
(2010) 06 BOM CK 0170
In the Bombay High Court
Case No : Criminal Appeal No. 17 of 2010

VPK Urban Co-Operative Credit Society Ltd.	APPELLANT
Vs	
Narayan S. Naik and Another	RESPONDENT

Date of Decision : 22-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Negotiable Instruments Act, 1881 (NI) — Section 118, 138

Citation : (2011) 4 BC 19 : (2011) 1 MhLj 458

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : D. Pangam, for the Appellant; D. Goankar, for the Respondent

Judgement

N.A. Britto, J.—This is a Complainant's appeal and is directed against judgment dated 13-8-2009 of the learned J.M.F.C. Ponda by which the accused has been acquitted u/s 138 of the Negotiable Instruments Act, 1881.

2. The Complainant is an Urban Co-operative Credit Society then governed by the Maharashtra Co-operative Societies Act, 1960 as extended to the State of Goa and now by the Goa Co-operative Societies Act, 2001 w.e.f. 1-1-2007.

3. The complaint was filed on 29-5-2008. According to the Complainant, the accused was one of the members of the Complainant who on 17-6-2000 was given a loan of Rs. 50,000/-, and towards the part repayment of the said loan the accused gave to the Complainant cheque dated 19-3-2008 for Rs. 58,000/- drawn on the Goa State Co-operative Bank Ltd., Marcel Branch, Goa; but when the said cheque was deposited, the same was returned dishonoured with endorsement "exceeds arrangement". The Complainant sent the statutory notice dated 19-4-2008 calling upon the accused to pay the said sum of Rs. 58,000/- within a period of 15 days which the accused received on 25-4-2008 but failed, and neglected to make the payment. The Complainant then filed the complaint and in support of the complaint the Complainant examined one Babani A. Gaude, the constituted attorney of the Complainant.

4. The case of the accused as can be seen from the cross-examination of the Complainant's attorney is that the subject cheque is one of the four cheques which were given to the Complainant at the time of sanctioning of the loan. However, the accused in his statement u/s 313 of the Code stated that the said cheque was given at the time of disbursement of the loan. The accused did not examine himself.

5. The accused came to be acquitted on two counts: firstly, on the ground of limitation. Secondly, the learned J.M.F.C. accepted the defence of the accused as probable that the subject cheque was one of the four cheques which were given by the accused at the time of sanctioning of the loan.

6. The aspect of limitation is interconnected with the objection that the accused was not a member of the Complainant-Society. It appears that the accused did take an objection that he was not a member of the Complainant-Society but that objection was not pressed and was given up and this has been recorded by the learned J.M.F.C. in para 8 of the Judgment. The Complainant in para 4 of the complaint and Complainant's attorney in para 4 of the affidavit in evidence had categorically stated that the accused was one of the members of the Complainant's-Society. He had also stated in his cross-examination that he had in his records the loan application as well as membership documents which he could produce, if directed. A suggestion was put to him that the documents referred to by him were not existing in his records, a suggestion which he denied. Another suggestion was put to him that the contents of paras 1 to 12 of the affidavit were false, a suggestion which he again denied. No specific suggestion was put to the said attorney of the Complainant that the accused was not a member of the Complainant. As already stated the Complainant in the complaint as well as in the affidavit in evidence had categorically stated that the accused is one of the members of the Complainant and the learned Magistrate had also observed that as per law only members can take a loan from the Co-operative Society. Only because a statement was denied it does not mean that it could not be accepted. The Complainant had categorically stated that the accused was a member of the Complainant-Society who was given a loan, and in my view, there is no reason why the said statement ought not to have been accepted more so when the Complainant gives loans only to its members which otherwise was not seriously disputed by the accused. On the basis of the evidence produced by the Complainant it was proved by the Complainant that the accused was one of the members of the Complainant-Society and was given a loan of Rs. 50,000/- on 17-6-2000. The last installment was to be paid on 19-3-2008.

7. That should take us to Section 92 of the Maharashtra Co-operative Societies Act, 1960 (Act of 1960, for short) as was made applicable to the State of Goa. Sub-section (1) of Section 92 of the Act of 1960 has a non-obstantive clause and it states that notwithstanding anything contained in the Indian Limitation Act, 1908 but subject to the specific provisions made in this Act, the period of

limitation in the case of a dispute referred to the Registrar under the last preceding section shall-

a) when the dispute relates to the recovery of any sum, including interest thereon, due to a society by a member thereof, be computed from the date on which such member dies or ceases to be member of the society.

