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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-A-1886-MA-2018
DECIDED ON: 09.03.2023

PUSHPA DEVI THR LRS

.....APPELLANT

VERSUS

PAYAL

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Arun Singal, Advocate
for the appellant.

SANDEEP MOUDGIL, J (ORAL)

Prayer in this application under Section 378(4) Cr.P.C., is for grant of Special Leave to Appeal from order of acquittal dated 18.04.2018 passed by Judicial Magistrate Ist Class, Panipat, whereby the complaint under Section 138 of the Negotiable Instruments Act was dismissed.

The factual matrix as unfolded on perusal of the complaint would read that the appellant and respondent being in friendly relation had a loan transaction, wherein the appellant alleged to have advanced Rs.1,20,000/- to the respondent for marriage of her sister and against that liability, a cheque bearing No.027697 dated 29.02.2016 equal to the amount as alleged to have been advanced drawn at ICICI Bank, Panipat was issued in favour of the appellant. The said cheque was presented to the drawee bank on 01.03.2016, which was dishonoured and returned by the bank vide memo dated 02.03.2016 with the remarks “drawer's signature differ”. A legal notice is also said to have been served dated 29.03.2016, which was refused to be accepted by the respondent and accordingly the complaint under Section 138 Negotiable Instruments Act was preferred before the Judicial Magistrate Ist Class, Panipat, since the respondent did not repay the amount, despite issuance of legal notice within the stipulated period. The said complaint was dismissed and the respondent-accused stood acquitted by the Judicial Magistrate Ist Class, Panipat vide order dated 18.04.2018, which has been assailed before this Court.

Learned counsel for the applicant-appellant contends that the Court below committed grave illegality while ignoring the fact that the cheque was returned on account of the fact that the signature's differ, which was duly proved by the bank official while deposing in the witness box, apart from the fact that, respondent has admitted his signatures on the cheque and issuance of the same cheque. Mr. Singal, learned Advocate with the strength of such averments argued that the burden thereafter shifted upon the respondent to show that, she had no liability to pay the amount, which she has actually failed, whereas it is the appellant, who has been wrongly and illegally fastened with the onus to prove on record his financial capacity supported by Income Tax returns.

The another leg of argument raised by the applicant-appellant is that the trial Court acquitted the respondent-accused on surmises and assumptions, while holding that friendly relation between him and the respondent-accused is not proved with the reasoning that the applicant-appellant failed to divulge the name of brother and sister of respondent-accused and ignored the material fact that the time and date of issuance of cheque stands admitted by the respondent-accused, which clearly makes out a case for conviction under Section 138 Negotiable Instruments Act and thus lodged the submissions with the prayer to grant leave to appeal and further allowing the appeal convicting the respondent-accused.

Heard learned counsel for the appellant.

This Court having examined the pleadings and evidence on record makes out the case set up by the applicant-appellant even in the cross examination is that she had been running a garment shop and her monthly income at that time was 20,000-25000 rupees per month out of which the loan was advanced in cash for providing financial help on account of construction of house and marriage of her sister to the respondent-accused. It is also the stand of the applicant-appellant that respondent-accused namely Payal and her mother Renu had come to applicant's home to collect the money and in lieu thereof, he gave a cheque in question as liability to repay the said financial loan within a period of two months. It is admittedly a financial help provided by the applicant-appellant on friendly terms having mutual faith and trust between the families. The applicant-appellant has also put reliance on ***Goa Plast Private Limited vs. Chico Ursula D'souza and Another 2003 (2) RCR (Criminal) 131 (SC)*** to argue that the presumption under Section 139 of the Negotiable Instruments Act is attracted in her favour that she hold the cheque in due course for discharge of a debt and liability. The Supreme Court also considered the observations made in ***NEPC Micon Limited and Ors. vs. Magma Leasing Ltd. 1999 (2) RCR (Criminal) 648 (SC)***. In addition thereof, it has also been asserted on her behalf that since it was a friendly loan given by the applicant-appellant, the documents were not prepared on account of mutual trust and faith between the two families and in support thereof referred to the case law in ***Manoj Jain vs. Surinder Kumar Jain & Anr. 2015 (4)***

RCR (Criminal) 624 (Delhi), wherein it was observed that:-

> *"11.Another contention of the Petitioner, is that the Respondent could not establish any legally enforceable debt or liability, as admittedly he is not an Income Tax payee, whereas Section 269SS of the Income Tax Act mandates that any loan or deposit of more than Rs.20,000/- is to be made by account payee cheque or bank draft. It was urged that the Respondent could not establish the source of the funds and it is really doubtful that such huge amount of loan was given to the Petitioner without any documentation.*
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> *12.Both the courts below have, justifiably, held that the provisions of Section 269SS of the Income Tax Act does not help the Petitioner as he did not cross examine the Respondent about the source of his income or his financial strength. Since friendly loan was given, the Respondent did not prepare any document. There is nothing on record, and no attempt has also been made by the Petitioner, to doubt the financial strength of the Respondent to advance loan."*

