

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 210 OF 2006

Mr. Karam Hussain Mohabbat Ali Shah

Age : 39 Years, Proprietor of M/s. Western

Plywood, having office at Bhujbai Wadi,

Opp. Janata Timber Market, Station Road,

Govandi, Mumbai – 400 043.

... Appellant

Versus

1. Mr. Abdul Latif Lakdawala

Age : 42 Years, Prop. of M/s. Latif & Sons,

having office at : 214, Bazar Ward,

N. M. Road, Mumbai – 400 070.

... Respondent No.1

2. The State of Maharashtra

... Respondent No.2

Mr.Saurish Shetye i/b. Mr.Mrityunjay Barai, Advocate for Appellant.

Mr.B.B.Tiwari, Advocate for Respondent No.1.

Mr.H.J.Dedhia – APP for the Respondent No.2 – State.

CORAM : S. M. MODAK, J.

RESERVED ON : 13TH FEBRUARY, 2023

PRONOUNCED ON : 17TH MARCH, 2023

JUDGMENT :-

1. The Court of Metropolitan Magistrate, 30th Court, Kulra, Mumbai convicted the Respondent-Accused for the offence punishable under

Section 138 of the Negotiable Instruments Act, 1881 [“NI Act”]. The Respondent is sentenced to simple imprisonment and fine. In addition to that, compensation was awarded separately. Whereas, the Appellate Court i.e. City Civil Court, Mumbai set aside the conviction and acquitted the Respondent-Accused.

2. It is a settled law that compensation can be awarded from the amount of fine or it may be awarded independently without imposition of fine. So, if the fine is imposed, the compensation has to be awarded from the amount of fine only. It mean to say that the amount of compensation cannot be more than the amount of fine. If fine is not imposed, then compensation can be awarded without any restriction. These are the provisions incorporated in Sections 357(1) and 357(3) of the Code of Criminal Procedure, 1973 [“Cr.P.C.”]. This has not been followed by the trial Court. In addition to that, an imprisonment in default of fine was six months. This was in excess of 1/4th of substantive sentence of imprisonment (one year) and it violates the provisions of Section 30 of the Cr.P.C. These are some of the grounds for setting aside the judgment of conviction. So also, the judgment was set aside for the reason that the Respondent-Accused rebutted the presumption and findings of the trial Court were wrong.

3. Both the learned Advocates have not disputed about legality of findings about awarding compensation and default sentence. High Court

of Kerala in the judgment in case of *Sanjeev V/s. Triveni Credit Corporation*¹ relied upon by the Appellant has also clarified this issue. The provisions of Section 357(3) of the Code of Criminal Procedure, 1973 [“Cr.P.C.”] were considered. If sentence of fine is imposed, there can be no resort to the provisions of Section 357(3) of Cr.P.C. So, the only issues arisen in this Appeal are :-

- a. whether the evidence given by the Respondent-Accused in rebuttal of the presumption is adequate or not and
- b. whether the findings of the First Appellate Court are correct or not.

4. I have heard learned Advocate Shri.Saurish Shetye for the Appellant, learned Advocate Shri.B.B.Tiwari for Respondent No.1-Accused and Shri.H.J.Dedhia – APP for the Respondent No.2–State.

Scope of Appeal

5. There was conviction order passed by the trial Court. Trial Court found all ingredients for an offence punishable under Section 138 of NI Act were proved. Whereas, this judgment was set aside by the Appellate Court mainly for two reasons. Here we are concerned only with the reversal of observations of the trial Court by the Appellate Court. When there is a judgment of acquittal, normally, the Appellate Court do not interfere unless exceptional case is made out. But, in this Appeal, this rule is not applicable, particularly for two reasons. One is judgment of

1 2006 SCC OnLine Ker 356

acquittal is reversed. Second is both the parties undertook the burden to prove on their shoulders. With this view in mind, the Appeal needs to be decided.

