Bombay High Court Purushottam Maniklal Gandhi vs Manohar K. Deshmukh And Anr. on 19 September, 2006 Equivalent citations: 2007 (4) BomCR 404 Author: C R.C. Bench: C R.C. JUDGMENT Chavan R.C., J. 1. Being aggrieved by the acquittal of the accused recorded by the learned Judicial Magistrate First Class Court No. 2 Nagpur in Complaint Case No. 82/1997, the complainant has preferred this appeal. 2. The complainant approached the Court of Judicial Magistrate First Class Nagpur with a complaint of offence punishable under Section 138 of Negotiable Instrument Act on the following facts. The complainant and the accused had cordial relations and were acquainted with each other. The complainant therefore wanted to deposit his savings with the accused and accordingly made deposit sum of Rs. 50,000/- on 12.12.1990, Rs. 10,000/- on 4.1.1991, Rs. 28,000/- on 12.2.1991 and Rs. 12,000/-on 5.4.1991. The complainant was in need of money and, therefore demanded its return in the month of March, 1996. Since the amount deposited with the accused was to bear interest and the accused represented to the complainant that he will be able to refund the amount only in December, 1996, the complainant accepted cheque No. 51719 dated 5.12.1996 issued by the accused for a sum of Rs. 2,22,000/- drawn on Nagpur District Central Cooperative Bank Limited, Ramnagar Branch, Nagpur. The complainant presented the cheque in the Bank on around 7.12.1996. By a memo dated 12.12.1996 he was informed that the cheque was dishonoured. The complainant therefore sent a notice to the accused on 16.12.1996 calling upon the accused to pay the amount due under the cheque within 15 days of receipt of the notice. This notice was duly received by the accused on 24.12.1996. Since the accused did not make the payment within stipulated period of 15 days, and on the contrary sent a reply on 3.1.1997 raising false defence, the complainant filed the said criminal complaint before the learned Magistrate. 3. Upon issuance of process by the learned Magistrate, the accused appeared and pleaded not guilty when the particulars of offence punishable under Sections 138 of the Negotiable Instruments Act were explained to hint. The complainant examined himself and an Officer of Nagpur District Central Cooperative Bank to prove his case. The accused examined said Shri Chandak in defence. It was argued before the learned Magistrate that the amount received by the accused was towards the construction work of Shri Madanlal Chandak, carried out by the accused. The complainant had contracted to construct for Madanlal Chandak and had engaged the accused as a Sub-Contractor. It was further alleged that since the accused wanted to take a loan from United Western Bank Mahal Branch, he requested the complainant to be his guarantor. The complainant insisted upon issuance of five blank cheques by way of security for offering himself to be a guarantor to the Bank. These cheques were utilised by the complainant for falsely prosecuting the accused. 4. The learned trial Magistrate held that the cheque in question was not proved to have been issued towards debt or legally enforceable liability and, therefore, offence punishable under Section 138 of the Negotiable Instrument Act was not made out. The learned Magistrate therefore, proceeded to acquit the accused which has resulted in presentation of this appeal. 5. I have heard both the learned Counsel for the appellant/original complainant, the

learned Counsel for respondent/accused No. 1, as also the learned Additional Public Prosecutor for the State. With the help of learned Counsel, I have gone through the entire evidence on record of the trial Court. While the complainant had stated in the complaint that the complainant wanted to deposit his savings with the accused and had therefore, deposited various sums on the dates mentioned in the complaint with the accused, the story given by the complainant in his evidence before the Court was different. He stated before the Court that the accused had come to him and demanded money for his business and construction work. Therefore, he gave various sums on different dates aggregating to Rs. 1,08,000/- to the accused. Thus, the complainant had departed from his original story of having made a deposit with the accused, and had come up with the story of having advanced loan. It is pertinent to note that it was suggested to complainant in the cross-examination that sum of Rs. 1,08,000/- was paid by the complainant to the accused for the construction work, carried out by the accused. This suggestion was denied by the complainant. In his statement under Section 313 of the Code, the accused admitted that he had received a sum of Rs. 1,08,000/- but claimed that it was against the work done by him for one Mr. Chandak. Thus, the fact that accused had received a sum of Rs. 1,08,000/- from the complainant, for whatever purpose, cannot be disputed. 