

Harish

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.24 OF 2023
WITH
INTERIM APPLICATION NO.20420 OF 2022**

Dattatray Narayan Umbare

...Appellant/
Applicant

Versus

Surekha Rajendra Bhoite & Anr.

...Respondents

Mr. Shivaji Y. Thorat, for the Appellant/Applicant.

Mr. Rahul Karnik, for Respondent Nos.1 & 2.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 15th FEBRUARY, 2023**

P.C. :

1. Heard Mr. Thorat, learned counsel appearing for the Appellants and Mr. Karnik learned counsel appearing for the Respondent Nos. 1 and 2.

2. The Appellant is the Original Defendant and by this Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 is challenging the legality and validity of the Judgment and Decree dated 10th February, 2021

passed by learned 4th Joint Civil Judge, Senior Division, Satara in Special Civil Suit No.169 of 2015 as well as the legality and validity of the Judgment and Decree dated 9th April, 2022 passed by the learned District Judge-1, Satara in Regular Civil Appeal No. 25 of 2021.

3. Mr. Thorat, learned counsel appearing for the Appellant submitted that, following substantial questions of law are involved in this Second Appeal :

- i) Whether the Appellate Court erred in holding that the Appellant could not be able to rebut the presumption U/s 118 of the Negotiable Instrument Act?
- ii) Whether the Appellate Court is justified in holding and inferring that the presumption raised U/s 118 of the Negotiable Instrument Act can be used in the aid of Plaintiffs' case even though there is no supporting documents placed by the Plaintiffs to prove that the disputed cheque (Exhibit 40) was drawn for consideration?
- iii) Whether the presumption drawn as to the legally enforceable debt/liability by the

Appellate Court, only on the basis of disputed cheque, is erroneous when admittedly the Defendant was acquitted in the Summary Criminal Case No. 2106 of 2013 filed by the Plaintiff No. 1 on the basis of same cheque and admittedly the Plaintiff failed to prove their claim by oral and documentary evidence even in Civil case?

- iv) Whether inference drawn by the Appellate Court in respect of disputed cheque is wholly unwarranted and Appellate Court erred in not appreciating the settled legal position that admission of signature on the disputed cheque is not tantamount to saying that the person admitted the liability?
- v) Whether finding of fact stands vitiated on wrong tests and on the basis of assumptions and conjectures resulting in perversity and the said issue of perversity come within the ambit substantial question of law?

4. It is the main contention of the learned counsel appearing for the Appellant that, in the criminal case, the Defendant has been acquitted and, therefore, the findings

recorded by the criminal Court are required to be taken into consideration by the Civil Court. It is further submission of Mr. Thorat, learned counsel appearing for the Appellant that there is no evidence that the cheque in question was made or drawn for consideration.

5. It is the submission of Mr. Karnik, learned counsel appearing for the Respondent that, both the Courts have concurrently found that, there is liability of the Defendant. He submitted that, the First Appellate Court has granted Decree of Rs.5,10,000/- whereas, the learned Trial Court has granted Decree of Rs.7,10,000/-. He submitted that, the learned First Appellate Court has passed the Decree on the basis of cheque issued by the Defendant and, therefore, no interference is required particularly under the jurisdiction of this Court under Section 100 of the Code of Civil Procedure, 1908.

6. Before considering the rival submissions, it is necessary to set out certain factual aspects as emerging from the evidence on record.

- a. It is the case of the Plaintiffs that the Plaintiffs are doing fabrication business and for that purpose they were having requirement of centering plates. The Plaintiffs placed an order of 500 centering plates at the cost of Rs. 1,410/- per plate and accordingly cost of 500 centering plates come to Rs. 7,10,000/-.
- b. It is the case of the Plaintiffs that from time to time they paid said amount of Rs. 7,10,000/- and the same has been accepted by the Defendant by executing cash memo dated 22nd November, 2012 bearing Exh-43. It is their contention that the Defendant failed to deliver the said centering plates and therefore, cheque for Rs. 5,10,000/- was issued on 27th April, 2013 which is produced at Exh-1.
- c. It is the case of the Plaintiffs that they presented said cheque to their banker on 2nd May, 2013 and the same was dishonored. As the Defendant avoided to make payment, notice dated 21st May, 2013 as contemplated under Section 138 of the Negotiable Instruments Act was issued.

