

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.330 OF 2002

Satish s/o Vasantrya Deshmukh,
Age : 47 yers, Occu.: Agriculture,
and Business, R/o.: Sangamner,
Tq. Sangamner, Dist. Ahmednagar

.... **APPELLANT**
(Original complainant)

VERSUS

1. The State of Maharashtra

2. Bansilal s/o Deepchand Katyare,
Age : 49 years, Occu.: Driver,
Presently residing at Pradnya
Housing Society, Near Principal
M. V. Kaundinya, Opposite Sangamner
College, Sangamner, Tq. Sangamner,
District: Ahmednagar.

... **RESPONDENTS**
(Resp. No.2, original accused)

.....

Advocate for Appellant : Mr. V. R. Dhorde
APP for Respondent No.1-State : Ms. D. S. Jape
Advocate for Respondent No.2 : Mr. A. P. Shah

.....

CORAM : SANDIPKUMAR C. MORE, J.

**RESERVED ON : 24/08/2023
PRONOUNCED ON : 30/08/2023**

....

JUDGMENT :

1. The appellant / original complainant in STC No.694 of 1996, has challenged the judgment and order dated 03/09/2001 passed

by the concerned JMFC, Sangamner (hereinafter referred to as 'the learned trial court') in the aforesaid case, which resulted into an acquittal of present respondent No.2 i.e. original accused from the charge under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the N. I. Act').

2. Facts giving rise to the present appeal are as under :

Respondent No.2 / accused was in a need of money for purchase of a truck and therefore, the appellant / complainant on 23/10/1995 advanced him hand loan of Rs.1,00,000/- due to earlier acquaintance. On 24/10/1995, respondent No.2 / accused purchased a truck bearing registration No. GJ-16-T-7644 for a total consideration of Rs.3,52,000/-. It was agreed by respondent No.2 / accused that he would repay the aforesaid hand loan amount of Rs.1,00,000/- within a period of a month or two. Since respondent No.2 could not repay the said amount within the stipulated period, he issued a cheque in dispute in the name of the appellant / complainant on 30/01/1996, drawn on Sangamner Merchants Co-operative Bank, Branch Sangamner. The appellant / complainant was constrained to deposit the said cheque in his bank account on 29/06/1996 due to non payment of the said amount. However, the cheque could not be honoured due to insufficient of funds. On 01/07/1996, the appellant / complainant issued a statutory notice to respondent No.2 / accused and thereby demanded the amount of cheque in dispute. Respondent No.2 / accused instead of paying the said amount of hand loan, replied the notice on 11/07/1996 and thereby denied the liability of paying the cheque amount.

3. It was the defence of the respondent No.2 / accused under the reply notice dated 11/07/1996 that he purchased the aforesaid truck from one Gulam Mohammad Jalal Khan Pathan, resident of Jakhavav, Tq. Mangrol, District : Surat, Gujrat State and paid consideration of Rs.2,00,000/- in cash to him. It was agreed that the remaining amount of Rs.1,52,000/- was to be paid as early as possible. However, respondent No.2 / accused then came to know that the said Gulam Mohammad Pathan was not the registered owner of the said truck and at that time the appellant / complainant being a mediator in the said transaction, told him to purchase the said truck and the balance amount be paid to Gulam Mohammad Pathan after the transfer of truck in the name of respondent No.2 / accused. Since the appellant / complainant was the mediator in the said transaction, he had taken responsibility of making the said truck transferred in the name of respondent No.2. It was further agreed at the relevant time that respondent No.2 / accused was to issue cheque to the appellant / complainant for transferring documents of the said truck in the name of respondent No.2 / accused. It was also agreed that the said cheque of Rs.1,00,000/- which was given by respondent No.2 / accused to the appellant / complainant, was to be encashed only on the transfer of the said truck to the name of respondent No.2 / accused within a period of six months. However, it is contended by respondent No.2 / accused that the appellant / complainant did not procure any document from Gulam Mohammad Pathan in respect of the said truck and avoided to transfer the said truck in his name. Since the appellant / complainant could not transfer the said truck, respondent No.2 / accused was not at all under the liability of paying the amount of

the cheque. It is also contended by respondent No.2 / accused that the appellant / complainant betrayed him by misusing the said cheque.

4. However, the appellant / complainant then filed complaint bearing S.T.C. No.694 of 1996 in the trial court on 24/07/1996 despite receiving the reply. In the meantime, the appellant / complainant had also filed a Special Civil Suit No.120 of 1996 for recovery of an amount of Rs.1,00,000/- in the court of Civil Judge (Senior Division), Sangamner, which was decreed on 19/02/1999. However, the learned trial court under his judgment and order dated 03/09/2001 dismissed the said complaint and acquitted respondent No.2 / accused and hence this appeal.

