

**(2004) 08 BOM CK 0007**  
**In the Bombay High Court**  
**Case No : Second Appeal No. 43 of 1991**

Madhukar Raghunath Bhave

APPELLANT

Vs

Wyawahare and Sons and Others

RESPONDENT

**Date of Decision :** 26-08-2004

**Acts Referred:**

Negotiable Instruments Act, 1881 (NI) — Section 118

**Citation :** (2005) 1 ALLMR 261 : (2005) 1 MhLj 19

**Hon'ble Judges :** A.S. Bagga, J

**Bench :** Single Bench

**Advocate :** R.L. Khapre, for the Appellant; A.S. Jaiswal, for the Respondent

**Final Decision :** Allowed

## **Judgement**

A.S. Bagga, J.—This second appeal filed by the original plaintiff is directed against the judgment and order dated 28-9-1990 passed by II Additional District Judge, Buldana in Regular Civil Appeal No. 83/1987. The facts leading to the filing of this appeal by the plaintiff are as follows.

2. A suit was brought by the appellant original plaintiff against the respondents original defendants for recovery of sum of Rs. 27,170/- as the price of goods sold and the interest thereon. It was the plaintiffs case that he is agriculturist. The defendant No. 1 is a partnership firm and his partners- defendants purchased 87.35 quintals of jaggery from the plaintiff valued at Rs. 27,170/-. The price of the goods was not paid at the time of its delivery. The defendant No. 2 however promised to pay the said amount shortly. On insistence by the plaintiff, defendant No. 2 handed over a cheque for Rs. 11835.94 bearing No. 04284 dated 20-9-1983. The balance amount was agreed to be paid within 15 days. But, on demand, the defendants avoided. On enquiry by the plaintiff it came to be known that there were no funds in the account of the defendants in the Bank. The plaintiff, therefore, approached the defendants. The defendant No. 3 issued four cheques in favour of the plaintiff. These four cheques borne numbers from 00830 to 00833 for the sums of Rs. 6,000/-, Rs. 6,000/-, Rs. 7,500/- and Rs. 7,670/-

respectively. These cheques were postdated cheques dated as 21-5- 1984, 31-5-1984, 22-6-1984 and 4-7-1984 respectively. None of the cheques, on presentation, were honoured. The plaintiff, therefore, served the defendants with notice dated 12-11-1984 calling upon them to pay the amount mentioned in the cheques. This notice was not replied by the defendants. Another notice dated 4-10-1985 was issued by the plaintiff to which a false reply was given. The defendants denied their liability, hence the plaintiff brought the suit for recovery of the aforesaid amount with interest.

3. Defendants resisted the suit by filing their written statement at Exh. 12. It was admitted that the first cheque of Rs. 11,835.94 dated 20-9-1983 was issued by them. It was also admitted in the written statement that four cheques, numbers of which are given in the plaint, were issued in favour of the plaintiff. It was, however denied that jaggery worth Rs. 27,170/- was purchased by the defendants. It was pleaded by the defendants that there were money lending transactions between the plaintiff and the defendants' commission agency shop. It was also stated in the written statement that whenever purchase were made, Tak-patti used to be given, but no such receipt of purchase of jaggery was given in this case. It was their case that suit transaction pertains only to the money lending transaction. It was stated that the loan amount was repaid by them from time to time with interest. It was their case that they had cleared all debts of the plaintiff and at the time of clearing entire dues, the defendants demanded cheques which they had issued. But the plaintiff stated that the cheques have been lost and the defendants believed the plaintiff. It was also pleaded by the defendants that the cheques were issued by them under coercion and misrepresentation.

4. The learned trial Judge, on the basis of pleadings of the parties framed necessary issues and after recording the evidence as was led by the parties, recorded findings that the plaintiff had proved sale of jaggery worth Rs. 27,170/- to the defendants and that the cheques had been issued by the defendants against the price of jaggery. Holding further that the defendants did not prove that the plaintiff was running money lending business and that the transaction was loan transaction, the learned trial Judge proceeded to decree the suit against the plaintiff for Rs. 27,170/- with interest " 12% per annum. Against the said judgment and decree, the original defendants preferred appeal. The appellate Court by the impugned judgment set aside the decree which was passed by the trial Court. The first appellate Court recorded the finding that no jaggery worth Rs. 27,170/- was sold to the defendants holding further that defendants had proved that cheques which were issued were without consideration. The learned Judge allowed the appeal and set aside the judgment and decree. Hence, this appeal.

5. I have heard the learned counsel for the parties and gone through the record. It would be important to note that original defendants, in their written statement had not denied issuance of cheque passed for the amount of Rs. 11,835.94 and

thereafter four cheques bearing Nos. 00830 to 00833 for the amounts of Rs. 6,000/-, Rs. 6000/- Rs. 7,500/- and Rs. 7,670/- respectively. It was their case that these cheques were issued by them by way of security to the borrowed amount. It was also pleaded by them that these cheques were obtained by the plaintiff from them by fraud and coercion. It was their case that it was money lending transaction.

6. The trial Court recorded findings that the defendants could not prove that the plaintiff was running money lending business nor there was money lending transaction between them. There was no evidence that cheques which the defendants admitted to have issued in favour of the plaintiff for different sums were issued under coercion or fraud. There was no argument in this regard. The learned first appellate Court observed that the plaintiff had claimed the amount of Rs. 27,170/- as a price of jaggery sold to the defendants. The learned Judge of the first appellate Court observed that the plaintiff would succeed only if it was shown that the defendants have purchased jaggery worth Rs. 27,170/- from the plaintiff otherwise, the cheques issued to be treated to have been issued without consideration.

