

(2009) 12 DEL CK 0021

In the Delhi High Court

Case No : Criminal App No. 684 of 2003

Attar Singh Wadhwa

APPELLANT

Vs

NCT of Delhi and Another

RESPONDENT

Date of Decision : 23-12-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 114, 3, 4

Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139, 142

Citation : (2009) 12 DEL CK 0021

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : Anand Maheshwari, for the Appellant; Vibhor Singh, for the Respondent

Final Decision : Dismissed

Judgement

Kailash Gambhir, J.—This order shall dispose of two criminal appeals filed by the same appellant challenging two separate judgments dated 17.9.2003 and two separate orders of sentence dated 18.9.2003 passed by the learned Additional Sessions Judge. In Criminal Appeal No. 680/2003, the appellant is concerned with the complaint filed by the respondent u/s 138 of Negotiable Instruments Act based on dishonoured cheque No. 521318 dated 9.11.2001 for a sum of Rs. 50,000/- while Criminal Appeal No. 684/2003 relates to the complaint filed by the respondent u/s 138 of N.I. Act based on three dishonoured cheques issued by the appellant for a sum of Rs. 50,000/- each vide cheque bearing nos. 521303, 521312 and 521313 dated 9.11.2001. The facts which are common to both the said appeals succinctly are that the respondent/complainant had filed two separate complaints u/s 138 of N.I. Act on the allegations that she had advanced a loan amount of Rs. 2 lacs to the appellant and in due discharge of his liability the respondent had issued four cheques, out of which three of the dishonoured cheques form part of one complaint while one dishonoured cheque for a sum of Rs. 50, 000/- forms part of the second complaint. All the aforesaid

cheques were presented for encashment by the respondent/complainant with her bank namely, State Bank of India, Palika Bazar New Delhi on 10.11.2001 but the same were returned unpaid with the remarks "insufficient funds" vide bank memo dated 13.11.2001 so far the said three dishonoured cheques were concerned, whereas the other cheque was presented on 9.11.2001 and the same was returned dishonoured with the same remarks vide bank memo dated 10.11.2001. Registered legal notice dated 21.11.2001 was sent by the respondent/complainant thereby calling upon the appellant to pay the said amounts within a period of 15 days from the date of the receipt of the notice but despite receipt of the notice on 22.11.2001, the appellant failed to make the payment. The respondent thereafter preferred the said two complaints u/s 138 of N.I. Act and vide judgment dated 17.9.2003, the learned Sessions Judge found the appellant guilty of offence punishable u/s 138/142 of N.I. Act. Vide order dated 18.9.2003, the learned Sessions Judge imposed a fine of Rs. 5,000/- each besides imposing an amount of Rs. 1,50,000/- and Rs. 50,000/- as compensation amount to be paid to the respondent/complainant. Assailing both the said judgments and orders of sentence the appellant preferred the aforesaid appeals.

2. Counsel for the appellant submitted that the complainant has failed to discharge the initial onus placed on her as the complainant respondent has not been able to prove as to when the loan amount was advanced and from where the money was drawn. Counsel also submitted that in the cross-examination of CW-1, she has stated that money was withdrawn from her bank but in the bank statement of the complainant which was proved on record as Ex.D-X, no such withdrawal of the cheque amount is reflected. Counsel for the appellant further submitted that it is an admitted case of the complainant that the appellant was having friendly relations with the husband of the complainant and he was having financial transactions with the appellant. Counsel for the appellant further submitted that simply because of the fact the appellant had admitted his signatures on the dishonoured cheques and also because of not sending reply to the legal notice would not itself prove that there was any liability of the appellant to pay the said amount of the dishonoured cheques. Counsel for the appellant further submitted that there is no averment in the complaint nor in the deposition made by the witnesses with regard to the exact loan transaction, and in the absence of the same it could not be proved that there was any liability on the appellant for the alleged debt. Counsel submitted that since there was no money transaction having been taken place between the parties so there could not have been any occasion for the petitioner to hand over the said cheques which ultimately got dishonoured. Counsel submitted that except the signatures of the appellant rest of the writing is not of the appellant and the complainant herself stated that the cheques were filled in by her daughter and not by the appellant. Counsel further submitted that there are material contradictions in the statement of the two witnesses with regard to the material facts of the case.

