
(2018) 01 BOM CK 0259
In the Bombay High Court
Case No : 536 of 2006

Ghanshyamdas Lalchand Chandak

APPELLANT

Vs

Sheikh Hamid Sheikh Gulab Anr.

RESPONDENT

Date of Decision : 09-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) -
Negotiable Instruments Act, 1981, Section 138, Section 139

Citation : (2018) 01 BOM CK 0259

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : A.S. Mardikar, A. Kshirsagar, K.S. Narwade, V.P. Maldhure

Final Decision : Dismissed

Judgement

1. The appellant, who is the original complainant in Summary Criminal Case 241/1999 instituted under the provisions of the Negotiable Instruments Act, 1981 ("Act" for short) is aggrieved by the judgment and order dated 1272005 passed by the learned Judicial Magistrate First Class, Malkapur acquitting respondent 1 original accused.

2. Heard Shri A.S. Mardikar, learned Senior Advocate for the appellant, Shri K.S. Narwade, learned Advocate for respondent 1 and Shri V.P. Maldhure, learned Additional Public Prosecutor for respondent 2.

3. The submission of the learned Senior Advocate Shri A.S. Mardikar is that the learned Magistrate failed to appreciate the correct import and implication of the statutory presumption under Section 139 of the Act. The learned Magistrate committed a serious error in recording a finding that the statutory presumption is rebutted by the accused, is the submission. The learned Senior Advocate places reliance on the judgments in (i) Rangappa v. Sri Mohan reported in (2010) 11 SCC 441 and (ii) T. Vasanthakumar v. Vijayakumari reported in (2015) 8 SCC 378. Per contra, Shri K.S. Narwade, learned Advocate, relying on the judgments

in (i) K.N. Beena v. Muniyappan and another reported in (2001) 8 SCC 458, (ii) Hiten P. Dalal v. Bratindranath Banerjee reported in (2001) 6 SCC 16, (iii) C. Antony v. K.G. Raghavan Nair reported in (2003) 1 SCC 1, (iv) M.S. Narayana Menon Alias Mani vs. State of Kerala and another reported in (2006) 6 SCC 39, (v) Rangappa vs. Shri Mohan reported in (2010) 11 SCC 441, (vi) Sunil Thukral vs. Tolu @ Tulo Puno Velip and another reported in 2014(5) Mh.L.J. 294, (vii) T. Vasanthakumar vs. Vijayakumari reported in (2015) 8 SCC 378, (viii) K.S. Joseph vs. Philips Carbon Black Limited and another reported in (2016) 11 SCC 105, and (ix) Shaikh Jalal (d) through L.Rs. vs. State of Goa and others reported in 2018(1) Mh.L.J. 225, contends that the finding of the learned Magistrate that the statutory presumption under Section 139 of the Act is rebutted, is unexceptionable.

4. The gist of the complaint is that the complainant is a trader of commodities such as grain and other agricultural produce and holds the statutory licence issued by the Agricultural Produce Market Committee, Malkapur. The accused purchased chilly worth Rs. 3,26,133/from the complainant from 25.1.1997 to 26.7.1997. The accused paid Rs.2,83,765/and upon settlement of the accounts issued cheque for the balance dues of Rs. 42,368/. The complainant presented the cheque 075876 dated 23.1.1999 for payment, the cheque was dishonoured, the statutory notice was issued to which the accused sent a false reply and hence the prosecution.

5. In the reply dated 1.12.1999, the accused denied liability and specifically asserted that blank cheques which were retained by the complainant as security for future transactions have been misused. This defence is also reflected in the trend and tenor of the crossexamination and the statement of the accused recorded under Section 313 of the Criminal Procedure Code.

6. The complainant examined himself as C.W.1 and deposed consistently with the complaint. It is extracted in the crossexamination that the complainant has destroyed the accounts pertaining to both the delivery of the goods to the accused and to the payment received from the accused. The complainant was not in a position to state the quantum of chillies purchased during the period from 25.1.1997 to 26.7.1997. The complainant was also not in a position to state the amount of cess paid to the market committee during the said period. The complainant states in the crossexamination that the amount mentioned in the disputed cheque is the amount outstanding against the accused on 25.1.1999. It must be noted that the date of cheque is 23.1.1999. It is admitted that the complainant instituted three prosecutions under Section 138 of the Act against the accused and that he received three cheques towit 075876 (disputed cheque) 075877 and 075878 at the same time. The complainant states that the account of the accused was settled in December 1998, however, he is not in a position to state the date or month of the destruction of the record. He denies the suggestion that the contents of the cheque Exhibit 59 are filled in by him and that the disputed cheque was one of the blank cheques obtained from the

accused as price of the goods which were to be sold to the accused on credit. C.W.2 Rajeshwar is the Secretary of the Agricultural Produce Market Committee and is examined to prove that at the relevant time the complainant was holding the licence. C.W.3 Vinod Malpani is the Chartered Accountant who audited the accounts of the complainant for the year 20.03.2004. The evidence on record would show that the only material evidence to prove the existence of the legally enforceable debt is that of C.W.1 complainant.

