

Kamal Vs. Ramkumar Sagarmal (HUF) through Karta, Sureshkumar Sagarmal Nevtia and Another

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Court : Mumbai Nagpur

Decided On : Sep-25-2014

Judge : S.B. Shukre

Appeal No. : Criminal Appeal No. 225 of 2001

Appellant : Kamal

Respondent : Ramkumar Sagarmal (HUF) through Karta, Sureshkumar Sagarmal Nevtia and Another

Advocate for Pet/Ap. : Shri. Panpalia

Judgement :

Oral Judgment:

1. This appeal is directed against the judgment and order dated 08/6/2001 passed in Summary Criminal Case No.14408 of 1998 by 9th Judicial Magistrate, First Class, Akola, thereby acquitting the respondents-accused of the offence punishable under Section 138 of the Negotiable Instruments Act, 1988 (the N.I. Act, for short). The criminal proceedings initiated under Section 138 of the N.I. Act against the respondents related to a cheque bearing No.656523 dated 23/2/1998 for Rs.25,000/- It was issued by respondent No.1 being the HUF of which respondent No.2 was the manager at the relevant time. It was signed by

respondent No.2 as the manager of respondent No.1-HUF. According to the appellant, the cheque was issued towards the satisfaction of legally enforceable liability. It was the case of the appellant that the appellant had given an amount of Rs.25,000/- by way of a hand loan and the repayment thereof was to be made by a cheque. Therefore, a post-dated cheque came to be issued by the respondents in favour of the appellant. The cheque was drawn on The Jintur Urban Co-Operative Bank Ltd., Akola. When the cheque was presented on 20/3/1998 to the Bank of the appellant, The Akola Janta Comm. Co-Op. Bank Ltd., Akola on 20/3/1998, it could not be honoured and was returned on 21/3/1998 on the ground that 'payment stopped by the drawer'.

2. Upon return of the cheque by the Bank of the appellant, the appellant issued notice within the stipulated period of time to the respondents calling upon them to make payment of the cheque amount. The respondents replied the notice. While the respondents did not deny issuance of the cheque, they took a stand that first cheque was issued by the respondents on the assurance given by the appellant that amount of the cheque would be sent later on by the appellant. It was submitted that thereafter the appellant never sent the amount of the cheque and, therefore, they sent a letter to the appellant requesting him to send the amount of the cheque, but in vain. According to the respondents, the cheque came to be issued without incurring of any liability by them and, therefore, there was no question of making payment of the cheque amount.

3. The proceedings under Section 138 of the N.I. Act, upon denial of the liability by the respondents, came to be initiated and the respondents were prosecuted for an offence relating to dishonour of the cheque. After considering the evidence on record and hearing the arguments of both sides, the learned Magistrate found that the cheque in question was issued towards discharge of legally enforceable liability by the respondents and that the respondents could not rebut the presumption raised in law in this regard as per Section 139 of the N.I. Act. Even then, the trial Court did not find the respondents as guilty of the offence with which they were charged and the reason therefor was that the notice issued by the appellant demanding payment of the amount of the cheque was invalid. According to the learned Magistrate, this notice did not specify the amount of the cheque in

any manner. Thus, the respondents were given acquittal by the judgment and order dated 08/6/2001. It is the same judgment and order, which are under challenge in the present appeal.

4. This appeal is on Board of final hearing for quite some time. The roznama shows that even though the respondents were duly served with notice and are also represented by their Advocate, nobody has appeared on behalf of the respondents. The appeal is of the year 2001 and over ripe for final hearing. The requirement of Section 386 Cri. P. C. is that in an appeal filed under Section 377 or 378 of Code of Criminal Procedure, the accused should be heard only if he appears and if he does not appear in spite of being duly served, the appeal has to be decided on merits, but subject to the condition that it should be done after perusing the record. The law only expects the appellate Court to dispose of the appeal on merits after perusal and scrutinising of the record and the requirement of hearing of the appellant or the accused comes into play only if they appear or any of them appears. The law in this regard has been settled by the Hon'ble Apex Court in the case of Bani Singh and others Vs. State of U.P. - (1996) 4 SCC 720, to which a useful reference may be made.