Other clauses of Sub-section (1) or other Sub-sections of Section 92 of the Act, we are not concerned with and it is admitted at the Bar that in case of a member, limitation, if any, would run only from the date the member dies or ceases to be a member of the Society.

8. The Goa Co-operative Societies Act, 2001 (Act of 2001, for short) has replaced the Act of 1960 w.e.f. 1-1-2007 and Section 85 of the Act of 2001 read as follows:

85. Limitation. -- (1) Notwithstanding anything contained in the Limitation Act, 1963 (XXXVI of 1963) but subject to the specific provisions made in this Act, the period of limitation in the case of a dispute referred to the co-operative authority under the last preceding section shall, --

(a) when the dispute relates to the recovery of any sum, including interest thereon due to a society by a member thereof, be six years from the date on which such sum or installment thereof payable by the member of the society concerned has fallen due.

(b)...

(c)...

(d)...

(2)...

(3) Notwithstanding anything contained in Sub-sections (1) and (2), the Co-operative authority may admit a dispute after the expiry of the limitation period, if the applicant satisfies the Co-operative authority that he had sufficient cause for not referring the dispute within such period and the dispute so admitted shall be a dispute which shall not be barred on the ground that the period of limitation had expired.

(4) Notwithstanding anything contained hereinabove, the period of limitation shall be computed from the date on which this Act comes into force in respect of all disputes and causes of action arising prior to the date of coming into force of this Act.

9. The Act of 2001 has again been amended w.e.f. 16-3-2009 and the relevant sub-clauses of Sub-section (1) and other Sub-sections of Section 85 read as follows:

85. Limitation. -- (1) Notwithstanding anything contained in the Limitation Act,

1963, (Act 36 of 1963) but subject to the specific provisions made in this Act, the period of limitation in the case of a dispute referred to the Registrar under the last preceding section shall, --

(a) when the dispute relates to the recovery of any sum, including interest thereon, due to a society by a member thereof, be computed from the date on which such member dies or ceases to be a member of the society;

(b)...

(c)...

(d)...

(2)...

(3) Notwithstanding anything contained in Sub-sections (1) and (2), the Registrar may admit a dispute after the expiry of the limitation period, if the applicant satisfies the Registrar that he has sufficient cause for not referring the dispute within such period and the dispute so admitted shall be dispute which shall not be barred on the ground that the period of limitation had expired.

Sub-sections (3) and (4) have been deleted.

10. Shri D. Pangam, the learned Counsel appearing on behalf of the Complainant has submitted that there was no limitation provided under the Act of 1960 and in terms of Section 85(1)(a) of the Act of 2001 the Complainant could have filed a dispute to recover the amount due before a Co-operative Authority upto the year 1913 i.e. six years from the date of coming into force of the Act of 2001 which came into force on 1-1-2007. In support of the submission, Shri Pangam has placed reliance on an unreported decision of this Court dated 28-8-2009 in Criminal Appeal Nos. 6 and 7 of 2009 wherein with reference to Section 85 of the Multi-State Co-operative Societies Act, 2002 it was observed that it made a special provision for settlement of disputes between a Multi-State Cooperative Bank and its members. It was stated that the dispute was to be decided in terms of Sub-section (4) of Section 84 and special period of limitation had been provided in terms of Clause (b) of Sub-section (1) of Section 85 of the said Act, and it was further observed that both the cheques issued by the accused were issued in repayment of the loan before it could have said it had become time barred.

