ANSS RAJASHEKAR

v.

AUGUSTUS JEBA ANANTH

(Criminal Appeal Nos. 95-96 of 2019)

JANUARY 18, 2019

[DR. DHANANJAYA Y CHANDRACHUD AND M.R. SHAH, JJ.]

Negotiable Instruments Act, 1881 – ss.138 and 139 – Dishonour of cheque – Appeal against conviction – Appellant's plea was that there was an absence of legally enforceable debt and the burden which was cast by the provisions of s.139 was discharged by him – Complainant's case was that the appellant had taken a loan of Rs.15 lakhs from him and the cheques were issued by appellant in discharge of the same – The defence of the appellant was that he did not borrow the said amount as alleged nor did he issue the cheque in discharge of any legally enforceable debt and that four blank cheques were issued by him to the complainant on his assurance of a loan from a financial institution – Held: Presumption under s.139 of the Act is rebuttable and the standard of proof for rebuttal of the presumption under s.139 of the Act is guided by a preponderance of probabilities – Complainant failed to establish the source of funds which he allegedly utilized for giving loan of Rs. 15 lakhs to the appellant – There was no receipt or document evidencing the payment of the amount – During the course of his cross-examination, the complainant had deposed that earlier, the appellant had furnished two cheques for Rs. 5 lakhs and Rs. 10 lakhs which he had presented – Complainant did not mention anything about these two cheques in his complaint – Nothing was stated by the complainant in regard to the fate of the earlier two cheques – Non-disclosure of the facts pertaining to the earlier two cheques, and the steps, if any, taken for recovery was a material consideration which indicated that there was a doubt in regard to the transaction – Appellant duly rebutted the presumption under s.139 of the Act and, therefore, is held entitled to acquittal.

Allowing the appeals, the Court

HELD: 1.1 Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a

cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a "reverse onus clause" the three Judge Bench of this Court in *Rangappa* held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities. In the instant case, the defence of the appellant was that the cheque was issued to the complainant on an assurance of a loan which would be obtained from a financial institution. [Paras 10, 11][737-E-F; 738-C-D]

1.2 During the course of his cross-examination, PW-1 admitted that a General Power of Attorney was executed by the appellant in his favour. Admittedly, the appellant and the respondent are related and there was some civil litigation between the father of the complainant and the appellant. The complainant admitted that, as a matter of fact, he himself received an amount of Rs. 10 lakhs from the appellant under a loan transaction but stated that he had repaid that amount to the appellant. PW-1 stated that the appellant had requested him for a loan of Rs. 15 lakhs in February 2004. The defence of the appellant being that no amount was actually paid by the complainant to him, the evidence of PW-1 in regard to the payment of the loan assumes significance. According to PW-1, the loan of Rs. 15 lakhs was paid into the hands of a representative of the appellant at his request. The appellant failed to indicate even the name of the representative to whom the alleged amount of Rs. 15 lakhs is stated to have been paid over in cash. The entire amount, significantly, is alleged to have been paid over without obtaining a receipt or document evidencing the payment of the amount. In the notice of demand that was issued by the complainant to the appellant after the cheque had been returned for want of funds, the complainant stated that the appellant had sought a 'financial accommodation' of Rs. 15 Lakhs. The first appellate court noted that while conducting the cross-examination of the accused, the complainant had stated that the accused had demanded a loan of Rs. 15 lakhs, but at that time the complainant had only paid an

amount of Rs. 5 Lakhs as a loan for which the accused issued a cheque. This suggestion was specifically denied by the accused. In this context, the first appellate court observed that whether the complainant had furnished a hand loan of Rs. 15 lakhs to the accused as stated in the complaint or whether the complainant had furnished a hand loan of Rs. 15 lakhs to the accused as stated in the complaint or whether the complainant had paid Rs. 20 lakhs as mentioned in the legal notice dated 10 August 2004 or whether he had paid an amount of Rs. 5 lakhs as suggested during the course of cross-examination was a matter of serious doubt. If the complainant had paid Rs. 15 lakhs to the accused, the suggestion during the course of cross-examination was a matter of serious doubt. If the complainant had paid Rs. 15 lakhs to the accused, the suggestion during the course of cross-examination of having paid an amount of Rs. 5 lakhs casts serious doubt on the existence of a debt in the first place. [Para 12][738-E-H; 739-A-D]