On examination of the judgment of acquittal passed by the trial Court, the defence raised by the respondent-accused primarily is that the applicant-appellant has failed to adduce any cogent and material evidence to demonstrate the alleged advanced loan that too in cash. It is also contended on her behalf that the once the applicant-appellant did not produce any account in evidence then the benefit of presumption under Section 139 of the Negotiable Instruments Act is not available to her. To further affirm her arguments, the attention of this Court did not miss the cross examination of the applicant-appellant, where it has been admitted that she used to keep a record of monetary transaction but could not explain for the instant transaction as to why there is nothing in writing and apart from that the applicant-appellant on the one hand has taken the excuse of having mutual trust and healthy relations between the two families of applicant-appellant and respondent-accused, but on the other hand admitted she is not aware of the names of brother and sister of the respondent-accused. Even going further, it is on record that no one from the family of applicant-appellant was invited or attended the marriage of respondent's sister, the purpose for which the alleged financial help was advanced.

This Court is obvious of the legal proposition that under Section 138 of Negotiable Instruments Act, prosecution proceeds with a presumption that the accused issued the dishonoured cheque for discharge of a legal liability/debt and under Section 139 of the said Act, complainant is not required to prove his case once the essential ingredients of this section are prima facie made out, however, the said presumption is rebuttable and once the onus is discharged by the accused, it shifts upon the complainant's to prove that the cheque in question in his favour was issued for discharging a certain legal debt as has been held in Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Ltd., 2016 (4) RCR (Criminal) 385.

This Court coming back to the factual aspects of the case in hand is fully conscious that the accused has not denied his signatures on the dishonoured cheque but there is specific denial to the alleged financial help from the complainant. Particularly in the light of the fact that the complainant failed to produce any evidence with regard to the source of income except bald statement to the tune of Rs.20,000-25,000/-, which cannot be believed as a gospel truth, which is also not supported by any mentioning of the same in any of account books maintained to run the business of garments shop and income tax returns. In the light of the said circumstance and the evidence on this issue, this Court is convinced that the accused has successfully rebutted the presumption of Sections 118 and 139 of Negotiable Instruments Act.

Admittedly, there is no written agreement or execution of any document with regard to the alleged financial help advanced by the applicant-appellant to the respondent-accused, who has also derailed her own case, while on one hand in her testimony deposed that the alleged loan was advanced on account of mutual trust being friendly relations between the two families, which was to be used for marriage of respondent's sister as well and on the other hand admitted that she was invited to the marriage nor any one of them attended to the marriage of respondent's sister,whose name was also not known to the applicant-appellant.

While examining the case law in Manoj Jain's case (Supra) though relied upon by the applicant-appellant, restricting to the submissions with regard to not preparing any document for the friendly loan is of no help to her but this Court has also gone into the same judgment, wherein para 15 to 18 the law on presumption has been thoroughly examined and adjudicated,which needs to be looked at herein as well:-

> *"15. In* ***Krishna Janardhan Bhat v. Dattatreya Hegde 2008(1) RCR (Criminal) 695 : 2008 (1) RCR (Civil) 498 : 2008(1) Recent Apex Judgments (R.A.J.) 279 : (2008) 4 SCC 54,*** *the law with respect to the burden of proof while dealing with the presumption under Section 39 of the Negotiable Instruments Act, has been succinctly adumbrated. The relevant portion of the said judgment is being reproduced hereinbelow :*
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> *"32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on records. An accused has a*

constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

33.In ***Bharat Barreal & Drum Mfg. Co. v. Amin Chand Payrelal [1999(2) RCR (Civil) 615:(1999) 3 SCC 35]*** *interpreting Section 118(a) of the Act, this Court opined: (SCC pp. 50-51, para 12)*

"12. Upon consideration of various judgments as noted hereinabove, 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."

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies.

35. A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidences on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.

36. In ***M.S. Narayana Menon v. State of Kerala [2006 (3) RCR (Criminal) 504: (2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30]*** *it was held that once the accused is found to discharge his initial burden, it shifts to the complainant.*

37. Four cheques, according to the accused, appear to have been drawn on the same day. The counterfoil of the cheque book, according to the appellant, was in the handwriting of R.G. Bhat wherein it was shown that apart from other payments, a sum of Rs. 1500/- was withdrawn on a self- drawn cheque. The courts below proceeded to hold that the defence raised by the appellant has not been proved, which, in our opinion, is not correct. He did not know that the said cheque had not been encashed. He replied to the notice thinking that one of the cheque has been misused. There is nothing on record to show that he knew that one of the cheques was still with R.G. Bhat.