5. The learned counsel for the appellant / complainant strongly submits that the issuance of cheque is not denied by respondent No.2 / accused and the learned Civil Judge (Senior Division), Sangamner has also decreed the suit filed by the appellant / complainant for recovery of the amount of the aforesaid cheque on 19/02/1999 i.e. during pendency of this complaint. He pointed out that in the agreement in respect of purchase of the aforesaid truck, the name of the appellant / complainant is not at all mentioned and therefore, no inference can be drawn that the appellant / complainant had acted as a mediator in the said transaction between respondent No.2 / accused and Gulam Mohammad Pathan. He pointed out that presumption under Section 139 of the N. I. Act is there that the cheque was issued by respondent No.2 / accused in favour of the appellant / complainant for discharge of legally recoverable debt. He further contended that the learned

trial court definitely erred in relying upon the rebuttal evidence of respondent No.2 in the criminal proceeding specially when the said evidence was not led by him in the civil proceeding.

6. On the contrary, the learned counsel for respondent No.2 / accused submits that though there is presumption under Section 139 of N. I. Act in favour of the person who issued cheque that it was issued for discharging legally recoverable debt, but same is rebuttable one and respondent No.2 by leading sufficient and reliable evidence has rebutted the same. He pointed out that the civil suit as well as criminal proceeding are independent of each other and the learned Civil Judge (Senior Division), Sangamner erred in holding that respondent No.2 / accused did not reply demand notice dated 01/07/1996 issued by the appellant / complainant. According to him, the said civil suit was decided in February, 1999 but respondent No.2 / accused due to inaction of the appellant / complainant to transfer the said truck in his name, got help of his relative as well as DW-2 Madhusudan Vishnu Kaundinnya for raising balance amount of the said truck late in the year 1998 and therefore, he could not produce the evidence in the civil suit. The learned counsel for respondent No.2 relied upon following citations:

- A) *Vijaykumar B. Agarwal vs. Govindbhai Dayal Mange and another, reported in 1999(3) Mh.L.J. 81 and*
- B) *M. S. Narayana Menon Allas Mani vs. State of Kerala and another, reported in (2006) 6 SCC 39.*

7. Heard rival submissions. Also perused entire documents on record.

8. Admittedly, there is no dispute regarding issuance of the cheque in dispute by respondent No.2 / accused to the appellant / complainant. It is a case of the appellant / complainant that for purchase of the above mentioned truck, he had advanced hand loan of Rs.1,00,000/- to respondent No.2 / accused, which he failed to repay and therefore, the appellant / complainant had to deposit the said cheque, which was subsequently dishonoured. As against this, respondent No.2 / accused has come with the case that the appellant / complainant had undertaken responsibility of transfer of the said truck in his name obtaining necessary documents from the original owner and that too within a period of six months and for that purpose the said cheque was issued, which was not to be deposited unless the truck was transferred in his name.

9. Admittedly, there is presumption under Section 139 of the N. I. Act that a cheque is issued for discharge of legally enforceable debt. However, the said presumption is rebuttable one. Moreover, the presumption under Section 118 of the N. I. Act is also rebuttable as it appears from its wording itself. The learned counsel for the appellant / complainant by relying upon the aforesaid presumption has contended that respondent No.2 / accused despite having an opportunity, did not lead any evidence in the civil suit arising out of the same transaction and therefore, the civil court has passed a decree in favour of the appellant / complainant. According to him, the learned trial court i.e.

concerned JMFC, Sangamner has definitely ignored the judgment of the civil court, which normally binds the criminal court. However, this court in the ***Vijaykumar B. Agarwal*** (*supra*) has observed that though the law permits the plaintiff to take out both civil and criminal proceedings in respect of dishonour of cheque which can be continued simultaneously but both remedies are independent of each other i.e. passing of a decree will not affect the criminal trial court and similarly the conviction and grant of compensation will not prevent the civil court from passing decree in favour of the plaintiff. That means in the criminal proceeding if it is shown by the accused by adducing satisfactory and cogent evidence that the cheque in dispute was not issued for discharge of legally recoverable debt then the presumption under section 118 and 139 of the N. I. Act stood rebutted and the accused can be acquitted on the basis of such rebuttal evidence. Further, it has also been observed by the Hon'ble Apex Court in the case of ***M. S. Narayana Menon Alias Mani*** (*supra*) as follows :

"29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in SEction 3 of the Evidence Act)the interpretation clause) to mean:

" 'Proved' - 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.

