Case Citation: (2017) taxcode.in 530 SC

CASE NO.:
Appeal (crl.) 518 of 2006

PETITIONER:
Krishna Janardhan Bhat

RESPONDENT:
Dattatraya G. Hegde

DATE OF JUDGMENT: 11/01/2008

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

1. Appellant and one R.G. Bhat were jointly running a business in the name and style of Vinaya Enterprises at Hubli together. Appellant executed a Power of Attorney in his favour.

2. Allegedly, he had handed over four blank cheques to the said constituted attorney for meeting the expenses of the business. The counter foil of the cheque books was also allegedly filled in by Shri R.G. Bhat.

The cheque bearing No. 044483 was shown to have been a self drawn one for a sum of Rs. 1500/-.

3. Disputes and differences having arisen between the appellant and the said R.G. Bhat in connection with running of the said business, the power of attorney granted in his favour was cancelled by the appellant. Disputes and differences between the parties were referred to the Panchayat. In the meeting of the Panchayat held on 02.10.1996, complainant/respondent who is the brother-in-law of the said R.G. Bhat was admittedly present. He participated therein. The result of the said meeting of the Panchayat is not known but it is not in dispute that the appellant herein issued a public notice through his advocate in a local newspaper on 3.10.1996 to the following effect:

\023My client Sh. Krishna Janardhana Bhat,
Proprietor of Vinaya Enterprises, Tarihal Hubli has
given authority to give notice as follows.

My client appointed Shri Raghavendra Ganapati
Bhat as his power of Attorney Holder on 21.8.1993
to run Vinay Enterprises as agent. He has started
misusing the terms and conditions of the Power of
Attorney. Hence my client cancelled the Power of
Attorney on 21.8.96 by giving notice. If at all
anybody deals with him on the Power of Attorney
my client is not responsible in future.\024

5. On the premise that the respondent advanced a sum of Rs. 1,50,000/- to the appellant on 14.6.1998 and the latter on his own went to his house on 20.7.1998 to return the loan by an account payee cheque which having been dishonoured when presented; a complaint petition was filed.

6. Prior thereto, a notice was sent on 27.8.1998 which was allegedly served on the appellant on 5.9.1998. He on that day itself sent a reply alleging in substance that the complainant had been colluding with R.G. Bhat in regard thereto, stating:

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\023Your client D.G. Hegde Goddalamane is husband of sister of my power of attorney holder R.G. Bhat (Proprietor Prasad Enterprises Tarihal Industrial Estate) of Hubli. I do not have any dealing with him as alleged in your letter.

Knowing that the power of attorney holder R.G. Bhat has lost faith and having acted illegally and in anticipation of his committing further illegal acts I have legally cancelled my power of attorney and published the notice in a famous Kannada daily \023Samyukta Karnataka\024 on 3.10.96. From that date I do not have any relation with him or any of his relatives including your client.

Please verify the handwriting and signature on the cheque and advice your client not to do such (illegalities) colluding with his brother-in-law.\024

7. The learned Trial Judge convicted the appellant and sentenced him to undergo imprisonment for six months and further directed payment of compensation for a sum of Rs. 1,50,000/-. An appeal preferred thereagainst was dismissed by the Sessions Judge by a judgment and order dated 28.7.2004.

8. The High Court in exercise of its revisional jurisdiction, however, on a revision petition filed by the appellant, partly allowed the same by reducing the substantive sentence to one week.

9. The Special Leave Petition was filed by the appellant in person. As it was noticed by a Bench of this Court that some question of law arises for its consideration, Mr. S. Balakrishnan, learned senior counsel was requested to assist the Court.

10. Mr. Balakrishnan urged that the learned Trial Judge, the Sessions Court as also the High Court committed a serious illegality insofar as it misread and misapplied the provisions of Section 139 of the Negotiable Instruments Act (for short \023the Act\024).