- d. Thereafter, the Plaintiffs filed criminal case and the said criminal case has resulted into acquittal.
- e. The Plaintiff simultaneously filed present Civil Suit on 11th October, 2015 in which the decree of Rs. 7,10,000/- was passed and in the Appeal filed by the present Appellant-Defendant, the same was modified and decree of cheque amount of Rs. 5,10,000/- was passed.

7. In the above background, it is necessary to consider the substantial questions of law raised by learned counsel appearing for the Appellant. The learned Trial Court on the basis of cash memo bearing Exh-43 which admittedly bears signature of the Appellant i.e. the Defendant and which mentions that Plaintiffs have paid total amount of Rs.7,10,000/- and on the basis of said cheque of Rs. 5,10,000/- (Exh-40) *inter alia* passed decree of Rs.7,10,000/- with simple interest at the rate of 9% per annum from the date of institution of the suit i.e. from 11th September, 2015 till realization of the entire amount.

8. Learned Trial Court *inter alia* while dealing with the contention of the defendant that the said cheque which was deposited in the bank by the plaintiffs was misused by the Plaintiffs in paragraph No. 16 while decreeing the Suit observed as follows :-

“Considering these specific admissions by the defendant, it is very surprising that he has not sent notice to plaintiffs or filed police complaint against them when his blank signed cheque (Exh.17) has been misused that is too for huge amount of Rs. 7,10,000/-. The Defendant has not provided any satisfactory explanation as to why he has not prosecuted plaintiffs when they have made and prepared false cash credit note (Exh.43) as well as misused his blank signed cheque (Exh.17). Therefore, defence of the defendant is devoid of any merit and the same is raised merely to escape from liability of repayment.”

(Emphasis added)

9. The learned Appellate Court has passed decree of only Rs. 5,10,000/- on the basis of the amount reflected on

the said cheque at Exh. 40. The learned Appellate Court has given following reasons in paragraph 20, 21 and 22 :-

"20.Plaintiffs' case basically rests on disputed cheque (Exh.40). The defendant has admitted the signature of the disputed cheque. Though there is no supporting document placed by the plaintiff to prove the consideration has passed for execution of the cheque in their favour by the defendant. However, the disputed cheque is itself a document raises presumption in favour of the consideration has passed to the extent of amount mentioned in it. The presumption raised under Section 118 of the Negotiable Instruments Act can be used in the aid of plaintiffs' case. It has come on record that the plaintiffs have pleaded that the defendant owes Rs. 7,10,000/-, out of that defendant has drawn cheque of Rs. 5,10,000/- in their favour. He assured , he would repay remaining amount of Rs. 2,00,000/- in due course of time. The plaintiffs have not proved with the documentary evidence that, entire amount of Rs. 7,10,000/- was given to the

defendant at once. Useful reference can be made to the judgment of Hon'ble Gujrat High Court in **(1979) 20 (2) Guj LR 195 (200) (DB)**, therein it is said that, *"The fact that a particular form of consideration pleaded by plaintiff had not been proved , it will not be sufficient ground on which the presumption can be said to have been rebutted and will not justify any Court in reaching the conclusion that the instrument is not supported by consideration at all."* and the Hon'ble Madras High Court in **(1985) 98 Mad LW 800 (804) : ILR (1987) 2 Mad 73** has held that, *"The presumption raised under S. 118 is not in respect of consideration mentioned in the negotiable instrument, it is in favour of there being a consideration for the negotiable instrument, any consideration which is valid under law and the consideration set up in the plaint, if different form one set out in the instrument, it is of no consequence."*

