
(2011) 05 BOM CK 0039
In the Bombay High Court
Case No : Criminal Appeal No. 678 of 2008

Smt. Y. Bangarama

APPELLANT

Vs

Shri Rakesh Wahane (Waney)

RESPONDENT

Date of Decision : 03-05-2011

Acts Referred:

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

Citation : (2012) 1 BC 25 : (2011) 7 RCR(Criminal) 2559

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : Gopal Mishra, for the Appellant; None., for the Respondent

Final Decision : Allowed

Judgement

A.P. Bhangale, J.—By means of this Appeal, the Appellant has challenged the validity, legality and correctness of the judgment and order dated 23rd July, 2008 passed by the learned Judicial Magistrate, First Class (Special Court) 138 of the Negotiable Instruments Act, Nagpur, whereby the Respondent/accused Mr. Rakesh Wahane /Rajesh Wahane (Rakesh Waney) was acquitted of the offence punishable u/s 138 of the Negotiable Instruments Act (hereinafter referred to as "the N.I. Act"). It is the grievance of the learned Advocate for the Appellant that despite service upon Respondent sole in respect of this appeal, he chose to remain absent. None appeared on his behalf.

2. It is contended that the Appellant (complainant) had agreed to purchase a plot from Bezonbagh Pragatishil Kamgar Griha Nirman Maryadit Sahakari Sanstha Maryadit, Nagpur and the Respondent/accused represented himself as Secretary of the said society. The Appellant/complainant had purchased Plot No. 3 for a total consideration of Rs. 1,50,000/-. Her relative one Mr N. Dharmarao had also agreed to purchase one plot in the said society. The complainant had paid the entire consideration to the accused on 24.8.2001 after she was made member of the society on 12.4.2001. The accused had also asked a sum of Rs. 25,000/ towards registration charges, stamp duty and miscellaneous expenses but no

receipt was issued against the amounts collected. While complainant was eager to construct her plot and perform groundbreaking ceremony, when she went there she was not allowed to do the same. As she never wanted to enter into litigation, she approached the accused and who promised her that she will get back her money. After repeated requests, the Respondent accused had issued a cheque in the sum of Rs. 1,25,000/vide cheque No. 198652 drawn on Oriental Bank of Commerce, Nagpur. She presented the cheque for encashment on or about 23.7.2003 which returned dishonored on 26.7.2003. Demand notice was sent to the accused on 12.8.2003 by RPAD and also under certificate of posting. However, no reply was sent to the demand notice nor any payment was made as mentioned in the cheque.

3. It is the main grievance of the Appellant that the trial Magistrate grievously erred in framing proper points for determination or issues so as to decide the complaint on merits case in accordance with law. It is the further grievance of the complainant (Appellant) that undue importance was given to false pleas of the accused instead of giving priority to the statutory presumptions available u/s 139 read with Section 118 of the N.I. Act. Thus, the learned trial Magistrate could not apply his mind to the facts of the case as no proper points for determination were framed and consequently miscarriage or failure of justice had occasioned in the trial.

4. The Respondent accused remained absent. None appeared to represent him.

5. I have considered the contentions in the light of the facts of the case and accusations which were levelled by the complainant. Section 138 of the N.I. Act is couched in the following terms:

138. Dishonour of cheque for insufficiency, etc. of funds in the account Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for (a term which may extended to two years), or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a

notice in writing, to the drawer of the cheque, (within thirty days) of the receipt of information by him form the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

6. The Hon''ble Supreme Court in Kusum Ingots & Alloys Pvt. Ltd. v. Pennar Peterson Securities Ltd. and Ors. (200) 2 SCC 745 in paragraph 10 mentioned the following five ingredients as follows:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, which is earlier;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within 15 days of the receipt of information by him form the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of said notice.

Section 118 of the N.I. Act also lays down the statutory presumption which begins with "until the contrary is proved" certain presumptions shall be made, which are as follows:

118: Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made:

(a) of consideration that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date - that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of endorsements - that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamp that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course - that the holder of a negotiable instrument is a holder in due course.

Under Section 139 of the N.I. Act there is statutory presumption in favour of the holder of the cheque it shall be presumed, unless the contrary is proved that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or any part, of any debt or liability. Looking to the above provisions the points for determination in such a case could be framed as under:

(1) Whether the accused had drawn a cheque on an account maintained by him in a bank for payment of the sum mentioned in the cheque payable to the complainant or to the order from that account in discharge of any legally enforceable debt or liability;

(2) Whether the complainant had presented the cheque to the bank within a period of six months from the date on which it was drawn or within the period of its validity;

(3) Whether the cheque returned unpaid and dishonored by nonpayment;

(4) Whether the demand notice was sent and served upon drawer of the cheque calling upon him to make payment due on account of the cheque.

(5) Whether drawer of the cheque in question failed to make payment of the amount of money to the payee or holder in due course of the cheque within 30 days of the receipt of the demand notice.

These points are required to be framed and answered in view of the facts and circumstances in the light of the statutory presumptions as mentioned above.

7. In the present case, the points for determination were framed as follows:

1. Whether complainant proves that the accused issued a cheque No. 198652 for Rs. 1,50,000/dated 23.7.2003, Exh.22 towards the discharge of legally enforceable liability of Rs. 1,50,000/?

2. Whether the complainant proves that notice dated 12.8.2003 Exh.26 was issued on the correct address of the accused?

3. Whether the accused has committed an offence punishable u/s 138 of the Negotiable Instruments Act?

4. What order?

Prima facie, therefore, all the points for determination as stated above were not framed as required according to law so as to decide the complaint case on merits on all fours. There also appears to be some confusion regarding the correctness of the name of the accused mentioned as Rajesh Wahane or Rakesh Wahane or Rakesh Waney. In the operative part of the order while mentioning it as Shri Rakesh Wahane, in the cause title, it is mentioned as "Rakesh" Wahane or Waney. The confusion in respect of name of the accused ought to be avoided by making due enquiry regarding full name, age, occupation and address of the accused which is least expected from the learned trial Magistrate trying the case.

8. With these observations, I think the ends of justice would be met if the impugned judgment and order is set aside with a direction to the learned Judicial Magistrate, First Class, Special Court u/s 138 of NI Act Nagpur to conduct the trial in accordance with law on its own merits bearing in mind the points for determination as also requirement of law as to the statutory presumptions as mentioned above. Hence the following order:

The impugned judgment and order dated 23rd July 2008, passed in Summary Criminal Case No. 3409/2005 is set aside. The learned JMFC (Special Court) u/s 138 of the N.I. Act Nagpur is directed to hear the parties afresh, if necessary, by giving opportunity of hearing to the parties concerned and to adduce more evidence, if any, after framing points for determination/ issues as above. The learned trial Magistrate shall decide the case in accordance with law bearing in mind the observations enumerated hereinabove. The appeal is allowed accordingly. Parties shall appear before the learned trial Magistrate on 13 th June, 2011 at 11.00 a.m.