

(2018) 07 BOM CK 0032

In the Bombay High Court

Case No : Criminal Appeal No.429 Of 2018. ,Criminal Application (APPA) No.346 Of 2017

?Sanjay Yalhavraoji Makode

APPELLANT

Vs

Shri. Suhas Prakashji Dhote

RESPONDENT

Date of Decision : 10-07-2018

Acts Referred:

Negotiable Instruments Act, 1881 — Section 118, 118(a), 138, 139
Indian Evidence Act, 1872 — Section 114

Citation : (2018) 07 BOM CK 0032

Hon'ble Judges : MANISH PITALE, J

Bench : Single Bench

Advocate : R.D. Raskar, V.N. Morande

Final Decision : Dismissed

Judgement

1. The applicant herein is the original complainant who has challenged impugned judgment and order dated 28.02.2017 passed by the Court of Judicial

Magistrate First Class, Warud (trial Court) in Summary Criminal Case No.114/2012, whereby the trial Court acquitted the respondent for offence

punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. Having heard the counsel for the applicant, sufficient ground is made out for grant of leave. Hence leave granted to the applicant to challenge the

said impugned judgment and order.

Criminal Appeal No.429/2018.

1.The question that arises for consideration in this appeal is whether presumption under Section 139 read with Section 118 of the aforesaid Act would

operate against the respondent (original accused) for an alleged offence of dishonour of cheque under Section 138 of the said Act and whether the

respondent had rebutted such presumption when he failed to file reply to the complaint of the appellant and he did not adduce any direct evidence in order to support his defence. It needs to be examined whether the trial Court in such circumstances was justified in acquitting the respondent in the present case.

2. The facts in the present case are in a narrow compass. The appellant (original complainant) and the respondent (original accused) are related to

each other having cordial relations. It was the case of the appellant that the respondent had approached him for a hand loan of Rs.2 lakhs and that the

appellant had given him cash amount of Rs.2 lakhs. According to the appellant, in order to repay the said loan, the respondent had issued two cheques,

but when they were presented for encashment, they were returned by the Bank with the remarks "funds insufficient".

3. The appellant issued notice to the respondent in respect of the dishonour of the cheques, but the respondent failed to respond to the same and,

therefore, the appellant was constrained to file complaint under the provisions of the said Act before the trial Court.

4. In the trial Court, the appellant led oral and documentary evidence while the respondent failed to lead any evidence in support of his stand.

Â Therefore, when the complaint came up for consideration before the trial Court, it was only the complaint of the complainant, documents filed

therewith and the oral evidence of the appellant that was available on record. It was the case of the respondent in arguments before the trial Court

that the appellant had failed to give necessary details of when and how the said amount of hand loan was given to the respondent and that there was

ample material on record in the form of cross-examination of the appellant, indicating that the cheque in question had been issued in the context of

another transaction towards security.

5. The trial Court considered the entire material on record and by the impugned judgment and order, it was held that although presumption in favour of

the appellant did operate under Sections 118 and 139 of the said Act, there was sufficient material on record to demonstrate that the defence of the

respondent was probable. On this basis, the trial Court acquitted the respondent.

6. Mrs. R.D. Raskar, learned counsel appearing on behalf of the appellant, submitted that the trial Court had committed an error in holding that the

defence of the respondent was probable because the respondent had failed to send reply to the statutory notice, he had failed to file any submissions

or response to the complaint before the trial Court and that he had not entered the witness box in order to adduce evidence in support of his defence.

It was submitted that when the respondent had failed to even respond to the statutory notice and no evidence was adduced on his behalf to support his

stand, the presumption under Sections 118 and 139 of the aforesaid Act operated in full force against the respondent. In the absence of any material

placed on record by the respondent to rebut such presumption, the trial Court could not have acquitted the respondent. It was submitted that the

contents of the complaint of the appellant ought to have been accepted by the trial Court and the respondent deserved to be convicted.

7. Per contra, Mr. V.N. Morande, learned counsel appearing on behalf of the respondent, submitted that even if there was presumption that cheque

was issued for discharge of legal debt or liability, once the signature on the cheque was admitted, the appellant (complainant) was still required to

prove foundational facts of his case. It was further submitted that when the appellant failed to prove such foundational facts regarding hand loan

advanced to the respondent, the presumption under the said Act would not be triggered. It was further submitted that even if presumption was to

operate against the respondent, he was entitled to rebut the same on the basis of material brought on record by way of cross-examination of the

appellant. It was submitted that in order to rebut the presumption, it was not necessary for the respondent to enter the witness box and that he could

very well rebut the presumption by discrediting the appellant in cross-examination. Both parties placed reliance on various judgments pertaining to the

said question.

8. Before referring to the evidence and material on record in the present case, in order to examine whether the appellant was justified in contending

that presumption operated against the respondent, which remained unrebutted, it would be necessary to refer to few precedents which would help in

answering the said question.

9. In the case of M.S. Narayana Menon .vs. State of Kerala â?" (2006) 6 Supreme Court Cases 39, the Hon'ble Supreme Court has referred to the

presumption under Sections 118 and 139 of the said Act and it has been held

that the presumption is rebuttable. In that context, the Hon'ble Supreme Court in the said judgment has held as follows:-

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 non-existence 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* [(1999) 3 SCC 35] 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 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 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.

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.

33. Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another.â??

10. In the case of Kumar Exports .vs. Sharma Carpets â?" (2009) 2 Supreme Court Cases 513, in the context of presumption against the accused

under the said Act, the Hon'ble Supreme Court has held as follows:-

â??20. The accused in a trial under Section 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 nonexistence 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.

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.

