

(2010) 02 GUJ CK 0126

Gujarat High Court

Case No: Criminal Appeal No. 1023 of 2002

Harishkumar Hiralal
Tapiyawala

APPELLANT

Vs

State of Gujarat and
Another

RESPONDENT

Date of Decision: Feb. 23, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 378
- Negotiable Instruments Act, 1881 (NI) - Section 138, 139, 141, 141(1)

Hon'ble Judges: Z.K. Saiyed, J

Bench: Single Bench

Advocate: Nitin Dave, for A.M. Parekh, for the Appellant; Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

Z.K. Saiyed, J.

The present appeal, u/s 378 of the Code of Criminal Procedure, 1973, is directed against the judgment and order of acquittal dated 19.3.2001 passed by the learned Chief Judicial Magistrate in Criminal Case No. 57213 of 1998, whereby the accused has been acquitted from the charges leveled against him.

2. The brief facts of the prosecution case are as under:

2.1 The appellant gave finance of Rs. 23,500/- to the accused - present respondent on 14.9.1998, which was to be paid by the respondent No. 2 - accused with interest on or before 14.11.1998 and therefore, the accused issued cheque against the said due of applicant. The said cheque was deposited on 14.11.1998 and said cheque was dishonoured on the same day. Thereafter, the appellant had given legal notice for the payment of said amount, but the respondent No. 2 had not paid said amount.

2.2 Therefore, Criminal Case No. 57213 of 1998 with respect to the offence punishable u/s 138 of the Negotiable Instrument Act, was filed against the respondent before the learned Judicial Magistrate, First Class, Bharuch. Necessary investigation was carried out and statements of witness was recorded. The trial was initiated against the respondent.

2.3 To prove the case against the present accused, the prosecution has examined, one witness and also produced documentary evidence.

2.4 At the end of trial, after hearing arguments on behalf of complainant and the defence, the learned trial Judge acquitted the respondent of all the charges leveled against him by judgment and order dated 19.3.2001.

2.5 Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the trial Court the appellant has preferred the present appeal.

3. It was contended by learned Counsel Mr. Nitin Dave appearing on behalf of Mr. A.M. Parekh learned Counsel for the appellant that the judgment and order of the trial Court is against the provisions of law; the trial Court has not properly considered the evidence led by the prosecution and looking to the provisions of law itself it is established that the prosecution has proved the whole ingredients of the evidence against the present respondent. Learned Counsel has also taken this Court through the oral as well as the entire documentary evidence. He has also contended that the order of the trial Court is also contrary to the record and has not considered the provisions u/s 139 of the Negotiable Instrument Act. It is also clear from the evidence on record that the accused had committed offence u/s 138 of the Act, but the learned Judge has not considered in true perspective. Therefore, the order is required to be quashed and set aside in the interest of justice.

4. At the outset it is required to be noted that the principles which would govern and regulate the hearing of appeal by this Court against an order of acquittal passed by the trial Court have been very succinctly explained by the Apex Court in a catena of decisions. In the case of [M.S. Narayana Menon @ Mani Vs. State of Kerala and Another](#), the Apex Court has narrated about the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgement of acquittal, the High Court should have borne in mind the well-settled principles of law that where two view are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below.

4.1 Even in a recent decision of the Apex Court in the case of State of Goa v. Sanjay Thakran and Anr. Reported in (2007) 3 SCC 75, the Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision the Court has observed as under:

16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgement delivered by the Court below. However, the appellate court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with.

4.2 Similar principle has been laid down by the Apex Court in the cases of State of Uttar Pradesh v. Ram Veer Singh and Ors. reported in AIR 2007 SCW 5553 and in Girja Prasad (Dead) by LRs v. state of MP reported in AIR 2007 SCW 5589. Thus, the powers which this Court may exercise against an order of acquittal are well settled.

4.3 It is also a settled legal position that in acquittal appeal, the appellate court is not required to re-write the judgement or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of [State of Karnataka Vs. Hemareddy Alias Vemareddy and Another](#), wherein it is held as under:

This Court has observed in [Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury](#), that it is not the duty of the appellate court when it agrees with the view of the trial court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice.

4.5 Thus, in case the appellate court agrees with the reasons and the opinion given by the lower court, then the discussion of evidence is not necessary.