3. Refuting the said submissions of the Counsel for the appellant, Counsel for the respondent submitted that the appellant never denied his signatures on the

dishonoured cheques. Counsel further submitted that the appellant also admitted the receipt of the legal notice sent by the complainant. Counsel also submitted that the trial court has rightly drawn adverse inference against the appellant on account of his not responding back to the legal notice. Counsel further submitted that the falsehood of the appellant is apparent from the fact that he had taken a stand that the cheque book was issued somewhere in the year 1999-2000 and on the other hand the appellant has stated that the dishonoured cheques were issued by the appellant five years prior to the date of the issuance of the cheques. The contention of the Counsel for the respondent was that such a stand taken by the appellant on the very face of it is highly improbable. Counsel submitted that the complainant has discharged her onus but the appellant has failed to rebut the presumption which arises in favour of the complainant u/s 139 and 118(a) of the N.I. Act, read with Section 114 of the Evidence Act. Counsel submitted that the contradictions in the statements of CW-1 and CW-2 are trivial in nature. Counsel submitted that adverse inference has to be drawn against the appellant because he failed to adduce any evidence in support of his defence.

4. Counsel for the respondent in support of his arguments placed reliance on the following judgments:

1. Hiten P. Dalal Vs. Bratindranath Banerjee,
2. Hiten P. Dalal Vs. Bratindranath Banerjee,
3. M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another,
4. M/s. U. Ponnappa Moothan Sons, Palghat Vs. Catholic Syrian Bank Ltd. and others,
5. Girishbhai Natvarbhai Patel Vs. State of Gujarat and Another,
6. Waterbase Ltd. Vs. Karuturu Ravendra, Proprietor, Butterfly Aquatech,
7. Gautam Chand Chopada v. Mahendrakumar Pukhraj Kothari and Anr. Cr.R.APP. 153 & 154/2008 & Crl. APP. No. 154 & 155/2008
8. Goaplast Pvt. Ltd. Vs. Shri Chico Ursula D'Souza and Another,
9. S.R. Muralidar Vs. Ashok G.Y.,
- 10 S. Mohan Singh Vs. Madan Lal,
- 11 Dr. Sampathkumar B.V. Vs. Ms. Dr. K.G.V. Lakshmi, GCIM, Lakshmi Health Centre,
- 12 Pankaj Mehra and Another Vs. State of Maharashtra and Others,
13. M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi,

5. It is a settled legal position that under the scheme of Negotiable Instruments Act, the statutory presumption has been created in favour of the holder of the

Negotiable Instrument. Section 139 requires that the court shall presume liability of the drawer of the cheque for the amount for which the cheque is drawn and similarly, u/s 118, unless contrary is proved, it is to be presumed that the negotiable instrument including a cheque has been drawn for consideration. It would be worthwhile to refer the following paras from the judgment of the Apex Court in the case of Hiten P. Dalal v. Bratindranath Banerjee (supra).

22. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in *The State of Madras Vs. A. Vaidyanatha Iyer*, , it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, the discretion is left with the Court but the draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

24. Judicial statements have differed as to the quantum of rebutting evidence required. In *Kundan Lal Rallaram Vs. Custodian, Evacuee Property, Bombay*, , this Court held that the presumption of law u/s 118 of Negotiable Instruments Act could be rebutted in certain circumstances, by a presumption of fact raised u/s 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in *Dhanvantraai Balwantraai Desai Vs. State of Maharashtra*, , where this Court reiterated the principle enunciated in *State of Madras v. Vaidyanath Iyer* (Supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in

the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised u/s 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words "unless the contrary is proved" which occur in this provision make it clear that the presumption has to be rebutted by "proof" and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....

6. As would be seen from above whenever a cheque is issued by its drawer and is given to the payee of the cheque or holder in due course then the statutory presumption arises in favour of the holder of a cheque that such a cheque has been issued by the drawer for due discharge of his debt or liability but since Section 139 of the Negotiable Instruments Act has made the said presumption rebuttable, therefore, the field has been kept open for the accused to rebut such a statutory presumption which arises in favour of the holder of the cheque. The task of the accused is not as simple as for rebutting the statutory presumption he must place such material which can inspire confidence of the court to believe the case of the accused than that of the complainant who is in possession of the dishonoured cheques issued by none else but the accused himself.