2. The complainant failed to establish the source of funds which he is alleged to have utilized for the disbursal of the loan of Rs. 15 lakhs to the appellant. During the course of his cross-examination the complainant deposed that earlier, the appellant had furnished two cheques for Rs. 5 lakhs and Rs. 10 lakhs which he had presented. The complainant admitted that he had not mentioned anything about the accused having issued these two cheques in his complaint. Nothing was stated by the complainant in regard to the fate of the earlier two cheques which were allegedly issued by the appellant. The non-disclosure of the facts pertaining to the earlier two cheques, and the steps, if any, taken for recovery was again a material consideration which indicated that there was a doubt in regard to the transaction. [Para 13][739-D-F]

3. The appellant duly rebutted the presumption under Section 139 of the Act. His defence that there was an absence of a legally enforceable debt was rendered probable on the basis of the material on record. Consequently, the order of acquittal passed by the first appellate court was justified. [Paras 14, 15][739-G; 740-C]

Rangappa v. Sri Mohan **(2010) 11 SCC 441 : [2010] 6 SCR 507 – relied on.**

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Case Law Reference

[2010] 6 SCR 507 relied on Para 6

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal
B Nos. 95-96 of 2019.

From the Judgment and Order dated 14.11.2014 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 861 of 2012.

Jay Kishor Singh, Adv. for the Appellant.

C Abhay Kumar, Saurabh Mishra, Vineet Kumar Singh, Himanshu Pal Singh, Advs. for the Respondent.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J. 1. Leave granted.

D 2. These appeals arise from the judgment and order of a learned Single Judge of the High Court of Karnataka dated 14 November 2014, reversing the judgment of the Lower Appellate Court acquitting the appellant of an offence under Section 138 of the Negotiable Instruments Act, 1881 ('the Act').

E 3. The case of the respondent-complainant is that on 09 March 2005, the appellant issued a cheque in the sum of Rs.5 lakhs in his favour, towards discharge of a liability of Rs.15 lakhs, in repayment of an amount which was borrowed in the month of February, 2004. According to the complainant, the amount was repayable within six months. When the
F complainant presented the cheque on 23 March 2005, it was returned by the bank for insufficiency of funds. The complainant presented the cheque again for realisation on 14 July, 2005 but it was returned with the same result. A notice of demand was issued by the complainant on 10 August, 2005. In response, the appellant-accused denied that there was a legally enforceable debt. In his reply, the appellant stated thus:

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> "4. My client and his wife and your client and his wife had purchased separate house sites in Survey No. 96/3 at Hoaramvuagrahara Village, Krishnarajapuram Hobli, Bangalore on 31.01.2001. All these sites situate adjacent to each other. Your client enticed my client and my client's wife to give power in his

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favour so that he could pursue the matter of getting housing loan from financial institutions at Bangalore. However your client prepared the power deed incorporating the clauses for sale also. When my client questioned about the inclusion of clauses for sale, your client had stated that it had inadvertently typed and the purpose of power deed is only for obtaining loan and so it need not be registered.

5. Besides this power deed your client also obtained from my client the original document being Document No. 10470/2001 and Khatha, Tax Receipts, Approved plan and also 4 blank cheques of U.T.I. Bank Ltd, Tuticorin including the cheque mentioned in your notice and Vysya Bank, Bangalore Cheque Book containing 10 leaves.

6. Your client obtained these cheques stating that the financial institutions will insist for the cheque leaves when the loan is sanctioned as to use these cheques for monthly repayment of loan amount. Your client has now misused the one such cheque as if it was issued by my client on 09.03.2005. Subsequently my client and his wife canceled the power deed and also requested your client to return the cheques and documents. However, your client is very particular to grab house sites along with half way constructed building for him and his father. An attempt was also made earlier in this regard. Your client's father colluding with your client sent a notice dated 09.05.05 containing false allegations to my client to execute the sale deed of said house site situate at the above mentioned survey number in favour of him. Since the attempt frizzled out, now the son, your client is trying in a different way, illegally using the mentioned cheque to harass my client to part with the said house site."

4. As the above reply indicates, the defence of the appellant was that the appellant and his wife and the complainant and his wife had purchased adjacent house sites. The complainant was alleged to have persuaded the appellant to execute a power of attorney in his favour for the purpose of obtaining a housing loan from the financial institutions in Bangalore. According to the appellant as many as four blank cheques of U.T.I Bank Ltd. and a Vysya Bank cheque Book containing ten leaves were obtained by the complainant from the appellant. One of the cheques which were handed over by the appellant to the respondent-complainant

A was alleged to have been misused.

