

(2015) 08 BOM CK 0225
In the Bombay High Court
Case No : Criminal Appeal No. 676 of 2003

Sudhakar

APPELLANT

Vs

Dharmaraj Sarjaji Karande

RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357

Evidence Act, 1872 — Section 114

Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139, 20

Citation : (2015) 08 BOM CK 0225

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : Madhur A. Golegaonkar, holding for Anil S. Golegaonkar, for the Appellant; Joydeep Chatterji, Advocates for the Respondent

Final Decision : Allowed

Judgement

T.V. Nalawade, J—The appeal is filed against the judgment and order of S.T.C. No. 642/1999 which was pending in the Court of the Chief Judicial Magistrate, Jalna. In the case filed by the appellant for offence punishable under section 138 of the Negotiable Instruments Act, 1881, the respondent is acquitted. Both the sides are heard.

2. It is the case of the appellant-complainant that he knew the accused for about 15 years prior to the date of transaction and he had friendly relations with the accused. It is contended that the accused had sustained loss in hotelling business and in agriculture and he was in need of money. It is contended that on the demand made by the accused he gave hand loan of Rs. 35,000/- to the accused due to the friendly relationship. It is contended that the amount was paid on 5-6-1998 and the accused gave post dated cheque of this amount for repayment of the hand loan.

3. It is the case of the complainant that as per the promise given by the accused, the cheque was presented for encashment on 11-9-1998 by him but the cheque

bounced with remark that there was no sufficient fund in the account of the accused. It is contended that he sent statutory notice to the accused which was served on him but the accused did not pay the cheque amount and did give response to the notice. After following the procedure laid down in the Negotiable Instruments Act complaint came to be filed. The process was issued. The accused pleaded not guilty.

4. Before the Chief Judicial Magistrate, only the complainant gave evidence. He examined himself and he examined the employees of the two banks. The accused took the defence of general denial, and no specific defence was taken even in the statement given under section 313 of the Code of Criminal Procedure. He did not dare to step into witness box. The learned Chief Judicial Magistrate has acquitted the accused due to some circumstances like the complainant did not disclose specifically the source of money and the cheques which were bearing subsequent numbers, were used by the accused in the year 1996 when the cheque in question was used in 1998.

5. The evidence of the complainant is consistent with the aforesaid contention made in the complaint. His evidence shows that he had given the amount in the month of June and the post dated cheque was given for repayment on loan. The relevant record like cheque, bank memo is at Exhibits 22 to 24. Statutory notice is at Exhibit 25 and the acknowledgement showing that it was received by accused is at Exhibit 26. The accused has not disputed that there was no amount in his account for encashment of the cheque and he has not disputed that the cheque bears his signature.

6. Different suggestions were given by learned counsel of the accused to the complainant during his cross examination as under:--

"(i) that, complainant and accused were doing business in partnership;

(ii) there was joint account in the names of the complainant and the accused in United Western Bank, Branch Jalna;

(iii) the accused and the complainant were supplying dry sugarcane crop to Nath Paper Mill as a business;

(iv) the accused and the complainant were doing jointly business of transport and the cheque was given for changing the engine of that truck;

(v) that the cheque was issued by the accused in the year 1996;

(vi) that, the cheque was not bearing date when it was handed over to the complainant by the accused."

7. Out of the aforesaid suggestions only one suggestion is admitted by the complainant that he and the accused had joint account in United Western Bank, Branch, Jalna. Though this admission is there the cheque in question has no relevance with that account. No evidence is given to show that the truck is standing in the name of the complainant and at the relevant time repairing work

of the truck was going on. There is no record of partnership business. There is no record of business of supply of dry sugar cane crop to Nath Paper Mill. Even extract of the joint account is not produced by the accused.

8. There is no need to discuss the evidence given by witness More (PW 2) who is Manager of the bank of the complainant as it is only on the point of dishonour of the cheque which is not disputed. It was not the joint account of the complainant and the accused.

9. Patil, (PW3) is the employee of the bank on which the cheque was drawn by the accused. In his evidence it is brought on the record that there was no amount in the account of accused and so the cheque was returned back. In the cross-examination it is brought on the record that cheque No. 929752 was used on 6-5-1995 and cheque No. 929759 was used on 15-1-1996 and the cheque book was issued to the accused prior to 1995. Account extract in respect of the account of the accused is produced at Exhibit 24. Substantive evidence and the account extract do not show that the other cheques like cheque Nos. 753, 755 to 758 were used by the accused already. Due to this circumstance inference is not possible that the present cheque was given in the year 1995 or 1996. The trial Court has drawn such inference when there is no specific case of such nature of the accused. When accused wanted to take defence of such kind, it was necessary for him to step into the witness box and say something about such defence. This way he can give opportunity to the complainant to cross examine him. It is within the knowledge of the accused only as to why and when there are discrepancies of aforesaid nature. The accused received statutory notice but he avoided to give reply. No other reason is given for dishonour of the cheque.

10. Though there is circumstance that some contents of the cheque are filled by the complainant, this circumstance also cannot be used against the complainant as there is no specific defence of any kind of the accused. In such cases provision of Section 20 of the Negotiable Instruments Act can be used against the accused. Further, there is presumption available under sections 118 and 139 of the Negotiable Instruments Act and in such cases even presumption under section 114 of the Evidence Act can be used. The learned Chief Judicial Magistrate has not considered those provisions and much is made out due to the aforesaid circumstances. This Court has no hesitation to hold that the accused has failed to rebut the presumptions which are raised by the aforesaid sections of the Negotiable Instruments Act. In view of the evidence given by the complainant that he is having agricultural land and he was doing work of many kinds, it cannot be inferred against him that he had no money like Rs. 35,000/- in the year 1998. When accused himself is coming with a case that they were doing business of many kinds like transport business, business of supply of dry sugarcane to paper factory, such inference could not have been drawn by the learned Chief Judicial Magistrate. This Court has no hesitation to hold that the learned Chief Judicial Magistrate has committed error in acquitting the accused. On the point of penalty it can be said that the case is very old, of the year 1999

and the amount is small and so sentencing the accused with imprisonment till rising of the Court and asking him to pay compensation of Rs. 50,000/- under section 357 of the Code of Criminal Procedure will be the just and proper punishment in this case.

11. In the result, the appeal is allowed. The judgment and order of acquittal of the Chief Judicial Magistrate Jalna is hereby set aside. The accused stands convicted for offence punishable under section 138 of the Negotiable Instruments Act 1881 and he is sentenced to suffer imprisonment till rising of the Court and to pay the compensation of Rs. 50,000/- (Rs. fifty thousand only) to the complainant. In case the compensation is not paid he is to suffer simple imprisonment for one month. Copy be sent to the Chief Judicial Magistrate, Jalna who is to issue conviction warrant against the accused.