
(2019) 01 BOM CK 0150
In the Bombay High Court
Case No : Criminal Appeal No. 849 Of 2008

Sumedha	Vs	APPELLANT
State Of Maharashtra And Ors		RESPONDENT

Date of Decision : 02-01-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 20, 138, 139
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 2 BCR(Cri) 301

Hon'ble Judges : S.M. Modak, J

Bench : Single Bench

Advocate : B.N. Mohta, A.R. Kulkarni, A. Shelat

Final Decision : Allowed

Judgement

S.M. Modak, J.

[01] Respondent/accused was acquitted by the Court of 5th J.M.F.C., Nagpur on 23/09/2008. It was for the offence punishable under Section 138 of Negotiable Instruments Act (hereinafter referred to as the "N.I. Act" for the sake of brevity) on the complaint lodged by the appellant. Now the appellant is challenging the correctness of the decision before this Court. Parties will be referred by their original status.

[02] The liability of Rs.35,000/- by way of hand loan was created on 03/07/1999 by the complainant, whereas cheque towards its repayment was issued on 10/01/1906/2006 by the accused. Accused admits signature but denies handwriting of the contents of the cheque. So also there was summary suit filed by the complainant against the accused for recovery of Rs.66,000/-. During his evidence before Court of Magistrate, he gave incomplete answers during cross-examination.

[03] Trial Court held the cheque must have been given in the year 1999 (and not in the year 2006) and the complainant must have misused it by filling in details.

So also trial Court laid emphasis on evasive answers about the suit during cross-examination.

[04] The issue before this Court is whether presumption is said to be rebutted by the accused and whether the trial Court was right in giving benefit to the accused.

[05] Questions have arisen in narrow compass. It involves single testimony of the complainant and few documents. Accused neither entered into witness box nor gave any evidence. I have heard Shri B.N. Mohta, learned Counsel for the complainant and Shri A. Shelat, learned Counsel for the accused. They took me through the record. Both have also relied upon few of the judgments. They are on the point of drawing of presumption under Section 139 of the N.I Act and its rebuttal by the accused.

RATIOS LAID DOWN IN THE JUDGMENTS:

[06] Since incorporation in the statute Book, the issue of drawing of presumption has remained focus of attention in prosecution of cases based on dishonour of cheques. After incorporation of these provisions about criminal prosecution, there are lakhs of cases in Courts throughout India. Even though the object behind amendment is laudable, while interpreting these provisions, Hon'ble Apex Court has considered various factors including enormous rise in tendency to resort to this remedy, over flooding of Court docket due to those cases. So also, Hon'ble Apex Court has also considered the purpose (behind making it a criminal offence) of giving more respect to honour the commitment given through cheque.

[07] When, I have read judgments cited before me, I find shift in approach while interpreting the provisions of law relating to presumption. That is why Hon'ble Supreme Court in case of Krishna Janardhan Bhat vs. Dattatraya G. Hegde reported in (2008) 4 SCC 54 was pleased to observe "there is only presumption of debt or liability under Section 138 of the N.I. Act". In other words, it does not extend to legally recoverable debt/liability.

[08] However, the observations about presumption were overruled by Hon'ble Supreme Court in a later decision in case of Rangappa vs. Sri Mohan reported in (2010)11 SCC 441. It was held "presumption do extend to legally recoverable debt". The judgment is delivered by three Judge Bench. It is also referred by Hon'ble Supreme Court in paragraph 22 of the judgment in case of Kishan Rao vs. Shankargouda reported in (2018)8 SCC 165. This is relied upon by the complainant. Probably, the accused through his advocate may not have come across the change in the interpretation as expressed in case of Krishna Bhat.

[09] I have read all the three judgments. Ultimately, ratio of the judgment is nothing but enunciation of the principles of law. But, we should not forget that the enunciation is made by considering the facts. From these judgments, certain principles of law emerge. They are as follows :

(a) On proof of introductory facts, presumption can be drawn in favour of the complainant.

(b) Presumption is a rebuttable presumption (as compared to conclusive presumption).

(c) Accused can rebut the presumption by making out a probable case.

(d) The burden is not that of proof beyond reasonable doubt but principle of preponderance of probabilities.

(e) It can be rebutted on the basis of available facts and circumstances.

(f) No need for the accused to enter into witness box. (g) However, mere denial/suggestions are not sufficient.

APPROACH OF TRIAL COURT :

[10] So, I will apply these principles to the facts before me. My observations and inferences will be on the basis of evidence before me. On perusal of the impugned judgment, I find a mistake committed by the trial Court in the approach how to appreciate the evidence. Every trial Court is supposed to digest the facts which are proved, give finding thereon and the facts which are not proved and its consequences. Trial Court has laid down emphasis on fact which are not proved and overlooked to the facts which are proved.