'Disproved' - A fact is said to be disproved when, after considering the matters before it, the court

either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

30. *Applying the said definitions of "proved" or "disproved" to the 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 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 Mfg. Co. v. Amin Chand Payrel albeit in a civil case laid down the law in the following terms :*

"12. Upon consideration of various judgments as noted herein above, 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."

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 record but also by reference to the circumstances upon which he relies."*

Thus, it appears that for rebutting the presumption under Sections 118 and 139 of the N. I. Act the accused need not even required to enter into witness box but on the basis of material on record he can point out such rebuttal. In the instance case, the

respondent No.2 / accused has also led evidence of his witnesses and therefore, it has to be seen from said evidence that whether the presumption stood rebutted.

10. Though the appellant / complainant has claimed that he paid an amount of Rs.1,00,000/- to respondent No.2 / accused on 23/10/1995 but in the judgment of Special Civil Suit No.120 of 1996 the learned Civil Judge (Senior Division), Sangamner has not believed the evidence of the appellant / complainant as to how he raised the said amount which was allegedly withdrawn by him from the bank partly and partly it was taken from one More. The learned Civil Judge (Senior Division), Sangamner has specifically observed that the said amount of Rs.50,000/- was withdrawn from the bank and the remaining amount of Rs.50,000/- was taken from More much prior to 23/10/1995 and therefore, it was observed that there was no reason for the appellant / complainant for raising the said amount much prior to 23/10/1995 for the alleged purchase of the truck by respondent No.2 / accused. Further, it is also extremely important to note that in the said suit judgment the concerned Civil Judge (Senior Division), Sangamner recorded the finding that respondent No.2 / accused did not reply notice of present appellant / complainant dated 01/07/1996, which is same in this matter, despite there being actual reply by respondent No.2 to the said notice on 11/07/1996, which was placed at Exhibit-40 in the instant matter. Moreover, it has also come on record that the appeal against the judgment of the said civil suit is also pending and nothing has been produced on record as to what happened to the said appeal. Be that as it may, the Hon'ble Apex Court in the judgment in case of *Vijaykumar B.*

Agarwal (*supra*) has already observed that civil as well as criminal proceedings in respect of dishonour of the cheque are independent of each other and in this case respondent No.2 / accused was under liability to rebut the presumption by adducing satisfactory and cogent evidence.

11. It is significant to note that respondent No.2 / accused has brought evidence on record that he raised Rs.2,00,000/- for purchase of the truck. According to him, he was having an amount of Rs.1,00,000/- and the remaining amount of Rs.1,00,000/- was given to him by DW-3 - Chandrakant Ganpat More. Rest of the amount of the truck i.e. amount of Rs.1,52,000/- was raised by him from the bank with the help of DW-2 Kaundinnya, who was retired Principal of Sangamner Arts and Science College for about 33 years. From the evidence of DW-2 it has been established that the present appellant / complainant as well as respondent No.2 / accused both were his students and there was no reason for DW-2 to depose against the appellant / complainant. Further, the evidence of DW-3 Chandrakant Ganpat More of whom respondent No.2 is brother-in-law, has also indicated that he helped respondent No.2 to purchase the truck by paying him Rs.1,00,000/-. Moreover, DW-1 Shishir Digambar Kamble, who was a bank employee of Marchant Bank, Sangamner, has also deposed that DW-2 Dadhusudan kept his National Certificate as a security for giving loan to respondent No.2 / accused of Rs.1,50,000/- and thereafter by transferring the truck in his name respondent No.2 / accused hypothecated the same with bank to avail loan of Rs.2,00,000/-, which was used for repayment of loan obtained by keeping NSC of DW-2 as a security

with bank. Thus, considering all the evidence adduced by respondent No.2 / accused for payment of consideration in respect of the truck it is transpired that respondent No.2 / accused has succeeded in rebutting the presumption under Sections 118 and 139 of the N. I. Act. Moreover, the evidence of the appellant / complainant in the said case appears doubtful in respect of giving an amount of Rs.1,00,000/- to respondent No.2 / accused for purchase of the truck. It appears that the learned trial court by considering all these facts has acquitted respondent No.2 / accused. On independent search of material record, this court is also of the same opinion. In view of the same, no substance is found in the appeal and therefore, it stands dismissed.

(SANDIPKUMAR C. MORE, J.)

VS Maind/-