

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.69 OF 2014

Mr. Ivan Singh, major, carrying on business
in the name of the Sole proprietary concern
M/s Warrior Minerals,
at Office No.S-6, Ground Floor,
the Grand Landscape Building,
near Mahalaxmi Temple, Panaji, Goa.

..... Appellant.

Versus

Shri Shivaji Tukaram Naik,
son of Tukaram Naik, aged 40 years,
occupation business,
resident of House No.326/1,
Ghongri, Navelim, Sankhali, Goa.

.....Respondent.

Shri S.M. Singbal, Advocate for the Appellant.
Shri Gaurish Agni with Shri T. Gawas, Advocate for the Respondent.

Coram:- PRITHVIRAJ K. CHAVAN, J.

Reserved on :- 30th July, 2019

Pronounced on :- 16th/19th August, 2019

JUDGMENT :

This is an appeal by the original complainant against an order of acquittal of respondent dated 25.08.2014 passed by JMFC, Panaji in Criminal Case No.85/OA/NI/2013/C.

2. Facts in brief can be summarised thus:

The appellant and respondent are friends. The respondent

was desirous of expanding his business of transportation by purchasing some trucks and, therefore, requested the appellant to help him financially.

3. The appellant therefore advanced a sum of ₹23,00,000/- (Rupees Twenty Three Lakhs only) to the respondent, interest free, due to their friendly relations. The amount of ₹23,00,000/- (Rupees Twenty Three Lakhs only) was advanced to the respondent by account payee cheques. The details are as under:

(i) Cheque No.960355 dated 03.02.2010 for ₹5,00,000/-,

(ii) Cheque No.960450 dated 19.03.2010 for ₹5,00,000/-,

(iii) Cheque No.960588 dated 02.06.2010 for ₹10,00,000/-,

(iv) Cheque No.181572 dated 21.09.2010 for ₹3,00,000/-.

Cheques herein above were drawn on HDFC Bank, Panaji.

4. As agreed between the parties, respondent had issued a cheque in the sum of ₹1,70,000/- (Rupees One Lakh Seventy Thousand only) dated 24.01.2013 drawn on Goa State Co-operative Bank, Ambegal Pale, Goa Branch towards part repayment of the loan. On presentation, it was returned dishonoured with a memorandum

dated 25.01.2013 with a remark “funds insufficient”.

5. The appellant therefore issued a notice dated 31.01.2013 calling upon the respondent to pay the amount of ₹1,70,000/- (Rupees One Lakh Seventy Thousand only) within 15 days from the receipt of notice. Despite due service, respondent no.1 failed to make the payment. He even did not reply to the said notice.

6. After filing the complaint under Section 138 of the Negotiable Instruments Act in the Court of JMFC, the complainant examined himself at Exhibit 21. The cheque in question is proved at Exhibit 22. The cheque return memo along with the advice of the Bank is proved at Exhibit 23 colly. The office copy of the demand notice dated 31.01.2013 and the postal receipts dated 01.02.2013 are proved at Exhibit 24 colly. The acknowledgment due card is proved at Exhibit 12. The statement of accounts of the HDFC Bank is proved at Exhibit 28.

7. The learned JMFC after recording the evidence of the complainant and after hearing respective parties, by the impugned

judgment acquitted the respondent of the offence punishable under Section 138 of the Negotiable Instruments Act. The defence of the respondent during the trial was a simple denial of commission of the offence alleged. The respondent did not step into the witness box.

8. The Trial Court, inter alia, held that an agreement dated 22.01.2010 does not indicate any reasonable nexus between the agreement and the cheque in question. It is further held that the agreement does not spell out as regards the loan of ₹23,00,000/- (Rupees Twenty Three Lakhs only).

9. At the outset, Shri S.M. Singbal, the learned Counsel for the appellant contends that an interest free loan was advanced to the respondent to expand his business in the light of the fact that they were on friendly terms. Respondent is a transport contractor. Both were serving for one Shri Timblo, a mine owner. The appellant was rendering his services to Shri Timblo for the purpose of storage of the minerals whereas the respondent was providing services as a transporter.

10. The learned Counsel for the respondent Shri Agni submits that there are no disputed questions of facts. However, he admits that the respondent's case is hanging on a very thin thread. According to the learned Counsel for the respondent, the appellant has failed to discharge the initial burden as he has not produced all the accounts of transaction. The appellant has not produced income tax returns. It is contended that the respondent had already repaid the amount between February to September, 2010 as well as in the year 2013 by issuing cheques. It is further contended by Shri Agni that twelve blank undated cheques were obtained by the appellant from him towards security of the said amount. The appellant has failed to establish a debt existing on the date of the filing of the complaint and, therefore, it is submitted that the respondent is not at all liable to repay anything to the appellant.

