Shriniwas Ramdas Siwerwat Vs Shantaram Pandurang Deotale

Criminal Appeal No. 672 of 2008

Court: Bombay High Court (Nagpur Bench)

Date of Decision: May 3, 2011

Acts Referred:
Evidence Act, 1872 â€" Section 114#Negotiable Instruments Act, 1881 (NI) â€" Section 118, 138, 139

Hon'ble Judges: A.P. Bhangale, J

Bench: Single Bench

Advocate: Firdos Mirza, for the Appellant; R.D. Bhuibhar, for the Respondent

Final Decision: Dismissed

Judgement

A.P. Bhangale, J.
The Appeal questions validity and legality of the judgment and order dated 18/08/2008 passed by the learned Chief

judicial Magistrate, Chandrapur in Summary Case No. 914 of 2006 whereby the Respondent/accused was acquitted of the offence punishable u/s

138 of the Negotiable Instruments Act.

2. The Appellant (original complainant) had filed a complaint in respect of dishonor of the Cheque bearing No. 320343 for Rs. 50,000/-, Cheque

No. 320346 for Rs. 1,15,000/-, Cheque no 320347 for Rs. 1,85,000/- drawn upon the Yavatmal Urban Co-operative Bank Ltd., Bhadravati

Branch. Thus, cheques in total sum of Rs. 3,50,000/- were issued by the accused.

3. The Cheques were presented in the state bank of India, Bhadravati branch of the Appellant for collection, but they were returned dishonored

with return memo dated 28/12/2005 with the remark "payment stopped by the drawer". Demand notice was issued on 02/01/2006, but the

Respondent failed to pay the demanded sum despite receipt of the notice on 13/01/2006. Thus, the complaint was filed u/s 138 of the Negotiable

Instruments Act.

4. The accused defended the claim by filing reply dated 02/02/2006 and denied the liability on the ground that the Cheques were blank Cheques

without there being any mention of the amount or the date. The Cheques were cancelled by the notice dated 08/12/2005 which the complainant

had refused to accept.

5. The complainant stated in his evidence that the Cheques of total amount of Rs. 3,50,000/- were given to him on 26/08/2005, which were read

over to him and then the accused signed them in his presence. The complainant admitted in the course of his cross-examination that he has not

mentioned the nature of his liability for the discharge of which the Cheques were drawn by the accused. The complainant also admitted that he had

received the reply to the notice from the accused.

6. Learned Advocate for the Appellant submitted that the learned trial Magistrate erroneously recorded that the Cheques were not issued in

discharge of legally enforceable liability despite admission by the Respondent/accused that he had issued direction to his bank to stop payment,

although the cheques were issued. The amounts due were not paid though the demand notice was served. He submitted that in the case of K.

Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, , it is observed by the Apex Court that as the signature in the cheque is admitted to be that

of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration

on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the

discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. Even though the cheque is dishonoured by

reason of ''stop payment'' instruction an offence u/s 138 could still be made out. It is held that the presumption u/s 139 is attracted in such a case

also. The authority shows that even when the cheque is dishonoured by reason of ''stop payment'' instructions by virtue of Section 139, the Court

has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course, this is a

rebuttable presumption. The accused can, thus, show that the ''stop payment'' instructions were not issued because of insufficiency or paucity of

funds. If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque

for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no

existing debt or liability at the time of presentation of cheque for encashment, then an offence u/s 138 would not be made out. The accused had

failed to enter in the witness box to prove his version and to rebut the presumption against him. It is, thus, submitted that the accused ought to have

been convicted by the trial Court.

7. Reference is also made to the ruling in Chanchal Choudhary v. State of Maharashtra and Ors. reported in 2010 (2) Mh. LJ. 224 (para 10 -

Bombay High Court DB) to submit that when issuance of the Cheques is admitted the presumption u/s 139 comes in to play in favor of the holder

of the cheque that the cheque was issued in discharge of a debt. The onus can only be discharged by the drawer of the cheque by proving to the

contrary.

8. Learned advocate for the Respondent, on the other hand, supported the impugned judgment and order to argue that there is no perversity so as

to interfere with the judgment and order under Appeal.

9. The argument that the Appellant as a holder of the Cheques was entitled to receive the amounts mentioned in the Cheques certainly needs

appreciation as it is the duty of the person, who draws the cheque in discharge of a legally enforceable debt or other liability, to provide funds in

the account to honor the cheque. A person who draws the cheque without reason to believe that it may be dishonored on presentation, can avoid

penal liability by making payment on demand in writing. One who is not having such a capacity should not issue a cheque. The statutory

presumptions under the Negotiable Instruments Act can live and survive till the accused proves that the Cheques were not issued for any

debt/liability.

