



Judgment

272 apeals397 & 398.22

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.397 OF 2022
AND
CRIMINAL APPEAL NO.398 OF 2022

CRIMINAL APPEAL NO.397 OF 2022

Vinod Dnyaneshwarrao Kharbade,
aged:- 51 years, occupation : service,
r/o Anju Colony, New Town
Badnera, Amravati, tahsil and district
Amravati. Appellant.

:: V E R S U S ::

Ku.Vaishali Raju Patil, (Nee)
Sau.Vaishali Nitin Burange,
age:- 46 years, occupation : service,
r/o c/o House of Shri Naitam, plot
no.24, Shivshakti Colony, Beside
Krushnarpan Colony, Amravati,
tahsil and district Amravati.

Second Address - Shivaji High
School, Purnanagar, taluka Bahtkuli,
district Amravati. Respondent.

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Shri P.A.Kadu, Counsel for the Appellant.
Shri S.S.Dhengale, Counsel for the Respondent.

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CRIMINAL APPEAL NO.398 OF 2022

Vinod Dnyaneshwarrao Kharbade,
aged:- 51 years, occupation : service,
r/o Anju Colony, New Town
Badnera, Amravati, tahsil and district

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..... Appellant.

:: VERSUS ::

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Shri P.A.Kadu, Counsel for the Appellant.
Shri S.S.Dhengale, Counsel for the Respondent.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 06/08/2024

PRONOUNCED ON : 20/08/2024

COMMON JUDGMENT

1. Criminal Appeal No.397/2022, arises out of judgment and order dated 1.2.2022 passed by learned Judicial Magistrate First Class, Court No.3, Amravati in SCC Nos.2774/2016 filed by the appellant/complainant whereby the respondent/accused is acquitted of offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

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Criminal Appeal No.398/2022, arises out of judgment and order dated 1.2.2022 passed by learned Judicial Magistrate First Class, Court No.3, Amravati in SCC Nos.3013/2016 filed by the appellant/complainant whereby the respondent/accused is acquitted of offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. Brief facts are as under:

The appellant/complainant is an agriculturist. Husband of the respondent/accused wanted to sell his shop situated at Rajapeth. The appellant/complainant was desirous to purchase shop. With an intervention of one Mahalle and Choudhari, an agreement of sale was executed between the appellant/complainant and husband of the respondent/accused on 9.3.2013. After execution of the said agreement, the husband of the respondent/accused sold shop to third person and, therefore, the agreement of sale executed in favour of the appellant/complainant was cancelled. The appellant/complainant returned documents to husband of the respondent/accused and husband of the respondent/accused

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refunded earnest amount to the appellant/complainant. Being there a friendly relation is developed between the appellant/complainant and the respondent/accused, the appellant/complainant gave hand loan of Rs.3,50,000/- to the respondent/accused and the respondent/accused executed a receipt dated 9.1.2015 as well as post dated cheques bearing No.031930 of Rs.2.00 lacs dated 9.5.2016 and bearing No.031923 of Rs.1,50,000/- dated 24.5.2016 of the Amravati District Central Cooperative Bank Limited. When the first cheque was presented, it was dishonoured for reason "Accounts Closed." The appellant/complainant issued a notice. After receipt of the notice, the respondent/accused has not paid the amount and, therefore, the appellant/complainant filed a criminal complaints under Section 138 of the Negotiable Instruments Act.

3. After hearing both sides and recording evidence, the trial court held that the appellant/complainant failed to establish that cheques were issued against legal and enforceable debt and acquitted the respondent/accused.

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4. Being aggrieved with the same, the present appeals are preferred by the appellant/complainant on ground that there was an ample material on record to show that there was legal and enforceable debt and presumption is not rebutted by the respondent/accused and wrongly acquitted the respondent/accused.

5. Heard learned counsel Shri P.A.Kadu for the appellant/complainant and learned counsel Shri S.S.Dhengale the respondent/accused.

6. Learned counsel for the appellant/complainant submitted that the trial court committed an error in holding that there was legal and enforceable debt and the respondent/accused rebutted the presumption. It is submitted that the respondent/accused failed to send reply to the statutory notice. The respondent/accused also failed to file any submissions as to allegation in the complaint neither entered into the witness box in support of their defence. It was submitted that when the respondent/accused kept mum to the statutory notice and no evidence was adduced on her behalf in

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support of her stand, the presumption under Sections 118 and 139 of the Negotiable Instruments Act is operated against them. As such, the view taken by the trial court is erroneous and, therefore, the judgments impugned in appeals are liable to be set aside.