It was contended that the procedural requirements of Section 138 are:

(i) There is a legally enforceable debt.

(ii) The drawer of the cheque issued the cheque to satisfy part or whole of the debt.

(iii) The cheque so issued has been returned due to insufficiency of funds.

It was urged that only ingredient No. 2 is a subject matter of presumption under Section 139 of the Act and not the first one. It was argued that except the word of mouth of the complainant nothing has been brought on record to prove the offence as against the appellant.

11. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondent, on the other hand, submitted that the appellant has rightly been found guilty of commission of an offence under Section 138 of the Act as bouncing of the cheque issued by him carries a mandatory presumption in terms of Section 139 read with Section 118 (a) of the Act.

It was urged that it is not believable that the appellant despite referring the dispute to the Panchayat and issuing a paper publication on 3.10.1996 would not insist on taking back the cheque book from his erstwhile constituted attorney or would not inform the bank thereabout. Moreover, he having come out with a positive defence, it was for him to prove the same.

12. Before we embark upon the factual issue involved herein, we would notice the manner in which the court proceeded to determine the case.

The learned Trial Judge framed the following points for its

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determination:

\023(1) Whether the complainant proves the hilt that
the accused to discharge earlier debt of
Rs.1,50,000/-, has got issued a cheque on
20.7.1998 for Rs.1,50,000/- drawn at Vijay
Bank, Tarahal Branch, Hubli?
(2) If so, whether the said cheque came to be
dishonoured as \023funds insufficient\024 after its
presentation and despite of issuance of
notice, the accused did not pay the due
amount within stipulated time without any
cause, thereby Negotiable Instruments Act?\024

The learned Trial Judge noticed the contents of the claim petition as also the evidence of PW-1. It also noticed the suggestions given to the said PW-1 by the appellant herein. Upon taking into consideration the same as also the statement of the appellant under Section 313 of the Code of Criminal Procedure, it posed a question as to whether there was no debt payable by the accused to the complainant and if so, whether the complainant colluding with R.G. Bhat had created the cheque with an intention to cause loss to the appellant. It, however, without making any further discussion, answered the said question directly on the material brought on record referring to a decision of the Karnataka High Court in S.R. Muralidar v. Ashok G.Y. [ILR 2001 Karnataka 4127] in extenso and opining that his decision in the case is similar to that of the Karnataka High Court, stating:

\023Considering the proposition of law, in the present
case also the accused admitted the signature on
Ex.P.1. But, the contention is that his P.A. Holder
mis-utilized his signed blank cheques through his
relative complainant and the fact of the present
case and fact of the decision mentioned by me are
similar one and the observation made by the
Hon\022ble High Court in the above decision and
principle laid down therein are clearly applicable
to the case in hand. Therefore, the defence taken
by the accused herein without stepping into the
witness-box, is not acceptable one and there is no
cogent evidence produced by the accused to prove
his special reasons for issuance of the cheque in
question.\024

13. It again referred to a decision of this Court in K. Bhaskaran v. Sankaran Vaidhyan Balan and Others [AIR 1999 SC 3762] and made almost a similar observation holding that as the complainant has discharged his initial burden, the onus shifted on the accused to produce rebuttal evidence against the presumption laid down in favour of the complainant stating:

\023Here, the accused has not produced any evidence
to discard the testimony of PW-1. Therefore, the
presumption is to be drawn in favour of the holder
of the cheque, who has received it for discharge of
liability in view of the decision of the Hon\022ble
Supreme Court.\024

14. Yet again, it relied upon a decision of the Karnataka High Court in M/s. Devi Tyres v. Nawab Jan [AIR 2001 Karnataka H.C.R. 2154], wherein it was opined:
\023There is issued (sic) that the amount is payable
and no criminal court is required to embark upon
any enquiry that goes behind the Act of issuance of
the cheque. If the drawer contends that there were
certain special reasons whereby a cheque was

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issued and that the cheque was not intended to be
encashed or honoured, the onus of establishing this
shifts squarely to the accused.\024

15. The complainant\022s case was, thus, primarily accepted for the reason that the appellant did not step into the witness box.

