

Prabhakar Vs. Nivruti and Another

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Court : Mumbai Nagpur

Decided On : Oct-01-2014

Judge : S.B. Shukre

Appeal No. : Criminal Appeal No. 498 of 2005

Appellant : Prabhakar

Respondent : Nivruti and Another

Advocate for Def. : Mr. Morande

Advocate for Pet/Ap. : Mr. Khandalkar

Judgement :

Oral Judgment:

1. This appeal is preferred against the judgment and order dated 2nd September, 2005 passed in Criminal Complaint No.484/2004, by the Judicial Magistrate, First Class, Karanja, thereby acquitting the respondent of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. Brief facts of the case are as under :

The respondent-accused had issued eight cheques of Rs.10,000/ each as payment of purchase price of the rice procured by him from the appellant on 18.11.2000. These cheques could not be encashed by the appellant due to

insufficient funds in the account of the respondent. As the notice issued under Section 138 of the Negotiable Instruments Act, 1881 (for short, N.I. Act) was not complied with, the appellant filed five criminal cases under Section 138 of the N.I. Act against the respondent-accused. The respondent-accused entered into a compromise out of the Court with the appellant and in pursuance of the same, on 28.6.2003, sought permission of the Court for compounding of the offences. The respondent-accused also issued a cheque bearing No.670947, dated 25.12.2003 for Rs.80,000/ drawn of Shikshak Sahakari Bank Ltd., Nagpur in favour of the appellant towards full and final settlement of the dispute between them. Considering all these facts, the learned Judicial Magistrate, First Class, Nagpur granted permission to both the parties to compound the offence.

3. When the cheque was deposited in the account of appellant maintained with the Urban Cooperative Bank Limited, Bhandara, the cheque was dishonoured for want of sufficient funds in the account of respondent on which the cheque was drawn. The cheque was returned for the said reason by the bank on 14.5.2004. Therefore, on 2.6.2004 the appellant sent a notice through registered post to the respondent demanding from him the sum of Rs.80,000/. The notice could not be served and was returned with an endorsement Not Claimed, following which the appellant instituted the complaint before the Judicial Magistrate, First Class, Karanja against the respondent under Section 138 of the N.I. Act.

4. As the respondent claimed to be tried, the Judicial Magistrate, First Class proceeded with the trial of the complaint case and upon consideration of the evidence and argument of both parties learned Magistrate found that though the cheque was dishonoured due to insufficient funds in the account of the respondent, the appellant failed to prove service of notice to the respondent and, therefore, recorded finding of acquittal of the respondent for an offence punishable under Section 138 of the N.I. Act in the judgment and order dated 2nd September, 2005.

5. Being aggrieved by the same, the appellant-complainant is before this Court in this appeal filed against the acquittal of the respondent under Section 378 of the Criminal Procedure Code.

6. I have heard Mr. Khandalkar, learned counsel for the appellant and Mr. Morande, learned counsel for the respondent. I have carefully gone through the impugned judgment and order and also the record of the case before the trial Court.

7. It is submitted by the learned counsel for the appellant that there is clinching evidence available on record showing that the Postman visited the house of the respondent at Navargaon and as the respondent was not present there an intimation was given by him for collecting of the postal article from Navargaon Post Office and yet it was not claimed by the respondent. The learned Magistrate, he further submits, ought to have held that the appellant proved the service of notice with the aid of Section 114 of the Indian Evidence Act, 1872 especially when there was no evidence brought on record by the respondent showing that at that time the respondent was not residing at Navargaon. In support, he has placed reliance on the cases of Amar Singh vs. Rala Singh, reported in AIR 1927 Lahore 506 and Puwada Venkateswara Rao vs. Chidamana Venkata Ramana, reported in AIR 1976 SC 869(1).

8. Mr. Morande, learned counsel for the respondent has submitted that the learned Magistrate is right in concluding that there was no service of notice upon the respondent. He submits that the appellant knew that at the time when the notice was issued, the respondent was not residing at Navargaon and was residing at Nandanwan, Nagpur still he sent notice to an address at Navargaon. He submits that the knowledge of the appellant in this regard can be gathered from the specific admissions given by his own witness PW 2 Sanjay Tulshiram Khobragadethe Postman who has made an endorsement Not Claimed on the notice vide Exhibit 28. He submits that the respondent has succeeded in establishing his defence that at the relevant time he was not residing at Navargaon and was residing at Nandanwan, Nagpur and, therefore, the view taken by the learned Magistrate, which is favouring the accused, should not be substituted by another view just because it is possible to take. He also submits that the law relied upon by the learned counsel for the appellant can be distinguished on facts and would have no application to the facts of the present matter and urged that the appeal be dismissed.

9. On careful consideration of the evidence available on record, I am of the view that there is merit in the argument of learned counsel for the appellant and no substance in the argument canvassed on behalf of the respondent.