APPROACH OF APPELLATE COURT :

[11] In a criminal trial, there is presumption of innocence in favour of the accused. This presumption is reinforced when there is judgment of acquittal. So, while dealing with such an appeal, the appellate Court should be cautious in appreciating the evidence. The appellate Court should see whether the evidence is properly marshalled by the trial Court and whether the law interpreted by the Constitutional Court is applied properly/not. The appellate Court should also see whether the findings of the trial Court are perverse or not.

CONCLUSION :

[12] On reading the evidence and considering the legal principles enunciated above, this Court is of the considerate view that trial Court has not appreciated the evidence properly. Trial Court has not applied the legal principles properly to the evidence before him. Trial Court has laid emphasis on certain facts. But at the same time, trial Court failed to draw an inference on the basis of failures to do certain acts on behalf of the accused. Trial Court ought to have considered cumulative effect of certain inferences drawn on the basis of proved facts and effect of failures on the part of accused. Trial Court only laid emphasis on certain inferences and overlooked the failures/shortcomings of the accused. So, this Court feels that conclusion is not correct and is perverse because it is drawn on the basis by overlooking certain materials and overlooking the legal principles. I intend to give reasons for my conclusion as observed above.

PROOF OF HAND LOAN OF RS.35,000/- :

[13] There is overwhelming evidence about giving of hand loan of Rs.35,000/- by

cheque, dated 03/07/1999. The accused is a proprietor of Nagpur Heavy Earth Movers. He has acknowledged receipt of Cheque on 03/07/1999 vide receipt at Exh.46. There are supporting back documents in the form of photocopy of passbook showing last 3 digits of cheque No.528 and debiting an amount of Rs.35,000/-. There is a certificate issued by Nagpur Nagarik Sahakari Bank Ltd., dated 03/07/2008. It mentions about clearance of the cheque. It is at Exh.40.

[14] Accused has not come with the defence of denial of taking hand loan. He comes with the defence that Rs.35,000/- was repaid (see suggestion in cross-examination - "It is not true to say that despite receipt of Rs.35,000/-, we have filed false case against the accused despite blank cheque of the accused). On this defence, there is no need to examine her banker by the complainant.

CONNECTION WITH HAND LOAN OF RS.65,000/- :

[15] This Court feels that hand loan of Rs.35,000/- and Rs.65,000/- are different. There is no need to prove giving of hand loan of Rs.65,000/-. Even otherwise, there is sufficient evidence to prove this hand loan also. This Rs.65,000/- was advanced vide Cheque No.128336, dated 04/10/2002. There is bank certificate at Exh.42 and photocopy of bank passbook at Exh.41. Trial Court committed wrong in interlinking hand loan of Rs.65,000/- with hand loan of Rs.35,000/-.

EFFECT OF SUMMARY SUIT NO.214/2006 :

[16] During cross-examination, the complainant expressed ignorance "about repayment of entire amount and its averment in the written statements". Trial Court gave unnecessary weightage to this answer. If the entire amount is repaid, it is for the accused to prove it. This is not the trial involving human conduct to be considered as a factor. The defence of total repayment could have been proved independently. I will discuss this issue in detail while making comment on presumption and its rebuttal.

[17] Certified copy of judgment passed ex parte is on record at Exh.45. The suit is for recovery of Rs.66,000/- (same cheque is there). The suit was decreed due to non-appearance of the accused. There may be steps taken by the accused for setting aside the decree. The findings of Civil Court are relevant to certain extent in criminal trial. But, the Criminal Court can decide the issues independently. However, we can certainly infer that suit is for recovery of Rs.66,000/- and not Rs.35,000/-.

ISSUANCE OF CHEQUE :

[18] Accused has drawn the cheque on UCO Bank (Exh.47). No one can deny that in the date column, year mentioned is 1906 (10/1/1906). The figures '19' is printed and the figures '06' is handwritten. It was deposited with Nagpur Nagrik Sahakari Bank Ltd. On 13/01/2006 (Exh.49). So certainly, there is suspicion how cheque of the year 1906 was deposited in the year 2006.

[19] This cheque was handed over by the accused on 10/01/2006. This is the evidence of complainant through her husband. Whereas, according to accused, it was delivered on 03/07/1999 that is when receipt for cheque was obtained from accused (suggestion during cross-examination but denied by complainant). There will be hardly any possibility that accused will issue such cheque (containing printed digits of the year '19') in the year 2006. The digits are printed. So there is reason to believe that this cheque was issued in the year starting from digit '19' and probably on 03/07/1999.

[20] It is also fact admitted by the complainant that accused has not written the contents. Power of attorney holder of the complainant has expressed ignorance as to then who has filled in the contents. So issue is about validity of such cheque. I think, the complainant can be given the benefit of the provisions of the N.I. Act.

COMPLETING THE CHEQUE :

[21] The complainant has preserved the cheque for almost all along 7 years. Section 20 of the N.I. Act gives authority to holder of negotiable instrument to make it complete. So, whoever, may be the writer of contents of cheque, the holder/complainant gets authority to fill in date, amount and name of payee. Probably these points might have not been raised before the trial Court. It is important to note that there is no excess use of authority. That is to say an amount more than Rs.35,000/- was not filled in the cheque.