11. Shri G. Gaonkar, the learned Counsel, on the other hand, submits that the provisions of Section 92 of the Act of 1960 or for that matter of Section 85 of the Act of 2001 would apply only for recovery proceedings initiated before the Registrar and not to complaints filed u/s 138 of the Negotiable Instruments Act, 1881. Learned Counsel has placed reliance on a decision of this Court in the case of Deendayal Nagari Sahakari Pathasanstha Maryadit Co-op. Society v. Shri Satyawar Nagesh Gaonkar 2009 ALL MR 3702 wherein it was stated as follows:

In my opinion, the period of limitation of three years ought to have been

computed not from the first date when the loan was disbursed on 19-4-2002 but from the date of the last installment which was due and payable and that is 18-4-2005, for only that could have given a cause of action to the complainant to recover the amount lent to the accused. In the circumstances, therefore, the view held by the learned Magistrate that the period of limitation of three years had to be computed from the date of disbursement of the loan cannot be accepted. It ought to have been computed from the last date of the last installment which was payable and that is on or about 18-4-2005 and only that would have given the cause of action for the complainant to file a Civil Suit and that is within a period of three years therefrom. It is not the case of the accused that the complainant had recalled the loan earlier on account of failure of the accused to pay any of the installments.

12. In my opinion, the submission of learned Advocate Shri Gaonkar cannot be accepted. The decision cited in the case of Deendayal Nagari Sahakari Pathasanstha Maryadit Co-op. Society v. Shri Satyawar Nagesh Gaonkar (supra) is also of no assistance to him as in that case what was decided is as to from which date the period of limitation of 3 years was to be computed i.e. whether from the date the loan was disbursed or from the date of last installment. If at all, it could support the case of the Complainant.

13. The question of limitation comes in the light of the explanation below Section 138 of the Negotiable Instruments Act, 1881 which provides that for the purposes of that section, "debt or other liability" means a legally enforceable debt or other liability. In other words, in case the remedy to recover the loan has become time barred the complaint u/s 138 of the N.I. Act will have got to be dismissed.

14. In the case at hand, the loan was disbursed on 17-6-2000. The last installment was due on 17-6-2003. The cheque was given on 19-3-2008. The complaint was filed on 29-5-2008. The Complainant could have filed recovery proceeding on or before 17-6-2009, at least in terms of Clause (a) of Sub-section (1) of Section 85 of the Act of 2001 which was in force till 16-3-2009. If we go by Sub-section (4) of Section 85 of the Act of 2001, as it then stood, the dispute could have been filed upto 31-12-2012. Therefore, either way it could not be said that the cheque in question was given towards a time barred debt. The conclusion of the learned J.M.F.C. that the cheque was issued towards a time barred debt cannot be sustained. The aspect of limitation is equally applicable to the cases filed u/s 138 of the Act inasmuch as it is also applicable in cases where disputes are raised before the Registrar. The learned J.M.F.C. therefore, was not right in applying the general law of limitation of three years when the Complainant was governed first by the Maharashtra Co-operative Societies Act, 1960, and then by the Goa Co-operative Societies Act, 2001. At present, it is Section 85(1)(a) and Sub-section (3) of Section 85 of the Act of 2001 which will govern the relevant recovery of dues payable by a member to a Co-operative Society.

15. On the second count, the learned J.M.F.C. has accepted the defence of the accused as suggested in cross-examination that the subject cheque duly signed was given in blank along with three other cheques at the time of sanctioning of the loan. On this count also the conclusion of the learned J.M.F.C. can be faulted. The Complainant's attorney might have stated that he could not answer off hand whether after 19-3-2008 the accused had issued any cheque for part repayment of the present loan, without checking his records. There can be no two opinions that it was expected of the attorney of the Complainant to come before the Court with all the records. However, it is to be noted that the Complainant's attorney had denied the suggestions put to him that the subject cheque was given along with other cheques at the time of sanctioning of the loan. Learned Counsel on behalf of the accused has fairly conceded that there is another case pending in appeal while against the accused in respect of a cheque of Rs. 1,00,000/-, the number and date of which learned Counsel has not been able to provide. However, the fact remains that the suggestions put to the Complainant's attorney were not even translated by the accused in his statement recorded u/s 313 of the Code. I say so because according to his statement u/s 313 of the Code it is only the subject cheque which was handed over as a signed blank cheque at the time of sanctioning of the loan. Learned Counsel on behalf of the accused has not been able to provide any explanation as to why four cheques had to be given at the time of sanctioning of the loan. It is true that the statements of account from the ledger produced on behalf of the Complainant showed that on 24-8-2006, 31-3-2008, 25-5-2008 and 28-5-2008 cheque bouncing charges of Rs. 100/- on each of the said occasions were debited to the account of the accused with the Complainant. However, it is to be noted that only because four cheques were returned dishonoured and cheque bouncing charges were debited to the account of the accused was no indication that they were given at the time of sanctioning of the loan. It is also probable that the accused had given the said cheques which includes the subject cheque towards the repayment of loan and because they were dishonoured that the said cheque bouncing charges were debited to the account of the accused. Nothing prevented the accused from giving his evidence in terms of suggestions put to the Complainant. Suggestions by themselves cannot be treated as evidence given in a case. Moreover, it is to be noted that the subject cheque was dated 19-3-2008. It is not the case of the accused that it is the Complainant's attorney who put that date. Section 118 of the N.I. Act, 1881 creates certain presumptions and one of them as to the date, namely, that every negotiable instrument bearing a date was made or drawn on such date. Therefore, it had to be presumed that the subject cheque was given by the accused on the date it bore. The said presumption could not have been displaced by merely putting suggestions to the Complainant's attorney without anything more. Therefore, the conclusion arrived at by the learned J.M.F.C. that the subject cheque was one of the four cheques given at the time of disbursement of the loan cannot be accepted.

