(2010) 1 BC 345 : (2011) 3 CivCC 104 : (2011) 2 RCR(Criminal) 797 : (2011) 2 RCR(Criminal) 797

Bombay High Court (Goa Bench)

Case No: Criminal Appeal No. 10 of 2009

Shri John Fernandes	APPELLANT
Vs	
Smt. Noorjahan Khan and State	RESPONDENT

Date of Decision: Oct. 8, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 114
- Negotiable Instruments Act, 1881 (NI) - Section 118, 138, 139

Citation: (2010) 1 BC 345 : (2011) 3 CivCC 104 : (2011) 2 RCR(Criminal) 797 : (2011) 2 RCR(Criminal) 797

Hon'ble Judges: N.A. Britto, J

Bench: Single Bench

Advocate: Iftikar Agha, for the Appellant; P.A. Kamat, for the Respondent

Final Decision: Dismissed

Judgement

N.A. Britto, J.
This a complainant''s appeal and is directed against Judgment dated 27.8.08 of the Learned J.M.F.C., Margao, acquitting the accused u/s 138 of the Negotiable Instruments Act, 1881.

2. The complaint was filed for dishonour of two cheques, details of which are as follows:

1. Cheque No. 162965 dated 12.1.07 for Rs. 6,97,200/-.

2. Cheque No. 0188869 dated 12.1.07 for Rs. 4,98,000/-.

3. The first cheque was drawn on ICICI bank and the 2nd was drawn on bank of India. There is no dispute that both the cheques were presented by the complainant for encashment but were returned with endorsement that the funds were insufficient. The case of the complainant is that the said cheques were given by the accused to defraud him and without any intention to pay the amount due of Rs. 11,95,200/- knowing fully well that the said cheques were bound to bounce for lack of sufficient funds. The complainant sent separate legal notices, both dated 14.2.2007 in respect of the said two cheques demanding payment. The accused received the said notices and sent a reply.

4. In the reply, the accused took the plea that he was not liable to pay any amount to the complainant. The accused alleged that the complainant was doing money lending business and was in the habit of taking blank cheques and then filling the same and claiming huge amounts from the people. As regards the claim of the complainant that the said cheques were issued towards the sale amount of the shop of the accused situated at the New Market, Margao, Goa, the accused sated that the accused did not own any shop in the said market. The accused denied that the complainant had advanced to the accused Rs. 11,95,200/-. The accused also called upon the complainant to give the details of the alleged payment of Rs. 11,95,200/- including the date of alleged payment, the manner of payment, the place where payment was made and the names of the witnesses who were present. The accused also called upon the complainant to give the copies of the said cheques so that the accused could comment on the writing on the same. As regards the first cheque the accused further stated that about four years prior to the date on the cheque, the accused had taken a private loan from the complainant of Rs. 10,000/- and at that time the complainant had insisted that the accused should hand over a blank cheque to him as security, and in case the loan was not paid then he would take action but the accused subsequently paid the loan to the complainant and the said amount of the loan was paid through the servant of the accused who was asked to hand over the amount to the complainant and get the cheque back and at that time the complainant had informed the said servant that he was unable to trace the said cheque and avoided to return the same, but the accused did not realize the dishonest intention of the complainant. As regards the second cheque, the accused stated that in the year 2003 the accused had asked the complainant for a loan of Rs. 2,00,000/- for construction of a house and the complainant had paid to the accused a sum of Rs. 1,80,000/- by deducting in advance the interest payable and at that time the complainant had asked to give a blank cheque and accordingly the second cheque was given without any writing and signature was taken of the accused. The accused stated that the said loan of Rs. 1.80,000/- was paid in cash to the complainant with interest thereon but the complainant did not return the said cheque saying that the said cheque was not signed or filled and was only a piece of paper and the same was misplaced. The accused also stated that the complainant had recently approached the accused with an offer to purchase the flat of the accused but the accused refused to sell the flat and as such the complainant got annoyed and misused the two blank cheques which were with the complainant to pressurize the accused to sell the flat. The accused also stated that the second cheque was not a

cheque or a negotiable instrument as it was not signed by the accused and the complainant had filled in the same and forged the signature of the accused. The accused also stated that the complainant was engaged in private money lending business which is an offence under law. The accused also called for an inspection of the said two cheques within fifteen days of the receipt of the reply.

5. Admittedly, the complainant did not comply with any of the requests made by the accused in his said replies dated 21.2.2007 but proceeded to file the complaint and examine himself in support of the same. The accused did not lead any evidence but filed an additional written statement and in it further stated that both the cheques were fabricated. The accused also stated that the said cheques were blank cheques given to the wife of the complainant as security towards the amount of Rs. 10,000/- and Rs. 1,80,000/- respectively taken by the accused from the complainant and his wife in the years 2003 and 2004. The accused also stated that subsequently the accused in the year 2004 asked the complainant for a loan of Rs. 2,00,000/- and at that time the second cheque was taken as security but the entire sum of Rs. 1,80,000/was repaid by the accused to the complainant and his wife within six months but the complainant did not return the cheque because the said cheque was not signed and filled and was merely a piece of paper and was misplaced. The accused further stated that both the cheques were not in her handwriting and they were not issued by the accused, as claimed by the complainant.

