

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA (SB) 84 of 2022

Indranil Mondal

-vs.-

Birla Corporation Limited

Mr. Ranajit Roy.

...For the Appellant.

Mr. Somopriyo Chowdhury,
Mr. Kausik De,
Ms. Kriti Mehrotra,
Ms. Mohini Majumder,
Mr. Raghav Munshi

... For the Respondent.

Reserved on : 06.01.2023.

Judgment on : 13.01.2023.

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 06.05.2022 passed by the Learned Additional District and Sessions Judge, 2nd Fast Track Court, City Sessions Court, Bichar Bhawan, Calcutta in criminal Appeal No. 195 of 2019 arising out of Case no. C-2379 of 2001, wherein the learned Appellate Court was pleased to set aside the order of acquittal passed under Section 138 of the Negotiable Instruments Act by the Learned Metropolitan Magistrate, 5th Court, Calcutta in complaint case

no. C-2379 of 2001 and convicted the appellant, thereby sentencing him to pay fine of Rs.3,40,000/- i.d. to suffer Simple Imprisonment for 6 months. By the same order the Appellate Court directed that the whole amount of fine should be paid and disbursed to the complainant as compensation.

Complaint case no. C-2379 of 2001 was initiated against the appellant/accused under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'N.I. Act'). The allegations made in the petition of complaint were to the extent that appellant was the proprietor of M/s Sova Builders which carried on business as dealer and stockists of the complainant company namely, Birla Corporation Ltd. The complainant company in due course of business supplied cement and raised bills and as such a current and continuous account was maintained by the complainant company. A sum of Rs.1,70,000/- was due and payable by the accused persons to the complainant and as such in discharge of the said liabilities an account payee cheque bearing no. 108106 dated 31.03.2001 for Rs.1,70,000/- drawn on Central Bank of India, Park Circus, Calcutta was issued in favour of the complainant company. The complainant company deposited the said cheque with its banker UCO Bank, 10, B.M.T. Sarani, Kolkata-700001, however, the said cheque when presented was dishonoured with the remarks 'funds insufficient/full cover not received' which revealed from the bank memo dated 03.04.2001. The intimation was received by the complainant on 4th April, 2001. The complainant company thereafter sent a demand notice to the accused person on 11th April, 2001 by Registered Post with A/D demanding the amount

covered by the dishonoured cheque to be paid within 15 days of receipt of the notice. The accused received the notice but failed and neglected to make any payment.

On the complaint being filed, cognizance of the offence was taken by the learned Magistrate and after recording the initial evidence summons were issued, pursuant to which accused person appeared before the learned trial Court. In course of the proceedings the accused was examined under Section 251 of the Code of Criminal Procedure and the substance of accusation was read over to him, to which he pleaded not guilty and claimed to be tried.

The complainant in order to prove its case examined the sole witness Vijoy Kumar Prahaladka (PW1) and relied upon the following documents being Ext.1, Cheque bearing No.108106 dated 31.03.2001; Ext.2, Bank Returned Memo dated 03.04.2001; Ext.3, general notice for information dated 11.04.2001; Ext.3/1, demand notice dated 11.04.2001; Ext.4, Acknowledgement card and Ext.5, letter of authority dated 06.01.2003

The learned Magistrate on an appreciation of the evidence placed by the prosecution observed that no documents except exhibits were filed at the instance of the complainant/prosecution. The documents so relied upon did not reflect or relate to the existing liabilities at the time of issuance of the cheque. According to the trial Court the complainant in his deposition stated that a ledger account was maintained, but no ledger account was produced before the Court to show that there was an existing liability of Rs.1,70,000/-

and the same is receivable for the purpose of issuance of the cheque. Learned Magistrate after assigning the reasons that no corroborating witnesses were produced by the complainant or any scrap of paper was produced before the Court to show that there was any existing debt or liability of the accused at the time of issuance of the cheque, held that the evidence do not inspire the Court to believe that the accused person issued the cheque in discharge of any existing legal debt or liability. The learned Magistrate thereafter opined that as the complainant has failed to show any legally enforceable debt or liability no offence is made out under Section 138 of the N.I. Act. As such, the accused was entitled to be acquitted under Section 251(1) of the Code of Criminal Procedure.

