Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 43 OF 2019

Mr. Rajendranath Ganesh Usgaonkar ...Applicant

Versus

1. Deendayal Nagari Sakhari Pathsaunsthan Maryadit

2. STATE, Thr. Public Prosecutor ...Respondents

Mr. Deepak Gaonkar, Advocate *for the Applicant.*
Mr. P. Karpe, Advocate for *the Respondent no.1.*
Mr. G. Nagvenkar, Additional Public Prosecutor *for the Respondent no.2- State.*

CORAM : MANISH PITALE, J
Reserved on : 1st September 2021
Pronounced on : 16th September 2021

ORDER

1. The revision-applicant is an accused convicted for offence under Section 138 of the Negotiable Instruments Act, 1881, (the said Act). The conviction and sentence imposed upon the Applicant by the Court of Magistrate were confirmed by the District Court by dismissing his appeal.

2. The principal contention raised in the present revision application is that the proceedings before the Magistrate stood vitiated for the reason that the documents filed along with the complaint, upon which the Respondent no.1-(original complainant) placed reliance on, were never marked as exhibits. According to the Applicant, this was a fundamental flaw in the manner in which the proceeding was conducted before the Court of Magistrate and, on this sole ground, the impugned judgments and orders deserve to be set aside and the matter needs to be remanded for a re-trial.

3. The Respondent no.1, i.e. the original complainant, had filed a complaint under Section 138 of the aforesaid Act, before the Court of Magistrate against the Applicant stating that the Applicant had taken a loan of ₹ 1,00,000/- and that the same was to be repaid in 60 monthly installments. The loan account was opened and the amount was disbursed to the Applicant on 02.11.2015. On 26.04.2017, the outstanding balance towards the said loan account was ₹1,07,207/- and the Applicant voluntarily gave a cheque dated 19.05.2017 drawn on Canara Bank, Panaji Branch for the said amount.

4. According to Respondent no.1, the said cheque was returned by the Bank on the ground of "insufficiency of funds". Respondent no.1 issued notice to the Applicant and when the amount was not made good despite receipt of the notice, Respondent no.1 was constrained to file the aforesaid complaint on 05.07.2017 against the Applicant. The Respondent no.1 also filed documents along with the list of documents in the said complaint.

5. The proceedings in the complaint continued before the Court of Magistrate wherein, the Branch Manager of the Porvorim Branch of the Respondent no.1, filed an affidavit in evidence before the Court of Magistrate. Along with the affidavit, the said Branch Manager produced six documents and prayed that they be marked as exhibits. It is undisputed that the aforesaid witness on behalf of the Respondent no.1 was cross-examined by the Advocate representing the Applicant and that reference was also made to the said documents on which Respondent no.1 placed reliance. The said documentary evidence was not disputed on behalf of the Applicant and it is also admitted position that the Applicant neither examined himself nor any other witness in support of his defence. It is also an admitted position that during the course of the proceedings before the Court of Magistrate, although documents filed along with the affidavit in evidence of the witness for the Respondent no.1 were taken on record and they were referred to in the said affidavit as well as during the process of cross-examination on behalf of the Applicant, none of the documents were marked as exhibits.

6. The Court of Magistrate took into consideration the complaint, the documents as also the evidence, and cross-examination undertaken on behalf of the Applicant and found that Respondent no.1 had made out a case against the Applicant. Accordingly, by order dated 23.05.2018, the Court of Magistrate convicted the Applicant for offence punishable under Section 138 of the aforesaid Act and sentenced him till rising of the Court. The Applicant was further directed to pay the amount of ₹ 1,07,207/- to Respondent no.1 as compensation within one month and in default to undergo 15 days of simple imprisonment.

7. Aggrieved by the said order of conviction and sentence, the Applicant filed an appeal before the Court of District Judge, Mapusa. In the Appeal, it was contended on behalf of the Applicant that due to failure on the part of the Court to mark the documents as exhibits, the entire proceedings before the Magistrate were vitiated. The said contention was rejected by the Court of District Judge on the ground that no prejudice was caused to the Applicant and that, in any case, the cross-examination undertaken on behalf of the Applicant referred to such documents. It was further recorded that the Applicant had not denied certain crucial aspects of the matter including his own signature on relevant documents, thereby showing that the contentions regarding the proceedings before the Magistrate having been vitiated, was without any substance. Accordingly, the Appeal was dismissed.