16. The appellate court took an identical stand. It proceeded on the premise that the statement of accused under Section 313 of the Code of Criminal Procedure regarding misuse of blank cheque by the complainant and filling up Rs. 1,50,000/- instead of Rs. 1500/- is contradictory to his own admission in the reply to the notice issued to him.

On what basis the said opinion was formed is not known. The appellate court refused to enter into the question as to whether the prosecution case is wholly unreliable, as the complainant had not been able to show his source of income so as to enable him to advance a huge loan of Rs. 1,50,000/-, holding:

\023Now as far as the financial ability of the complainant to issue cheque for such huge amount to the accused is not a matter to be considered by the trial court or by me also since issue of Ex.P.1 and its dishonour is proved by the complainant beyond reasonable doubt.\024

17. The High Court in exercise of its revisional jurisdiction although accepted the contention of the appellant that the presumption under Section 139 of the Act extends \023only to the extent that the holder of the cheque received the cheque for the discharge in whole or in part of any debt or other liability\024 and the same only means \023that cheque was issued for consideration, but does not extend to the extent that the cheque was issued for the discharge of the debt or liability as pleaded by the accused\024, opined that the complainant had discharged that onus by adducing his own evidence. Observing that the appellant did not step into the witness box, it was opined that although the relationship between the appellant and Shri R.G. Bhat was strained, there was nothing to show that the relationship between the appellant and the complainant became strained despite the fact that a panchayat meeting was held in regard to the said dispute in 1996. The High Court, however, refused to go into the factual aspect of the matter stating that it was exercising a revisional jurisdiction, stating:

\023Since the burden of proving that the cheque had been misused is on the accused-petitioner, and there being a concurrent finding of the Trial Court and the Appellant Court with regard to that holding that the petitioner had failed to discharge that burden, I do not find any ground to interfere in the order of the Trial Court and that the Appellate Court, so far as they hold the petitioner guilty of an offence punishable under Section 138 of the Negotiable Instruments Act.\024

18. Before embarking upon the legal issues, we may analyse the deposition of PW-1 \026 Complainant. He was a resident of village Goddalmane. Appellant is a resident of village Kekkar. As he was running an industry at Hubli, he sometimes resided in Hubli also. They were said to be friends. He asked him to give a loan of Rs. 1.5 lakhs in the first week of June, 1998 and the amount was handed over to him on 14th June, 1998. It was allegedly agreed that on the appellant\022s failure to repay the said loan within one month, 15% interest would be charged. No document was executed; no pronote was executed; no receipt was obtained. Appellant is said to have come to his house suo moto on 20.07.1998 and handed over the cheque which was sent to Varada Grameen Bank for collection whereupon notice had been issued. Despite the fact that he was aware that a dispute had

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been raised in regard to the writings in the cheque, the same was not proved. Merely, the cheque was tendered and it was marked as an exhibit. The cheque appears to have been issued as a proprietor of a business concern.

Despite the fact that R.G. Bhat was his brother-in-law, he denied that he was running the said business. He also feigned his ignorance as to whether the said industry was being run by R.G. Bhat on the basis of the Power of Attorney executed by the appellant. He, however, accepted that they had been running it together. He also accepted the relationship between him and R.G. Bhat. He knew about the dispute. He accepted that a panchayat meeting was held in regard thereto. Surprisingly, he denied his knowledge in regard to the existence of the power of attorney stating that the same was not made in his presence. He admitted that he was present on 2.10.1996 in the panchayat meeting to resolve the problem arising out of the dispute between R.G. Bhat and the appellant. He accepted that wooden and steel materials were placed in Vinay Enterprises and R.G. Bhat had been running the same type of industry in Tarihal Industrial Estate. According to him, he had been running such an industry in the name of Prasad Enterprises even prior to 1996. His acquaintance, according to him, with the appellant was only through his brother-in-law. He did not say that he had friendship with the appellant. There also does not appear to be any business transactions between them. He could not state about the denomination of the notes although according to him he had drawn the amount from the society.