Case in short

6. There was transaction of purchase and sale of plywood. Initially, Respondent purchased from partnership firm M/s. Western Plywood in which, Appellant was a partner. Later on, Respondent purchased from the Appellant as proprietor. The Appellant relied on the following 3 bills :-

Sr.No.	Bill No.	Date of Bill	Amount of Bill
(i)	Bill No. 37	20/02/2005	Rs.1,15,390
(ii)	Bill No. 40	20/03/2005	Rs.1,00,018/-
(iii)	Bill No. 44	20/03/2005	Rs.92,235/-

7. Respondent-Accused denied purchase and delivery also in the year 2005. However, he admits issuance of 5 cheques. There are 4 cheques drawn on HDFC Bank. They are :-

Sr.No.	Cheque No.	Date of Cheque	Amount of Cheque
(a)	116145	31/03/2005	Rs.50,000
(b)	116146	01/04/2004	Rs.50,000
(c)	116147	06/04/2005	Rs.50,000
(d)	116148	08/04/2005	Rs.50,000

8. Respondent intimated his bank on 17th March, 2004 about stopping of payment. Banker Vishal Badwa – Executive Personal Banking – HDFC Bank – Sion Branch, Mumbai has given evidence. Whereas, one cheque

was for Rs.1,00,000/-. Details of which are as follows :-

(a) Cheque No.189559 Memon Co.op. Bank Ltd. Kurla Branch

Here also, payment is stopped by informing the Bank. Banker Kadir Khan Adhan Khan – Sr. Clerk – Memon Co.op. Bank Ltd. Kurla Branch was examined. However, he could not produce the letter.

9. Respondent received cheque book containing those books in the year 2003. Two bank witnesses have said so. That is why, Respondent-Accused taken two pleas :-

- (a) There is no question of issuing cheque in the year 2005 when cheque book was issued in the year 2003.
- (b) When stop payment instructions were given in the year March-2004, the question of issuing cheques in the year 2005 does not arise.

10. The Appellant deposited all cheques in his bank Hindustan Co-operative Bank Ltd., Shivaji Nagar, Govandi Branch. All were dishonoured for the reason 'stop payment'. Their details are as follows :-

Sr.No.	Cheque No.	Date of Cheque	Amount of Cheque	Reason for Dishonour
(i)	189559	31/03/2005	Rs.1,00,000/-	Payment stopped by drawer
(ii)	116145	31/03/2005	Rs.50,000	Payment stopped by drawer
(iii)	116146	01/04/2004	Rs.50,000	Payment stopped by drawer
(iv)	116147	06/04/2005	Rs.50,000	Payment stopped by drawer
(v)	116148	08/04/2005	Rs.50,000	Payment stopped by drawer

11. There is a statutory notice issued dated 16th April, 2005 to the Respondent. He replied on 26th April, 2005 and denied purchase of goods and delivery and thereby, denying the liability. On this background, the Complainant filed Complaint. The Complainant examined himself, whereas, evidence from the side of accused consists of :-

- (a) Accused : Mr. Abdul Latif Lakdawala
- (b) DW No.1 : Kadir Khan Adhan Khan : Memon Co-op Bank Ltd.
- (c) DW No.2 : Vishal Badva : HDFC Bank Ltd.

12. So, we have to see whether the Respondent is successful in rebutting the presumption and whether the Appellate Court was right in reversing the findings of the trial Court.

Law on the point of rebuttal

13. Learned Advocate for the Appellant relied upon the following judgments :-

- (i) Subrata Bose V/s. Mithu Ghosh²
- (ii) Mithu Ghosh V/s. Subrata Bose³
- (iii) Tedhi Singh V/s. Narayan Dass Mahant⁴
- (iv) Kishan Rao V/s. Shankargouda⁵
- (v) Oriental Bank of Commerce V/s. Prabodh Kumar Tewari⁶
- (vi) Pulsive Technologies Private Limited V/s. State of Gujarat and Others⁷

² 2022 SCC OnLine Cal 3538

³ Special Leave to Appeal (Crl.) No(s).12818 of 2022 ; dated 04.01.2023 ; Supreme Court

⁴ (2022) 6 Supreme Court Cases 735

⁵ (2018) 8 Supreme Court Cases 165

⁶ 2022 SCC OnLine SC 1089

⁷ (2014) 13 Supreme Court Cases 18

(vii) (M/s.) Prajapati Oil Industry Through its owner
Rameshbhai V/s. State of Gujarat⁸