7. The issuance of cheques by the defendants in favour of the plaintiff was not disputed, on the contrary the defendants admitted to have issued the cheques in favour of the plaintiff. What was stated by them that the cheques were issued in connection with money lending transaction. It was not their case that there was no consideration received by them. Even otherwise, the cheques being issued, there is presumption under law that the cheques were issued for consideration. It was for the defendants to prove that no consideration had been passed. The learned first appellate Court held that since the appellant failed to show that jaggery was sold by him to the defendants and since the consideration, according to the plaintiff for the cheques which were received by the plaintiff was for the jaggery, and therefore, it will have to be held that there is no consideration. The learned Judge relied on the observation made in *Md. Shafi Khan v. Md. Moazzam Ali* AIR 1923 All 214. In this case it has been observed as follows :

"We agree entirely with the views expressed in the two judgments, and, though it is undoubted that the onus does lie upon the defendant, in cases of this kind, to prove that no consideration was given, nevertheless, if a plaintiff when, as in this case, consideration was denied in the written statement, goes into the witness box and if the result of his examination is such that he fails to establish the point which he set out to make, namely, that he gave the consideration and the Court is thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and has a right to a decree. This is no way trenches upon the ordinary rule that the defendant must prove absence of consideration if that is his case."

8. The learned counsel for the appellant has submitted that the judgment referred to above on which reliance is placed by the learned first appellate Court does not lay down the law as interpreted by the learned first appellate Court. By

subsequent ruling in Lal Girwar Lal Vs. Dau Dayal, a note of warning as to how that case should be properly understood, and it was held that : "We are not satisfied that it was meant to be laid down in that case that where the plaintiff merely fails to prove that consideration passed and the defendant also fails to prove that he did not get consideration, there is no presumption in favour of the plaintiff. The learned counsel for the appellant has brought to my notice a case between Tarmahomed Haji Abdul Rehman v. Tayab Ebrahim Bharamchari AIR (36) 1949 Bom 257 wherein it has been stated that; where the plaintiff has failed to prove that consideration passed and the defendant has also failed to prove that he did not get consideration, under these circumstances the presumption in favour of the plaintiff continues. This proposition of law which is laid down in Bombay's case finds support from the observations made in Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal, . Wherein it has been held that; "Section 118 of the Negotiable Instruments Act deals with the presumptions as to Negotiable Instruments. One of such presumption is, "that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred for consideration". This presumption is based upon a principle and is not a mere technical provision." It has been further observed that; it is open to the defendant to prove that the case set up by the plaintiff is not true and rebut the presumption u/s 118 by showing a preponderance of probabilities in his favour and against the plaintiff. He need not lead evidence on all conceivable modes of consideration for establishing that the promissory note is not supported by any consideration whatsoever. The words "until the contrary is proved" in Section 118 do not mean that the defendant must necessarily show that the document is not supported by any form of consideration but the defendant has the option to ask the Court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case, to fact upon the supposition that consideration did not exist. Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pro-note, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption "disappears". Finally, the Apex Court in the aforesaid ruling has held that; if the defendant fails to prove non-existence of consideration, onus cannot be shifted on the plaintiff. Claim made by plaintiff has to be allowed even if evidence adduced by plaintiff is found to be unbelievable in rebuttal of defendant's case.

9. In the present case, it would be seen that issuance of cheques by defendants in favour of the plaintiff has not been disputed. It was for the defendants to discharge initial burden of showing that no consideration passed. A presumption that consideration for issue of these cheques is not rebutted. The plaintiff had alleged that the cheques were issued for the price of the goods purchased by the defendants. The trial Court recorded a finding that the amount of Rs. 27,170/- representing to the price of the goods. Even after holding that the jaggery was

not purchased by the defendant, a presumption of passing of consideration for the cheques issued by the defendants would continue. That is what is precisely laid down in both the aforesaid cases, one by the Bombay High Court and other by the Apex Court.

10. Shri Jaiswal, the learned counsel for the respondents placing reliance on the ruling of the Supreme Court on which reliance has been placed by the appellant contended that where the parties have joined issue and have led evidence, the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic. There is no dispute about this preposition. In the present case, it would however be seen that there is absolutely no evidence adduced by the defendants to show that no consideration is passed. On the contrary, the defendants' stand was that the cheques were issued under coercion and misrepresentation and on another occasion it was stated that the cheques were given by way of security for the loan transaction. It was also stated that the plaintiff was moneylender. The defendants also stated that they had paid all the amounts due from them and that the cheques issued by them were not returned. There was no evidence of coercion and misrepresentation. The defendants had admitted that the cheques were issued by way of security. In these circumstances, it could not be said that initial burden of rebutting the presumption under the provisions of Section 118 of the Negotiable Instruments Act was discharged. The trial Court had held that the cheques were issued on account of jaggery purchased by the defendants. Even if, this finding is negated, the presumption under the provisions of Section 118 of the Act continued to exist as there was no material to hold that this presumption had been rebutted by the defendants showing preponderance of probabilities in their favour. Thus, even after examining the evidence on record as desired by the learned counsel for the respondent, it cannot be said that the presumption about existence of the consideration stood rebutted.

11. In the result, the appeal is allowed. The judgment and order dated 29-9-1990 passed by the first appellate Court is set aside and the judgment and decree of the trial Court dated 19-9-1987 is restored. The respondents shall pay the cost to the appellant throughout and shall bear their own.