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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.487 OF 2001.

Sachin Food Processor,	]
registered partnership firm	]
having its registered office	] .. <u>Appellant</u>
“SAROD” Nashik Road through	] (Original
Partner Shri. Sharad Vinayak Chandorkar	] Complainant)
age: 64 Occn.Business,	]
r/o Sarod, Nashik Pune road	]
Nashik road	]

-VS-

1. Shri.Sanjay T. Pathak (Kulkarni)	]
age: adult, Occupation: business	]
r/o Indraprasth Colony	] .. <u>Respondents</u>
in front of Icchamani Ganpati	](Respondent No.1
Temple, Upnagar (Nashik)	] Original
	] accused)
2. State of Maharashtra	]

Shri. S. M. Oak, advocate for the appellant.
Smt. Varsha Palav a/w Mr. Ajinkya Palav and Ms. Rekha Musale, for the respondent.
Smt. V.R. Bhosale, APP for the respondent State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 4TH FEBRUARY 2016.

ORAL JUDGMENT: [Per: Dr. Shalini Phansalkar-Joshi, J.]

1. This appeal is preferred by original complainant, challenging the acquittal of respondent-accused, for the offence punishable under Section 138 of the Negotiable Instruments Act, as recorded by the joint Judicial Magistrate First Class, Nashik, vide his judgment and order dated 17th April, 2001, in Summary Case No.1469 of 1998.

2. Brief facts of the appeal can be stated as follows :-

Appellant herein is a registered partnership firm. It has filed private criminal case against respondent through its partner Shri.Sharad Chandorkar, for the offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the, “N.I. Act”), alleging inter alia that the respondent has from time to time since 10th June, 1997, started purchasing broiler chicken on cash basis from the appellant firm. Initially respondent used to purchase the broiler chicken on part payment. Appellant has maintained accounts of the transactions that took place between the appellant and respondent. It was specifically alleged in the complaint that respondent has purchased broiler chicken amounting to Rs.2,69,000/- by

various bills dated 16.5.1998, 17.5.1998, 20.6.1998 and on 21.6.1998. Towards discharge of his liability of Rs.2,69,000/-, respondent issued cheque of Rs.2 lacs and assured to pay balance amount of Rs.69,000/- by the end of August, 1998. However, when the said cheque was presented to bank, it came to be dishonoured. Hence after issuing demand notice, appellant has filed this case before the trial Court.

3. The trial Court recorded plea of respondent vide Exh.23 to which he claimed not guilty. In support of its case, the Partner of appellant firm, Sharad Chandorkar examined himself and other two witnesses from the bank to prove dishonour of the cheque. On appreciation of this evidence, trial Court was pleased to hold that the appellant has failed to prove that the cheque was issued towards discharge of existing legal liability and accordingly the trial Court acquitted the respondent.

4. This judgment of the trial Court is challenged in the appeal, by learned counsel for the appellant, by submitting that Section 118(a) and Section 139 of the N.I.Act, clearly lay down presumption in favour of holder of cheque that cheque was issued towards discharge of existing legal liability. Hence it was incumbent on the respondent accused to rebut the

said presumption by leading his own evidence. Respondent, has, however, not examined himself nor led any other rebuttal evidence. Hence the said presumption has remained unrebutted. Therefore, according to learned counsel for appellant, the trial Court has committed an error apparent on the face of record, by acquitting the respondent, hence the impugned judgment and order of the trial Court is required to be quashed and set aside.

5. Per contra, learned counsel for respondent has submitted that respondent can rebut presumption under Section 118(a) and Section 139 of the N.I. Act even through the cross examination of complainant and other material on record; for that purpose it is not necessary for him to enter into the witness box or to lead any defence evidence. As per learned counsel for respondent, cross examination of complainant clearly reveals that complainant himself is not sure about the dates of the transaction and the corroborating documentary evidence to prove the transactions in question is also not produced on record, though according to appellant, he was having such evidence. Hence as per learned counsel for respondent, the trial Court has rightly concluded that in the absence of sufficient evidence on record proving the existence of any legal liability, respondent cannot be held

guilty.

6. Thus, the only disputed question raised for consideration in this appeal is whether the cheque was issued towards discharge of existing legal liability?.

7. On this issue, one can make useful reference to two judgments of Apex Court in i) K. Bhaskaran -vs- Sankaran Vaidhyan Balan and anr 1999 (4) ALL MR. 452 and ii) Goaplast (P) Ltd -vs- Chico Ursula D'souza and anr, (2003) 3 SCC 232 relied upon by learned counsel for appellant. In both these judgments, the Apex Court has considered the effect of presumption as laid down under Sections 118(a) and 139 of the N.I. Act. In K. Bhaskaran -vs- Sankaran Vaidhan Balan and anr, Apex Court has held in para No.9 that,

“If the signature on the cheque is admitted to be that of the accused, presumption envisaged in Section 118(a) 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 is on the accused to rebut the aforesaid presumption”.