7. The learned Magistrate has recorded a finding that the complainant has not proved that the disputed cheque was issued towards discharge of existing debt or liability. Several circumstances are relied upon by the learned Magistrate to reach the said conclusion. It is noted that the handwriting regarding the amount in figure and words and the name is different from the signature and the ink too is different. The version of the complainant is that the account books of the delivery of the goods to the accused and the payment received by the accused are destroyed. No documentary evidence of whatsoever nature is produced to prove the transaction/s. The learned Magistrate was alive to the statutory presumption under Section 139 of the Act. However, the learned Magistrate has held that the presumption under Section 139 of the Act is rebutted by the accused. In the view of the learned Magistrate, the defence disclosed in the reply notice, and the total absence of any documentary proof of the transaction/s was sufficient to rebut the presumption.

8. In *Rangappa vs. Sri Mohan* reported in (2010) 11 SCC 441, the Hon'ble Apex Court, while holding that since the signature on the cheque is not disputed, the statutory presumption under Section 139 of the Act is activated, which the accused could not rebut since the defence of lost cheque was not probable, observed thus : "27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendantaccused cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the

prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

9. In *T. Vasanthakumar vs. Vijayakumari* reported in (2015) 8 SCC 378, the Hon"ble Apex Court, relying on the three Judges Bench judgment in *Rangappa vs. Sri Mohan*, on facts, holds that the statutory presumption is not rebutted by the accused.

10. In *K.N. Beena vs. Muniyappan and another* reported in (2001) 8 SCC 458, the Hon"ble Apex Court, refers to *Hiten P. Dalal v. Bratindranath Banerjee* and holds, on the factual matrix, that bare denial of the liability in reply notice is not sufficient to shift the burden of proof on the complainant to prove that the cheque was issued for a debt or liability.

11. The Three Judges Bench judgment of the Hon"ble Apex Court in *Hiten P. Dalal v. Bratindranath Banerjee* reported in (2001) 6 SCC 16 considers the scope and ambit of Section 139 of the Act thus : "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 *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.* at p.65, para 14). 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 nonexistence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the court but to 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 v. Custodian, Evacuee Property*, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 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 *Dhanvantrai Balwantrai Desai vs State of Maharashtra* AIR where this Court reiterated the principle enunciated in *State of Madras vs Vaidyanath Iyer* 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 under Section 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. (AIR p.580, para 12)"

[See also *V.D. Jhingan vs. State of Uttar Pradesh*; *Sailendranath Bose vs. The State of Bihar* and *Ram Krishna Bedu Rane vs. State of Maharashtra*.]"

12. The nature of the initial burden of proof on the accused to rebut the statutory presumption under Section 139 is explained by the Hon"ble Apex Court in *M.S. Narayana Menon Alias Mani v. State of Kerala* and another reported in (2006) 6 SCC 39 thus :

"29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act (the interpretation clause) to mean:

" "Proved" 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.

"Disproved" A fact is said to be disproved when, after considering the matters before it the Court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

30. Applying the said definitions of "proved" or "disproved" to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the nonexistence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

31. A Division Bench of this Court in *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal* albeit in a civil case laid down the law in the following terms:

"12. 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 under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the nonexistence 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 nonexistence 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 nonexistence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 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.⁵"

This Court, therefore, clearly opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence.

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies. 38. If for the purpose of a civil litigation, the defendant may not adduce any evidence

to discharge the initial burden placed on him, a "fortiori" even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the

High Court.

45. Two adverse inferences in the instant case are liable to be drawn against the Second Respondent:

(i) He deliberately has not produced his books of accounts.

(ii) He had not been maintaining the statutory books of accounts and other registers in terms of the byelaws of Cochin Stock Exchange.

Moreover, the onus on an accused is not as heavy as that of the prosecution. It may be compared with a defendant in a civil proceeding."

13. I need not burden the judgment by discussing the judgments of the learned Single Judge of this Court which are cited by the learned Advocate for the accused since the judgments follow and apply the law enunciated by the Hon"ble Apex Court in the judgments noted supra.

14. The settled position of law is that if the signature on the cheque is admitted, the statutory presumption under Section 139 of the Act stands activated and the accused is obligated to rebut the presumption before the burden of proving the existence of debt or liability shifts to the complainant. However, the accused need not adduce direct evidence and is entitled to rely on the material brought on record, during the evidence of the complainant, or otherwise, to rebut the statutory presumption. The burden on the accused of proving the nonexistence of debt or liability is duly discharged if the accused brings on record, on preponderance or probabilities, that the existence of a legally enforceable debt or liability is doubtful.

15. If the evidence is tested on the anvil of the enunciation of law by the Hon"ble Apex Court, I do not find any perversity or serious error in the judgment and order of acquittal. The finding that the statutory presumption is duly rebutted since concededly the complainant did not produce any record whatsoever pertaining to the purchase of chilly by the accused including the record pertaining to chilly is unexceptionable. The defence, which is disclosed at the first available opportunity, is more than amply probablised on the touchstone of preponderance of probabilities. Since the accused succeeded in rebutting the statutory presumption, the burden shifted on the complainant to prove the existence of the debt or liability, which burden is not discharged by the complainant. It must be borne in mind, that this Court would be slow to interfere in a judgment of acquittal unless the judgment is demonstrably perverse or is vitiated by a serious error of law or fact or occasions grave miscarriage of justice. I am not persuaded to hold, in the fact of the case, that the judgment impugned suffers from any such infirmity as would warrant interference.

16. The appeal is sans merit and is rejected.