The complainant being aggrieved appealed against the aforesaid judgment and order of acquittal passed by the learned trial Court in Criminal Appeal no. 195 of 2019. The learned Appellate Court after hearing both the parties arrived at its finding which is set out as follows:

“For the purpose of rebutting the initial evidential burden, the defendant can rely on the direct evidence or circumstantial evidence or on presumption of law or fact. The accused may rely upon the circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may rely upon the presumption of the fact for instance, those mentioned in Section 114 of Evidence Act to rebut the presumptions arising under Section 118 and Section 139 of the N.I. Act. The accused has also an option to prove the non-existence of consideration and debt or liabilities 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 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 shift back to the complainant and thereafter the presumption under Section 118 and 139 will not again come to the complainant's rescue.

Accused may adduce direct evidence or circumstantial evidence. Bare denial of the passing of consideration and apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff.....”

.....

“Nothing transpired from the cross-examination of the PW-1 that accused succeeded to raise probable defence and reverse the onus upon the complainant, save and except challenging the authority of PW-1 to represent the complainant company and legality of demand notice.”

The appellate Court thus arrived at a finding by setting aside the judgment and order of acquittal passed by the learned trial Court, thereby allowing Criminal Appeal no. 195 of 2019 and directing the accused to pay a sum of Rs.3,40,000/- i.d. to suffer Simple Imprisonment for 6 months and the fine amount paid by the accused was directed to be disbursed by way of compensation.

Mr. Ranajit Roy learned Advocate appearing on behalf of the appellant submitted that there is a difference and distinction between an appeal being preferred in respect of a judgment and order of conviction and a judgment and order of acquittal. According to the learned Advocate it is a settled principle of law that an accused is presumed to be innocent and an order of acquittal fortifies such a principle of innocence as such the Appeal Courts should be slow in interfering with an order of acquittal and the same should not be done until and unless there is manifest error appearing in the records of the case. Learned advocate submitted that in the instant case the appellate Court appreciated the evidence and arrived at a finding which is completely opposite to the order of acquittal which has been passed by the learned Trial Court. According to the learned Advocate although the case was under Section 138 of the N.I. Act the complainant is required to prove the case by producing documentary evidence which are of bare minimum necessities. The learned advocate questioned the manner in which the provision of Section 139 of the N.I. Act has been interpreted in the background of the evidence available in the record. Additionally it has been submitted that the appellant by way of cross-examination rebutted the prosecution case which was unacceptable to the appellate Court and in fact the appellate Court has substituted its own views by holding that the accused was liable to pay the amount of the dishonoured cheque. Learned Advocate insists on setting aside the order of Appellate court.

Mr. Somopriyo Chowdhury learned Advocate appearing for the respondent/complainant submitted that the trial Court proceeded to

appreciate the evidence as if it was a case of proof beyond reasonable doubt and grossly mis-interpreted the provision of Section 139 of the N.I. Act. It has been emphasized on behalf of the complainant that the learned trial Court failed to appreciate the provision of Section 139 of the N.I. Act in its true and proper perspective and the Appellate Court on an appreciation of the material so produced before it which included the oral evidence as well as documentary evidences arrived at its finding. It has been argued that the appellate Court has to scrutinise the evidence in its proper perspective and invited this Court to re-visit and re-scrutinise the cross-examination to ascertain whether any probable defence has been created at the instance of the accused or if it is a case of mere denial. Learned Advocate supported the judgment passed by the learned Appeal Court and submitted that the same should not be interfered with.