8. Aggrieved by the same, the Applicant filed the present revision application, wherein notice was issued. The Applicant deposited certain amounts before the Court.

9. Mr. Deepak Gaonkar, the learned Counsel appearing for the Applicant, submitted that the failure on the part of the Court of Magistrate to mark documents as exhibits had vitiated the entire proceedings. It was submitted that the Criminal Procedure Code, as well as the Criminal Manual, contemplate the procedure for marking documents as exhibits. The learned Counsel referred to Section 294 of the Criminal Procedure Code (Cr.P.C.) in this context and submitted that as per the law laid down in the context of the said provision, the Court was supposed to mark the documents filed along with the complaint as exhibits so that they could be specifically referred to by the exhibit numbers during the course of the trial and the accused was granted ample opportunity to deal with such material on record. The learned Counsel referred to Rules 33 and 34 of Chapter VI pertaining to such Rules as to inquiries and trials in all Courts contained in the Criminal Manual. By referring to the said provisions, it was submitted that in the present case, the entire proceedings before the Court of Magistrate stood vitiated, thereby indicating that a re-trial was warranted in the facts and circumstances of the present case.

10. It was further submitted that the Court of District Judge failed to appreciate the contentions raised on behalf of the Applicant while dismissing the Appeal. The learned Counsel for the Applicant referred to the Judgment of the Hon'ble Supreme Court in the case of ***Bipin Shantilal Panchal vs. State of Gujarat & anr.***[1] and Judgments of this Court in the case of ***Geeta Marine Services Pvt. Ltd. & anr. vs. State & anr.***[2] and ***Peacock Industries Ltd. & Ors. vs. M/s. Budhrani Finance Ltd. & anr.***[3]

11. On the other hand, Mr. P. Karpe, the learned Counsel appearing on behalf of the contesting Respondent no.1, i.e. the original complainant, submitted that in the present case, there was absolutely no prejudice caused to the Applicant even when the documents on record were not marked exhibits by the Court of Magistrate. It was submitted that the Applicant never raised any objection with regard to production of the said documents and in fact, his Counsel referred to the said documents while

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1 2001 ALL MR(Cri) 452

2 2009 ALL MR (Cri) 672

3 2006 ALL MR(Cri) 2233

cross-examining the witness for Respondent no.1. It was further submitted that specific questions with regard to the said documents were put to the Applicant under Section 313 of the Cr.P.C. and hence there was no case of prejudice made out on behalf of the Applicant. It was further submitted that the marking of documents is an administrative act on the part of the Court for the convenience of identifying documents and proof or otherwise of such documents is a completely different exercise. So it was submitted that in the present case the witness who appeared on behalf of the Respondent no.1 deposed in respect of the said documents. It was further submitted that the Applicant i.e. original accused, not only failed to object with regard to the production of the said documents, but during the cross-examination of the witness appearing for the Respondent no.1, the Counsel appearing for the Applicant specifically referred to and put those documents to the witness appearing for the Respondent no.1. On this basis, it was submitted that the revision application deserves to be dismissed. The learned Counsel relied on the Judgment of the Hon'ble Supreme Court in the case of ***Rangappa vs. Mohan***[4] and Judgment of this Court in the case of ***Bama Kathari Patil vs. Rohidas Arjun Madhavi***[5] as also Judgment of the Delhi High Court in the case of ***Sudir Enginiring Company vs. Nitco Roadways Limited***[6]***.***

12. Heard learned Counsel for the rival parties and perused the material on record. The principal question that arises for consideration is as to whether failure on the part of the Court of Magistrate to mark the documents as exhibits vitiated the

4 2010(11) SCC 441

5 2004(2) MhLJ 752

6 1995(34) DRJ 86

proceedings to such an extent that a case for retrial was made out by the Applicant.

13. A perusal of the record shows that the Respondent filed the complaint and along with the complaint a list of documents was also filed. The witness i.e. the Branch Manager of the Respondent no.1, who deposed on affidavit in evidence in support of the complaint in para 17 of the affidavit stated as follows :

> *"17. I say that I am producing following documents which may be taken on record and marked as exhibits:-*
>
> *(a) Copy of Resolution authorising Mrs. Archana Sagar Govekar in the present matter.*
>
> *(b) Copy of Cheque bearing No. 333915 dated 19.05.2017, drawn on Canara Bank, Panjim Branch, for an amount of Rs. 1,07,207/-(Rupees One lakh Seven Thousand Two Hundred And Seven only).*
>
> *c) Copy of Return Memo of the Complainant and Accused Bank.*
>
> *d) Copy of the legal demand notice dated 14/06/2017 addressed to the accused by the complainant along with A.D. Card and postal slip.*

e) Notarised copy of Agreement for loan and promissory Note.

f) Copy of Loan statement along with Certificate."