11. Shri Singbal, the learned Counsel for the appellant, on the other hand, took me through the evidence of the complainant vis-a-vis the bank statement and the answers given by the respondent to the questions recorded during his statement under Section 313 of the Code of Criminal Procedure. The learned Counsel assailed the judgment of

the Trial Court by stating it to be perverse which has been passed de hors the evidence on record. It is based on surmises and conjectures. Shri Singbal further submits that it is not the case of the respondent that it is a time barred debt. There is no evidence of repayment or adjustment of any amount adduced by the respondent. The respondent even failed to tender log book of the trucks in support of his contention. The learned respective Counsel placed reliance on a judgment of the Supreme Court in case of ***Sampelly Satyanarayana Rao V/s. Indian Renewable Energy Development Agency Limited***¹.

12. As already stated hereinabove, there is no dispute on question of facts. The execution of loan agreement Exh. 21 dated 31.12.2010 and issuance of a cheque bearing registration no.021721 dated 24.1.2013 for ₹1,70,000/-(Rupees one lakh seventy thousand only) at Exh. 22(c) and the cheque Return Memo of the Goa State Co-operative Bank Ltd Exh.23 dated 25.1.2013 are undisputed.

13. Similarly, there is no dispute of issuance of statutory notice dated 31.1.2013 alongwith postal receipt dated 1.12.2013 and acknowledgment dated 4.2.2013.

¹ (2016) 10 SCC 458

14. In fact, the respondent's candid admissions, which are vital in nature, strengthens the claim of the appellant rather than setting up a plausible and probable defence by the respondent. It has been elicited in the cross of the appellant that as per loan agreement Exh. 21, the respondent had borrowed ₹42,00,000/- (Rupees Forty two lakhs only) from him. However, as per paragraph 3 of the affidavit in evidence of the appellant he had advanced ₹23,00,000/- (Rupees twenty three lakhs only) to the respondent. A specific question was asked to the appellant as to which of the two versions are correct in the sense what has been incorporated in Exh.21 about ₹42,00,000/- (Rupees forty two lakhs only) or what has been stated in paragraph 3 of the affidavit which mentions about the advancement of ₹23,00,000/-(Rupees twenty three lakhs only). The appellant answered that both the statements are correct which are not contrary because after specific period he could not produce the cheque to the bank based on the assurance of the respondent that he will repay the amount.

15. Cross examination further reveals that as per loan

agreement Exh.21, last date of payment of instalment for the money borrowed by the respondent was 10.11.2014. Cross further reveals that the appellant had hired two dumping plots at Navelim Bicholim and at Maina Bicholim. Indisputably, the respondent is a contractor with Timblo and was paid by Timblo. The role of the appellant was to sublease his plots to the exporters who stocked their iron ore on his plots and thereafter export the same.

16. Though the appellant had stated that the respondent had replied his demand notice, it was incumbent on the part of the respondent to produce the same in order to substantiate his contention that he had repaid the entire amount and there was nothing due against him. Respondent could have, otherwise, rebutted the presumption which is in favour of the appellant.

17. It is further brought in the cross examination of the appellant that a loan of ₹ 42,00,000/- (Rupees forty two lakhs only) was sanctioned for the purpose of buying trucks for the respondent which was in addition to an amount of ₹23,00,000/-(Rupees twenty three lakhs only). He denied the suggestion that the trucks were to be

used by the respondent for the appellant's mining work. Admittedly, there is no separate agreement between the parties in respect of loan of ₹23,00,000/- (Rupees twenty three lakhs only), however, the appellant has furnished details of the cheques issued by the respondent which are as under:-

Cheque Number	Amount
21721	170000
21722	170000
21723	160000
63950	125000
63947	125000
63949	125000
62345	300000
62340	200000
62341	200000
62342	200000
62343	200000
62344	200000

18. The appellant has also produced his statement of account Exh.28 issued by HDFC, Bank. Bank statement depicts following details:-

- i An amount of ₹5,00,000/- (Rupees five lakh only) was credited in the account of the

respondent on 3.2.2010.

- ii. Thereafter an amount of ₹5,00,000/- (Rupees five lakhs only) was credited in his account on 20.3.2010.
- iii. The next entry is dated 3.6.2010 indicating credit of ₹10,00,000/- in the account of the respondent.
- iv. Entry dated 22.9.2010 depicts a credit of ₹3,00,000/- (Rupees three lakhs only) in the account of respondent.

