
(2015) 06 BOM CK 0146
In the Bombay High Court
Case No : Criminal Appeal No. 62 of 2014

Varun Beverages Ltd.

APPELLANT

Vs

Abhay Shah and Others

RESPONDENT

Date of Decision : 30-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2015) 3 BomCR(Cri) 300

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : C.A. Coutinho and Shailesh Redkar, for the Appellant; S. Taliegaonkar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

C.V. Bhadang, J.—By this appeal, the appellant/ complainant is challenging the judgment and order dated 27/03/2014 passed by the Judicial Magistrate, First Class, Margao in Criminal Case No. 26/OA/NI/10/D. By the impugned judgment, the learned Magistrate has acquitted the first respondent from an offence punishable under Section 138 of the N.I. Act, 1881 (the Act, for short)

2. The appellant/ complainant had filed a complaint under Section 138 of the Act before the Magistrate. The complainant is marketing soft drink /packaged drinking water. The first respondent was a retailer, selling the said soft drinks and packaged drinking water. The appellant used to supply the soft drinks to the first respondent in respect of which, bills used to be raised. It was contended that as on 31/03/2009, the first respondent was liable to pay a sum of Rs. 2,92,212/- (comprising of 2,32,272/- towards the price of soft drink and Rs. 59,940/- being the cost of empties i.e. bottles and crates lying in possession of the first respondent). It was contended that the first respondent had issued a cheque dated 17/11/2009 in favour of the appellant, which was drawn on ICICI Bank Ltd., Kolhapur Branch for a sum of Rs. 2,92,212/- towards the satisfaction of the

outstanding amount. When the appellant deposited the cheque with its Banker i.e. Yes Bank, Margao, Goa, it was dishonoured on account of "payment stopped by drawer". This was communicated to the appellant on 23/11/2009, following which the appellant issued a notice and thereafter, filed the complaint. It appears that the first respondent had sent a reply dated 31/12/2009 to the notice, denying the liability to pay the amount. The appellant sent a counter reply to the same, dated 04/02/2010. At the trial, the appellant examined its Manager Rajesh Nandedkar (PW1) and Reena Naik (PW2) and produced certain documents, including the invoices and the statement of Ledger Account. The first respondent examined himself and one Niraj Shaha (DW2).

3. The learned Magistrate framed a solitary point as to whether appellant has proved that the first respondent had issued the cheque in discharge of a legally enforceable debt / liability and whether the cheque was dishonoured. The learned Magistrate answered the point in the negative and proceeded to dismiss the complaint. That is how, the appellant is before this Court.

4. I have heard Shri Coutinho, the learned Counsel for the appellant and Shri Taleigaonkar, the learned Counsel for the first respondent. With the assistance of the learned Counsel for the parties, I have perused the record, the evidence led and the impugned judgment.

5. It is submitted by the learned Counsel for the appellant that the appellant used to supply the stock of soft drinks to the first respondent in respect of which bills used to be raised from time to time. It is submitted that the first respondent was making payment not on the basis of individual invoices raised, however, there was a running account kept between the parties. It is submitted that the subject cheque was issued by the first respondent after finalising of the accounts in the year 2009. It is submitted that on behalf of the appellant, statement (exhibit 62) was produced on record which would clearly go to show that the amount of Rs. 2,32,272/- was outstanding against the first respondent in respect of the soft drinks supplied. The learned Counsel has taken me through the statement of account, in order to submit that the accounts were properly maintained. It is submitted that the first respondent had set up a defence that during summer, there was an increased demand for the soft drinks. Hence, the first respondent had obtained extra number of empties (bottles and crates), for which the appellant had insisted for a blank cheque being given. The said cheque was accordingly delivered to the appellant and it was not on account of any outstanding dues. The learned Counsel for the appellant submitted that this defence of the first respondent cannot be upheld, in as much as, at one stage, he had claimed that the extra empties were obtained for the summer season from March to May, while at another, he claimed that the extra empties were obtained in order to meet the increased demand during the Dasara and Diwali Festival days. He submitted that thus, the defence of the first respondent, could not have been accepted. It is submitted that there was a statutory presumption arising in favour of the appellant, which has not been rebutted. It is submitted that the

reasons articulated by the learned Magistrate for upholding the rebuttal, cannot be sustained and the first respondent has not overcome the barrier of Section 139 of the said Act. It is, therefore, submitted that the view taken by the learned Magistrate would be an impossible view, requiring interference. On behalf of the appellant, reliance is placed on the decision of the Hon"ble Supreme Court in the case of Rangappa Vs. Sri Mohan, AIR 2010 SC 1898 : (2010) 2 BC 693 : (2010) CriLJ 2871 : (2010) 5 JT 259 : (2010) 5 SCALE 340 : (2010) 11 SCC 441 : (2011) 1 SCC(Cri) 184 : (2010) 100 SCL 389 : (2010) AIRSCW 2946 : (2010) AIRSCW 6043 : (2011) AIRSCW 404 : (2010) 4 Supreme 169 : (2010) 5 Supreme 206 , Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal, AIR 1999 SC 1008 : (1999) 97 CompCas 786 : (1999) 1 CTC 497 : (1999) 1 JT 576 : (1999) 1 SCALE 521 : (1999) 3 SCC 35 : (1999) 1 SCR 704 : (1999) AIRSCW 636 : (1999) 2 Supreme 187 and a decision of this Court in Krishna P. Morajkar Vs. Joe Ferrao and Another, (2013) 5 ABR 294 : (2013) ALLMR(Cri) 4129 : (2014) 2 BomCR(Cri) 738 : (2013) 4 RCR(Civil) 714 : (2013) 4 RCR(Criminal) 539 .

