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K. PRAKASHAN

v.

P.K. SURENDERAN

B OCTOBER 10, 2007

[S.B. SINHA AND H.S. BEDI, JJ.]

Negotiable Instruments Act, 1881—ss. 139 and 118(g)—
C *Presumption under—Nature of—Held: Presumptions are rebuttable—Standard of proof on prosecution is proof of guilt beyond all reasonable doubt, and on accused is mere preponderance of probability—Its not necessary for accused to step into the witness box to discharge burden of proof—On facts, trial court holding that though burden of proof was*
D *on accused, in view of the materials on records, he must be held to have discharged the same, and acquitting him—High Court holding that accused having not examined himself cannot be said to have discharged burden of proof and convicting him, not sustainable.*

E *Code of Criminal Procedure, 1973—s. 378—Appeal against acquittal—Power of appellate court—Held: Where two views are possible, appellate court should not interfere with finding of acquittal recorded by court below.*

F **Respondent advanced a certain sum to the appellant on different dates. Appellant issued a cheque for the said amount and the cheque was dishonoured. Respondent filed complaint petition against the appellant under section 138 of the Negotiable Instruments Act, 1881. It was appellant's case that his cheque book was stolen. Trial court**
G **considered the materials brought on record and held that although the burden of proof was on the appellant, in view of the materials brought on records, he must be held to have discharged the same, and acquitted the appellant. High Court convicted the appellant**

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holding that the appellant having not examined himself cannot be said to have discharged the burden of proof cast on him in terms of section 139 of the Act. Hence the present appeal. A

Appellant-accused contended that the High Court erred in setting aside the acquittal of appellant since for discharging the burden of proof it was not necessary for the appellant to examine himself; and that the materials brought on record were found to be sufficient for shifting the burden of proof upon the complainant as the accused had discharged his primary onus. B

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Allowing the appeal, the Court

HELD: 1.1. The Negotiable Instruments Act, 1881 raises two presumptions; firstly, in regard to the passing of consideration as contained in section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in section 139 discharged in whole or in part any debt or other liability. Presumptions both under sections 118 (a) and 139 are rebuttable in nature. Having regard to the definition of terms 'proved' and 'disproved' as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution *vis-a-vis* an accused it is not necessary that the accused must step into the witness box to discharge the burden of proof in terms of the aforementioned provision. 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 [Para 12 and 13] D E F

1.2. If two views are possible, the appellate court shall not reverse a judgment of acquittal only because another view is possible to be taken. The appellate court's jurisdiction to interfere is limited. [Para 20] [1021-D] G

2.1. Trial Judge had passed a detailed judgment upon analysing the evidences brought on record by the parties in their entirety. The H

A criminal court while appreciating the evidence brought on record may have to weigh the entire pros and cons of the matter which would include the circumstances which have been brought on record by the parties. The complainant has been found to be not a man of means. It is not a case where the appellant paid any amount to the B respondent towards repayment of loan. He even did not charge any interest. He had also not proved that there had been any commercial or business transactions between himself and the appellant. Why the appellant required so much amount and why he alone had been making payments of such large sums of money to the appellant has C not been disclosed. According to him, he had been maintaining a diary. A contemporaneous document which was in existence as per the admission of the complainant, therefore, was required to be brought on records. He failed to do so. He also did not examine his father and brothers to show that they were men of means and in fact D advanced a huge sum to him only for the purpose of grant of loan by him to the appellant. Trial Court not only recorded the inconsistent stand taken by the complainant in regard to the persons from whom he had allegedly borrowed the amount, it took into consideration the E deposit of the cheques in the bank.

[Para 14] [1017-C, G; 1018-A]

2.2. Keeping in view the peculiar fact situation it cannot be said that the judgment passed by Trial Judge was perverse or suffered F from any legal infirmity. It was not a case where the Trial Judge failed to consider the evidences brought on record and/or mis-appreciated the same. High Court has not met the reasons of the Trial Judge. It proceeded on the premise that the appellant had not been able to discharge his burden of proof in terms of Section 139 of the Act G without posing unto itself a further question as to how the said burden of proof can be discharged. Furthermore, it did not take into consideration the legal principle that the standard of proof upon a prosecution and upon an accused is different.

