

M/S. Pinak Bharat And Company Vs Anil Ramrao Naik And Others

Court: Bombay High Court

Date of Decision: Dec. 2, 2022

Acts Referred: Negotiable Instruments Act, 1881 " Section 20, 87, 138, 139

Code Of Criminal Procedure, 1973 " Section 313

Indian Penal Code, 1860 " Section 415

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

Bench: Single Bench

Advocate: A. S. Khandeparkar, Prerak A. Sharma, Khandeparkar, Rohit Mahadik, Nihir U. Dedhia, Rushikesh Bhagat, Saurabh Mittal, Vaibhav Kulkarni, Prerak A. Sharm, Megha Bajoriya, H. J. Dedhia

Final Decision: Dismissed

Judgement

Sr. No.,Case No.,Cheque No.,Date,Amount

1., "Summary Criminal

Complaint Case No.

3002996/SS/2007",904443,27/04/2007, Rs. 1 Crore

2., "Summary Criminal

Complaint Case No.

3002997/SS/2007",904444,27/04/2007, "Rs. 68,51,590/-

(c) Drawing of the cheques on account of the accused is not disputed (para no. 27).,,,,,

(d) Cheque for Rs. 1 Crore was handed over without mentioning date on it. Trial Court has posed a question why date was put on the cheque and at,,,,,

whose instructions. (para no. 28),,,,,

(e) The cheque was deposited after filing of the Civil Suit by the accused against the complainant.,

(f) That is why the Court found the theory put up by the accused that cheque was given for security purpose as a reasonable. (para no. 29),

(g) Putting up name of the payee and date on the cheque by the complainant particularly after filing of the Civil suit was not accepted by the trial,

Court. (para no. 30),

(h) Receipt of Rs. 19,00,000/- (by way of three cheques of Rs. 4,00,000/- on 19/03/2005, Rs. 5,00,000/- on 17/06/2005 and Rs. 10,00,000/- on",

30/05/2005) was suppressed by the complainant. Whereas it is admitted during the cross-` examination.,

(i) The Memorandum of Understanding is silent from which date the interest is payable.,,,,

(j) Once the amount of Rs. 19,00,000/- is received by the Complainant in the year 2005, the demand of Rs. 1 Crore appears to be unreasonable and",,,,

excessive. (para no. 31),,,,

(k) Failure to pay existing liabilities when the cheques were presented.,,,,

(l) By way of cross-examination the accused was successful to offer probable and acceptable explanation so as to rebut the presumption under,,,,

Section 139 of the Negotiable Instrument Act.,,,,

(m) When the cheques were handed over on 09/05/2003 without mentioning the date, there was no any legal and enforceable liability on the part of",,,,

accused. (para no. 36),,,,

(n) Cheques were handed over by way of security and hence it does not come within the four corners of Section 138 of the Negotiable Instrument,,,,,

Act. (para no. 37),,,,

11. So far as the reason for dishonor and complying with the provisions of Section 138 of the Negotiable Instrument Act, the trial Court gave findings",,,,

in favour of the Complainant. So now the issue is whether the findings against the complainant are correct or not.,,,,

12. The conclusions drawn by the trial Court can be summarized as follows:,,,,

(i) When the cheques were handed over on 09/05/2003 there was no liability.,,,,

(ii) When the suit was pending how the accused can give an authority to the complainant to put name of the payee and the date on the cheques.,,,,

(iii) Cheques were handedover by way of security.,,,,

(iv) Once the complainant has admitted the payment of Rs. 19,00,000/- in the year 2005, there was no existing debt or liability when actually cheques",,,,

were deposited on 27/04/2007.,,,,

Submissions,,,,,

13. Whereas according to the learned Advocate Shri Khandeparkar, the trial Court has failed to consider the provisions of Sections 138 and 139 of the",,,,

Negotiable Instrument Act as interpreted in various judgments. He read over the contents of the Memorandum of Understanding, various",,,,

correspondence and also filed copy of the award dated 25/09/2015 delivered by learned Arbitrator. Whereas according to learned Advocate Ms.,,,,

Bajoriya, in fact there was no criminal intention on the part of the accused to cheat the complainant and accused has shown his bonafides when he",,,,

has paid Rs. 19,00,000/-. According to her, the date and name of the payee were blank and when the complainant has filled in those details. By way",,,,

of civil suit the accused has prayed for extension of time for recovery of the amount by the complainant on the basis of the Memorandum of,,,,

Understanding. She has taken me through various clauses of the Memorandum of Understanding, which gives various options to the complainant. She",,,,

also submitted that there were various reasons why accused could not complete the construction and in fact there was stay granted by this Court. She,,,,

also submitted that the complainant has received the entire amount as per the award of the learned Arbitrator and now nothing remains. She submitted,,,,

that on this background, the prosecution under Section 138 of the Negotiable Instrument Act cannot be continued and according to her the",,,,

Respondent-accused is aged about 82 years of old.,,,,

14. By way of reply, the learned Advocate Shri Khandeparkar submitted that an action for recovery of money under the Civil law and prosecution" ,,,,

under Section 138 of the Negotiable Instrument Act can simultaneously be prosecuted and intend to cheat is not required.,,,,