19. Thus, there is no scope to infer that the appellant had not credited an amount of ₹23,00,000/- (Rupees twenty three lakhs only) in the account of respondent. There is no reason to negate the documentary evidence in the form of bank statement. Nothing has been brought on record or shown by the respondent in rebuttal thereof.

20. The appellant had denied the suggestion in the cross that the cheques were taken as a security and not towards repayment of loan. He also denied that the cheques were misused by the appellant and so also the amount in figures and words as well as dates on the

cheques were put by the appellant's office.

21. During his examination under Section 313 of Cr.P.C., the respondent states that he had repaid ₹23,00,000/-(Rupees twenty three lakhs only) to the appellant in the year 2009-10, however this answer, in itself, is not sufficient to rebut the presumption under Section 139 of the Negotiable Instruments Act. The respondent also admitted that he had neither replied the statutory notice issued by the appellant nor complied with the same. Merely stating that he did not owe any amount to the appellant would not be sufficient in the light of the concrete and acceptable evidence adduced by the appellant in the trial Court.

22. In the case of *Sanjay Mishra Vs Kanisha Kapoor*² It is held that merely because the amount advanced is not shown in the Income Tax Returns, in every case, one cannot jump to say that presumption under Section 139 of the Act stands rebutted.

23. The appellant herein has established that there was a legally enforceable debt and cheque was drawn from the account of

² 2009(5) Bom. C.R.464

bank for discharge in whole or in part of such debt which presupposes a legally enforceable debt. The appellant has also established that the cheque was returned due to “Insufficiency of funds.” As held by the Hon'ble Supreme Court in the case of ***Krishna Janardhan Bhat Vs. Dattatraya G. Hegde***³ that as per Section 271-D of the Income Tax Act, if a person takes or accepts any loan or deposit in contravention of provisions of Section 269-SS, he shall be liable to pay, by way of penalty, a sum equal to an amount of loan or deposit so taken or accepted. Thus, only on that basis it cannot be said that the presumption in favour of the appellant has been rebutted.

24. Here, the appellant has succeeded in showing lending of amount to the respondent and, therefore, existence of legally enforceable debt cannot be denied. Respective learned Counsel placed reliance on a judgment of Supreme Court in case of ***Sampelly Satyanarayana Rao Vs Indian Renewable Energy Development Agency Limited*** (supra). Paragraphs 11, 12 and 17 of the judgment read thus:-

11. The judgment in Indus Airways [(2014) 12 SCC 539] is clearly distinguishable. As already noted, it was held therein that liability arising

³ 2008(2) bom. C.R(Cri.) 505(S.C.)

out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also described as “security” in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

12. *The crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.*

17. In Rangappa Vs. Sr. Mohan[(2010)11 SCC 441], this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises. It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment.”

25. The Hon'ble Supreme Court has held that whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being any subsisting debt or liability, once loan amount was disbursed and as per agreement, instalments had fallen due on date of issuance of cheque, dishonour of such cheque would fall under Section 138 of the Negotiable Instruments Act. Such issuance of cheque, undoubtedly represents outstanding liability. The judgment is mainly on the aspect of exercise of power under Section 482 of Cr.P.C. for quashment of proceedings. Incidentally, the Hon'ble Supreme Court has also dealt with the scope of Section 138 of the Negotiable Instruments Act. The Hon'ble Supreme Court approved the views of the different High Courts as noted therein and also deduced underlying principles which

were be discerned from the discussion of the said cases.

26. The learned Counsel for the respondent has pressed into service a judgment of the Hon'ble Supreme Court in case of ***M.S. Narayana Menon Alias Mani Vs State of Kerala and another***⁴ The Hon'ble Supreme Court in paragraphs 27, 28, 30 and 31 held:-

27. *In view the aforementioned backdrop of events, the questions of law which had been raised before us will have to be considered. Before, we advert to the said questions, we may notice the provisions of Sections 118(a) and 139 of the Act which read as under:*

"118. Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions shall be made:

(a) of consideration - that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."

"139. Presumption in favour of holder -- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."
Presumptions both under Sections 118(a) and 139 of the Act are rebuttable in nature.

28. *What would be the effect of the expressions 'May Presume', 'Shall Presume' and 'Conclusive Proof' has been considered by this Court in Union of India (UOI) v. Pramod Gupta (D) by L. ₹ and O ₹, [(2005) 12 SCC 1] in the following terms:*

⁴ (2006)6 SCC 39.