21. In view of the above referred judgments of Hon'ble Gujrat High Court and Madras High Court, **by raising presumption in favour of the plaintiff as provided under Section 118 (a) of the Negotiable Instruments Act, it can be safely infer that the defendant has issued**

disputed cheque in favour of plaintiff for consideration. Although PW2 has admitted that, rate of centering plates was decided @ Rs. 1200/- per piece, the said amount would come to Rs. 6,00,000/- and not Rs. 7,10,000/-. The defendant could not able to rebut the presumption provided under Section 118 of the Act. **The defendant has come with the case that the disputed cheque was lost by him and the plaintiffs have misused the said cheque.** The learned Trial Court has rightly observed that, defendant neither filed complaint for loss of disputed cheque nor he informed their banker about the cheque was misplaced or lost. The defendant cannot take stand at this juncture that, he was not aware about the disputed cheque is used by the plaintiffs against him until the filing of criminal case against him by the plaintiffs.

22. The judgment and observations passed by the Criminal Court are not binding upon the Civil Court. The party can very well maintain the suit for recovery of money based on the Negotiable Instruments to prove the civil liability of the defendant on the basis of

standard of preponderance of probabilities and not beyond reasonable doubts as per the Criminal Jurisprudence. Therefore, I come to the conclusion that **the plaintiffs have not proved entire civil liability to the tune of Rs. 7,10,000/-, being holder in due course of disputed cheque issued by the defendant in favour of the plaintiff No. 1 having admitted the signature, it was issued for consideration mentioned in it and thus the defendant is liable to pay Rs. 5,10,000/- to the plaintiffs."**

(Emphasis added)

Perusal of the reasoning given by the learned Trial Court and learned First Appellate Court, both the Courts have *inter alia* observed that, there is presumption in favour of the Plaintiffs as provided under Section 118(a) of the Negotiable Instrument Act. The evidence on record could not show that the Defendant has rebutted the said presumption. Both the Courts have relied on the circumstance that the Defendant neither filed complaint for loss of disputed cheque nor informed their banker that the disputed cheque was misplaced.

10. Both the Courts have concurrently found that, the signature on the cheque is of the Defendant and, in fact, the Defendant has accepted his signature on the cheque. Section 118 of the Negotiable Instrument Act provides that, until contrary is proved every negotiable instrument was made or drawn for consideration is the presumption flowing when, the Negotiable Instrument Act is drawn.

11. The substantial questions of law raised by the Appellant are mainly regarding presumption under section 118 of the Negotiable Instrument Act. In this particular case, admittedly, the Defendant has executed the cheque. Both the Courts by giving cogent reasons have held that, the said presumption has not been rebutted by the Defendant or rebutted from the circumstances brought on record. Reliance of the Appellant on the Judgment, by which, he has been acquitted is not of much assistance to the Appellant. It is settled legal position that, the finding of the Criminal Courts are not binding on the Civil Court. Both the Courts have given valid reasons to come to the

conclusion that, the presumption under Section 118(a) of the Negotiable Instrument Act has not been rebutted by the Appellant.

12. The contention raised by the learned counsel appearing for the Appellant that, finding of fact stands vitiated on wrong tests and on the basis of assumption and conjectures resulting in perversity is without any basis. Both the Courts on the basis of evidence on record by giving valid reasons have passed the decree.

13. The learned counsel appearing for the Appellant has relied on decision in *B. Girish Vs. S. Ramaiah*¹. In the said case, it has been held that, in absence any oral and documentary evidence from complainant presumption under Section 139 and 118 stood rebutted. The said decision has no application to the present case. In the present case, the Plaintiff has laid both oral and documentary evidence and, after appreciating the evidence on record, both the Courts have concurrently

¹ AIR 2011 (NOC) 422 (KAR.)

held that, presumption has not been rebutted. Therefore, there is no substance in the substantial questions of law raised by the Appellant.

14. The Second Appeal is dismissed with costs.

15. In view of the dismissal of Second Appeal, nothing survives in the Interim Application and the same is also dismissed.

[MADHAV J. JAMDAR, J.]