6. The Learned Magistrate after considering the evidence of the complainant came to the conclusion that the accused had succeeded in rebutting the presumptions available to the complainant in his favour and further held that the complainant had failed to establish the liability of the accused under the said cheques, beyond reasonable doubt. The Learned Magistrate observed that according to the complainant the said sum of Rs. 11,95,200/- was paid in two installments within a period of four days and the installments were paid at the complainant''s residence when one Conceicao Mascarenhas and the wife of the complainant were present but none of them were examined as witnesses by the complainant in support of his claim of payment. The Learned Magistrate also noted that according to the complainant a sum of Rs. 10,00,000/- was taken by the complainant from one Conceicao Mascarenhas as they intended to purchase a shop in partnership, from the accused and therefore the Learned Magistrate observed that the said Mr. Mascarenhas was an important witness to be examined but was not examined by the complainant.

7. Be that as it may, Shri. I. Agha, Learned Counsel appearing on behalf of the complainant, submits that the accused has admitted that there were transactions between the complainant and the accused. Learned Counsel further submits that the defence taken by the accused in the reply to the statutory notice sent by the accused was not put to the complainant in his cross examination. Referring to an answer to question No. 4 of the statement recorded of the accused u/s 313 of the Code, Learned Counsel submits that the accused had given a false answer when it was admitted position that the cheques

bounced because of insufficient funds into the account of the accused. Learned Counsel further submits that in case according to the accused, loans were taken and repaid, the accused ought to have led some evidence in support of the said repayment and since the accused did not lead his own evidence or that of any other witness, an adverse inference has got to be drawn against the accused. Learned Counsel further submits that the complainant''s case has always been consistent and the case of the complainant is supported by the presumptions which are in his favour. Learned Counsel further submits that various theories put forward by the accused either in the cross examination of the complainant or in the additional statement filed were not at all proved by the accused. Learned Counsel has placed reliance on K. Prakashan Vs. P.K. Surenderan, and Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, . Learned Counsel has also referred to the case of Wilson Fernandes v. Nitin Pandurang Chodankar 2004 (2) G L.R. 439.

8. On the other hand, Shri Kamat, the Learned Counsel on behalf of the accused, has firstly submitted that there is no averment in the complaint that the two cheques were given by the accused to the complainant in discharge of a legally enforceable liability. Learned Counsel further submits that the cross examination of the complainant shows that the case of the complainant is far from probable. Learned Counsel further submits that it is difficult to accept that the complainant would have lent two large sums of money within a span of four days and in case the said sums were advanced by the complainant in the presence of the said Mr. Mascarenhas or his wife, it was incumbent upon the complainant to have examined them to support his case and since the complainant has not examined them, this is a fit case to draw an adverse inference against the complainant, for their non-examination. Learned Counsel further submits that the accused right in the reply to the statutory notice had made it clear to the complainant that she did not own any shop in the New Market at Margao and in case according to the complainant, the two cheques were given by the accused towards the sale of the shop, then the complainant ought to have had some documents or procured the same to prove that the accused owned a shop. Learned Counsel has further submitted that the trial Court has analyzed the evidence produced by the complainant and has come to a right conclusion, and, therefore this Court may not interfere with the same.

9. Admittedly, both the cheques issued by the accused to the complainant were returned because there was insufficient amount in the respective bank accounts of the accused and not for any other reason and in such a situation it could be safely assumed, that both the cheques were indeed signed by the accused, notwithstanding the defence taken by her that one of the cheques was not signed by her and therefore the complainant would have been certainly entitled to the benefit of the presumptions available to the complainant in terms of Sections 138 and 139 of the Negotiable Instruments Act, 1881. The accused had also not led any evidence in support of the very many pleas taken by her, either in her reply or in statement u/s 313 of the Code but that does not mean that the complainant is entitled to succeed. Falsity or weakness in the defence version does not establish the case of complainant that is a fundamental principle of criminal

jurisprudence. The said presumptions are certainly rebuttable and it is well settled now that they can be rebutted on the basis of the very evidence of the complainant or by the accused leading his own.

10. The Apex Court in K. J. Bhat (supra) has stated that the question whether a presumption is rebutted or not must be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where 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. The Apex Court referred to the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, and held that once the accused has failed to discharge his initial burden, it shifts to the complainant.

