(2019) 04 SHI CK 0016

High Court of Himachal Pradesh

Case No: Criminal Appeal No. 1 Of 2019

Mohinder Kumar	APPELLANT
Vs	
Mast Ram Pathak	RESPONDENT

Date of Decision: April 9, 2019

Acts Referred:

- Negotiable Instruments Act, 1881 - Section 118(A), 138, 139, 140, 141, 142
- Code Of Criminal Procedure, 1973 - Section 313
- Evidence Act, 1872 - Section 3, 4

Citation: (2019) 1 DCR 763

Hon'ble Judges: Tarlok Singh Chauhan, J

Bench: Single Bench

Advocate: L.S. Mehta, Mohar Singh

Final Decision: Disposed Off

Judgement

Tarlok Singh Chauhan, J

1. The appellant is the complainant, who aggrieved by the order of acquittal passed by the learned trial Magistrate on 20.11.2017 in a complaint under

Section 138 of the Negotiable Instruments Act (for short the Ã¢â‚¬ËœActÃ¢â‚¬â„¢), has filed the instant appeal.

2. Taking into consideration the nature of the order I propose to pass, it is not necessary to delve into the facts in detail save and except that in the

complaint filed by the appellant it was averred that the respondent/accused was a good friend and had requested for financial assistance of

Rs.1,80,000/Ã, which was required by him for running his business smoothly and properly. The complainant arranged this amount and handed over the

same to the respondent. The respondent in turn issued cheque bearing No.523642 on 5.7.2014 amounting to Rs.1,80,000/Ã,drawn at State Bank of

India, Branch at Kali Bari, Shimla in favour of the complainant. Upon presentation of the cheque by the complainant in his bank Axis Bank, Ltd SDA

Complex, Kasumpti, Shimla on 30.8.2014, the same was dishonoured on account of Ã¢â‚¬Ëœinsufficient fundsÃ¢â‚¬â„¢. The complainant sent legal notice on

6.9.2014, but despite service thereof, the respondent/accused did not make the payment, constraining the complainant to file the complaint under

Section 138 of the Act.

3 On the basis of preliminary evidence led by the complainant, the respondent/accused was summoned and claimed trial by pleading not guilty.

4. The complainant examined himself as CWÃ‚1 and tendered certain documents in his evidence. Thereafter, the statement of the respondent/accused

under Section 313 Cr.P.C. was recorded in which he stated that a false case has been made against him and in defence, the accused/respondent

examined two witnesses and thereafter closed his evidence.

5. As observed above, the learned trial Magistrate dismissed the complaint and acquitted the respondent/accused of the charge under Section 138 of

the Act, constraining the complainant to file the instant appeal.

6. It is vehemently argued by Mr. L.S. Mehta, learned counsel for the appellant, that the findings recorded by the learned trial Magistrate are perverse

and, therefore, deserve to be setÃ‚aside. Whereas, on the other hand, Mr. Mohar Singh, learned counsel for the respondent/accused would contend

that the order of acquittal as passed by the learned Court below is based on correct appreciation of the complaint as also the oral and documentary

evidence led on the record and, therefore, the order warrants no interference by this Court.

7. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

8. A perusal of the impugned order would reveal that the learned trial Magistrate after referring to the oral and documentary evidence on record has

in paraÃ‚â€‹12 observed as under:

Ã¢â‚¬Å“The initial onus to prove that the complainant has advanced a sum of Rs.1,80,000/Ã, to the accused who in discharge of the said legal liability

issued cheque Ext.CWÃ‚â€‹1/A which was dishonoured was upon the complainant onlyÃ¢â‚¬Â¦.Ã¢â‚¬â€‹

9. Likewise, similar observations are found in paraÃ‚â€‹15 of the order and the same read as under:

Ã¢â‚¬Å“The complainant was required to prove presumption as provided under Section 118(A) of the Negotiable Instruments Act, that cheque in question

was issued for consideration and if said presumption is proved on record then only burden shifts upon the accused as provided under Section 139 of

the Negotiable Instruments Act. It is presumed that cheque in question was issued in discharge of some legal liability and holder of the cheque

received the said cheque on account of some such liability. The complainant in the present case miserably failed to prove from the entire evidence on

record that there was any such legal liability of the accused in discharge of which he issued cheque Ext.CWÃ‚1/A, which was dishonoured on the

ground of insufficient funds qua which memo Ext.CWÃ‚1/B was also issued. The complainant failed to discharge initial burden to prove that cheque in

question was issued in discharge of some legal liability, hence this burden never shifted upon the accused that said cheque which is duly signed by him

was not issued in discharge of some legal liability.Ã¢â‚¬â€‹

10. Even in paraÃ‚â€‹16 somewhat similar observations can be found and the same read as under:

Ã¢â‚¬Å“Thus, the complainant miserably failed to prove that he has advanced amount of Rs.1,80,000/Ã, to the accused as evidence led by him is contrary

to the facts as contained in the complaint which makes case of the complainant doubtful story. Hence, the complainant has failed to prove beyond

shadow of reasonable doubt that he has advanced an amount of Rs.1,80,000/Ã, to the accused who in discharge of said legal liability issued cheque

