(2006) 04 BOM CK 0113

In the Bombay High Court

Case No : Criminal Appeal No. 122 of 2005

Uday Sathe (Ex-Major) APPELLANT

Vs

Rahul Rajendra Borundia and Another RESPONDENT

Date of Decision : 25-04-2006

Acts Referred:
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2006) 3 CivCC 526 : (2006) CriLJ 3435 : (2006) 4 MhLj 421 : (2006) 4 RCR(Civil) 153 : (2006) 4 RCR(Criminal) 51

Hon'ble Judges : R.S. Mohite, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; P.S. Hingorani, Assistant Public Prosecutor, Sanjeev A. Sawant, for the Respondent

Final Decision : Allowed

Judgement

R.S. Mohite, J.—This is an appeal filed by the original complainant impugning the judgment and order passed by the IIIrd Extra Jt. District Judge and Addl. Sessions Judge, Pune, on 27-5-2004 allowing Criminal Appeal No. 244 of 2003 and setting aside the conviction u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act") and sentence of one year simple imprisonment with compensation of Rs. 6204/-imposed upon the accused by the judgment and order of the trial Court being the J.M.F.C., Pune, on 6-9-2003 in Summary Criminal Case No. 6032 of 2003.

2. The facts of the case are as under:

(a) On 25-4-2003, the complainant sold 50 equity shares of J and K Bank Ltd. through respondent No. 1 (hereinafter referred to as the "Accused"). Delivery of the shares were given to the accused on 26-4-2003. By way of payment of the price of the shares, the accused issued a cheque on 30-4-2003 for an amount of Rs. 6,204.50 to the complainant. The cheque issued by the accused came to be dishonoured on 5-5-2003 for want of sufficient funds and on 7-5-2003, a dishonour memo was received by the complainant from his Bank indicating that the cheque had been dishonoured for insufficient funds.

(b) On 9-5-2003, a notice of demand came to be issued by the complainant, demanding the amount of the cheque. This notice can be found on record at Exh.18. On 13-5-2003, a reply to this notice came to be given on behalf of the accused requesting the complainant to re-deposit the cheque and assuring him that on re -deposit of the said cheque, the same would be honoured.

(c) Instead of re-depositing the cheque, on 6-6-2003 the complainant chose to file a criminal complaint alleging an offence u/s 138 of the Act. Process was issued on the said complaint and after a summary trial, by a judgment and order dated 6-9-2003, the J.M.F.C, Pune, was pleased to convict the accused for an offence punishable u/s 138 of the Act and sentenced him to suffer simple imprisonment for one year and also to pay compensation of the cheque amount of Rs. 6,204/. He directed that on the accused depositing the compensation amount, the complainant would be entitled to withdraw the said amount.

(d) Being aggrieved by the order passed by the J.M.F.C., Pune, the accused preferred an appeal being Criminal Appeal No. 244 of 2003 in the Court of Session. After hearing both the sides, the Sessions Court has pleased to allow this appeal and acquit the accused on the footing that there was some substance in the grievance made by the accused that the cheque had been returned unpaid by a mistake of his Bank, though he had sufficient funds in his account. The second ground on which this appeal was allowed was that since the accused had vide his reply to the demand notice immediately requested the complainant to again present the cheque, coupled with an assurance that on presentation, the cheque would be honoured, this amounted to making payment within the meaning of Section 138(c) of the Act.

3. On a perusal of the record, I find that both the grounds on which the accused was acquitted are untenable in law. As far as the question of fact as to whether the accused had sufficient balance in his account when the cheque came to his Bank for collection, it is seen from the Bank''s statement that there was initially sufficient money in the account on 5-5-2003, but there were several intra-day transactions in which moneys were withdrawn and deposited. Some of these transactions on the same day related to withdrawal which reduced the amount in the account in the course of the day. When the cheque which is the subject-matter of the dispute came up for payment, there was a negative account. Later on the same day, further payments were made into this account and at the end of the day, the account was once again surplus. This is, therefore, a marginal case where on the date of collection, the account of the accused started with a surplus and ended with a surplus, but went into negative territory in the course of the day. In an account where a large number of transactions take place and particularly in an account in which there are numerous transactions, the possibility of there being insufficient funds even intra-day is a commercial reality. When a person issues a cheque, he must take stock of such possibilities and

must take care that his account does not go into red during the period when the cheque issued by him can come to his Bank for collection.

4. The law, however, gives the accused a chance to make amends in the contingency of his cheque bouncing. When a notice is given by the complainant demanding payment, the accused must make payment within a period of 15 days of the receipt of this notice. The meaning of the term "make the payment" cannot be intended to mean "make a conditional payment" or "make a promise of making payment". In normal commercial practice, it is possible that payment may be made by cheque. However, in a case enchases involves a criminal offence, if the accused chooses to make his payment by cheque, then he runs a risk. There might be a case when the complainant accepts such cheque and enchases the same. In such a case, obviously, the payment is complete. However, even if the complainant accepts the cheque, he always has an option to refuse to encash it. This option must be conceded to the complainant because there are other dimensions involved in the completion of an offence u/s 138 and if it is held that mere acceptance of the cheque is valid payment then legal complications can arise. The question as to whether the original cause of action survives and the question as to limitation are questions that can arise to the prejudice of the complainant. Similar is the case where the accused calls upon the complainant to re-present the original cheque, coupled with the promise that the cheque would be honoured. If the complainant chooses this course of action, he is likely to face the same risks and it is possible that his ultimate right to file a complaint u/s 138 may be prejudiced, as questions relating to cause of action and limitation can arise if he chooses to present the cheque for the second time. In this view of the matter, in the present case, I am not inclined to hold that the mere request to re-present the cheque, coupled with the promise that the same would be honoured would amount to "making the payment" within the meaning of Section 138(c) of the Act.

5. In view of my findings given above, the appeal is liable to be allowed. On the question of sentence, I find that the cheque amount was only Rs. 6,204.50. In his reply, the accused had made a request to the complainant to present the cheque and had assured that the same would be honoured. It is another matter that the complainant chose not to do so. Even in the 313 statement, the accused had categorically stated that he was willing to pay the amount to the complainant. In the circumstances, though I find that the accused is liable to be convicted for the offence u/s 138 of the Act, on the question of sentence, I am not inclined to send him back to jail and, in my view, the interest of justice would be met if the accused is directed to pay to the complainant a compensation of Rs. 20,000/- and, in addition, to pay a fine of Rs. 5,000/-.

6. In the circumstances, the appeal is allowed. The respondent No. 1 accused is convicted for the offence u/s 138 of the Negotiable Instruments Act. By way of sentence, he is directed to pay a fine of Rs. 5,000/-and compensation of Rs. 20,000/- to the complainant. The fine or compensation already paid will be liable

to be adjusted against the amount payable under this order. The Advocate for the accused undertakes to this Court to deposit the amount of fine and to pay compensation within a period of two weeks from today. Both these amounts shall be deposited in the Court of J.M.F.C. at Pune. The complainant will be at liberty to withdraw the amount of compensation of Rs. 20,000/-, if paid.