[Paras 17 and 20] [1020-B; 1021-E, F]

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M.S. Narayana Menon Alias Mani **v.** *State of Kerala and Anr.*, **[2006] 6 SCC 39;** *Kamala S.* **v.** *Vidhyadharan M.J. and Anr.*, **[2007] 5 SCC 264;** *Goaplast (P) Ltd.* **v.** *Chico Ursula D'Souza and Anr.*, **[2003] 3 SCC 232 and** *Mahadeo Laxman Sarane and Anr.* **v.** *State of Maharashtra,* **(2007) 7 SCALE 137, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1410 of 2007.

From the Judgment and Order dated 6.4.2006 of the High Court of Kerala at Ernakulam in Crl. A. No. 176 of 2001.

Jayanth Muth Raj and Ramesh Babu M.R. for the Appellant.

Bina Madhavan, Nupur and S. Udaya Kumar Sagar (for Lawyer's Knit & Co.) for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. The impugned judgment is one of reversal of a judgment of acquittal passed by the learned Trial Judge in favour of the appellant.

3. Respondent herein allegedly, on diverse dates, advanced a sum of Rs. 3,16,000/- to the appellant who issued a cheque for the said amount on 18.12.1995. The said cheque was dishonoured on the ground of 'insufficient fund'. Allegedly, when the matter was brought to the notice of the appellant, he undertook to remit the amount on or before 30.01.1996. The cheque was again presented but the same was not encashed on the ground "payment stopped by the drawer".

4. On the aforementioned premise, a complaint petition was filed by the respondent herein against the appellant under Section 138 of the Negotiable Instruments Act (for short "the Act").

5. The complainant in support of its case led evidence to show that he had advanced various sums on the following terms:

A "On 31-1-94 a sum of Rs. One lakh; on 8-6-94, Rs. 86,000/-; on 12-6-94, Rs. 28,000/-; on 23-4-95, Rs. 50,000/- on 18-6-95, Rs. 40,000/- and on 7-8-95, Rs. 12,000/-."

6. Defence of the appellant, on the other hand, was that he had issued blank cheques for the purpose of purchase of spare parts, tyres, etc. in connection with the business of transport services run in the name of his brother. The blank cheques used to be returned by the sellers of spare parts, etc. when the amounts were paid. According to the appellant, the complainant lifted the impugned cheque book put in the bag and kept in his shop. Appellant in support of his case examined the Bank Manager of the Bank concerned.

7. The learned Trial Judge upon analyzing the materials brought on records *inter alia* held:

D (i) The complainant himself who had not sufficient funds and used to borrow the same from his brothers, father and others failed to show that he had any financial capacity to advance such a huge amount.

E (ii) As all the transactions were admittedly recorded by him in a diary which having not been produced, an adverse inference should be drawn.

F (iii) The complainant failed to prove before the Court that there had been any commercial or business transaction between himself and the accused. The complainant had not charged even any interest although a huge sum was allegedly advanced on diverse dates.

G (iv) From Ext. D1 the counterfoil of the cheque book issued to the appellant from the bank it appeared that whereas cheque No. 782460 was presented before the bank for collection of the dues on 30.12.1993, cheque No. 782451 of the same cheque book reached the bank only on 8.01.1996. It was, therefore, opined that if the last cheque reached the bank for collection on 30.12.1993, in normal and reasonable course

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cheque No. 782451 must have been issued even prior thereto. A

(v) The documentary evidence substantiates the case of the accused that cheque No. 782451 allegedly given by him on 18.12.1995 was not genuine.