38. Disputes and differences between him and R.G. Bhat *stood established by admission of the respondent himself. Similar industry was being run by R.G. Bhat although he was acting as the constituted attorney of the appellant. According to the appellant, R.G. Bhat had cheated him. The counterfoil showed that not more than Rs. 20,000/- had ever been withdrawn from that bank at a time. The courts were required to draw an inference as to the probability of the complainants advancing a sum of Rs. 1.5 lakh's on mere asking and that too without keeping any documentary proof. Even there was no witness. The purported story that the appellant would himself come forward to return the amount by a cheque knowing fully well that he did not have any sufficient funds is difficult to believe.*

39. In ***K. Prakashan v. P.K. Surenderan [2007(4) RCR (Criminal) 588 : (2008) 1 SCC 258 :(2008) 1 SCC (Cri) 200 : (2007) 12 Scale 96]*** *this Court following* ***M.S. Narayana Menon [(1999) 3 SCC 35]*** *opined:* ***(K. Prakashan case [(2006) 6 SCC 39 : (2006) 3 SCC (Cri) 30],*** *SCC p. 263, paras 13-14)*

"13 [12]. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118(a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature. Having regard to the definition of terms proved and disproved as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-a-vis an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision.

14 [13]. It is furthermore not in doubt or dispute that *whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."*

*40. In **John K. John v. Tom Varghese [2007(4) RCR(Criminal) 807 :(2007) 12 SCC 714: JT (2007) 13 SC 222]** this Court held: (SCC p. 717, para 11)*

"11 [10]....The High Court was entitled to take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken."

*41. Mr. Bhat relied upon a decision of this Court in **Hiten P. Dalal v. Bratindranath Banerjee [2001(3) RCR (Criminal) 460 : (2001) 6 SCC 16 : 2001 SCC (Cri) 960]** wherein this Court held: (SCC pp 24-25, paras 22-23)*

"22....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. 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". "(See also ***K.N. Beena v. Muniyappan [2001(4) RCR (Criminal) 545 :(2001) 8 SCC 458 : 2002 SCC (Cri) 14])***

42. We assume that the law laid down therein is correct. The views we have taken are not inconsistent therewith."

16. After espousing the law in this regard, the Supreme Court also took note of certain other aspects namely, presumption of innocence being a human right and the requirement ofa cautious approach in determining the compatibility between the concepts of reverse burden and presumption of innocence. The above noted elucidation is as follows:

"44. The presumption of innocence is a human right. [See ***Narender Singh v. State of M.P. [2004(3) RCR (Criminal)***

613 : (2004) 10 SCC 699 :2004 SCC (Cri) 1893], Ranjitsing Brahmajeetsingh Sharma v. State of Maharashtra [2005(2) Apex Criminal 389 : (2005) 5 SCC 294 : 2005 SCC (Cri) 1057] and Rajesh Ranjan Yadav v. CBI [2007(1) RCR (Criminal) 166 : (2007) 1 SCC 70 (2007) 1 SCC (Cri) 254]) *Article 6(2) of the European Convention on Human Rights provides :*

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasized. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e,g,. honest and reasonable mistake of fact. In a recent Article The Presumption of Innocence and Reverse Burdens : A Balancing Duty published in [2007] C.L.J. (March Part) 142 it has been stated :- "In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the

pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment."

45.We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same."

17. The factual background, the relationship of the parties and the amount of loan are some of the indices to definitely come to the conclusion, that the petitioner could not rebut the presumption in favour of the Respondent being the holder of the cheque. The Petitioner was in debt and the *cheque in question was issued for discharge of that debt.*

18. The reception of evidence, the appreciation of law and its application to the facts of the present case by the Trial Court cannot be faulted with."

On a clinical test of the discussion made hereinabove as per the facts and legal proposition applying to the instant case, the story of the applicant-appellant suffers from serious doubts and the judgment of acquittal passed by the trial Court dated 18.04.2018 do not suffer from any illegality, infirmity and perversity, therefore, the application is devoid of merits. Hence, the same is dismissed and as a result thereof accompanied memo of appeal also stands rejected.

(SANDEEP MOUDGIL)
JUDGE

09.03.2023
Meenu

Whether speaking/reasoned *Yes/No*
Whether reportable *Yes/No*