6. On the contrary, it is submitted on behalf of the first respondent that while the appellant/ complainant is obliged to prove its case beyond reasonable doubt, the first respondent can prove his defence and discharge the statutory burden on preponderance of probability. It is submitted that the learned Magistrate has rightly come to the conclusion that the statutory presumption stands rebutted in this case. The learned Counsel submitted that the subject cheque (exhibit 7/c) shows the use of two inks. Thus, the signature and the body of the cheque are written in two different inks, which would clearly show that a blank cheque was handed over. It is submitted that the witness for the appellant had admitted that while parting with the additional empties, during the peak season, the appellant insisted for blank cheques. He, therefore, submitted that the defence is probalised. It is submitted that the blank cheque was handed over to one Anil Patil, who was the Depot Manager of the appellant at Shirol, Kolhapur. Anil Patil has not been examined by the appellant. There is no challenge to exhibits 62 and 64. He submitted that thus, the learned Magistrate has rightly acquitted the appellant and in the absence of there being any perversity in the impugned judgment, no interference is called for. The learned Counsel has placed reliance on the decision of this Court in Shri Rajendra Babal Naik Vs. Shri C.M. Mathew and State, (2010) 1 BC 383 , Shri John Fernandes Vs. Smt. Noorjahan Khan and State, (2010) 1 BC 345 : (2011) 2 RCR(Criminal) 797 , Navneetdas Narayandas Barshikar Vs. Bacchubhai Mulji Tanna, Proprietor of B.M.T. Industries and The State of Maharashtra, (2012) 1 BC 227 : (2012) BomCR(Cri) 35 : (2012) 4 MhLj 180 and Joseph Vilangadan Vs. Phenomenal Health Care Services Ltd. and Another, (2011) 1 ALLMR 709 : (2011) 2 BC 471 : (2011) CriLJ 531 . He, therefore, urged that the appeal be dismissed.

7. I have considered the rival circumstances and the submissions made.

8. The legal position about the scope and ambit of the powers available to this

Court, in an appeal against acquittal is no longer res integra. In a recent decision in the case of Chandrappa and Others Vs. State of Karnataka, (2007) CriLJ 2136 : (2007) 3 JT 316 : (2007) 3 SCALE 90 : (2007) 4 SCC 415 : (2007) 2 SCR 630 , the Hon"ble Apex Court has held thus :

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

Thus the examination of the challenge to a judgment of acquittal has to be confined within the aforesaid parameters. It is trite that even where two views are equally possible, the Appellate Court cannot substitute its view in the face of the one taken by the trial Court, on the ground that it is more plausible. Thus, unless and until it is shown that the view taken by the trial Court is perverse, based on misappreciation of evidence or is an impossible view, interference is not called for.

9. Turning to the present case, it is not in dispute that the first respondent was a marketing agent of the appellant. The appellant has a depot at Shiroli at Kolhapur, Maharashtra and one Anil Patil was the incharge of the depot operations. It is further undisputed that the appellant used to supply the soft drinks and bottled drinking water to the first respondent in respect of which

invoices were raised. It is further undisputed that the payment was made by the first respondent not on the basis of individual invoices, but a running account was maintained between the parties, against which the first respondent used to make payment. The business relations between the parties continued from April, 2006 to August 2008. According to the appellant, although supplies were made from the depot at Shirol, the account operations were done at Goa.

10. The appellant came with a case that as on 31/03/2009, the total amount due and payable by the first respondent was Rs. 2,92,212/- which comprised of Rs. 2,32,272/- towards the soft drinks and Rs. 59,940/- towards empties (crates and bottles). It was claimed that against this payment, the first respondent had passed the cheque dated 17/11/2009, drawn on his account with ICICI Bank, Kolhapur Branch, which was deposited by the appellant with Yes Bank at Margao. By an intimation dated 23/11/2009, the appellant was informed that the cheque has been dishonoured on account of stop payment instruction being issued by the first respondent. The appellant issued a notice dated 27/12/2009, which was replied to, by the first respondent, vide reply dated 31/12/2009. The certificate exhibit 97/c from the ICICI Bank shows the stop payment instruction was issued on 24/06/2008. The appellant, therefore, claimed that the first respondent had intentionally issued a cheque in respect of which, already a stop payment instruction was issued. On the contrary, it is the defence of the first respondent that during summer season of 2007, the first respondent had sought additional empties to cater to the increased demand of soft drinks, against which Anil Patil had insisted for a blank cheque being issued by way of security. It was specifically contended in the notice reply exhibit 93/c that crates were returned and the respondent demanded back the blank cheque when he was told by Anil Patil that the cheque has been misplaced. This was informed in June 2008. Hence, the first respondent issued the stop payment instruction to the Bank on 24/06/2008. In the reply, the first respondent specifically set up a defence that the respondent was making the payment by cheques of the ICICI Bank upto 18/10/2007. Thereafter, till 02/12/2007, the payment was made by cheques drawn on Indian Bank and from 14/12/2007, to 20/08/2008, the payment was made by demand draft. It was contended that after December 2007 there was no transaction of payment by a cheque, while denying that an amount of Rs. 2,92,212/- was outstanding. The first respondent specifically claimed that there was a reconciliation statement exhibit 68, according to which, the outstanding payment was Rs. 1,10,928/- as on 23/06/2008. It was also claimed that as on 31/08/2009, the amount due was Rs. 44,123.31. An amount of Rs. 54,000/- was lying with the appellant towards the security for the empties. It was also claimed that the outstanding amount of Rs. 44,123.31 can be recovered from the security deposit amount of Rs. 54,000/-.