PRESUMPTION & REBUTTAL :

[22] As the foundational facts are proved, presumption under Section 139 of the N.I. Act is drawn in favour of the complainant. At the time of filing of complaint supporting documents were not filed. Power of attorney holder is aware about transaction of his wife/ complainant and the accused. He is not aware about his and brother's transaction with the accused. Trial Court has laid emphasis on it. This will not weaken the case of complainant unless any substantial evidence by the accused is adduced to show that these transactions have some connection with liability of Rs.35,000/- arising out of the cheque in question.

[23] PAN Card only shows the person is paying income tax. It has got no further importance. This Court feels the accused has failed to rebut the presumption for various reasons. One is, there is theory of repayment of Rs.35,000/- put forth during cross-examination and it was put in a halfhearted manner. It was also not pleaded in a Section 313 Cr.P.C. statement. The theory of quarrel between his brother and the complainant is unacceptable (answer in statement). There are no details about when the amount was repaid in what manner. Secondly, there was no reply to notice. Thirdly, defence of repayment taken in written statement was not fortified by filing acceptable documents. Fourthly, the accused has never demanded return of cheque after Rs.35,000/- was repaid by him.

[24] The accused has not made out a probable defence. It is nothing but evasive

defence. The trial Court has failed to draw inferences on the basis of failure on the part of accused to do above facts. The theory of repayment of Rs.35,000/- is nothing but after thought theory. Leave apart its proof, it falls short of sufficient details. So, there will only be conclusion that there is no evidence to rebut presumption. I conclude that cheque was issued by the accused for discharge of debt of Rs.35,000/- towards the complainant.

DISHONOUR OF CHEQUE & RECEIPT OF NOTICE :

[25] The memo issued by UCO Bank is at Exh.48. It was dishonoured for the reason 'exceeds arrangement'. There is no challenge to this fact either during cross-examination or during Section 313 Cr.P.C. statement. Memo does not bear seal of the bank. It is redundant in view of non-challenge by the accused. This reason is covered as per the reasons mentioned in Section 138 of the N.I. Act. The amount of cheque must be more than arrangement by the accused with the bank.

[26] There is sufficient evidence about receipt of notice by the accused. Notice dated 08/02/2006 (Exh.50). It was issued in time and there was clear demand to pay Rs.35,000/- within 15 days. Postal receipt at Exh.51 shows about delivery to post and Exh.52 (acknowledgment) shows receipt by the accused on 15/02/2006. Complaint was filed in time on 20/03/2006. There is sufficient compliance of these provisions of law.

EVIDENCE THROUGH POWER OF ATTORNEY :

[27] This point was not raised before the trial Court. Photocopy at Exh.38 shows authority given to husband to depose on behalf of the complainant. Original was brought at the time of evidence. Law on this point is settled. Power of attorney can give evidence (a) for the acts done in pursuance to the power, (b) for the acts done by the principal and of which the attorney is having personal knowledge. Husband knows the transaction and even he gave instructions along with wife to the advocate while giving notice. It is not challenged. So, I do not find any fault in the present evidence.

FINAL CONCLUSION :

[28] For the above discussion, I conclude that the accused failed to rebut the presumption under Section 139 of the N.I. Act. I conclude that complainant succeeds in proving issuance of cheque by the complainant for discharge of debt of Rs.35,000/- towards complainant. I conclude that there is a failure on the part of the complainant to pay Rs.35,000/- within 15 days of receipt of notice on the background of dishonour of cheque. Hence, complainant succeeded in proving commission of offence under Section 138 of the N.I. Act by the accused.

SENTENCE :

[29] There are 3 kinds of punishments laid down under Section 138 of the N.I. Act. There can either be imprisonment or there can only be fine. There can also

be combination of both. I do not intend to inflict imprisonment straight away as the original case is of the year 2006. Hence, I intend to fine the accused Rs.40,000/-, out of which Rs.35,000/- be paid to the complainant towards compensation. I am not intending to impose double the amount of cheque towards fine also for the reason of long pendency. Imprisonment can be imposed if fine amount is not paid within reasonable period.

HEARING THE ACCUSED :

[30] There is no need to give personal hearing to the accused, because this is not an appeal against enhancement of sentence.

[31] In the result, the following order is passed.

- i. Appeal is allowed.
- ii. Judgment, dated 23/09/2008 in R.C.C. No.6003/2016 by the Court of 4th J.M.F.C., Nagpur is set aside.
- iii. The accused/respondent is convicted for the offence punishable under Section 138 of the N.I. Act.
- iv. Accused is sentenced to fine of Rs.40,000/-.
- v. In case of failure to pay the amount within two months, accused is sentenced to simple imprisonment for one year.
- vi. Fine be deposited with trial Court. Once deposited, Rs.35,000/- be paid to the complainant by way of compensation.
- vii. Trial Court to do needful, if fine amount is not paid in time.