IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APPA) NO.330 OF 2017

(Ashok s/o Shrikrushna Gabhane Vs. Swapnil s/o Shyammurai Naidu)

Office Notes, Office Memoramda of Coram, appearances, Court's orders of directions and Registrar’s Orders.	*Court's or Judge's orders.*

Shri C.F. Bhagwani, Advocate for the Applicant.
Shri M.S. Wakil, Advocate for Respondent.

CORAM: ROHIT B. DEO, J.
DATE: 13th MARCH, 2018.

Heard.

2. This is an application under Section 378 (4) of the Criminal Procedure Code, 1973 seeking leave to appeal to challenge the judgment and order dated 13-2-2017 rendered by the Judicial Magistrate First Class, Court 25, Nagpur in S.C.C| 19180/2015 by and under which, the respondent-accused is acquitted of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (“Act” for short).

3. The gist of the complaint instituted under Section 138 of the Act is that the accused borrowed Rs. 15,000/- on 15-5-2015 and then again Rs. 15,000/- on 27-5-2015 as

hand loan. The accused issued cheque dated 7-7-2015 for Rs. 9535/- towards part repayment of the said loan. The cheque was dishonored, the accused did not comply with the statutory notice and hence, the complaint.

4. The statutory notice, which is placed on record by the respondent makes no reference to the complainant having advanced a hand loan to the accused. The only statement in paragraph-1 of the statutory notice is that since the accused was indebted to the complainant he issued cheque dated 7-7-2015 for Rs. 9,535/-. Concededly, there is absolutely no documentary evidence placed on record in support of the averment in the complaint that an amount of Rs. 30, 000/- was extended as hand loan.

5. The learned Magistrate, on holistic appreciation of the evidence on record, has held that the complainant failed to prove that disputed cheque was issued to discharge legally enforcible debt or liability.

6. The learned Counsel for the applicant is relying

on the judgment of the Hon'ble Apex Court in ***Rangappa v/s Shri Mohan*** reported in (2010) 11 SCC 441 and in particular the enunciation of law that once the signature on the cheque is not disputed the statutory presumption under Section 139 of the Act is activated and the burden is on the accused to prove that the defence is probable. Since the learned Counsel is relying on the judgment supra, it would be apposite to take note of the observations of the Hon'ble Apex Court in paragraph-28 of the said judgment.

> *"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".*

7. The enunciation of law in Rangappa v/s Shri

Mohan is that the limited burden on the accused, to rebut the statutory presumption under Section 139 of Negotiable Instrument, is to raise a probable defence which creates doubts about the existence of legally enforcible debt or liability. The accused is not obligated to step into the witness box or lead direct evidence. The accused can rely on the material placed on record by the complainant and axiomatically the material which is extracted in the cross-examination of the complainant and his witnesses. In Rangappa's case the Hon'ble Apex Court has emphasised that the standard of proof for discharging the burden on the accused is that of preponderance of probabilities.

8. The law is too well settled to warrant a lengthy discussion. The burden on the accused to rebut the statutory presumption under Section 139 of the Act is not absolute and suffice it if the accused creates doubt about the case of complainant and the existence of the debt or liability. In the case at hand, the accused is relying on the infirmities in the case of the complainant and the material extracted in the cross-examination of the complainant to create a doubt

about the existence of legally enforcible debt or liability. Firstly, there is a absolutely no evidence on record to show that the complainant extended hand loan of Rs. 30,000/- to the accused. The statutory notice makes no reference to hand loan. Indeed, the statutory notice makes no reference to debt of Rs. 30,000/-. All that is stated in the statutory notice is that the accused is indebted to the complainant. There is absolutely no explanation on record as to why, if really the debt or liability was Rs. 30,000/- the accused would issue and the complainant would accept cheque for odd amount of Rs. 9,535/-. The emphasis by the learned Counsel Shri Bhagwani on a stray question put to the complainant in the cross-examination that the amount of Rs. 30,000/- was advanced in cash, is misconceived. It is difficult to speculate as to what was the question. In every probability what the learned counsel for the accused was wanting to bring on record is that the amount allegedly advanced as hand loan was advanced in cash. Be that as it may, the statement coming on record in the cross-examination does not take the case of the complainant any further.

9. The defence of the accused as is discernible from the response to question 15 of the statement under Section 313 of Criminal Procedure Code is that the disputed cheque was given to the complainant to secure the amount due and payable by the client of the accused towards the payment of insurance premium. It is not in dispute that the accused was a subordinate of the complainant. The complainant was working as Manager of DHFL, which is *inter-alia* engaged in the business of insurance. The accused was given a target is the defence. The disputed cheque was given by the accused to his superior to secure the payment of insurance premium of policy solicited by the accused, is defence. On holistic appreciation of the evidence on record, the defence is more than probabilised on the touchstone of preponderance of probabilities on the anvil of the law enunciated by the Hon'ble Apex Court in *Rangappa V. Shri Mohan.*

10. The view taken by the learned Magistrate is a possible view and no perversity either in approach or appreciation of evidence is demonstrated. No compelling

case is made out to grant leave to appeal under Section 378 (4) of the Criminal Procedure Code.

11. The application is rejected.

RKN JUDGE