5. In these circumstances, I have heard Shri Panpalia, learned Counsel for the appellant. I have carefully gone through the impugned judgment and order and also perused the record of the case.

6. Shri Panpalia, submitted that in this case there were no other cheques involved so as to create a doubt about the amount of the cheque. He further submits, the evidence on record would show that respondent No.2 has admitted the fact that he was aware of the amount of the cheque and it was of Rs.25,000/-. In the notice issued by the appellant vide Exh.33 what was demanded was the amount of the cheque after mentioning the cheque number and also the date of the cheque and that in the reply given to the notice (Exh.39), the respondent nowhere disputed the validity of the notice on the ground that it is vague and does not specify the amount of the cheque, so submits the learned Counsel. He further submits that the learned Magistrate has misinterpreted the ratio of the case of Suman Sethi Vs. Ajay K. Churiwal and another - AIR 2000 SC 828 and wrongly concluded that the

notice was invalid and, therefore, the complaint was not maintainable.

7. Insofar as the aspect of the rebuttal of presumption under Section 139 of the N.I. Act is concerned, there is absolutely no evidence brought on record by the respondents to enable the Court to uphold the contention that this presumption has been rebutted by the respondents. A bald statement has been made in defence that the cheque in question was issued by respondent No.2 on behalf of respondent No.1 as it was promised by the appellant that amount of the cheque would be sent by him to respondent No.2. No evidence nor any material has been brought on record to probablise this defence. Therefore, the finding recorded by the learned Magistrate that the presumption under Section 139 has not been rebutted by the respondents has to be upheld as legal and correct leaving no scope for interference with it.

8. However, it is seen from the impugned judgment and order that the learned Magistrate has misdirected himself in reading the evidence available on record so as to incorrectly find that the notice (Exh.33) issued by the appellant was invalid. It is true that in this notice the appellant has not mentioned the amount of the cheque either in figures or in words. What the appellant has mentioned is the number of the cheque as 656523, date of the cheque being 23/02/1998, name of the Bank on which it was drawn and name of the Bank to which it was presented for encashment. Then, it is also mentioned in the notice that the appellant was calling upon the respondents to pay to the appellant within 15 days of receipt of the notice the "amount of the cheque". It is significant to note that in this notice, except for the amount of the cheque, no other dues or money have been claimed by the appellant. The notice clearly shows that what was ultimately demanded by the appellant from the respondents was nothing but the amount of the cheque. So, it would be important for this Court to examine whether there was any doubt about the amount of cheque No.656523 dated 23/02/1998 in the mind of the respondents.

9. If one goes through the reply of the respondents vide Exh. 39, one would find that respondent No.2 had absolutely no doubt in his mind about the amount of the cheque and it was of Rs.25,000/-. Even before dishonour of the cheque, the

evidence shows, respondent No.2 had admittedly sent a letter dated 07/3/1998 informing the applicant that respondent No.2 had not received the payment of Rs.25,000/-, being the amount of the cheque. Thus, this evidence establishes beyond reasonable doubt that there was absolutely no confusion or doubt in the mind of respondent No.2 that the amount of cheque No.656523 dated 23/02/1998 drawn on Jintur Urban Co-Op. Bank was of Rs.25,000/- only. I must say, at this stage, there is no dispute about issuance of the cheque and it is nobody's case that there were other cheques of the same date which were dishonoured. In fact, there is also no doubt about the validity of the notice vide Exh.33 with no challenge having been made to it on this count at any point. This can be seen from the reply given by respondent No.2 to the notice vide Exh.33. Even in the evidence of respondent No.2, no challenge to the validity of the notice has been made on the ground that the notice suffered from the vice of vagueness on account of non mentioning of the amount of the cheque in a specific manner. All these facts would together show that the parties had understood as to what was the amount of the cheque and what was due from the drawer under the cheque to its payee. As such, the learned Magistrate could not have dismissed the complaint by holding, albeit wrongly, that the notice was invalid.