11. Thereafter, a three Judge Bench of the Hon'ble Supreme Court in the case of Rangappa .vs. Sri Mohan â?" (2010) 11 Supreme Court Cases 441 , in the context of Section 139 of the said Act, has held as follows:-

â??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 accused/defendant 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.â??

12. In this context, the trial Court has taken note of judgment of the Hon'ble Supreme Court in the case of John K. Abraham .vs. Simon C. Abraham and another â?" (2014) 2 Supreme Court Cases 236 wherein at para 9, the Hon'ble Supreme Court has held as follows:-

â??9. Â It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant.â??

13. The position of law that emerges from the aforesaid precedents is that although presumption does arise against the accused in such cases under Sections 118 and 139 of the said Act, the presumption is rebuttable on the touchstone of preponderance of probabilities. The accused is also entitled to show that the foundational facts on which such presumption arises have not been proved by the complainant and further that the accused can rebut a presumption under the said provisions, either by adducing direct evidence in support of his stand or by discrediting the complainant in cross-examination to demonstrate that his defence was probable. On the accused demonstrating the real facts of the matter either by direct evidence or by showing that the evidence and material placed on record by the complainant himself was not believable and that it stood discredited, the presumption would cease to operate against the accused.

14. David Kaiser way back in the year 1955 in an article titled â??Presumptions of Law and Factâ? published in Marquette Law Review quoted

majority opinion of the Missouri Court in the case of Machowik .vs. Kansas City - 196 Mo.550 (1906), which reads as follows:-

“Presumptions are the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts”.

15. As per the law laid down by the Hon'ble Supreme Court the presumption under Sections 118 and 139 of the said Act is rebuttable. The accused can throw the sunshine of actual facts and rebut the presumption that may arise. This can be done either by adducing direct evidence or on the basis of material placed on record by the complainant, including discrediting the complainant in cross-examination, thereby raising a probable defence.

16. Applying the said position of law to the facts of the present case, it is found that the respondent (accused) failed to reply to the statutory notice sent by the appellant (complainant), he failed to file any reply or submissions in response to the complaint filed before the trial Court and he did not enter the witness box. Therefore, there was no direct evidence led by him to support his stand and he merely relied upon the evidence of the complainant as it emerged in crossexamination.

17. In the present case, it was not disputed that the signatures on the cheques were that of the respondent. It was argued that the cross-examination of the appellant demonstrated that he had failed to support his case of having advanced cash hand loan to the respondent. It was further contended that the crossexamination also demonstrated that the cheques were issued for some other transaction and not for repayment of hand loan as claimed by the appellant.

18. A perusal of the evidence of the appellant shows that although in chief examination the appellant has reiterated the contents of his complaint to the effect that he had advanced cash hand loan of Rs.2 lakhs to the respondent, but in cross-examination, the appellant has conceded that he was not aware about the details of when and in what manner he had given the cash hand loan amount to the respondent. He claimed to have withdrawn the cash amount from his bank accounts and that he was holding saving bank accounts in State Bank of India, Warud Branch and District Central Co-operative Bank, Warud Branch, but he stated that he was not able to produce the account statements of his bank accounts. Thus, the appellant failed to produce any material in support of his claim that he had indeed advanced cash

hand loan of Rs.2 lakhs to the respondent. This was a foundational fact in the present case because according to the appellant the cheques in question had been issued by the respondent in order to repay the said loan amount. The appellant failed to discharge the initial burden to show that he had required funds for advancing money to the respondent.

19. In further cross-examination, the appellant admitted that although he had PAN number, he was not submitting income tax returns. He further admitted that he did maintain accounts but there was no entry in his accounts about having given loan of Rs.2,00,000/- to the respondent. The appellant admitted that he had invested certain amounts in stocks and shares with one Anand Rathi, Stocks and Broker and that he had received certain amounts from the said Anand Rathi. There was a suggestion given to the appellant that the respondent had given the said cheques towards security till the time accounts with the said Anand Rathi were settled, but he denied the same. The appellant also denied the suggestion that he was doing transactions with Anand Rathi through the respondent.

20. A perusal of the aforesaid statements made in cross-examination by the appellant shows that he has completely failed to prove the foundational fact of having advanced loan to the respondent. Therefore, his claim that the cheques in question were issued by the respondent for repayment of the loan could not be accepted. The failure on the part of the appellant to produce his account statement and absence of entry in accounts maintained by him regarding loan advanced to the respondent, does show that there was no material to support the basic facts on which the entire case of the appellant was based. Apart from this, suggestions given in the cross-examination and statements made in response thereto by the appellant, show that there were other transactions in respect of which there was exchange of moneys by the appellant. Applying the position of law as it emerges from the above quoted precedents to the facts of the present case, it becomes clear that sufficient material was available on record whereby the defence of the respondent became probable. In such a situation, the presumption under the provisions of the said Act ceased to operate and the burden fell upon the appellant to prove his case, which he failed to do by placing on record cogent evidence.

21. As the foundational facts were not established by the appellant in the present

case, it cannot be said that the trial Court committed any error in holding that the respondent deserved to be acquitted. The appellant's case stood completely discredited in cross-examination and, therefore, he could not succeed before the trial Court riding on the presumption said to operate in his favour under Sections 118 and 139 of the aforesaid Act. In the impugned judgment and order, the trial Court has taken into consideration the entire material on record and by applying the law in respect of presumptions under the said Act, has taken a possible view of the matter. It is trite law that when two views are possible, the one that accrues in favour of the accused (respondent in the present case), must be adopted.

22. In the light of the above, there is no merit in the present appeal and it stands dismissed. Consequently, the impugned judgment and order passed by the trial Court stands confirmed.