7. In support of his contentions, learned counsel for the appellant/complainant placed reliance on following decisions:

1. **Rajesh Jain vs. Ajay Singh**, reported in (2023)10 SCC 148;
2. **Kalamani Tex and anr vs. P.Balasubramanian**, reported in (2021)5 SCC 283;
3. **Hemant Pavel Gracias vs. Socorro Santan Fernandes**, reported in 2008(2) DCR 423, and
4. **Rangappa vs. Sri Mohan**, reported in (2010)11 SCC 441.

8. *Per contra*, learned counsel for the respondent/accused submitted that even if there was a presumption that cheques were issued for discharge of legal debt or liability, once signatures on cheques were admitted, the appellant/complainant was still required to prove foundational

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facts of his case. However, the appellant/complainant failed to prove such foundational facts regarding hand loan advanced to the respondent/accused. It is not necessary for the respondent/accused to enter into the witness box. The appellant/complainant can rebut the presumption through cross examination also.

9. In support of his contentions, learned counsel for the respondent/accused placed reliance on following decisions:

- 1. Sanjay Yadhavraoji Makode vs. Suhas Prakashji Dhote, reported in 2018(3) DCR 24;**
- 2. Shankar Jaganath Mane vs. Sikkandar Mohammed Bidiwala, reported in 2020(3) DCR 471, and**
- 3. Mahendra Gulabchand Kochar vs. Sakharam Ramdas Patil, reported in 2009 SCC OnLine Bom 493.**

10. Before referring to the evidence and material on record, it is necessary to refer the law settled by the Honourable Apex Court.

11. The Honourable Apex Court, in the case of **M.S.Narayana Menon vs. State of Kerala, reported in (2006)6**

SCC 39, referred to presumption under Sections 118 and 139 of the Negotiable Instruments Act and held that the presumption is rebuttable. The Honourable Apex Court in paragraph No.30 of its judgment observed as follows:

“30. Applying the said definitions of 'proved' or 'disproved' to 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 is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

It has further been observed that a Division Bench of this Court in **Bharat Barrel and Drum Manufacturing Company vs. Amin Chand Payrelal**, reported in (1999)3 SCC 35 laid down law in following terms:

“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."

12. The Single Bench of this Court also in the case of **Sanjay Yadhavraoji Makode vs. Suhas Prakashji Dhote** *supra* by referring few precedents observed that as the foundational

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facts were not established by the appellant in the present case, it cannot be said that the trial Court committed any error in holding that the respondent deserved to be acquitted.

13. Thus, in catena of decisions, it is clearly opined that it is not necessary for the defendant to disprove existence of consideration by way of direct evidence. The standard of proof evidently is preponderance of probabilities and it can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies. Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another.

14. Thus, the accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such

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rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Negotiable Instruments Act will not help to the complainant.

15. A Three Judges Bench of the Hon'ble Supreme Court in the case of **Rangappa vs. Sri Mohan**, reported in (2010)11 SCC 441, in the context of Section 139 of the Negotiable Instruments Act, has held as follows:

"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 139 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

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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."

16. Thus, the position of law settled by the aforesaid decisions is that although presumption does arise against the accused in such cases under Sections 118 and 139 of the Negotiable Instruments Act, the presumption is rebuttable on the touchstone of preponderance of probabilities.

17. Applying the aforesaid proposition of law to the facts of the present case, it is found that the respondent/accused failed to reply to the statutory notice sent by the

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appellant/complainant. Admittedly, they had not filed any reply or submission in response to the complaint of the complainant and also not entered into the witness box. Thus, there was no direct evidence led by him in support of his case. She placed reliance on cross examination of the appellant/complainant. The defence of the respondent/accused was that blank cheques issued to the security were misused by the appellant/complainant. It was further defence of the respondent/accused that she never took hand loan from the appellant/complainant and not executed usanwar pawti and not issued cheques.