In K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, it was held:

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. The Trial Court was not persuaded to rely on the interested testimony of DW-1 to rebut the presumption.

7. As held by the Apex Court in Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, , standard of proof for accused is preponderance of probabilities as the accused has not to prove his defence beyond reasonable doubt. The Apex Court while laying down the said principle also clearly held that it is for the court to do a balancing act between the statutory presumption arising in favour of the complainant on one side and the material produced by the accused to rebut such presumption on the other side with a view to ascertain the truth. It would be worthwhile to refer to the following paras from the said judgment.

22. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

23. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

24. In *Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal*, interpreting Section 118(a) of the Act, this Court opined:

Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption u/s 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising u/s 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen" with a doubt....

8. The Apex Court in the recent judgment of *Kumar Exports Vs. Sharma Carpets*, held:

18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial u/s 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of

presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

20. The accused in a trial u/s 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

9. In the background of the aforesaid legal position, let me now deal with the contentions raised by the Counsel for the appellant to see whether the appellant

had placed enough and cogent material before the trial court to rebut the said statutory presumption which arose in favour of the respondent/complainant. Before dealing with the contentions of the Counsel for the appellant, it cannot be lost sight of the fact that the appellant has nowhere disputed that the dishonoured cheques were issued and signed by him. The appellant has also not disputed that the funds lying in his bank account were not sufficient to clear the amount of cheques on their presentation. The appellant has also not disputed the fact that he has received the legal notice from the respondents but no reply thereto was sent by him. With the said admissions on the part of the appellant and the statutory presumption arising in favour of the respondent u/s 139 and Section 118 of the N.I. Act, it is required to be seen as what plausible defence the appellant has put forth to displace the case of the respondent. The appellant in his statement u/s 313 has stated that he had handed over four signed blank cheques to the husband of the respondent as security four or five years ago as he was having business relations with him. It would be worthwhile to reproduce the portion of the said statement given by the appellant u/s 313 of Cr.P.C., as under:

I am innocent. I had handed over four signed blank cheques to the husband of the complainant as security 4/5 years ago, as I was having business relations with him. The cheques were to be used by him in case of my making default in the dealings and not otherwise. The complainant had misused the cheques and had lodged a false complaint before this Hon'ble Court.

10. Bare perusal of the said statement would show falseness on the part of the appellant as nowhere he has disclosed as what kind of business relations he had with the husband of the complainant; what kind of business or trade it was; why there arose a need to issue four signed blank cheques and where was the need to issue such cheques as guarantee. The appellant even could not spell out the exact period when the said cheques were issued and also under what circumstances the said cheques could be presented by the complainant. The said statement of the appellant does not inspire any confidence and appears to be clearly false and misconceived.

11. Another contention raised by the Counsel for the appellant is that in the bank statement of the complainant, which was proved on record as Ex.D-X, it does not show that the money for the advancement of the loan was withdrawn from her bank account and the particulars of the cheques were written by her daughter, although the figures were filled by the appellant. This contention of the Counsel for the appellant is clearly devoid of any force. The complainant in her cross-examination has deposed that she had paid Rs. 50,000/- and Rs. 1,50,000/- in cash which were earlier withdrawn by her from her bank account but nowhere the respondent indicated any date of withdrawal of the said amount. Even otherwise, the appellant is not concerned with the source from where the amount was withdrawn by the respondent as nobody would issue any cheque unless either the cheque amount has been received by the drawer of the cheque or

there is some other transaction between the parties which led the accused to issue the cheques. As regards the cheques having been filled in with the hand writing of the daughter of the complainant, nothing unusual can be smelled once the cheques in question were signed by the appellant himself. Certain other minor contradictions were also pointed out by the Counsel for the appellant but such contradictions are trivial in nature and cannot tilt the balance.

12. Hence in the light of the contentions raised and authorities cited, I find the present appeal devoid of any merit and hence is hereby dismissed.