Ext.CWÃ‚1/A which was dishonoured on account of insufficient funds. Accordingly, in the light of these facts, the point No.1 is decided against the

complainant and is answered in negative.Ã¢â‚¬â€‹

11. Apparently, the learned trial Magistrate has not at all kept in mind the presumptions as to Negotiable Instrument as envisaged under Sections

118(a) and 139 of the Act, which reads as under:Ã‚â€‹

Ã¢â‚¬Å“118. Presumptions AS to negotiAble instruments.Ã‚â€‹Until the contrary is proved, the following presumptions shall be made:Ã‚â€‹

(a) of consideRAtionÃ, that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been

accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

139. Presumption in fAvour of holder.Ã, 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.Ã¢â‚¬â€‹

12. Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act No. 66 of 1988 with the object of inculcating faith in the efficacy

of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were intended to discourage people

from not honouring the commitments by way of payment through cheques. It is for this reason that the Courts should lean in favour of an

interpretation which serves the object of the statue.

13. In M.S. NARAYAnA Menon AliAS MAni vs. StAte of KeRAlA And Another (2006) 6 SCC ‚3 t9he HonÃ¢â‚¬â„¢ble Supreme Court while dealing

with a case under Section 138 of the Act held that the presumption under Sections 118(a) and 139 were rebuttable and the standard of proof required

for such rebuttal was Ã¢â‚¬Å“preponderance of probabilityÃ¢â‚¬â€‹ and not proof Ã¢â‚¬Å“proved beyond reasonable doubtÃ¢â‚¬â€‹ and it was held as under:Ã‚â€‹

Ã¢â‚¬Å“29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as

proved unless and until it is disproved. The words 'proved' and 'disproved' have been defined in Section 3 of the Evidence Act (the interpretation

clause)Ã¢â‚¬Â¦.

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

nonÃ, 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.

* * *

32.The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the

materials on records but also by reference to the circumstances upon which he relies.

41Ã¢â‚¬Â¦..Ã¢â‚¬â„¢23Ã¢â‚¬Â¦...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"".Ã¢â‚¬â€‹

14. Similar reiteration of law can be found in K. PRAKASHAn vs. P.K. SurendeRAn (2008) 1 SCC 258 wherein it was observed as under:Ã‚â€‹

Ã¢â‚¬Å“13. 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 natureÃ¢â‚¬Â¦...

14. 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.Ã¢â‚¬â€‹

15. To the same effect is the decision of the HonÃ¢â‚¬â„¢ble Supreme Court in KrishnA JAnArdHAn BHAt vs. DAttAtRAYA G. Hegde (2008) 4 SCC

54 wherein the HonÃ¢â‚¬â„¢ble Supreme Court observed as under:Ã‚â€‹

Ã¢â‚¬Å“32Ã¢â‚¬Â¦..Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

* * *

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 probabilitiesÃ¢â‚¬Â¦...

* * *

45Ã¢â‚¬Â¦.. 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 Ã¢â‚¬â€‹

16. Earlier to that the HonÃ¢â‚¬â„¢ble Supreme Court in Hiten P. DAlAl vs. BRAtindrAnAth BAnerjee (2001) 6 SCC 1, 6compared the evidentiary

presumptions in favour of the prosecution with the presumption of innocence in the following terms:Ã‚â€‹

Ã¢â‚¬Å“22Ã¢â‚¬Â¦..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 nonÃ‚existence 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 contraryÃ¢â‚¬Â¦Ã¢â‚¬Â¦.Ã¢â‚¬â€‹

17. Section 139 of the Act provides for drawing a presumption in favour of the holder and the HonÃ¢â‚¬â„¢ble Supreme Court in KumAr Exports vs.

SHArmA CArpets, (2009) 2 SCC 513 has considered the provisions of the Act as well as Evidence Act and observed as under:Ã‚â€‹

Ã¢â‚¬Å“14. Section 139 of the Act 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.

15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence

or insufficient evidence. Under the Indian Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the

Act, namely, (1) ""may presume"" (rebuttable), (2) ""shall presume"" (rebuttable) and (3) ""conclusive presumptions"" (irrebuttable). The term `presumption'

is used to designate an inference, affirmative or disaffirmative of the existence a fact, conveniently called the ""presumed fact"" drawn by a judicial

tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the

satisfaction of the tribunal. Presumption literally means ""taking as true without examination or proof"".

* * *

18. Applying the definition of the word `proved' in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes

evident that in a trial under Section 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 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 in 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.