6. Defence witness Madanlal Chandak stated that he had given the construction work to complainant Gandhi and accused Manohar was Gandhi's partner. In cross-examination he clarified that he had made the payment by cheque directly in the name of accused Manohar, and though the cheque, was sent through Gandhi, it was in the name of accused Deshmukh. If this is so, there would be no question of the accused having received any amount from the complainant Gandhi for construction work as claimed by the accused. In that case the accused would have stated that he had not received any amount from the complainant, but had received a cheque from Chandak. However, the suggestion to complainant Gandhi that he gave Rs. 1,80,000/- as the amount towards construction work carried out, would falsify the defence claim that the amount was received towards construction work of Chandak. 7. On behalf of accused a cheque book had been produced before the trial Court at Ex. 25. In this cheque book the counter foil of cheque Nos. 51708 to 51712 are blank and on their reverse name of P.M. Gandhi is mentioned. The cheque which has been dishonoured bears the Sr. No. 51711. The learned Counsel for the respondent/ accused points out that cheques from this cheque book were issued from April, 1993 till 6.9.1995, when cheque No. 51738 drawn on self, was issued. Subsequent cheques in the book are blank. He pointed out that after the five cheques counter foil of bearing the name of the complainant on the reverse, a cheque was issued to one Rupesh Kumar on 11.1.1994. Therefore, according to the learned Counsel, the cheque in question bearing No. 51711 was not in fact issued on 5.12.1996, but a blank cheque was taken from his client by the complainant in the year 1993 itself. 8. The learned Counsel for the respondent submitted that ordinarily the Appellate Court should be slow in disturbing the finding of fact recorded by a trial Court based on appreciation of evidence. He submitted that in this case the complainant, who had come up with a case of having made

deposit of savings with the accused, gave a go bye to that story, and adopted the story of having advanced money to the accused. The complainant had no explanation as to how the cheques came to be issued in the year 1996 in respect of the transaction of 1990 and, therefore, the learned trial Judge had rightly refused to believe the complainant. There can be no doubt that ordinarily this contention of the learned Counsel for the respondent would have been valid. An Appellate Court, examining the findings of a trial Court, should indeed be slow in disturbing a finding of fact, if such fact related to an incident like assault. But, in respect of issuance and delivery of a negotiable instrument, about which apart from the factual aspects there are statutory presumptions as well, this proposition may not be valid. Therefore, it may be necessary for an Appellate Court to find out as to what facts are established, and whether on the basis of such fact, any presumption get attracted or rebutted in order to draw appropriate inferences. At the cost of repetition it has to be pointed out that the accused has not disputed receipt of Rs. 1,08,000/- from the complainant. Therefore, whether this amount was received as deposit or as advance is not very material. In either case, the accused would be liable to refund the amount to the complainant, since the accused had failed to show that the amount was received towards the construction work of building of Shri Chandak, which he claimed to have executed on behalf of complainant. 9. The learned Counsel for the appellant submitted that it was not open to the learned trial Judge to come to any such conclusion on the basis of the guarantee forms or the counter foils of the cheque book produced by the accused. He submitted that Section 20 of the Negotiable Instrument Act prescribes that when a person signs and delivers to another either wholly blank or incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete the negotiable instrument for any amount not exceeding the amount covered by the stamp, which the instrument may bear. He further submitted that Section 118 of the Negotiable Instrument Act provides that unless contrary is proved, it shall be presumed that every negotiable instrument was made or drawn for consideration and was made or drawn on the date which the instrument bears. He submitted that these presumptions are in addition to the presumption under Section 139 of the Act that, unless contrary is proved, the holder of a cheque received the cheque for the discharge, in whole or in part, or any debt or other liability. He therefore submitted that it would not be open to urge that the cheque in question was not made on 5.12.1996, or was not for a sum of Rs. 2,22,000/-, or that the sum mentioned in the cheque was not towards debt or other legal liability. 10. His Learned Adversary submitted that these presumptions are duly rebutted by the accused by placing on record first, the counter foil of the cheque book which indicates that the cheques could have been issued in the year 1993 and secondly, by placing on record the guarantor form dated 5.12.1993 to show that the cheque could have been issued as a security for the act of the complainant in offering himself as guarantor. Therefore, according to the learned Counsel the presumptions had been duly rebutted since the law does not expect an accused to prove a fact with the same standard of proof which is required of a complainant or the prosecution. It is enough if the accused can