"It is true that the legislature used two different phraseologies"shall be presumed" and "may be presumed" in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis- a-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof".

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 non-existence 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."

27. While discussing the meaning of the words "proved" "disproved" it is held that the Court has to presume Negotiable Instrument to be for consideration unless the existence of consideration does not exist. In the light of the agreement Exh. 21

existence of consideration has been proved by the appellant which is further fortified from the statement of account Exh. 28. The respondent has failed to disprove the existence of a legally enforceable debt. Thus, in the absence of any probable defence, the appellant's case needs to be believed and accepted. The ratio can be accordingly made applicable to the present set of facts as the respondent has failed to discharge the burden under Section 118(a) and Section 139 of the Negotiable Instruments Act. There is no question of shifting the onus upon the appellant to prove his case. The respondent could have produced his reply to the demand notice in order to substantiate his defence. It is not the case of the respondent even during the cross examination of the appellant that it was a time barred debt. Respondent could have produced log books of the trucks.

28. The learned Trial Court committed gross error in law by not correctly appreciating the evidence on record which clearly establishes issuance of cheque by the respondent, due service of statutory notice and execution of loan agreement by the parties Exh. 21.

29. The learned trial Court has erroneously observed by holding that there was no legally enforceable debt unmindful of the admissions brought on record during the cross examination of the appellant vis-a-vis the other documentary evidence as discussed herein above. It appears that the learned trial Court has swayed away with the fact that the bank statement produced by the appellant indicate an amount of ₹23,00,000/- (Rupees twenty three lakhs only) which has been credited to the account of respondent, however, Exh.21 indicates a loan amount of ₹42,00,000/- (Rupees forty two lakhs only) and therefore, there is no independent agreement showing transaction of ₹23,00,000/- (Rupees twenty three lakhs only). The learned trial Court has failed to appreciate the evidence in its correct perspective. It can be seen that agreement Exh.21 has been tendered to show that there were additional business transaction between the parties in view of their relationship.

30. The impugned judgment is, therefore, perverse and is in ignorance of settled principles of law as well as evidence on record. There is absolutely no question of another possible view being taken in the given fact situation. The impugned judgment is therefore,

wholly unsustainable in law. Consequently, the appeal needs to be allowed and the same is allowed. The impugned Judgment and order of acquittal dated 25.8.2014 passed by Judicial Magistrate First Class, Panaji is quashed and set aside. The accused/respondent is convicted of an offence punishable under Section 138 of the Negotiable Instruments Act.

31. As regards the sentence to be awarded to the respondent accused, Shri Agni, the learned Counsel submits that he is unable to establish contact with the respondent and, therefore, requests for adjourning the matter till Monday i.e. 19/08/2019.

32. It is made clear that since the respondent is held guilty and is required to be heard on the point of sentence, he shall remain present without fail.

33. Stand over to 19/08/2019.

PRITHVIRAJ K. CHAVAN, J.

NH/VN

Judgment continued on 19/08/2019

34. On the point of sentence to be awarded to the respondent accused, I heard Shri Agni, the learned Counsel as well as the respondent in person. It is submitted that the respondent is the only earning member of the family and has a daughter. There are no antecedents.

35. On the other hand, Shri Singbal, the learned Counsel for the appellant submits that the appellant is not ready to accept any proposal at this stage and, therefore, prayed for passing appropriate sentence.

36. Having considered the evidence on record and the conduct of the respondent, I am not inclined to show any leniency. I, therefore, proceed to pass the following sentence, which will meet the ends of justice:

ORDER

(i) The respondent accused Shivaji Tukaram Naik is convicted of an offence punishable under Section 138 of the Negotiable Instruments Act.

(ii) He is sentenced to undergo simple imprisonment for one year and shall pay a fine twice the amount of the cheque dishonoured.

(iii) In default of payment of fine, he shall further undergo simple imprisonment for three months.

(iv) The respondent accused shall surrender to his bail bonds.

(v) The respondent accused shall immediately surrender before the JMFC, Panaji today itself.

(vi) The learned JMFC after taking the respondent accused in custody, issue necessary warrant of committal to the jail as provided in Section 388 of the Code of Criminal Procedure.

(vii) Authenticated copy of the judgment to be furnished to the respondent accused as per law.

37. At this Stage, the learned Counsel for the convict submits that the sentence pronounced be kept on hold for some time. The request is declined.

PRITHVIRAJ K. CHAVAN, J.

NH/VN