

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRA-S-40-SB-2008 (O&M)
Date of Decision: 14.03.2023**

Jagdish Singh	Versus	...Appellant
Shiv Kumar		... Respondent

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Ms. Akanksha, Advocate for
Mr. Rajiv Joshi, Advocate
for the appellant.

Mr. R.S. Bajaj, Advocate
for the respondent.

N.S.SHEKHAWAT, J.

Challenging the correctness and legality of the impugned judgment dated 12.01.2007 passed by the learned Judicial Magistrate 1st Class, Jalandhar, whereby, the respondent has been acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter to be referred as the '**the Act**'), the appellant/complainant has preferred the instant appeal before this Court.

The learned trial Court held that the respondent/accused was successful in setting up the defence that the cheque in question was not issued in discharge of legal liability and the presumption in favour of the complainant stood effectively rebutted and acquitted the respondent of the notice served upon him.

The complaint was filed by the appellant/complainant against the respondent/accused by alleging that the respondent had taken a friendly loan of Rs. 4 lacs from the complainant and in order to discharge his legal debt and liability towards him, the respondent issued a cheque bearing No. 755749 dated 19.01.2005 for a sum of

Jalandhar. However, on presentation, the cheque was returned dishonoured by the bank of the accused vide memo dated 01.06.2005 with the remarks "Insufficient Funds". After the dishonour of the cheque, the complainant got a legal notice dated 03.06.2005 issued through his counsel and the same was sent by registered AD/UPC on 04.06.2005 and the respondent was called upon to make the payment of the dishonoured cheque within a period of 15 days from the receipt of the legal notice. However, despite service of notice, the accused failed to make the payment of the amount of the cheque. With these broad allegations, the complaint was filed by the appellant/complainant under Section 138 of the Act against the respondent.

Learned counsel for the appellant vehemently argued that the impugned judgment is based on misappreciation of evidence and suffers from illegality and perversity. The respondent/accused had not disputed his signatures on the cheque in question and he rather admitted that he stood as a guarantor for DW2 Sanjiv Kumar and had issued the cheque in his said capacity. The learned counsel further argued that in view of the presumption enshrined in Section 118 and Section 139 of the Act, the onus to prove his innocence was to be discharged by the respondent/accused. However, the learned trial Court committed grave error by ignoring the statutory presumption and the burden was casted on the present appellant, which was apparently contrary to the statutory mandate.

On the other hand, the learned counsel for the respondent/accused vehemently argued that the presumption under

Section 118 read with Section 139 of the Act was a presumption of law and was rebuttable presumption. The respondent, who was the drawer of the cheque, had led sufficient evidence to dispel the said presumption by leading cogent evidence. He further contended that the learned trial Court had recorded several reasons for coming to the conclusion that the cheque was not issued by the respondent in discharge of legal debt/liability and the entire story of the complainant was surrounded by a cloud of suspicion. Thus, he prayed for upholding the impugned judgment.

The above said presumption of law under Section 139 of the Act has been discussed in detail by the Hon'ble Supreme Court in the matter of **Hiten P. Dalal Vs. Bratindranath Banerjeet 2001(6) SCC 16** and held as follows

'21. The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that "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". The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.

*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 vs. A. Vaidyanatha Iyer AIR 1958 SC 61**, 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). 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 nonexistence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, 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" . 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'.

24. Judicial statements have differed as to the quantum of rebutting evidence required. In **Kundan Lal Rallaram vs Custodian, Evacuee Property, Bombay AIR 1961 SC 1316**, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in **Dhanvantrai Balwantrai Desai vs State of Maharashtra AIR 1964 SC 575**, where this Court reiterated the principle enunciated in **State of Madras vs Vaidyanath Iyer (Supra)** and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable

man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."

(Emphasis supplied)

Still further, the said presumption of law as contemplated under Section 139 of the Act was again considered by the Hon'ble Supreme Court in the matter of **Rangappa Vs. Mohan 2010 (11) SCC, 441** by observing as under:-

"26. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that

the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.'

Consequently, it is apparent that the statutory presumption under Section 118/139 of the Act is not a statutory presumption of fact, rather it is a presumption of law and the accused can always adduce evidence to disprove the presumption and to prove to the contrary. Sometimes, the accused may produce direct evidence to prove that the cheque in question was not supported by consideration and there exist any debt or liability to be discharged by him. However, the Court may not insist in every case that the accused

should disprove the non-existence of the consideration and debt by leading direct evidence, which may not be possible. To disprove the presumption, an accused should bring on record such facts and circumstances, upon consideration of which, the Court may either believe that the consideration and debt did not exist or there non-existence was probable that a prudent man, would under the circumstances of the case, act upon the plea that they did not exist.