11. The Apex Court in K. Prakashan (supra) held that the accused is required to discharge the burden of proof by preponderance of probability and further held that the Act raised two presumptions, firstly in regard to the passing of consideration as contained in Section 118(a) and secondly a presumption that a holder of a cheque received the same of the nature referred to in Section 139 and both the presumptions were rebuttable in nature and while the standard of proof so far as the prosecution is concerned, is proof of guilt beyond reasonable doubt, the one on the accused is only mere preponderance of probability and further held that considering the nature of burden upon the prosecution vis-a-vis the accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the afore mentioned provision. The Apex Court also held that it is trite law that if two views are possible, the Appellate Court shall not reverse a Judgment of acquittal only because another view is possible to be taken.

12. Reverting to K. J. Bhat, (supra) the Apex Court also held that that the Courts must be on guard to see that merely on the application of presumption as contemplated u/s 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. The Apex Court further observed that 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 the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who would 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.

13. The Apex Court in Mallavarapu Kasiviswesware Rao Vs. Thadikonda Ramulu Firm and Others, has held that, after referring to Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal, that in case 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 would 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 Court also held that it was discernible from the said decision that if 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 u/s 118(a) in his favour.

14. The Apex Court in Kumar Exports Vs. Sharma Carpets, has held that in a trial u/s 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of the negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and discharge of any debt or liability. A presumption is not in itself evidence but only makes a prima facie case for a party for whose benefit it exists. The Apex Court further held that in a trial u/s 138 of the Act the accused has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumption an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non existence of consideration and that by leading direct evidence because the existence of negative evidence is entirely possible nor contemplated. At the same time it is clear that bare denial of the passing of the consideration and existence of that, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumption the 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 their non existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act. The accused has also another 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 complainant, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such 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 therefore the presumptions under Sections 118 and 139 of the Act will not again come to the complainant"s rescue.

15. Reverting to the facts of the case, Counsel on behalf of the complainant, may be right in contending that the accused did not substantiate the very many theories the accused had advanced in his defence. In fact, the accused has not. However, the case of the complainant has been very inconsistent and the complainant has floundered, as the cross examination progressed and from this it can be safely concluded that the complainant has proved himself to be unreliable and this has made way for the accused to prove the non existence of consideration; or at least that it was improbable or doubtful.

16. The case of the complainant was that the two cheques were given by the accused to the complainant by way of repayment of advance of Rs. 11,95,200/- as the accused did not wish to sell the shop earlier agreed to be sold by the accused to the complainant. The complainant did not set out in his complaint as to when he advanced the said sum of Rs. 11,95,200/- to the accused and this inspite of the fact that in the reply the accused had called upon him to do so. In cross examination the complainant stated that the said amount was advanced in the year 2004 in two installments and within four days and the complainant wished the Court to believe that he had advanced the said sums of Rs. 6,97,200/- and Rs. 4,98,000/- in cash to the accused in a span of four days without any receipt or for that matter any agreement for the sale of the shop. The complainant in further cross examination, stated that the shop was agreed to be purchased by him and by one Conceicao Mascarenhas and the latter had advanced a sum of Rs. 10,00,000/while he took a sum of Rs. 1,95,200/- from his wife. However, the complainant did not spelt out this position in the complaint nor explained as to why, if two of them wanted to purchase the shop, there was no much divergence in their contribution towards the purchase price of the shop. Admittedly, the complainant did not examine the said Conceicao Mascarenhas, nor his wife. The complainant also could not substantiate his claim that he had taken Rs. 1,95,200/- from his wife. When cross examined on this aspect, the complainant stated that he had withdrawn Rs. 1,95,200/- in three installments, two installments being of Rs. 50,000/- and one installment of Rs. 1,00,000/- but on further cross examination, the complainant admitted that the withdrawal of Rs. 1,00,000/- was on 10.12.04 and withdrawal of Rs. 50,000/- was on 19.7.04 but ultimately was compelled to admit that he did not remember how much he withdrew and again stated that he had withdrawn Rs. 1,10,000/- from which he gave Rs. 50,000/- to the accused and kept the balance with him. All this would not have happened in case the complainant had advanced the sum of Rs. 11,95,200/- in two installments as stated by him. The complainant would also have remembered the date and the month as the sums were quite large. Counsel on behalf of the complainant submits that the complainant had withdrawn the money in installments of Rs. 50,000/- because of the restrictions placed by the Income Tax Act. If that be the case, one fails to understand how the complainant paid such a huge amount to the accused in cash and that too without any receipt. The case of

the complainant appears to be highly improbable that the accused had given the cheques towards the consideration the complainant had paid to the accused towards the sale of the shop, a shop which was not even in possession of the accused and which was being run by one Shroff.

17. This is an appeal against acquittal, and, as already stated, if from the evidence produced two views are equally possible, the Appellate Court will not reverse a Judgment of acquittal and convert an acquittal into conviction. In the case at hand the accused was able to, with the very evidence of the complainant, to show that the two cheques were without any consideration and having discharged the said burden, it was for the complainant to have proved consideration as a matter of fact, which the complainant has failed to prove.

18. Considering the facts of the case, the acquittal of the accused could not be faulted. I find there is no merit in this appeal and consequently the same is hereby dismissed with costs of Rs. 5,000/-.