5. I have gone through the judgment and order passed by the trial court. I have also perused the oral as well as documentary evidence led by the trial court and also considered the submissions made by learned Counsel for the appellant.

6. It appears from from the oral and documentary evidence that the cheque was issued on 14.9.1998 in connection with the debts and said cheque was deposited on 14.11.1998. It was proved by documentary evidence at Exhibit 18 and Exhibit 19 - notice reflects that the complainant accepted the cheque. It is argued by the learned Counsel that prosecution has prima facie case and even after, the learned Judge has not considered that it was legal debt and in connection of right of the complainant that the case of the

prosecution was not considered. Even he has also vehemently argued that it is not a civil nature matter and question of contract security, which is not applicable in this case. The same was involved within the meaning of the contract security and even today also, the learned Counsel for the appellant is unable to convince this Court that present appellant - original complainant was having licence or not, for which there is no evidence produced on record.

7. In the case of Shanku Concretes Pvt. Ltd. and Ors. v. State of Gujarat and Anr. reported in 2000 (2) GLR 1705, this Court (Hon"ble Mr. Justice J.R. Vora), has observed paras 7 and 13 as under:

7. While dealing with the first part of the matter, learned Advocate Mr. N.K. Majmudar urged that a civil suit has been filed by the complainant for the money advanced and agreement between the parties was executed and as per the arrangement of the agreement, the cheques were offered as a collateral security and, therefore, the transaction was exclusively and entirely a civil transaction and which would not attract criminal liability u/s 138 of the Act. Mr. Majmudar, for this, has relied upon a decision of the High Court of Madras in the matter of Balaji Seafoods Exports (India) Ltd v. MAC Industries Ltd reported in 1999 Current Criminal Reports 424 wherein it was held that undated cheques given as security and bounced, would not attract the provision of Section 138 of the Negotiable Instruments Act. On the second part of the matter, learned Advocate Mr. Majmudar urged that as per Section 141(1), the person in-charge of company only be made answerable u/s 138 of the Negotiable Instruments Act. The present petitioners No. 2 and 3, at the relevant time, were not in-charge of the company and, therefore, they cannot be made accused in the given criminal case u/s 138 of the Negotiable Instruments Act. It was urged that the provision of Section 141 of the Negotiable Instruments Act were ignored by the learned Magistrate while issuing notices against petitioners No. 2 and 3. There is nothing on the record, according to Mr. Majmudar, to denote that the cheques in question were given at the instance of present petitioners No. 2 and 3, nor both of them or any of them as per the averment in the complaint were in-charge of affairs of company as envisaged u/s 141(1) of the Negotiable Instruments Act.

13. The above view further strengthen from the agreement executed between the parties. It is amply clear in the agreement that accused shall repay the amount after six months of the execution of agreement and it is also made clear that for due performance (in Gujarati is mentioned in the agreement) of the contract. The intention of the parties is clear from this averments that the cheques were issued as the collateral security for the due performance of the contract, by which the Company and the Director i.e. accused No. 2 bound themselves to repay the said amount. It is, therefore, clear that cheques were not issued to discharge any existing debt.

8. The learned Counsel for the appellant has relied upon the judgment in the case of [Anil Kumar Sawhney Vs. Gulshan Rai](#), I have perused the said judgment and it is not

applicable to the present case. There is also civil remedy. Even the ingredients of Section 138 of the Negotiable Instrument Act, is not attracted. I do not find any substance in the present appeal and I am in total agreement with the reasons assigned by the learned trial Court.

9. Learned Counsel is not in a position to show any evidence to take a contrary view of the matter or that the approach of the trial court is vitiated by some manifest illegality or that the decision is perverse or that the trial court has ignored the material evidence on record.

10. In the above view of the matter, I am of the considered opinion that the trial court was completely justified in acquitting the respondent of the charges leveled against him.

11. I find that the findings recorded by the trial court are absolutely just and proper and in recording the said findings, no illegality or infirmity has been committed by it.

12. I am, therefore, in complete agreement with the findings, ultimate conclusion and the resultant order of acquittal recorded by the court below and hence find no reasons to interfere with the same. Hence the appeal is hereby dismissed. Bail bond, if any, stands cancelled. Record and proceedings to be sent back to trial Court, forthwith.