question as to whether the presumption stood rebutted or not must therefore be determined keeping in view the other evidence on record.

10. It is not necessary to deal with the first submission made on behalf of the accused by Shri. Pangam with reference to the Division Bench Judgment. In my view, the accused had brought two formidable circumstances on record to discharge the initial onus of proof by showing that the consideration was improbable or doubtful. The first circumstance is that the admission of the complainant's witness that both the cheques were in blank and were filled in by the complainant which is more in consonance with the evidence given by the accused rather than the conflicting pleas of the complainant. The second is that the letter to the bank giving instructions to stop payment were given by the accused even before the date of the second cheque which is again in consonance with the defence taken by the accused and these two circumstances were more than sufficient for the accused to discharge the initial onus regarding improbabilities of consideration and then it was for the complainant to have proved that infact he had advanced the sum of Rs. 1,20,000/-as claimed by him. The accused had denied his signature on the cheque of Rs. 20,000/-. Nothing had prevented the complainant from bringing anyone from the bank to show that it is the accused who had received the amount due on the said bearer cheque. Likewise, nothing prevented the complainant from proving with some bank record that indeed he had atleast taken a gold loan of Rs. 1,00,000/-and given the money to the accused.

11. In the light of the above, in my view, this is not a fit case for interference with the order of acquittal. I find that there is no merit in this appeal and consequently the same is hereby dismissed with costs of Rs. 5,000/- to be paid by the complainant to the accused.