14. There is no dispute about the fact that when the said witness produced the aforesaid documents on the record of the Court of Magistrate, the Applicant never raised any objection. In fact, the record shows that the Counsel appearing for the Applicant cross-examined the witness of Respondent no.1 on the basis of the affidavit in evidence, as also the documents produced on record by the said the witness. By referring to the documents, including the dishonored cheque, the AD card, the loan statement, and the loan agreement, the Counsel appearing for the Applicant put specific questions to the witness of Respondent no.1 during cross-examination. In other words, the Applicant not only failed to raise any objection with regard to the documents so produced on behalf of the Respondent but hopelessly referred to such documents while cross-examining the witness of Respondent no.1.

15. It is also an admitted position, that the Applicant neither examined himself nor any other witness in support of his defence and he also did not produce any documents on record. The Court of Magistrate proceeded on the basis of such material and found that offence under Section 138 of the said Act was made out against the Applicant and accordingly convicted and sentenced him in the manner noted above. It was for the first time, before the Appellate Court, that the Applicant claimed that failure on the part of the Court of Magistrate to mark the documents as exhibits had vitiated the proceedings. The said contention was specifically considered by the Court of District Judge while dismissing the Appeal. It was found that not only did the Counsel appearing for the Applicant referred to the documents during the process of cross-examination, but such documents were put to the Applicant under Section 313 of the Cr.PC. On this basis, it was found that the Applicant had failed to demonstrate the prejudice caused to him thereby rejecting the prayer for re-trial in the facts and circumstances of the present case.

16. This Court has considered the aspect of prejudice in the facts and circumstances of the present case, particularly because the Applicant has been convicted and sentenced under the provisions of the said Act on the basis of the material brought on record on behalf of the Applicant, which was referred to and relied upon by the Courts below. In order to examine the aspect of prejudice, the emphasis placed on Section 294 of the Cr.P.C., on behalf of Respondent no.1, needs to be considered.

17. In the judgment in the case of ***Bipin Shantilal Panchal*** (supra), the Hon'ble Supreme Court has held that when an objection is raised during the course of taking evidence regarding the admissibility of any material, the Trial Court can make a note of such an objection and mark the objected document tentatively as an exhibit in the case, subject to such objections to be decided at the last stage in the final judgment. It has been held that by adopting such a procedure, valuable time of the Court can be saved. A perusal of Section 294 of Cr.P.C., in this context, would show that when a document is included in a list on behalf of the prosecution of the accused and genuineness of any document is not disputed, such a document can be read in evidence, without further proof and that such a procedure is obviously for expediting proceedings before the Court.

18. In this context, this Court in the case of ***Geeta Marine Services*** (supra), has considered earlier judgments in the context of Section 294 of the Cr.P.C. and proceedings in the complaint under Section 138 of the aforesaid Act. Much emphasis has been placed on the manner in which objections can be raised in respect of documents and, in that context, the procedural aspect of the matter has been elaborated to the effect that the witness has to enter the witness box and the documents need to be marked as exhibits. Thereafter, this Court in the said judgment has considered the situation where a dispute is raised regarding the admissibility of a document and the manner in which such a situation is to be dealt with.

19. In the case of ***Peacock Industries Ltd. Pvt. Ltd.,***(supra), this Court has given elaborate directions with regard to the manner in which cases under Section 138 of the aforesaid Act are to be dealt with. In the course of giving such directions, it is recorded that the complainant is avoiding filing unnecessary and irrelevant documents and that the complainant should file an affidavit in view of examination in chief with all documents to be exhibited in the Court. It is then recorded that if an objection is raised as regard admissibility of a document, the same can be tentatively marked as identification and the objection so raised has to be decided at the stage of final judgment. In other words, the proceedings have to be continued to the stage of cross-examination and further, till the final stage of arguments and judgment rises for the objections, if any, to be dealt with.