10. Insofar as the findings recorded by the learned Magistrate that the respondent had issued a cheque dated 25.12.2003 for Rs.80,000/ towards legally enforceable liability and that this cheque vide Exhibit 24 was dishonoured due to insufficiency of funds in the account of the respondent are concerned, I do not see any reason to make any interference with them. There is a record of the Court which clearly establishes these facts. The application for compounding of offence had been moved and is at Exhibit 30. The Court had passed an order on 26.8.2003 granting permission to the appellant and the respondent to compound the offence out of the Court and by document vide Exhibit 31 the appellant had withdrawn all the five criminal cases filed against the respondent. The document vide Exhibit 30 also shows that the respondent had issued a cheque dated 25.12.2003 for Rs.80,000/ in favour of the appellant towards satisfaction of the amount due under the cheques which were the subject matters of the Criminal Case Nos.487/2001, 550/2001, 653/2001, 1036/2001 and 864/2001 filed against the respondent under Section 138 of the N.I. Act. In the light of this record, the learned Magistrate has found that the defence taken by the respondent that said cheque was in fact a blank cheque which was stolen by the appellant has not been found to be proved or as probable. The respondent has also not disputed the findings recorded in this regard by the learned Magistrate. Therefore, now what has remained to be examined is as to whether or not the conclusion reached by the learned Magistrate that the appellant could not prove the service of notice upon the respondent is based upon the evidence available on record.

11. The envelope containing the notice (Exh.28) had been returned by the Post Office at Navargaon with the concerned Postmans endorsement Not Claimed. The respondent does not dispute this fact. What the respondent submits is that at the time when the notice was sent to him he was not residing at village Navargaon, Tahsil, Sindewahi, District Chandrapur and was residing at Nandanwan Layout, Nagpur. However, if one goes through the cross-examination of the complainant (PW 1) taken on behalf of the respondent, one can very well see that it is not at all

the defence of the respondent that at the time when the notice was issued, he was residing at Nandanwan Layout, Nagpur and not at village Navargaon. No suggestion in this regard has been put to the appellant i.e. complainant. There is only one suggestion given to the complainant and it is to the effect that the respondent is presently residing at Plot No.242 Nandanwan Layout, Nagpur. From this suggestion it would become clear that the respondent had only suggested that at the time when the cross-examination of appellant was taken, it was taken on 19th April, 2005, the respondent was residing at Nagpur. The complaint was filed by the respondent on 27th July, 2004 and address of the respondent in the complaint was shown to be at Post Navargaon, Tq. Sindewahi, District Chandrapur. The respondent has not denied his said address shown in the complaint at any point of time during the trial. Even no suggestion of denial of Navargaon address has been put to the appellant. On the contrary, it is seen that summons that was sent to the respondent on this address was received by him and he filed his appearance before the trial Court. The vakalatnama of Advocate Mr.L.K. Deshmukh (Exh14) filed on behalf of the respondent before the trial Court gives address of the respondent as resident of village Navargaon. Even in the bail bond (Exh.15) respondent has furnished his address as resident of Navargaon. This evidence would clearly establish the fact that at the time when the notice was issued and also the summons of the complaint proceedings initiated against the respondent was issued, the respondent, to his own knowledge, was residing at Navargaon and, therefore, the appellant was right in sending the notice to the respondent at his address at village Navargaon. This evidence also establishes the fact that the appellant had no reason to believe that the respondent had at that time shifted his residence from Navargaon to Nandanwan Layout, Nagpur and as a matter of fact there was no question of the appellant even suspecting any such thing there being no shifting of residence to Nagpur as alleged.

12. The envelope (Exh.28) in which the notice was sent to the respondent has been admittedly returned with Postmans endorsement Not Claimed. This endorsement would show that the Postman had been to the house of the respondent for delivery of article and as the respondent was not found present in his house, an intimation was given by the Postman for collecting of the article from the Post Office and even then the article was not claimed by the respondent. This

can be seen from the evidence of PW 2 Sanjay Tulshiram Khobragade, the concerned Postman. He has stated that he had given the intimation twice, first on 2nd June, 2004 and subsequently on 7th June, 2004 about the article and yet, the article was not claimed by the respondent. Of course, he has also stated that to his knowledge, the respondent was not residing at Navargaon. But, it is seen from his entire evidence that this witness is not sure about the fact of residence of the respondent at village Navargaon as in one breath, he stated that the respondent was residing there and in another breath, he stated that he was not residing there for last 8 to 9 years and that he was informed by sister of the respondent that the respondent had shifted his residence to Nagpur. The part of evidence of the Postman regarding respondent not residing at Navargaon is contradictory to his statement that respondents residence is at Navargaon and can be rejected on the ground that it is against the fact not disputed by the respondent. I have already said that the respondent has not at all disputed the fact that at the time when the notice was issued, he was residing at village Navargaon. In Indian Criminal Jurisprudence, it is now well settled principle of law that when a part of evidence of a witness appears to be unreliable and of doubtful nature and if that part can be separated from the rest of the evidence which is reliable, only that part which is found to be of trustworthy nature can be read in evidence and the other part which is not so credible can be rejected, as it is for the Court to separate the grain from the chaff and it must be done by the Court to advance the cause of justice. It is also well settled that the principle that once a liar always a liar has not been accepted by the Indian Courts. It has been held time and again that the maxim *falsus in uno falsus in omnibus* has no application in India. A useful reference in this regard may be made to the law laid down by the Honble Apex Court in the following cases:

- i) Gangadhar Behera and others vs. State of Orissa, reported in (2002) 8 SCC 381.
- ii) Ramesh Harijan vs. State of U.P. reported in (2012) 5 SCC 777.
- iii) Sohrab s/o. Beli Nayata and another vs. The State of Madhya Pradesh, reported in (1972) 3 SCC 751.

iv) Balaka Singh and others vs. The State of Punjab, reported in AIR 1975 SC 1962.