Before proceeding with the merits of the case it would be pertinent to state that the principles which apply ordinarily in cases of appeal against acquittal do not squarely apply in cases under Section 138 of the N.I. Act. To that effect the Hon'ble Apex Court in Rohitbhai Jivanlal Patel –Vs. – State of Gujarat reported in (2019) 18 SCC 106, is pertinent, paragraph 12 of the said judgment is set out as follows:

“12. According to the learned counsel for the appellant-accused, the impugned judgment is contrary to the principles laid down by this Court in Arulvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] because the High Court has set aside the judgment of the trial court without pointing out any perversity therein. The said case of Arulvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1

SCC (Cri) 288] related to the offences under Sections 304-B and 498-A IPC. Therein, on the scope of the powers of the appellate court in an appeal against acquittal, this Court observed as follows : (SCC p. 221, para 36)

“36. Careful scrutiny of all these judgments leads to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law.”

The principles aforesaid are not of much debate. In other words, ordinarily, the appellate court will not be upsetting the judgment of acquittal, if the view taken by the trial court is one of the possible views of matter and unless the appellate court arrives at a clear finding that the judgment of the trial court is perverse i.e. not supported by evidence on record or contrary to what is regarded as normal or reasonable; or is wholly unsustainable in law. Such general restrictions are essentially to remind the appellate court that an accused is presumed to be innocent unless proved guilty beyond reasonable doubt and a judgment of acquittal further strengthens such presumption in favour of the accused. However, such restrictions need to be visualised in the context of the particular matter before the appellate court and the nature of inquiry therein. The same rule with same rigour cannot be applied in a matter relating to the offence under Section 138 of the NI Act, particularly where a presumption is drawn that the holder has received the cheque for the discharge, wholly or in part, of any debt or liability.

Of course, the accused is entitled to bring on record the relevant material to rebut such presumption and to show that preponderance of probabilities are in favour of his defence but while examining if the accused has brought about a probable defence so as to rebut the presumption, the appellate court is certainly entitled to examine the evidence on record in order to find if preponderance indeed leans in favour of the accused.”

The same principle was reiterated in Sumeti Vij –Vs. – Paramount Tech Fab Industries reported in 2021 SCC OnLine SC 201, paragraph 16 is set out below:

“16. *It is well settled that the proceedings under Section 138 of the Act are quasi-criminal in nature, and the principles which apply to acquittal in other criminal cases are not applicable in the cases instituted under the Act.”*

I have considered the submissions advanced by the learned Advocates appearing for the appellants as well as the respondent. Taking into account both the judgments of the learned trial Court and the learned Appellate Court, I am of the opinion that the learned Magistrate ignored the basic foundation of the provisions of N.I. Act as also the importance of presumption associated with the said Act. It has been held by the Hon’ble Supreme Court in Hiten P. Dalal –Vs. – Bratindranath Banerjee reported in (2001) 6 SCC 16 as follows:

22. Because both Sections 138 and 139 require that the court “shall presume” the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras v. A. Vaidyanatha Iyer [AIR 1958 SC 61 : 1958 Cri LJ

232] it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." (*Ibid.* at p. 65, para 14.) Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

"after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists" [Section 3, Evidence Act] .

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man".

The evidence in this case reflects that no probable defence has been created by the accused nor the accused has been able to dislodge or rebut the prosecution evidence. As such there is no scope for interference with the order of appeal so passed. Accordingly, the judgment and order in Criminal Appeal 195 of 2019 is hereby affirmed.

Consequently, the present appeal being CRA (SB) 84 of 2022 is dismissed.

Pending applications, if any, are consequently disposed of.

Appellant is directed immediately to comply with the order passed by the Learned Additional District and Sessions Judge, 2nd Fast Track Court, City Sessions Court, Bichar Bhawan, Calcutta so far as the sentence of fine is concerned.

Department is directed to send back the Lower Court Records to the Trial Court and communicate this judgment, so that effective steps are taken by the learned trial Court.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)