16. The other conclusions arrived at by the learned J.M.F.C. could not be faulted.

On both the counts, therefore, the judgment of the learned J.M.F.C. acquitting the accused needs to be reversed. The accused therefore is hereby convicted u/s 138 of the N.I. Act, 1881.

17. Shri Gaonkar has placed reliance on the judgment of this Court on *Ramkrishna Urban Co-operative Credit Society Ltd. v. Shri Rajendra Bhagchand Warma* 2010(4) Mh.L.J. 27 : 2010(2) Mh.L.J. 414 : 2010 ALL MR 1098 wherein this Court had held that when blank cheques issued prior to the disbursement of the loan as a collateral security are given in such a case there is no existing debt or liability, and, therefore the case does not fall within the four corners of an offence u/s 138 of the N.I. Act, 1881. However, it is to be noted that the said decision stood on its own facts which are recorded in para 5 of the learned judgment and cannot be applied to the facts of the present case.

18. As regards the sentence, Shri Pangam, the learned Counsel appearing on behalf of the Complainant submits that the accused be sentenced at least to one month simple imprisonment, and be directed to pay compensation at least of Rs. 70,000/- considering the costs which the Complainant had to incur in prosecuting the complaint. On the other hand, Shri Gaonkar, the learned Counsel on behalf of the accused submits that the accused will pay the amount due on the cheque within a period of 21/2 months, and in case the accused does not pay the said amount during the said period of time, the accused could be sentenced for default. Shri Gaonkar has also placed reliance on *Deendayal Nagari Sahakari Pathasanstha Maryadit Co-op. Society v. Shri Satyawar Nagesh Gaonkar* (supra) and submitted that no substantive sentence be imposed on the accused. It appears that there was a concession made in that case and for that reason no substantive sentence was imposed upon the accused in the said case of *Deendayal Nagari Sahakari Pathasanstha Maryadit Co-op Society*(supra).

19. In my opinion, the submissions made by Shri Pangam are just and reasonable. Punishment for any offence must be commensurate to the offence committed but there are no golden scales to measure it either. Deterrence remains one of the objects of imposing punishment. The very object of enacting Section 138 of the Act was to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the account or for the reason that it exceeds the arrangements made by the drawer with adequate safeguards to prevent harassment of honest drawers. One year punishment was found to be deficient and inadequate and therefore the punishment provided for the offence was enhanced from one year to two years. The Apex Court in *Suganthi Suresh Kumar Vs. Jagdeeshan*, has stated that if the amount had been paid to the Complainant there perhaps would have been justification by imposing a fine sentence but in a case where the amount covered by the cheque remained unpaid, it should be the look out of the trial Magistrates that the sentence for the offence under Section 138 should be of such a nature as to give proper effect to the object of legislation. No drawer of the cheque can be allowed to take

dishonour of the cheque issued by him light heartedly. It is a different matter if the accused paid the amount at least during the pendency of the case.

20. Considering the facts of the case, therefore, in my view, the ends of justice would be met by sentencing the accused u/s 138 of the N.I. Act to Simple Imprisonment of one month and to pay a compensation of Rs. 70,000/-and in default to undergo Simple Imprisonment of three months. Accused to surrender within a period of fifteen days before the learned J.M.F.C. to undergo the sentence.