5. The complainant lodged a complaint before the Additional Chief Metropolitan Magistrate at Bangalore being CC No. 26999 of 2006 under Section 138 of the Act on 9 September 2005.

B 6. The Trial court by a judgment dated 31 January 2009 acquitted the appellant. The complainant - respondent filed Criminal Appeal No. 285 of 2009 before the High Court. By its judgment dated 29 October 2010 the High Court allowed the appeal and remitted the matter to the Trial court, having regard to the judgment of this Court in "*Rangappa Versus Sri Mohan*"[1]. On remand, the Trial court by a judgment dated 5 C March 2011 convicted the appellant and sentenced him to undergo imprisonment of one year and to pay a fine of Rs.7 lakhs out of which an amount of Rs.6.75 lakhs was directed to be paid to the respondent by way of compensation. The appellant instituted Criminal Appeal No. 245 of 2011 before the Additional Sessions Jude, Bangalore. By a judgment dated 05 March, 2012, the First Appellate Court reversed the conviction D and sentence recorded by the Trial court. The respondent thereupon filed a Criminal Appeal before the High Court, being Criminal Appeal No. 861 of 2012. The High Court reversed the judgment of acquittal, recording that while the notice of the appeal was served upon the appellant, he had remained absent. While recording the conviction under E Section 138 of the Act, the High Court modified the sentence to the effect that the appellant shall pay a fine of Rs.5 lakhs which would be paid as compensation to the respondent and, in default, he shall suffer imprisonment for a period of three months. The conviction recorded by the Trial court was maintained but the amount of fine was reduced, as noted above.

F 7. On 29 April 2016, notice was issued on the question of limitation, there being a delay of 410 days in filing the special leave petition as well as on the petition. Having considered the cause shown by the appellant for condoning the delay we deem it appropriate to condone the delay. We do not find from the record of this case that there was any deliberate G act of neglect on the part of the appellant in pursuing his remedies.

8. Assailing the judgment of the High Court, learned counsel appearing on behalf of the appellant has addressed the submissions on two aspects. First, it is submitted that there is an absence of a legally

H [1] (2010) 11 SCC 441

enforceable debt. Hence, it is urged that the conviction which has been recorded by the High Court is unsustainable. Secondly, it is urged that the appellant discharged the burden which is cast by the provisions of Section 139 and established a defence on a preponderance of probabilities as required by the judgment of this Court in Rangappa (supra). The learned counsel has extensively relied upon the judgment of acquittal by the Additional Sessions Judge dated 5 March, 2012, adopting the appreciation of evidence in that judgment as the submissions of the appellant in support of the present appeal. Learned counsel submitted that the High Court should have been circumspect in overturning the judgment of acquittal. No reasons have been disclosed in the impugned judgment upon assessment of evidence, much less reasons for coming to the conclusion that the acquittal by the first appellate court was either perverse or would lead to a miscarriage of justice.

9. On the other hand, learned counsel appearing on behalf of the complainant-respondent has submitted, placing reliance on the judgment in Rangappa (supra), that the appellant failed to discharge the burden which cast upon him and that the presumption under Section 139 of the Act applies to the facts of the present case. Adverting to the material on the record it is urged that the fact that the cheque was signed by the accused and was drawn on the bank where he has an account is not in dispute. It is urged that the defence was correctly appreciated by the Trial court while recording a conviction under Section 138 and the High Court in restoring that conviction has not fallen into error.

10. Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a "reverse onus clause" the three Judge Bench of this Court in *Rangappa* (supra) held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities. This Court held thus:

> "28 In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, *it is a settled position that when an accused has to rebut the presumption under Section 139, the*

standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own." (emphasis supplied)

11. In the present case, it is necessary now to consider whether the presumption under Section 139 stands rebutted by the accused-appellant. The defence of the appellant is that he has not borrowed the amount of Rs. 15 lakhs from the complainant as alleged nor had he issued the cheque (Exhibit P-1) in discharge of a legally enforceable debt. Specifically, the defence of the accused is that no payment was made by the complainant to him, in discharge of which the cheques have been issued. His defence was that the cheque was issued to the complainant on an assurance of a loan which would be obtained from a financial institution. This, as we have noted, was also the defence in reply to the notice of demand issued by the complainant.