10. While recording a wrong finding not based upon the evidence, the learned Magistrate has misinterpreted the judgment of the Hon'ble Apex Court rendered in the case of Suman Sethi (supra). In this case the Hon'ble Apex Court has clearly held that it is well settled principle of law that the notice has to be read as a whole and in the notice, demand has to be made for "said amount" i.e. cheque amount and if no such demand is made, it would have to be examined if the notice is bad or not on this count by considering the language of the notice. If, in the notice, a demand has been made not only for the amount of the cheque but also for the interest and other charges, then it would be necessary to bifurcate all these amounts by specifying as to what is due under the cheque and what is due on other counts. But, if no such bifurcation is made and an omnibus demand is made inclusive the amount of the cheque as well as the amount due on account of interest, damages and other charges, such notice would be invalid in law. The learned Magistrate, confused himself in understanding the law so laid down by the Hon'ble Apex Court and it appears that the learned Magistrate was swayed away

by some of the observations of the Hon'ble Apex Court, which he reproduced in the impugned judgment and order by picking them up half heartedly. Therefore, I find it necessary to reproduce the relevant observations of the Hon'ble Apex Court as appearing in paragraph-8 of the said judgment in their entirety and they read as under.:

"It is well settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e. cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to "said amount" there is also a claim by way of interest cost etc. whether the notice is bad would depend on the language of the notice. If in a notice while giving up break up of the claim the cheque amount, interest, damages, etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, notice might well fail to meet the legal requirement and may be regarded as bad."

11. The above referred observations make it clear that in every case a notice can not be held to be bad only for failure to specify therein the amount of the cheque and it would depend upon the language of the notice to come to an appropriate conclusion in the matter. I have already considered the evidence brought on record by both the sides and found that this evidence sufficiently establishes the fact that the notice was complete in all sense and specific demand was made for payment of the "amount of the cheque" and that there being no doubt or confusion or dispute about the amount of the cheque, the notice conveyed what it ought to have and, therefore, valid in the eye of law.

12. In these circumstances, I find that the learned Magistrate has committed a serious error of fact and law in recording a verdict of acquittal of the respondents for the offence punishable under Section 138 of the N. I. Act and I find that the appellant has proved beyond reasonable doubt his case against the respondents. As a sequel, the verdict of acquittal is quashed and set aside and I find that respondents are guilty of the offence punishable under Section 138 of the N. I. Act

and respondent No.2 being the manager of respondent No.1-HUF, would be liable to be receive the sentence.

13. At this stage, I have heard learned Counsel for the appellant on the question of sentence. Respondent No.2 is not available as he has not chosen to appear before the Court.

14. In the case of Kumar Exports Vs. Sharma Carpets - 2009 (4) Mh.L.J. 23, the Hon'ble Apex Court has held that once the appellate Court, after hearing an appeal against acquittal, records conviction, the powers enumerated in Section 386(a) of the Code of Criminal Procedure, 1973 do not contemplate that appellate Court can remit the matter to the trial Court for passing appropriate order of sentence. The Hon'ble Supreme Court further observed that the judicial function of imposing appropriate sentence must be performed only by the appellate Court on reversing the order of the acquittal and not by any other Court or otherwise, it is an abdication of its power in favour of the trial Court. In view of this law, I have heard the learned Counsel for the appellant on the point of the sentence.

15. Learned Counsel for the appellant submitted that at the time when the cheque was dishonoured and liability under Section 138 of the N.I. Act arose, the maximum punishment prescribed for the offence under Section 138 was of only one year and in this case, since the cheque was issued towards discharge of commercial liability, maximum punishment as prescribed by law needs to be imposed, keeping in view the object of Chapter XVII of the N. I. Act, 1881 inserted by the Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988. He also submits that adequate compensation to the extent of Rs.1 lac needs to be awarded in this case.

16. In the case of Suganthi Suresh Kumar Vs. Jagdeeshan - (2002) 2 SCC 420, the Hon'ble Apex Court after analysing various judgments of the Supreme Court held that having regard to the object of fastening of criminal liability for dishonour of cheque by inserting Chapter-XVII in the Negotiable Instruments Act, 1881, there was need for making liberal use of the provision of awarding of compensation as contained under Section 357(3) of Cri. P. C. The Hon'ble Apex Court considered its own judgments rendered earlier in the case of K. Bhaskaran Vs. Sankaran