11. In the case of Rangappa (supra), the Hon'ble Apex Court has held that the presumption available under Section 139 of the Act also extends to cheque having been issued against the discharge of a legally enforceable liability. However, such presumption can be rebutted by the accused on the basis of

evidence on record on preponderance of probability. Thus, the burden on the accused is not as heavy as that on the complainant.

12. In the present case, the first respondent has admitted the signature on the cheque. The defence is that it was given as a security and not against any legally enforceable liability of the nature as stated by the appellant. The learned Magistrate has considered the evidence led by the parties, in order to see whether the presumption under Section 139 of the Act stands rebutted from paragraph 48 onwards of the judgment. It has been found that the first respondent has shown on preponderance of probability that payment of cheque drawn on ICICI Bank was discontinued in the year 2007. It has also been found that the appellant and his witnesses have admitted that at times blank cheques were obtained. It is submitted on behalf of the appellant that the learned Magistrate has misconstrued the evidence in this regard, in as much as what was admitted was a minimum of three blank cheques were obtained as security when the distributors were appointed and it was further stated that in the present case, no such blank cheques were obtained. It is submitted that therefore, the evidence on record has not been properly appreciated, in recording the finding. I have carefully gone through the judgment in paragraphs 55 to 60 of the judgment. The learned Magistrate has considered this aspect and has found that although it was claimed that no such cheques were obtained in the present case, the witness was unable to state as to why in this particular case, the blank cheques were not obtained as security. It has also been found that it is not expected that there would be any document when such cheques are obtained. The learned Magistrate has considered the apparent discrepancy as to the time where the subject cheque was given by the first respondent and after considering the evidence, as also the answers given by the first respondent in reply to the questions put under Section 313 of Cr.P.C., had come to the conclusion and to my mind, rightly so, that the contradictions/ discrepancy would be of no consequence. Lastly, the learned Magistrate has considered the fact that the signature and the body of the cheque appear in different inks, which would be one of the circumstances to probabalise the defence of the first respondent. The witnesses for the appellant had claimed that they are not aware whether Anil Patil had insisted and accepted the blank cheques, as claimed by the first respondent. In that view of the matter, Anil Patil, being the employee of the appellant, could have been examined and would have been the proper witness to negate any such defence. That has not been done. In such circumstances, in my considered view, it has rightly been found that the presumption would stand rebutted.

13. The learned Magistrate has, thereafter, proceeded to examine the evidence whether the appellant has independently proved the existence of a liability of Rs. 2,92,212/- as on 31/03/2009. Although the parties had business dealings from April 2006 to August, 2008 and when the payment was made by the first respondent not on the basis of individual invoices, but on the basis of running account, it was obligatory on the part of the appellant to produce the entire

account from inception, which would have established the credibility of the account so maintained. However, that is not done. Furthermore, in the account statement exhibit 62/C, there is an opening balance, which is shown and unless and until the opening balance is substantiated on the basis of some other account previously maintained, the outstanding amount at the foot of the said statement, cannot be held to be credible. The first respondent had come with a specific case that the accounts were settled on 23/06/2008 when the outstanding was Rs. 1,10,928/- and the reconciliation statement is produced at exhibit 68/c. Although the learned Magistrate had found on comparing of the signature that the statement exhibit 68/c bears the signature of the representative of the appellant, which is comparable to the invoices produced at exhibit 7/c, however, has not based her finding on the reconciliation statement. In my considered view, the defence set up by the first respondent at the very inception, when he issued the reply to the notice on 31/12/2009, appears to be credible and probable. The appellant had failed to establish on the basis of acceptable evidence that on 31/03/2009, an amount of Rs. 2,92,212/- was due and outstanding against the first respondent. At any rate, the finding recorded by the learned Magistrate is a plausible view, recorded on appreciation of oral and documentary evidence on record and it is not shown that the view taken by the learned Magistrate is either perverse or is an impossible view.

14. In the result, no case for interference is made out. The appeal accordingly stands dismissed.