

(2012) 02 GUJ CK 0022
In the Gujarat High Court
Case No : Criminal Appeal No. 1439 of 2010

Vishnubhai Hargovandas Patel

APPELLANT

Vs

Baldevbhai Ramjibhai Patel

RESPONDENT

Date of Decision : 01-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 263, 264, 313, 326, 326(3)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2012) 3 Crimes 652

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : N.V. Gandhi, for the Appellant; Vasant S. Shah, R.J. Goswami and Ms. C.M. Shah, AGP, for the Respondent

Judgement

Bankim N. Mehta, J.—By filing this appeal u/s 378 of Criminal Procedure Code, 1973, the appellant original complainant has challenged the judgment and order of acquittal passed by learned Metropolitan Magistrate (Negotiable Instrument Act, Court No. 2), Ahmedabad on 7.8.2009 acquitting the respondent accused for the offence u/s 138 of the Negotiable Instrument Act. According to the complainant, he is the owner of School Building of Ranjan High School in Bapunagar, Ahmedabad and the accused is engaged in the activities of Ranjan High School Therefore the accused came into his contact and took hand loan of Rs. 3,57,000 in last two years but on account of relation, no writing was obtained. On making demand of return of the amount, the accused gave cheque No. 481551 dated 25.8.1998 for Rs. 2,97,000 and cheque No. 481552 dated 25.10.1998 for Rs. 60,000 drawn on Gandhinagar Nagrik Co-operative Bank, Sachivalaya Branch, Gandhinagar. On presenting the cheques in the Bank, both the cheques returned unpaid on account of insufficient fund and he was informed by the Bank on 11.11.1998 about the dishonour of cheques. Therefore, he gave notice to the accused on 17.11.1998 demanding amount of unpaid cheques. The notice was sent by the RPAD and under postal certificate. The notice sent by. RPAD could not be served to the accused as the accused remained absent at the

time of delivery of the envelope containing the notice. However, the notice sent under postal certificate was received by the accused but the accused did not pay the outstanding amount of Rs. 3,57,000 nor replied to the notice. Therefore, the complaint was filed in the Court of learned Metropolitan Magistrate, 16th Court at Ahmedabad and it was registered as criminal case No. 5294/1998. The Trial Court issued summons and the accused appeared and pleaded no guilty. Therefore, the prosecution adduced the evidence. On completion of recording of the evidence, further statement of the accused was recorded u/s 313 of the Criminal Procedure Code. After hearing learned advocates for the parties, the Trial Court by impugned judgment acquitted the accused. Being aggrieved by the said decision the complainant has preferred this appeal.

2. At the time of hearing of the appeal, record and proceeding of the Trial Court were called for. On perusal of the record, it transpires that part of the evidence was recorded by learned Metropolitan Magistrate Court No. 9, Ahmedabad, but thereafter, the case was transferred to the Court of learned Metropolitan Magistrate (Negotiable Instrument Act, Court No. 2), Ahmedabad and it was registered as criminal case No. 507/2008. Learned Metropolitan Magistrate (Negotiable Instrument Act, Court No. 2) proceed further from the stage left by his earlier learned Magistrate and heard oral submissions of learned advocate for the parties and delivered the impugned judgment. Therefore, it becomes clear that learned Metropolitan Magistrate, who recorded the evidence did not pass the impugned judgment but his Successor Magistrate heard the arguments and delivered the judgment. In the decision of *Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another*, , para 13 and 14 as under:

Para 13--The manner in which record in summary trials is to be maintained is provided in Section 263 of the Code. Section 264 mentions that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of evidence and a judgment containing a brief statement of the reasons for the finding. Thus the Magistrate is not expected to record full evidence which he would have been, otherwise required to record in a regular trial and his judgment should also contain a brief statement of the reasons for the finding and not elaborate reasons which otherwise he would have been required to record in regular trials.

Para 14-- The mandatory language in which Section 326(3) is couched, leave no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-sections (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witnesses. Therefore, the Judge or the Magistrate who has recorded such

substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. Section 326(3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice.

3. In view of the above law laid down by the Honourable Supreme Court, the impugned judgment of acquittal is required to be set aside and the case is required to be remanded to the Trial Court for re-trial in accordance with law. Learned advocate Mr. Champavat for learned advocate Mr. RJ Goswami for respondent accused is unable to dispute the fact that the evidence was recorded by one Metropolitan Magistrate and the judgment was delivered by another Metropolitan Magistrate. Even he is not able to point out any decision contrary to law laid down by the Honourable Supreme Court in the said decisions.

4. In view of the above, the appeal succeeds. The impugned judgment and order of acquittal passed by learned Metropolitan Magistrate (Negotiable Instrument Act, Court No. 2) Ahmedabad on 7/8/2009 in criminal case No. 507/2008 (new) and criminal case No. 5294/98 (old) is set aside and the case is remanded to Trial Court for re-trial in accordance with law.

5. In view of the fact that the case is filed in the year 1998, it is expected that learned Metropolitan Magistrate trying the case gives priority to the case and shall dispose of the same as early as possible after giving opportunity of hearing to both the parties.

6. The parties are directed to appear before the Trial Court on 1/3/2012. The record and proceedings be sent back to Trial Court.