(vi) The complainant contradicted himself insofar as whereas in the complaint petition he *inter alia* alleged that the loan was raised by him from his father as also from others; in his evidence, he did not state that he had borrowed any amount from third parties. B

(vii) The cheque dated 18.12.1995 which is said to have been handed over to him on 5.10.1995 should have been encashed immediately after the date of issue as he is said to be in need of money which was not done. C

(viii) Although the burden of proof was on the appellant, he, in view of the aforementioned circumstances, must be held to have discharged the same. D

8. The High Court, however, by reason of the impugned judgment reversed the said findings of the learned Trial Judge holding *inter alia* that the appellant having not examined himself cannot be said to have discharged the burden of proof cast on him in terms of Section 139 of the Act stating: E

(i) "...Virtually, the accused has not adduced any evidence to establish the specific case set up by him that the cheque leaf was placed inside a bag and that the above bag was kept in the shop of the complainant and that the complainant has lifted the particular cheque leaf during the period the bag was kept in his shop. He has also not adduced any evidence to establish his contention that he, employed as a driver in the K.S.R.T.C., was also involved in managing the private bus owned by his brother and that he used to issue blank cheques for the purchase of spare parts, tyres, etc. The above are matters that he could have adduced independent evidence in support. But he has declined to do so..." F G

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A (ii) No adverse interference could have been drawn by the Trial Court only because the purported diary was not produced.

(iii) The finding of the Trial Judge that it was difficult to believe that the complainant has advanced diverse amounts without any stipulation as to interest is not supported by any evidence.

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Although, ordinarily a judgment of acquittal should not be reversed when two views are possible, the High Court opined that the Trial Judge had proceeded and adjudged the evidence on an incorrect premise that it was for the complainant to establish the details of the transaction.

C The High Court recorded a judgment of conviction and sentenced the appellant to undergo imprisonment till the rising of the court and to pay a sum of Rs. 3,16,000/- by way of compensation.

9. Appellant is, thus, before us.

D 10. Mr. Ramesh Babu M.R., learned counsel appearing on behalf of the appellant, would submit that the High Court committed a manifest error in reversing the judgment of acquittal passed by the learned Trial Judge completely on a wrong premise inasmuch as for discharging the burden of proof it was not necessary for the appellant to examine himself. E Materials brought on record, the learned counsel would contend, having been found to be sufficient for shifting the burden of proof upon the complainant as the accused had discharge his primary onus, the High Court committed a serious error in passing the impugned judgment. Strong reliance in this behalf has been placed on *M.S. Narayana Menon Alias* F *Mani* v. *State of Kerala and Anr.*, [2006] 6 SCC 39].

11. Ms. Rachna Srivastava, learned counsel appearing on behalf of the complainanat – respondent, on the other hand, would submit that having regard to the fact that the appellant had raised a specific defence, viz., theft of the cheque book, it was for him to prove the same and as G he has not examined himself, the impugned judgment should not be interfered with.

12. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature H

referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118(a) and 139 are rebuttable in nature. Having regard to the definition of terms 'proved' and 'disproved' as contained in Section 3 of the Evidence Act as also the nature of the said burden upon the prosecution vis-à-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.

14. The learned Trial Judge had passed a detailed judgment upon analysing the evidences brought on record by the parties in their entirety. The criminal court while appreciating the evidence brought on record may have to weigh the entire pros and cons of the matter which would include the circumstances which have been brought on record by the parties. The complainant has been found to be not a man of means. He had allegedly advanced a sum of Rs. 1 lakh on 13.01.1994. He although had himself been taking advances either from his father or brother or third parties, without making any attempt to realize the amount, is said to have advanced sums of Rs. 86,000/- on 8.06.1994. Likewise he continued to advance diverse sums of Rs. 28,000/-, Rs. 50,000/-, Rs. 40,000/- and Rs. 12,000/- on subsequent dates. It is not a case where the appellant paid any amount to the respondent towards repayment of loan. He even did not charge any interest. He had also not proved that there had been any commercial or business transactions between himself and the appellant. Whey the appellant required so much amount and why he alone had been making payments of such large sums of money to the appellant has not been disclosed. According to him, he had been maintaining a diary. A contemporaneous document which was in existence as per the admission of the complainant, therefore, was required to be brought on records. He failed to do so. He also did not examine his father and brothers to show that they were men of means and in fact advanced a huge sum to him only for the purpose of grant of loan by him to the appellant. The learned Trial Court not only recorded the inconsistent stand taken by the

A complainant in regard to the persons from whom he had allegedly borrowed the amount, it took into consideration the deposit of the cheques in the bank commenting:

> "...Ext. D1 the counterfoil of the cheque book issued to the accused from that bank, was proved through him. It contains the
B counterfoils of the cheques 782451 to 782460. Ext. D2 is the pass book issued to the accused from that bank. SW1 is the Branch Manager of Syndicate Bank, Koyilandy. He would say that in Ext. P4 ledger extract, cheque No. 782460 reached the bank for collection on 30.12.93. The net transaction in that account was
C in the year 1996. Cheque No. 782451 reached the bank on 8.1.96. Ext. D1 shows that is the first cheque in that book. 782460 is the lost cheque in that book. If the lost cheque i.e. 782460 reached the bank for collection on 30.12.93 in normal and reasonable course the first cheque i.e. 782451 might have been
D issued even prior to that date. Case of the complainant is that Ext. P1 cheque was given to him by the accused on 5.10.95 and the cheque was dated 18.12.95. Ext. P4, D1 and D2 substantiate the case of the accused that the allegation of the complainant that Ext. P1 cheque was given to him on 18.12.95 is not genuine."

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15. The High Court, as noticed hereinbefore, on the other hand, laid great emphasis on the burden of proof on the accused in terms of Section 139 of the Act.

16. The question came up for consideration before a Bench of this
F Court in *M.S. Narayana Menon* (supra) wherein it was held:

> "38. If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a "fortiori" even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will
G bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court.
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> 39. A presumption is a legal or factual assumption drawn from the existence of certain facts."

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It was furthermore opined that if the accused had been able to discharge his initial burden, thereafter it shifted to the second respondent in that case. A

The said legal principle has been reiterated by this Court in *Kamala S.* v. *Vidhyadharan M.J. and Anr.*, [2007] 5 SCC 264 wherein it was held: B

> "The Act contains provisions raising presumption as regards the negotiable instruments under Section 118(a) of the Act as also under Section 139 thereof. The said presumptions are rebuttable ones. Whether presumption stood rebutted or not would depend upon the facts and circumstances of each case. C
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> The nature and extent of such presumption came up for consideration before this Court in *M.S. Narayana Menon Alias Mani* v. *State of Kerala and Anr.*, [(2006) 6 SCC 39] wherein it was held : D
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> "30. Applying the said definitions of "proved" or "disproved" 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 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 dos 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." E F
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> This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefor can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. Categorically stating that the burden of proof on accused is not as high as that of the prosecution, it was held; G H

A "33. 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.""

B 17. We, therefore, are of the opinion that keeping in view the peculiar fact situation obtaining in the present case it cannot be said that the judgment passed by the learned Trial Judge was perverse or suffered from any legal infirmity. It was not a case where the learned Trial Judge failed to consider the evidences brought on record and/or mis-appreciated the same.

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18. Ms. Srivastava has relied upon a decision of this Court in *Goaplast (P) Ltd.* v. *Chico Ursula D'Souza and Anr.*, [2003] 3 SCC 232 wherein this Court opined:

D "6...The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment E of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words F can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 G must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi *Cements Ltd.* v. *Kuchil Kumar Nandi 2* . On same facts H is the decision of this Court in *Ashok Yeshwant Badave* v.

Surendra Madhavrao Nighojakar. The decision in Modi case overruled an earlier decision of this Court in *Electronics Trade & Technology Development Corpn. Ltd.* v. *Indian Technologists & Engineers (Electronics) (P) Ltd.* which had taken a contrary view. We are in respectful agreement with the view taken in Modi case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date."

19. No exception to the aforementioned legal principle can be taken. What, however, did not fall for consideration in the aforementioned case was as to how the said burden can be discharged.

20. It is now trite that if two views are possible, the appellant court shall not reverse a judgment of acquittal only because another view is possible to be taken. The appellate court's jurisdiction to interfere is limited. [See *M.S. Narayana Menon* (supra) and *Mahadeo Laxman Sarane & Anr.* v. *State of Maharashtra,* (2007) 7 SCALE 137] The High Court furthermore has not met the reasons of the learned Trial Judge. It proceeded on the premise that the appellant had not been able to discharge his burden of proof in terms of Section 139 of the Act without posing unto itself a further question as to how the said burden of proof can be discharged. It furthermore did not take into consideration the legal principle that the standard of proof upon a prosecution and upon an accused is different.

21. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed.

N.J. Appeal allowed.