10. But, looking to the facts and circumstances of this case and the cross-examination of the complainant made on behalf of the accused, it is

revealed that the complainant had executed a sale deed in favor of the accused in respect of immovable property(vide Ex 42). The said immovable

property had charge of a loan in the sum of Rs. 6,00,000/- from the Yavatmal Urban Co-operative Bank. NOC from the Bank was acquired by

the Complainant for Sale of the property. Loan was repaid to the Bank by the Complainant after obtaining the amount from the accused. The

Complainant''s evidence also disclosed that he had purchased the Shere Punjab Restaurant with Bar from it''s previous owner Smt. Balvinder

Singh Siddhu and Bar license was in her name. The Respondent-accused defended the prosecution herein on the ground that the Bar license was

required to be transferred in the name of the accused and the expenses required to be incurred for the transfer were to be borne by the accused,

but the exact expenses were not known. Therefore, blank Cheques were issued by the accused under his signatures by merely mentioning the

name of the Complainant as Payee. The complainant had filled in other details i.e. the amount and the date on each of those Cheques and misused

the same. The accused had issued the Cheques to the complainant to enable him spend amounts to get the restaurant and Bar license transferred to

the accused. The notice sent on behalf of the accused on 08/12/2005 (Ex. 83) mentioned the fact that the complainant had agreed to transfer the

licenses for the Restaurant and the Bar and obtained blank Cheques on the ground that the exact amount of expenses to be incurred for renewal of

the licenses was not known beforehand. The notice also cancelled the blank Cheques No. 320343, 320346, and 320347 handed over to the

complainant by the accused due to material alteration made by the complainant without consent of the accused - who was interested to get the

licenses transferred to the name of the accused. The defence could point out that the complainant is guilty of suppressing these facts in the demand

notice (Ex 25) as well in the Complaint and in the affidavit in lieu of the Examination-in-chief (Ex. 16). The accused has, thus, successfully shifted

the onus back upon the complainant to establish the existence of valid Consideration for the inchoate Cheques in question. The Complainant who

had undertaken the work to transfer the licenses for the Restaurant and the Bar to the name of the accused failed to establish as to how much

amount was required to be spent for the transfer of the licenses for the restaurant and the Bar to the name of the accused and whether the accused

was aware of it. The Cheques in question (Ex. 20 to 22) were inchoate written in Marathi as to the name of payee only, but the other details were

left blank. Subsequently, to get those Cheques encashed, the complainant filled in different dates and the amounts in words and figures, which were

written in English. Difference in ink is also apparent in evidence. The accused had stopped the payment of all these Cheques informing the drawee

Bank that the Cheques were issued for transfer of the license of the Restaurant and the Bar; but since the work was not done by the Complainant

till that date, he is stopping the payments of those Cheques. By notice dated 08/12/2005 (Ex. 84) the accused had cancelled those Cheques

before their presentation to the Bank. The complainant did not establish by evidence as to what work was done by him and how much expenses

were incurred by him to transfer the licenses of the Restaurant and Bar to the accused or as to what amount was actually spent by him for that

purpose. The defence by the accused that blank Cheques were obtained by the complainant for the purpose of getting the licenses of the

Restaurant and Bar transferred to the name of the accused is acceptable; plausible and probable in the facts and circumstances of the case and the

complainant did not adduce any evidence to the contrary as to the actual work performed and expenditure incurred for the work of the accused.

For the aforesaid reasons the Complainant was not entitled to materially alter and use the inchoate Cheques by filling rest of the details in Cheques,

assuming for the sake of the argument that they were issued by the accused with implied authority to fill in the blanks as there was no proof of

legally enforceable liability and no case is made out to support valid claim of consideration for the cheques issued and sought to be realised.

11. In Kusum ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd. reported in (2002) 2 SCC 745, five vital ingredients were laid down by the

Apex court to prove the offence punishable u/s 138 of the Negotiable Instruments Act. They are as under -

On a reading of the provisions of Section 138 NI Act it is clear that the ingredients which arc to be satisfied for making out a case under the

provision are:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person

from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the dale on which it is drawn of within the period of its validity

whichever is earlier;

(iii) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour

the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing,

to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15

days of the receipt of the said notice;

12. If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the

explanation to the section, clarification is made that the phrase ""debt or other liability"" means a legally enforceable debt or other liability.

13. The defence in the case in hand could persuade the trial court to believe that the Cheques in question were not issued for consideration nor in

discharge of any liability or debt. There was no convincing evidence from the complainant"s side as to existence of any existing debt or liability to

be discharged by the accused. The learned trial Magistrate was, therefore, right to hold that the accused had discharged the onus that the Cheques

were not received by the Complainant for any existing debt or liability. The complainant had failed to prove the necessary ingredients of the offence

punishable u/s 138 of the Negotiable Instruments Act. The view taken by the Trial Court was possible and plausible after considering the evidence

and documents produced. The accused can discharge onus by relying upon Section 114 of the Indian Evidence Act while adducing evidence as to

common course of natural events, human conduct and public or private business to prove the non-existence of consideration or debt. If the

accused establishes the probability leading to the belief that the consideration or debt did not exist or their non-existence was so probable that the

prudent man will believe that the consideration or debt did not exist, the burden shifts back upon the complainant to produce convincing evidence

to show that the real fact is not as it is presumed. The statutory presumptions in favour of the complainant are not by themselves evidence but only

make out the prima-facie case in favour of the complainant. They can exist, live and survive till the contrary evidence is proved by the accused

sufficient enough to believe that the Cheques in question were not issued by the accused for any consideration/debt or liability. It is open for the

accused to rebut the statutory presumptions by proving that the Cheques were not issued for any consideration or that there was no any debt or

liability to be discharged by the accused. The accused can succeed upon proof of preponderance of probabilities.

14. The trial magistrate delivered well reasoned judgment after marshaling the evidence. I do not find any serious infirmity or perversity in record to

disturb the impugned judgment and order of acquittal. The Appeal is, therefore, dismissed.