13. Thus, it can be seen from the evidence of PW 2 Sanjay and also the undisputed facts that at the time when the notice was issued, respondent was residing at village Navargaon and that PW 2 Sanjay had tried to deliver the article containing notice to the respondent, but in vain. PW 2 Sanjay had also left a message in the household of the respondent for claiming of the article, but without any effect, and that is how the notice was sent back with an endorsement Not Claimed. All these facts and circumstances together exhibit common course of natural events and human conduct giving rise to a presumption under Section 114 of the Indian Evidence Act, 1872 that the conduct of the respondent pointed towards nothing but receipt of notice by him. This presumption has not been rebutted by the respondent by giving a probable explanation for his not claiming the article. There is absolutely no material or no evidence brought on record or pointed out to me by the learned counsel for the respondent from which this Court could infer that the respondent was not residing at village Navargaon at the relevant time or that Postman had never been to the house of respondent at village Navargaon and that Postman made a false endorsement of Not Claimed on the postal article vide Exhibit 28. Therefore, relying upon the law laid down in the cases of Amarsingh and Puwada Vyankatesh Rao (*supra*), wherein it has been held that with the aid of Section 114 of the Evidence Act, the Court can satisfy itself from the evidence brought on record by the rival parties about the service of notice, I find that the appellant has duly proved service of notice upon the respondent.

14. Once it is found that the evidence brought on record by the appellant has duly established service of notice upon the respondent and the respondent having not admittedly complied with the notice, it would necessarily follow that the appellant has fulfilled all the requisite conditions for constituting an offence punishable under section 138 of the N.I. Act against the respondent. Therefore, I find that the appellant has brought home to the respondent his guilt for an offence of dishonor of the cheque punishable under Section 138 of the N.I. Act. The finding recorded by the trial Court that the service of notice has not been proved by the appellant is

absolutely perverse, it being not based upon the evidence available on record. The learned Magistrate has misconceived the defence taken by the respondent and has ignored the circumstances indicating unmistakably but admission on the part of the respondent that at the relevant time he was residing at village Navargaon. The finding of the learned Magistrate regarding non-service of notice, therefore, deserves to be quashed and set aside and the respondent needs to be convicted for an offence punishable under Section 138 of the N.I. Act.

15. At this stage, I have heard Mr. Khandalkar, learned counsel for the appellant and Mr. Morande, learned counsel for the respondent on the question of sentence.

16. Mr. Khandalkar has submitted that keeping in view the object of insertion of Chapter XVII to the N.I. Act by the amending Act i.e. Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988), S.4 (w.e.f. 1.4.1989) stringent punishment must be awarded to the respondent. On the other hand, Mr. Morande has submitted that the appellant is a young person and his entire family is dependent upon him and, therefore, a lenient view should be taken in the matter.

17. The purposes of punishment for economic offences primarily are; deterrence, laying down a lesson that crime never pays and restitution. The sentence that should be imposed in cases involving economic offences must be such as to advance the purposes of punishment for these offences. At the same time the sentence may also, if warranted by the facts of the case, adequately address the individualistic issues of the offender, so that he is encouraged to reform himself rather than feel disappointed with law which may prove counterproductive to sentencing policy. The sentence should also be proportional to the crime committed.

18. The respondent is a young person on whom his family is dependent for livelihood. There are no criminal antecedents to him. Therefore, this would be a case where respondents personal interests need to be balanced against the objects of punishment. Therefore, I am of the view that the sentence of six months of simple imprisonment together with compensation under Section 357(3) of the Criminal Procedure Code of Rs.1,00,000/should meet the ends of justice.

19. Accordingly, the appeal is allowed and the impugned judgment and order are hereby quashed and set aside.

20. The respondent is convicted of the offence punishable under Section 138 of the N.I. Act and sentenced to suffer simple imprisonment for a period of six months.

21. The respondent is also directed to pay compensation of Rs.1,00,000/ under Section 357(3) of the Criminal Procedure Code out of which an amount of Rs.90,000/ shall be paid to the appellant and remaining amount of Rs.10,000/ shall be deposited in the account of the District Legal Services Authority, Bhandara within a period of 15 days from the date of the order.

22. If respondent fails to pay the compensation so directed, the respondent shall undergo further simple imprisonment for a period of three months.

23. The bail bonds of the respondent are cancelled.

24. Action be taken under Section 388 of the Criminal Procedure Code.

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