18. Perusal of the evidence of the appellant/complainant shows that though during chief examination he had reiterated contents of the complaint, during cross examination he admitted that he has not produced any documents on record to show that he is doing agricultural work as well as private work. He has also not filed on record any evidence to show that his wife is also earning. It revealed from the cross examination that initially there was transaction of agreement

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of sale between the appellant/complainant and the respondent/accused. He has neither filed copy of the said agreement of sale nor any document to show that how much amount was decided as a consideration amount and how much amount he received. He admitted to the extent that he is unable to tell on which date and how much amount he paid to the respondent/accused. He specifically admitted that economic condition of the respondent/accused is better than his economic condition. It further came during his cross examination that in usanwar pawti Exhibit-28 his name is not mentioned. Thus, it is not disputed that signatures on cheques were that of the respondent/accused. It was submitted that the appellant/complainant failed to support his case of having advanced cash loan to the respondent/accused. The cross examination also demonstrates that there was some other transaction which was subsequently cancelled. However, there is no evidence that husbands of the respondent/accused repaid the said earnest amount. As far as the hand loan given to the respondent/accused is concerned, no date is mentioned.

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19. Perusal of the evidence of the appellant/complainant shows that he specifically admitted that his name is not mentioned in the usanwar pawti. As such, from the usanwar pawti nowhere it reveals that it was executed in favour of the appellant/complainant. As far as source of income of the appellant/complainant is concerned, his admission is sufficient to show that the respondent/accused is teacher and having good income than the appellant/complainant. The appellant/complainant has not disclosed source of his earning and there is no other material to show that he was in a position to give such amount as a hand loan. It is pertinent to note that the entire reliance of the appellant/complainant is on the usanwar pawti, but the said usanwar pawti nowhere reveals that it was executed in favour of the appellant/complainant.

20. In the case of **Rajesh Jain vs. Ajay Singh** *supra*, as relied upon by learned counsel for the appellant/accused, it is held that the standard of proof to discharge this evidential burden is not as heavy as that usually seen in situations where the

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prosecution is required to prove the guilt of an accused. The accused is not expected to prove the non-existence of the presumed fact beyond reasonable doubt. The accused must meet the standard of 'preponderance of probabilities', similar to a defendant in a civil proceeding. In order to rebut the presumption and prove to the contrary, it is open to the accused to raise a probable defence wherein the existence of a legally enforceable debt or liability can be contested.

21. As the defence taken by the respondent/accused is a probable defence, the trial court acted upon it and held that the appellant/complainant failed to prove that cheques were issued in discharge of legal and enforceable debt.

22. It is well settled that while exercising appellate powers, especially while dealing with appeals against acquittal, cardinal principle to be kept in mind is that there is a presumption of innocence in favour of accused unless the accused is proved guilty. The presumption continues and finally culminates into a fact when the case ends in acquittal. The possibility of two views in criminal cases is not an

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extraordinary phenomenon while considering appeals against acquittal. A fact cannot lose sight of the same. The trial court has appreciated the entire evidence and reversal of an order of acquittal is not to be based on mere existence of different views or mere difference of opinion. Normally, while exercising the appellate jurisdiction, it is the duty of the appellate court to see, whether decision is correct or incorrect on law and facts. While dealing with appeals against acquittal, the court cannot examine the impugned judgment only to find out whether the view taken was correct or incorrect. After re-appreciating oral and documentary evidence, the Appellate Court must first decide whether the Trial Court's view was a possible view. The Appellate Court cannot overturn acquittal only on the ground that after re-appreciating evidence, it is of the view that the guilt of the accused was established beyond a reasonable doubt.

23. In the present case, as the foundational facts were not established by the appellant/complainant, it cannot be said that the trial court committed any error to hold that the

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respondent/accused deserves to be acquitted. The appellant/complainant is completely discredited during the cross examination and, therefore, appeals are devoid of merits. The trial court has taken into consideration the entire material on record and by applying the law in respect of presumption under the said Act has taken a possible view of the matter. When the trial court has taken a possible view, there should not be any interference by the higher court. It is well settled that when two views are possible, one which is in favour of the accused will prevail.

24. In that light of the above, appeals being devoid of merits liable to be dismissed and the same are **dismissed**.

Appeals stand **disposed of**.

(URMILA JOSHI-PHALKE, J.)

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