19. The use of the phrase ""until the contrary is proved"" in Section 118 of the Act and use of the words ""unless the contrary is proved"" in Section 139

of the Act read with definitions of ""may presume"" and ""shall presume"" as given in Section 4 of the Evidence Act, makes it at once clear that

presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the

duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the

real fact is not as presumed, the purpose of the presumption is over.Ã¢â‚¬‹

18. The HonÃ¢â‚¬â„¢ble Supreme Court thereafter held that the accused may adduce evidence to rebut the presumption, but mere denial regarding

existence of debt shall not serve any purpose.

19. In RAngAppA vs. Sri MOHAn, (2010) 11 SCC 441, HonÃ¢â‚¬â„¢ble three Judges Bench of the HonÃ¢â‚¬â„¢ble Supreme Court had occasion to examine

the presumption under Section 139 of the Act and it was held that in the event the accused is able to raise a probable defence which creates doubt

with regard to the existence of a debt or liability, the presumption may fail. It is apposite to refer to the relevant observations which read as under:Ã‚â€‹

Ã¢â‚¬Å“26. In light of these extracts, we are in agreement with the respondentÃ‚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 v.

Dattatraya G.Hegde (2008) 4 SCC 54 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 of proof.Ã¢â‚¬â€‹

20. In a very recent judgment in T.P. MurugAn vs. BojAn (2018) 8 SCC 469, the HonÃ¢â‚¬â„¢ble Supreme Court has held that once a cheque has been

signed and issued in favour of holder of cheque, there is statutory presumption that it is issued in discharge of a legally enforceable debt or liability, but

at the same time, it was also held that this presumption is rebuttable one and the issuer of cheque can rebut that presumption by adducing credible

evidence that the cheque was issued for some other purpose like security for loan etc..

21. Bearing in mind the aforesaid exposition of law, it can conveniently be held that in terms of Section 4 of the Evidence Act whenever it is provided

by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words Ã¢â‚¬Å“provedÃ¢â‚¬ and

Ã¢â‚¬Å“disprovedÃ¢â‚¬â€‹ have been defined in Section 3 of the Evidence Act.

22. Applying the said definitions of Ã¢â‚¬Å“provedÃ¢â‚¬ or Ã¢â‚¬Å“disprovedÃ¢â‚¬ to the 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 nonÃ‚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.

23. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the

materials on record but also by reference to the circumstances upon which he relies. 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. Bearing in mind the aforesaid exposition of law, it is clearly evident that the learned trial Magistrate has failed to take into consideration the fact

that once a cheque has been signed and issued in favour of the holder, there is a statutory presumption that it is issued in discharge of legally

enforceable debt or liability. This presumption, of course, is rebuttable one if the issuer of the cheque is able to discharge the burden that it was issued

for any other purpose like security of loan.

25. Section 139 of the Act is a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of

negotiable instruments. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not

exist or that under the particular circumstances of the case, the nonÃ‚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 presumptions 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 nonÃ, existence of consideration and debt by leading direct evidence because the existence of negative evidence is

neither possible nor contemplated. However, at the same time, it is clear that bare denial of the passing of the consideration and existence of debt,

apparently would not serve the purpose of the accused. Something which is probable has to be brought on record by the accused in order to get the

burden of proof shifted on the complainant. To disprove the presumptions, 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 nonÃ, existence was so probable that a

prudent man would under the circumstances of the case, act upon the plea that they did not exist.

26. In view of the presumptions attached by virtue of Sections 118 and 139 of the Act, the Court was required to draw a presumption that the cheque

was issued for consideration and until the consideration was proved, some presumption would hold good. Therefore, in the given circumstances, the

learned trial Magistrate has clearly fallen in error, in not being aware of the presumption attached to Negotiable Instruments Act by virtue of Sections

118 and 139 of the Act and has, therefore, erred in placing the initial onus on the complainant rather than placing the same on the accused/

respondent.

27. In this view of the matter, this Court need not express any opinion on the merits of the case or the same may prejudice any of the parties.

Therefore, in the given circumstances, this Court has no other option but to setÃ‚aside the order of acquittal passed by learned trial Magistrate and

direct it to reÃ‚â€‹hear the matter bearing in mind the provisions, more particularly, those contained in Sections 118 and 139 of the Act.

28. Accordingly, I find merit in this appeal and the order passed by learned trial Magistrate on 20.11.2017 in Complaint No.145Ã‚3 of 2015/14 is setÃ‚â€■

aside and the trial Court is directed to decide the same afresh in accordance with law and bearing in mind the observations made hereinabove.

29. The parties through their counsel(s) are directed to appear before the learned trial Magistrate on 30.4.2019.

30. The appeal is disposed of in the aforesaid terms, so also the pending application(s), if any.