He did not produce any books of accounts or any other proof to show that he got so much money from the bank. He admittedly did not have any written document pertaining to the accused. He accepted that there was no witness to the transaction. He, of course, denied certain suggestions, but the suggestions put to him were required to be considered by the court below in the backdrop of the facts and circumstances of the case.

19. The courts below failed to notice that ordinarily in terms of Section 269SS of the Income Tax Act, any advance taken by way of any loan of more than Rs. 20,000/- was to be made by way of an account payee cheque only.

Section 271D of the Income Tax Act reads as under:

\023271D. Penalty for failure to comply with the provisions of section 269SS. (1) If a person takes or accepts any loan or deposit in contravention of the provisions of section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted. (2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner.\024

20. Indisputably, a mandatory presumption is required to be raised in terms of Section 118(b) and Section 139 of the Act. Section 13(1) of the Act defines \021negotiable instrument\022 to mean \023a promissory note, bill of exchange or cheque payable either to order or to bearer\024.

Section 138 of the Act has three ingredients, viz.:

(i) that there is a legally enforceable debt;
(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which pre-supposes a legally enforceable debt; and
(iii) that the cheque so issued had been returned due to insufficiency of funds.

21. The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the

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second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

22. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

23. 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.

24. In Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal [(1999) 3 SCC 35] interpreting Section 118(a) of the Act, this Court opined:

\023Upon 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\005\024

[Emphasis supplied]

25. 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 \021preponderance of probabilities\022. 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.

26. A statutory presumption has an evidentiary value. The question as to

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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.

27. In M.S. Narayana Menon Alias Mani v. State of Kerala and Another [(2006) 6 SCC 39], it was held that once the accused is found to discharge his initial burden, it shifts to the complainant.

28. 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.

29. 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 complainant\022s advancing a sum of Rs. 1.5 lakhs 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.

30. In K. Prakashan v. P.K. Surenderan [2007 (12) SCALE 96], this Court following M.S. Narayana Menon (supra) opined:

\02312. 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 \021proved\022 and \021disproved\022 as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-‘-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.

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.\024

In John K. John v. Tom Varghese & Anr. [JT 2007 (13) SC 222], this Court held:

\02310\005The 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

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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.\024

31. Mr. Bhat relied upon a decision of this Court in Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16] wherein this Court held:

\02322\005Presumptions 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,
\023after 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\024.
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 \023prudent man\024.\024

[See also K.N. Beena v. Muniyappan and Another (2001) 8 SCC 458]

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

33. But, we may at the same time notice the development of law in this area in some jurisdictions.

The presumption of innocence is a human right. [See Narender Singh & Anr. v. State of M.P. (2004) 10 SCC 699, Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr. (2005) 5 SCC 294 and Rajesh Ranjan Yadav @ Pappu Yadav v. CBI through its Director (2007) 1 SCC

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70] Article 6(2) of he European Convention on Human Rights provides : \023Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law\024. 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 \023The Presumption of Innocence and Reverse Burdens : A Balancing Duty\024 published in [2007] C.L.J. (March Part) 142 it has been stated :-

\023In 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 \026 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.\024

34. 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.

35. Keeping in view the peculiar facts and circumstances of this case, we are of the opinion that the courts below approached the case from a wholly wrong angle, viz., wrong application of the legal principles in the fact situation of the case. In view of the legal position as has been enunciated by this Court in M.S. Narayana Menon (supra) and later cases, we are of the opinion that the High Court should have entertained the revision application.

36. For the reasons aforementioned, the appeal is allowed. The judgments of conviction and sentence passed against the appellant are set aside.

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