Adverting to facts of the instant case, the positive case set up by the appellant/complainant was that respondent/accused had taken a friendly loan of Rs. 4 lacs from the complainant and in discharge of his legal debt/liability towards the appellant, the respondent had issued the cheque in question dated 19.01.2005 for a sum of Rs. 4 lacs, drawn on State Bank of India, Harbans Nagar, Branch Jalandhar. However, the learned trial Court rightly observed that the appellant had failed to prove that he had such an intimate close relations with the respondent, so that he may advance a loan of Rs. 4 lacs to the respondent without getting any documents signed from him. Apart from that, the appellant also failed to show that the amount was actually available with him or on the date of the advancement of the loan, he had sufficient financial capability to advance the said loan to the respondent and that too without even executing of any document in this regard. Apart from that, the appellant also stated that he was not a income tax payee and had not withdrawn the amount of Rs. 4 lacs from any bank. He stated that he had received the money as rent from the tenants in his land. However, he again failed to place on record any evidence to show that he had

received the rent from his tenants on the said date. The learned trial Court rightly observed that the said facts render the alleged loan transaction to be doubtful. Furthermore, the appellant also failed to prove the presence of any other person at the time of advancement of loan, terms of loan, period of loan etc. On the contrary, in the instant case, the learned trial Court rightly observed that the defence had been successful in rebutting the presumption of law under Section 139 of the Act by leading cogent and convincing evidence. In fact, the respondent had advanced a loan of Rs. 3 lacs to one Sanjiv Kumar, DW2. The appellant/complainant denied that he knew any Sanjiv Kumar @ Bittu. However, there was sufficient evidence on record which clearly showed that the loan was advanced by the appellant to said Sanjiv Kumar @ Bittu. The respondent/accused examined Kamal Kishore, Clerk, Jalandhar Central Cooperative Bank Limited as DW1, who stated that on 12.09.2006, the appellant had presented a cheque No. 33357 for a sum of Rs. 4 lacs drawn on Union Bank of India, Jalandhar, with his bank for clearance, but the same was returned unpaid. Still further, DW3 D.R.Sharma, Senior Manager, Union Bank of India, Jalandhar, clearly stated that Sanjiv Kumar @ Bittu was having a saving bank account in his bank and Sanjiv Kumar @ Bittu had issued a cheque bearing No. 33357 for an amount of Rs. 4 lacs on 12.09.2006 from the said account. However, the same was returned unpaid due to the reason "Funds Insufficient". The entire record was produced on record in this regard by DW1 Kamal Kishore, Clerk and DW3 D.R. Sharma Senior Manager. In fact, Sanjiv Kumar @ Bittu also appeared as DW2, who supported the case of the respondent in

this regard. In fact, the complainant had misused the cheque issued by the accused and presented the same with his banker. He was not justified in presenting the cheque issued by the present appellant with his banker and the impugned judgment is based on correct appreciation of evidence and law and is ordered to be upheld.

It has been held by the Hon'ble Supreme Court in the matter of **Dwarka Dass and others Vs. State of Haryana 2003 AIR (Supreme Court) 185** as under:-

*3. Two earlier decisions of this Court ought also to be noticed in this context, namely, **Ramesh Babulal Doshi v. State of Gujarat (1996(9) SCC 225) : 1996(3) RCR (Criminal) 188 (SC)**, wherein in paragraph 7 of the Report this Court observed :*

"7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an

acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only - reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."

*4. The other decision, though slightly earlier in point of time, happens to be that of **Tota Singh [Tota Singh & anr. v. State of Punjab (1987(2) SCC 529) : 1987(2) RCR (Criminal) 35 (SC)]**, wherein this court in paragraph 6 of the Report stated as below :*

"6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW2 and PW6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such reappraisal, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a reappraisal of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an

order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

In view of the above discussion, impugned judgment dated 12.01.2007 passed by the learned Judicial Magistrate 1st Class, Jalandhar, is ordered to be upheld and the appeal is, accordingly, dismissed being devoid of merits.

All pending applications, if any, are disposed off, accordingly.

The case property, if any, may be dealt with as per the rules after expiry of period of limitation for filing the appeal.

Records of the Court below be sent back.

14.03.2023
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No