Vaidhyan Balan - (1999) 7 SCC 510 and Harisingh Vs. Sukhbir Singh - (1988) 4 SCC 551. It referred to Bhaskaran's case wherein it is observed that if a Judicial Magistrate of the First Class was to order compensation to be paid to the complainant from out of the fine realised, the complainant will be the loser when the cheque amount exceeded the said limit of the Judicial Magistrate to impose fine. It is further noted therein that in such a case, a complainant would get only the maximum amount of rupees five thousand and therefore, a way out to alleviate the grievance of the complainant would have to be found and it would be by making resort to Section 357(3) Cri.P.C. The Hon'ble Apex Court was also in agreement with the law laid down in the case of Hari Singh Vs. Sukhbir Singh wherein it was held that the quantum of compensation may be determined by taking into account the nature of crime, the justness of the claim by the victim and the ability of accused to pay. It was also laid down therein that the sentence of imprisonment can be imposed in case of any default in payment of compensation ordered by the Court under Section 357 (3) Cri. P. C.

17. Even in the case of R. Vijayan Vs. Baby and another - 2012 (2) Mh.L.J. 584, the Hon'ble Apex Court has held that when a sentence of fine forms a part of the sentence of imprisonment, the Court can direct a portion of the fine amount to be paid as compensation for any loss or injury caused by the offence or for defraying the expenses properly incurred by the prosecution. Such compensation from out of the fine amount can be imposed by taking resort to the provision of Section 357(1) of the Code. However, when the sentence imposed does not include fine or where the sentence relates to only imprisonment, the Court would have the power to direct the accused to pay, by way of compensation, such amount as may be specified in the order to a person who has suffered loss or injury as per the provision of Sub-Section (3) of Section 357 of the Code. The Hon'ble Apex Court has also made it clear that the compensation can be directed to be paid either under Section 357(1) or Section 357(3) of the Code but not under both the Sections as these two Sections do not co-exist.

18. From the above discussion, it would be clear that the Court has power to impose compensation and the Hon'ble Apex Court has led emphasis upon liberal use of the provision of Section 357(3) of the Code in order to suitably compensate

the complainant who has suffered loss on account of dishonour of the cheque. The only conditions subject to which the powers under Sub-Section (3) of Section 357 of the Code should be exercised are that the compensation should be just and that fine should not form part of the sentence or the sentence imposed should only be of imprisonment.

19. Having considered the law governing the field of awarding compensation together with sentence of imprisonment under Section 138 of the N. I. Act, now, it would be necessary to examine the question as to what should be the sentence and quantum of compensation, which could be termed as adequate, just and proper so as to meet the ends of justice.

20. The accused, i.e. respondent No.2, is a businessman, who had issued the cheque in question towards satisfaction of legally enforceable liability and the liability was commercial in nature. The object of Section 138 of the N.I. Act is to enhance the creditability of the cheque and facilitate its acceptability as an instrument for completion of economic transactions. Therefore, I am of the view that the sentence to be imposed must be of such a nature as would achieve the object of Section 138 of the N. I. Act and also achieve the purposes of punishment for economic offences namely deterrence, exemplifying that crime does not pay and restitution. Viewed in this way, I am of the opinion that a simple imprisonment of six months would meet the ends of justice. In addition, the quantum of compensation to be awarded could be Rs.75,000/-, having regard to the fact that the cheque was dishonoured in March. 1988 and during the pendency of the proceedings before the learned Magistrate and thereafter till date, respondent No.2 has not paid the amount of the cheque.

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

The respondents are convicted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and respondent No.2-Sureshkumar Sagarmal Nevtia is sentenced to suffer Simple Imprisonment for six months. Respondent No.2 is further directed to pay compensation of Rs.75,000/- (rupees seventy-five thousand only) under Section 357(3) of the Code of Criminal Procedure, 1973, out

of which an amount of Rs.70,000/-(rupees seventy thousand only) shall be paid to the appellant and an amount of Rs.5,000/- (rupees five thousand only) shall be credited to the account of District Legal Services Authority, Akola, within a period of three months from the date of the order.

In case, there is default in payment of the amount of compensation within the stipulated period, it is directed that respondent No.2 shall undergo further Simple Imprisonment for a period of three months.

The bail bonds of respondent No.2 are cancelled and he be placed under arrest forthwith by the concerned police station and be committed to Jail for undergoing the sentence.

Action under Section 388 Cr.P.C. be taken.

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