Simultaneous proceedings,,,,

15. On these aspects, I agree to his submission. There are different acts which constitute cause of action for prosecution under Section 138 of the" ,,,,

Negotiable Instrument Act. It starts from deposit of cheques and ends with failure to make payment within 15 days from the receipt of the notice and,,,,

intention to deceive which is required for offence under Section 415 of the Indian Penal Code is not required for the offence under Section 138 of the,,,,

Negotiable Instrument Act. About simultaneous prosecution, the Hon'ble Supreme Court has clarified in case of M/s Sri Krishna Agencies Vs." ,,,,

State of A.P. and Anr (supra) as referred above.,,,,

Cheques given as security,,,,

16. It will be material to consider the contents of the Memorandum of Understanding which is undisputed document. Giving of a loan of Rs. 1 Crore,,,,

by the complainant to the accused is admitted. Execution of the Memorandum of Understanding is admitted. Issuance of the two cheques having the,,,,

numbers as mentioned above by the accused to the complainant is also admitted. That finds place in clause no. 11 of the Memorandum of,,,,

Understanding. So, when these cheques were issued on 09/05/2003, admittedly there was liability of Rs. One crore in between the developer and",,,,

financer, and developer owes that amount to the financer." ,,,,

Sr. No,Letter Dated,Sent by whom,Subject,

1.,09/02/2007,"Complainant to the

accused","Thereby communicating her first preference to receive the premises but informing that as

it is not available. She has requested to pay Rs. 3. 50 Crores immediately",

2., "14/02/2007 (wrongly typed as

January)", "Accused to the

complainant", "Wherein the accused has admitted liability to pay Rs. 3.50 Crore and also asking for

further maximum grace period of one year.",

3., 26/02/2007, "Accused to the

complainant", Informing her that accused is in process of arranging the funds,

4., 27/02/2007, "Complainant to the

accused", Asking him to pay amount immediately.,

26. Section 87 of the Negotiable Instrument Act talks about the effect of the material alteration. The ingredients are as follows:-,,,,

(i) The material alterations render the negotiable instrument void.,,,,

(ii) As against the person who was party at the time of making alterations.,,,,

(iii) If he does not consent thereto.,,,,

(iv) Even if he does not give consent, it is not void, if the alteration is made to carry out the common intention of the original parties. ",,,,

27. In the case in our hand, the name of the payee and date were put on the cheque. There is no dispute about the handing over the cheques by the",,,,

accused to the complainant. Even I have concluded that the debt or liability is also proved by the complainant at the time of handing over the cheques.,,,,

Even it is proved at the time of depositing the cheques. So, putting a date whether was in pursuance to the common intention of the parties is a",,,,

question. Putting the name of the payee also cannot be held to be objectionable. It is for the reason that they were handed over to the complainant.,,,,

only.,,,,

28. Section 87 of the Negotiable Instrument Act authorises alteration in two contingencies: -,,,,

(a) If it is with the consent of the parties.,,,,

(b) Even if party does not given consent if the alterations is done in order to carry out common intention of the parties.,,,,

29. If we apply this test, it can be said that neither of these contingencies exist so as to authorize to the complainant to put in dates on the cheques.",,,,

They were handedover in the year 2003 and they were deposited in the year 2007. The complainant has not stated that those dates were put in as,,,,

instructed by the accused. In fact, the circumstances brought on record suggest that there was dispute filed in Civil Court by way of suit. The accused",,,,

has sought for extension of the time.,,,,

30. The facts of Bir Singh (supra) does not involve interpretation of section 87 of the Negotiable Instruments Act.,,,,

31. As per clause no. 5, the financier is prohibited from calling the developer to repay to secured loan with interest for a period of 36 calendar months",,,,

next to execution of the Memorandum of Understanding. Whereas clause no.7 gives discretion to the financier to demand immediate repayment of the,,,,

secured loan with interest. Whereas the prayer in the plaint says that the period of 36 calendar months be calculated from a month next to the January,,,,

2007. The suit was also contested. Even the correspondence dated 14/02/2007, by the accused to the complainant says that he has asked for grace" ,,,,

period of one year. So, under such circumstances, it is difficult that the accused has consented the complainant to deposit those cheques." ,,,,

32. On that aspect, only I agree with the findings given by the trial Court. No doubt cheque is negotiable instrument which is transferable and" ,,,,

negotiable, presumption under Section 138 of the Negotiable Instrument Act can be drawn only when the pre-conditions are satisfied. The complainant" ,,,,

unilaterally has put in dates on the cheques without the authority of the accused and even by not informing him. So, it amounts to material alterations." ,,,,

If it is so such negotiable instrument becomes void. Hence prosecution under Section 138 of the Negotiable Instrument Act cannot be initiated. On,,,,

that aspect the complainant has failed to satisfy the requirement of valid cheque.,,,,

33. I have not considered the observations made by the learned Arbitrator in the award that is to say whether the accused is fastened with certain,,,,

liabilities and how much he has paid.,,,,

34. For the above discussion, I find no merit in both these appeals and they are dismissed. Applications, if any, also disposed of." ,,,,