12. It is in this background, it would be necessary to advert to the material which was relied upon by the first appellate court to acquit the accused-appellant. During the course of his cross-examination, PW-1 admitted that a General Power of Attorney was executed by the appellant in his favour. Admittedly the appellant and the respondent are related and there was some civil litigation between the father of the complainant and the appellant. The complainant admitted that, as a matter of fact, he himself received an amount of Rs.10 lakhs from the appellant under a loan transaction but stated that he had repaid that amount to the appellant. PW-1 stated that the appellant had requested him for a loan of Rs.15 lakhs in February 2004. The defence of the appellant being that no amount was actually paid by the complainant to him, the evidence of PW-1 in regard to the payment of the loan assumes significance. According to PW-1, the loan of Rs.15 lakhs was paid into the hands of a representative of the appellant at his request. The appellant failed to indicate even the name of the representative to whom the alleged amount of Rs.15 lakhs is stated to have been paid over in cash. The entire amount, significantly, is alleged to have been paid over without obtaining a receipt or document evidencing the payment of the amount. In the notice of demand that was

issued by the complainant to the appellant after the cheque had been returned for want of funds, the complainant stated that the appellant had sought a 'financial accommodation' of Rs.15 Lakhs and paid a sum of Rs.20,000 (corrected thereafter in a corrigendum). The first appellate court noted in the course of its judgment that while conducting the cross-examination of the accused, the complainant had stated that the accused had demanded a loan of Rs.15 lakhs, but at that time the complainant had only paid an amount of Rs.5 Lakhs as a loan for which the accused issued Exhibit P1. This suggestion was specifically denied by the accused. In this context, the first appellate court observed that whether the complainant had furnished a hand loan of Rs.15 lakhs to the accused as stated in the complaint or whether the complainant had paid Rs.20 lakhs as mentioned in the legal notice dated 10 August 2004 or whether he had paid an amount of Rs.5 lakhs as suggested during the course of cross-examination was a matter of serious doubt. If the complainant had paid Rs.15 lakhs to the accused, the suggestion during the course of cross-examination of having paid an amount of Rs.5 lakhs casts serious doubt on the existence of a debt in the first place.

13. Besides what has been set out above, an important facet in the matter was that the complainant failed to establish the source of funds which he is alleged to have utilized for the disbursal of the loan of Rs.15 lakhs to the appellant. During the course of his cross-examination the complainant deposed that earlier, the appellant had furnished two cheques, one of ICICI Bank for Rs.5 lakhs and another of Canara Bank for Rs.10 lakhs which he had presented. The complainant admitted that he had not mentioned anything about the accused having issued these two cheques in his complaint. Nothing was stated by the complainant in regard to the fate of the earlier two cheques which were allegedly issued by the appellant. The non-disclosure of the facts pertaining to the earlier two cheques, and the steps, if any, taken for recovery was again a material consideration which indicated that there was a doubt in regard to the transaction.

14. On a totality of the facts and circumstances and based on the evidence on the record, the first appellate court held that the presumption under Section 139 of the Act stood rebutted and that the defence stood probabalised. From the judgment of the High Court, the significant aspect of the case which stands out is that there has been no appreciation of the evidence or even a reference to the reasons furnished by the first

A appellate court. The High Court adverted to the judgment of this Court in Rangappa (supra). Having adverted to that decision, the High Court reversed the order of acquittal by holding that a mere denial of the transactions or an omnibus denial of the entire transaction could not be considered as a tenable defence. The judgment of the High Court is unsatisfactory and does not contain any reference to the evidence whatsoever. There was absolutely no valid basis to displace the findings of fact which were arrived at by the first appellate court, while acquitting the accused.

15. For the reasons indicated above, we are of the view that having regard to the law laid down by the three Judge Bench in Rangappa (supra) the appellant duly rebutted the presumption under Section 139 of the Act. His defence that there was an absence of a legally enforceable debt was rendered probable on the basis of the material on record. Consequently, the order of acquittal passed by the first appellate court was justified.

16. In the circumstances, we allow these appeals and set aside the impugned judgment of the High Court convicting the appellant under Section 138 of the Act. We, accordingly, restore the order of acquittal passed by the first appellate court.

Devika Gujral Appeals allowed.