20. There can be no quarrel with the propositions laid down in the said judgments along with learned Counsel for the Applicant who placed much reliance, but in the present case, the crucial aspect of the matter is that, admittedly, no objection at any stage was raised on behalf of the Applicant to the admissibility of the documents in question. In fact, as noted above, not only were the documents not objected to but the Counsel representing the Applicant referred to such documents while cross-examining the witness of the Respondent. Questions pertaining to the documents were also put to the Applicant under Section 313 of Cr.P.C.

21. In this context, the judgments relied upon by the learned Counsel appearing for the Respondent, are irrelevant because it is laid down in the case of ***Bama Kathari Patil*** (supra), of this Court, that exhibiting a document is an administrative act and that putting an exhibit number on a document, does not mean that it is proved and that it is required to be proved in accordance with the provisions of the Evidence Act, 1872.

22. In the case of ***Rangappa vs. Mohan*** (supra), the Hon'ble Supreme Court referred to the presumption against the accused under Section 139 of the said Act, particularly when the signature on the cheque was admitted. In the present case, there is nothing to show that the Applicant at any stage disputed the signature on the cheque and, therefore, the presumption is clearly operative against the Applicant.

23. In the case of ***Sudir Enginiring Company vs. Nitco Roadways Limited*** (supra), the Delhi High Court reiterated the stages that a document passes through during the course of a trial. It has been reiterated that the marking of a document as an exhibit is the first stage but the proof or otherwise of such a document would depend upon admissions, denial, and the substantive evidence produced on record to prove such documents.

24. Therefore, it becomes clear that in the present case, that the Applicant failed to raise any objections to the aforesaid documents brought on record on behalf of the Respondent, the documents stood admitted. The Applicant referred to the documents at the stage of cross-examination of the witness to Respondent no.1 and, therefore, the question of prejudice sought to be raised on behalf of the Applicant, is not only misplaced but it is clearly an afterthought. The Appellate Court was justified in rendering findings against the Applicant in this context.

25. As regards Section 465 of the Cr.P.C., in the case of ***Ajay Kumar Ghoshal & Ors. vs. State of Bihar & anr.***[7]***,*** the Hon'ble Court has elaborated upon the conditions in which the Court may direct re-trial/de novo trial. It has been emphasized that a prayer for directing re-trial is not to be casually considered and that the error, omission, or irregularity completed by the accused must be shown to have occasioned a failure of justice. While

7 (2017) 12 SCC 699

recognizing power in the Appellate Court for directing re-trial/de novo trial, the Hon'ble Supreme Court in the aforesaid judgment has held at paras 11 and 12 as follow :

> *"11. Though the word "retrial" is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.*
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> 12. *'De novo' trial means a "new trial" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold 'de novo' trial. But the question is when such power should be exercised. As stated in Ukha Kolhe vs. State of*

Maharashtra (1964) SCR 926, the Court held that:

> *"11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons."*

26. Thereafter, the Hon'ble Supreme Court referred to several judgments and found that a direction for a re-trial/de novo trial should be a last resort and that too only when such a course becomes indispensable. Thus, it becomes clear that if the accused is unable to show the failure of justice, a direction for re-trial/de novo trial cannot be granted. This Court is of the opinion that the failure on the part of the Trial Court in the facts and circumstances of the present case, to mark the documents produced by the Respondent no.1 as exhibits, at worse can be termed as an error/omission/irregularity but, there is nothing to show that the same occasioned failure of justice. The Appellate Court was fully justified in holding that the Applicant failed to demonstrate prejudice caused to him. The applicant failed to raise any objection to the documents, produced on record on behalf of Respondent no.1. Even at the stage of final arguments and judgments, no such objection was raised. In fact, the Counsel representing the Applicant referred to the documents produced by the Respondent-Bank by cross-examining the witness of Respondent no.1. The said documents were put to the Applicant under Section 313 of Cr.P.C. Hence, it is evident that the Application cannot succeed in seeking a direction of re-trial/de novo trial by merely referring to Rules 33 and 34 of Chapter VI of the Criminal Manual or Section 294 of the Cr.P.C.

27. The learned Counsel appearing for the Applicant did not raise any contentions on the merits of the matter. Therefore, no case is made out for exercise of revisionary jurisdiction in the facts and circumstances of the present case. The criminal revision is found to be without any merits and deserves to be dismissed. Accordingly, the Criminal Revision Application is dismissed.

28. Consequently, Respondent no.1 is permitted to withdraw the amounts deposited by the Applicant before the Court.

MANISH PITALE, J.