8. In *Goaplast (P) Ltd. -vs- CHICO Ursula D'souza and anr*, the Apex Court has further held that in view of Section 139 of N.I.Act, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing the evidence and the burden of proof is on the person who wants to rebut the presumption.

9. How this presumption under Section 118(a) and 139 of N.I.Act, can be rebutted and what can be the standard of proof required for rebuttal is considered by the Apex Court, in *Vijay -vs- Laxman and anr 2013 (2) JT. 562*; relied upon by learned counsel for respondent. The Apex Court, has in this authority has affirmed that the presumption as contemplated under Section 118(a) and 139 of the N. I. Act is rebuttable presumption as the very provisions contain the expression, “*unless the contrary is proved*”. These words are the riders imposed by the Legislature under the aforesaid provision of Section 118 (a) and 139 of the N.I.Act as the Legislature chooses to provide adequate safeguards in the Act to protect the honest drawers from unnecessary harassment.

10. In this authority, the Apex Court then also relied upon its own

decision in M.S. Narayana Menon -vs- State of Kerala (2006) 6 SCC 39, wherein it was held that the presumption under Section 118(a) and 139 of the N.I. Act, is rebuttable presumption and it can be rebutted by accused by leading his own evidence or even through the cross -examination of complainant and his witnesses. It was further held that the standard of proof required for such rebuttal is preponderance of probabilities and not proof beyond reasonable doubt. Thus, so long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. For rebutting such presumption what is required is to raise the probable defence. For that purpose even the evidence adduced on behalf of complainant would be relied upon. The rebuttal does not have to be conclusively established, but such evidence may be adduced either by entering into witness box or through cross examination of complainant and his witnesses or even from the material produced on record. It is for the Court to believe the defence to exist or to consider its existence to be reasonably probable having regard to the standard of proof and reasonability of prudent man.

11. Thus, the law is now fairly well settled that presumption to be

drawn under Section 118(a) and Section 139 of the N.I.Act, can be rebutted not only through the direct evidence of the accused, but also from the material on record and also by reference to the circumstances upon which the accused relies. The standard of proof is essentially that of preponderance of probabilities and not proof beyond reasonable doubt.

12. In the backdrop of this legal position, if the evidence adduced on record in this case is scanned, it can be seen that in cross examination, the appellant has given several admissions which are proving fatal to his case as they have the potential to dislodge the presumption under Section 118(a) and 139 of the N.I. Act.. According to complaint lodged by appellant, respondent purchased broiler chicken amounting to Rs.2,69,000/- by various bills dated 16.5.1998, 17.5.1998, 20.6.1998 and 21.6.1998. However, in his cross examination, he has admitted that he has not supplied broiler chicken to respondent on 16th May, 1998 and 17th May, 1998. He has further admitted that dates of supply of broiler chicken mentioned in the complaint are incorrect dates. However, said fact is not corrected thereafter even when those dates are also appearing in the demand notice. In his verification to the complaint, he has not stated that respondent gave cheque

of Rs.2 lacs towards payment of purchase of broiler chicken worth Rs.2,69,000/-. In his cross examination, he has further admitted that he has not supplied goods to respondent on 15.6.1998 also. According to him, he has not placed any document about demand of broiler chicken by the respondent from him. He has also not produced any document on record to show receipt of broiler chicken by the respondents, on the dates mentioned by him. He has further admitted that he has not placed any document to show that he had supplied broiler chicken of Rs.2,69,000/- to the respondent. In his complaint, he has stated that he has maintained accounts of the transactions. However, those accounts are not produced on record. Further he has admitted in his cross examination that his partnership firm issues receipt of the payment received from the customer by cash or by cheque. However, no such provisional receipt is issued to the respondent after receiving cheque . He has further admitted that his partnership firm issues delivery challan at the time of supply of goods to the customers. However, the copies of delivery challans of the goods supplied to respondent are also not produced on record. Even the office copies of bills issued to the respondent are also not produced on record. Thus, there is no

iota of evidence to prove the alleged transaction of purchase of broiler chicken by respondent from the shop of appellant.

13. When the respondent was very much challenging said transaction through the cross examination of appellant, it was incumbent on the appellant to produce such evidence especially when it was available with the appellant. In the light of these facts, trial Court was constrained to uphold that when on the dates mentioned in the complaint admittedly broiler chicken was not supplied to the respondent and when no documentary evidence is produced by the appellant to prove that on any other dates broiler chicken was supplied to the respondent and that too worth Rs.2,69,000/-, it becomes fatal to the case of appellant as through the cross examination of appellant, respondent has succeeded in rebutting the presumption which was available to the appellant under Sections 118(a) and 139 of the N.I.Act.

14. In my considered opinion, the view taken by the trial Court, on appreciation of entire evidence on record, therefore, is a probable and plausible view. Hence, while this Court is dealing with an appeal against acquittal, this Court cannot substitute its own view in place of the view

taken by the trial Court. The view taken by the trial Court, therefore, needs to be confirmed. Hence appeal stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

C E R T I F I C A T E

Certified to be true and correct copy of the
original signed judgment.