(viii) Devender Kumar V/s. Khem Chand⁹

14. I am not dealing with facts of individual cases, but the principles culled out are important. The law on the point of drawing of presumption and rebuttal of presumption is well settled. The presumption under Sections 118 and 139 of the NI Act were incorporated in the Act so as to enhance the reliability of negotiable instrument. On the basis of negotiable instruments, parties transfer the amount. Parties trust negotiable instruments. So, in order to boost it, these presumptions are incorporated in negotiable instrument. On one hand, there is a presumption attached to negotiable instrument and on the other hand, the drawer of the cheque is given liberty to rebut it. It is always a subject matter of challenge whether that presumption is rebutted or not. “How it can be rebutted and whether rebuttal of presumption is as onerous as that of complainant” are settled by various interpretations. Only question remains on the basis of facts, can it be said that the presumption got rebutted.

15. As said above, presumption can be rebutted by adducing own evidence or it can be rebutted by challenging the complainant’s evidence. In this case, the similar question has arisen. The trial Court held that the offence is proved, whereas, First Appellate Court concluded that Accused

⁸ 2003 SCC OnLine Guj 242

⁹ 2015 SCC OnLine Del 12578

succeeded in rebutting the presumption. The correctness of these findings are the subject matter of challenge before this Court.

16. After going through the citations, evidence and findings, I am of the considered view that the Appellate Court was right. I confirm those findings. I will give reasons for that conclusion.

Reasonings

17. Learned Advocate for the Appellant has tried his level best to challenge those findings. He may be right while canvassing the law and relying upon the interpretations but unfortunately, he is not backed by the evidence. He strenuously urged that defence taken while conducting a trial cannot be accepted unless it is preceded by notice reply. He also contended that mere averments in the notice reply are not sufficient. They need to be substantiated during trial. He also submitted that once a signature on the cheque is admitted and drawing of cheque is admitted, the onus shifts on the Accused and there is no responsibility on the Appellant to prove the documents supporting sale of the plywood to the Accused. He went to the extent of contending that it is for the Respondents to prove that the plywood was not delivered to him. For that purpose, he relied upon the observations in above referred judgments.

18. Whereas, according to learned Advocate Shri.Tiwari for the Respondent-Accused, his client has made it clear explicitly in the notice reply about non receipt of the plywood and in fact, on this background, it

was absolutely necessary for the Appellant to adduce evidence to show delivery of plywood. He submitted that the cheque books from which those cheques were issued was obtained from the two banks in the year 2003 and when the plywood is not delivered, instructions were given to the bankers to stop the payment.

19. I have read the contentions in the notice reply. The Respondent has made it very clear that the plywood was not delivered to him. He has also made it clear that cheques are to be deposited only when plywood is delivered. But in fact, the Appellant was bound to return the cheques and as they were not returned, instructions were given to the bank to stop the payment. The Appellant does not dispute the fact that notice reply is not received by him. From reading the evidence of two bankers examined by the Respondent, it is clear that the stop payment instructions were issued to them. It is clear that the concerned cheque books were issued in the year 2003. On this background, it was obligatory on the part of the Appellant to prove delivery of plywood. Surprisingly, he filed four invoices. However, they were not proved during evidence. Even with the consent of both the sides, I have read them. Even Complainant admits during the cross-examination that he is not having acknowledgment for the delivery of plywood.

20. From the above, it can very well be said that the Respondent has made out a probable defence. Facts is of two kinds. One is positive fact

and another is negative fact. It is difficult to prove negative fact. Similarly, it is difficult for the Respondent to prove that he has not received the plywood. As against this, it is easy to prove positive fact. So, it was the duty of the Appellant to prove that the plywood was in fact delivered. He has failed to do the same. The facts of case of *M/s. Prajapati Oil Industry (supra)* can be differentiated. The conviction under Section 138 of NI Act was confirmed upto High Court. Though accused pleaded 'no receipt of goods as a defence', he could not substantiate it. The accused has not protested for non receipt of goods. Herein, Accused has stopped payment of cheques and also made his stand clear in notice reply.

21. In view of that, there is no legally recoverable debt or liability which has accrued in his favour. The Appellate Court was right in concluding that the Respondent has rebutted the presumption. Hence, no case for interference is made out. The judgment is well reasoned judgment. It does not require interference. Hence, Appeal is dismissed.

(S. M. MODAK, J.)