raise a probability which would make his defence probable in order to rebut the presumption. 11. The learned Counsel for the appellant drew my attention to the case of Bratindranath Banerjee v. Hiten P. Dalal . He pointed out that this case had eventually been taken to the Supreme Court and the Supreme Court in its judgment 2, had dismissed the appeal. In Bratindranath case (supra), this Court had observed in para-32 of the judgment that there is a difference in presumptions under Section 114 of the Evidence Act, where it is open to a Court to draw or not to draw a presumption as to the existence of the fact, and a presumption under Section 4 of the Prevention of Corruption Act where, if certain facts are proved, the Court is required to draw a further presumption, unless the contrary is proved. The learned Counsel submits that the burden on the accused in such a case would not be as light as it is in the cases of presumptions under Section 114 of the Evidence Act, and that such burden cannot be discharged by the accused by offering an explanation which is reasonable and probable. Relying on the judgment of the Supreme Court Dhanvantrai Balwantrai Desai v. State of Maharashtra , this Court in Bratindranath case (supra) observed that the explanation which the accused wanted to offer must be true, and, that the words 'unless the contrary is proved' required that the presumption has to be rebutted by proof, and not by bare explanation which is merely plausible. The learned Counsel submitted that the statutory presumption is thus, placed on a different pedestal by the Apex Court as observed by this Court in Bratindranath's case. 12. In para 41 of the judgment in Bratindranath case this Court had further observed that where the burden is on the accused, the proof required to be given by him cannot be equated with the degree and character of proof which normally rests on the prosecution, and that the accused may discharge his burden and prove his case on the basis of preponderance of probabilities. The Court observed that in cases of statutory presumptions the Court is bound to draw the presumption and, therefore, in order to rebut such a presumption, the defence must clearly make out that the ingredients of the offence are absent. The learned Counsel for the appellant submitted that as observed by this Court in the above case, the Court cannot render a statutory presumption sterile by a process of convoluted logic or by giving benefit of doubt. 13. According to the learned Counsel, this Court, while dealing with Bratindranath case, has specifically referred to a liability in respect of a cheque, and in para 68 of the judgment, observed that the burden of proving that there was no debt or liability is on the accused, which he himself has to discharge by adducing proof. The learned Counsel drew my attention to observations in para 113 of judgment in Bratindranath case about appreciation of evidence in general. The learned Counsel therefore submitted that the statutory presumption which are raised by Sections 118 and 139 of the Negotiable Instrument Act have to be rebutted by the accused by tendering evidence which would satisfy a man of ordinary prudence that the cheque was not issued on the date mentioned therein, or for consideration mentioned therein, or was not for discharge of debt of legal liability. 14. Ordinarily, the presumption in respect of date would be rebutted by showing that the instrument, from several instruments serially numbered, was handed over by one party to another on a date corresponding with the dates of previous

and subsequent instruments. The learned Counsel for the appellant however submitted that the fact that the cheque is from a cheque book in which subsequent signed cheque are of earlier dates is not relevant, when a party handed over a signed cheque which is wholly blank, giving the holder the authority to complete the blanks. Therefore, according to the learned Counsel even if it is taken for a while that the cheque was actually handed over in the year 1993 as alleged, it does not follow that the accused had not given the complainant the authority to put appropriate date. Therefore, the presumptions as to the dates mentioned in the cheques would not stand rebutted on the bare consideration of counter foil of the cheque book. Hence, it cannot be contended that the instrument was not intended to bear the date 5.12.1996. 15. The learned Counsel for the accused also questioned as to how the sum of Rs. 2,22,000/- came to be typed on the cheque, when, even according to the complainant, the sum of only Rs. 1,08,000/- had been paid to the accused. He submitted that the complainant had failed to give any calculation as to how he arrived at the figure of Rs. 2,22,000/-. The complainant has stated that the cheque bears the figure of Rs. 2,22,000/ - because it is inclusive of the interest. Considering the passage of time and rates of interest then prevailing it may not be necessary to go into actual calculations. 16. This takes me to the question as to whether the guarantor's consent form dated 5.12.1993 could be sufficient to rebut the presumption under Section 139 of the Negotiable Instrument Act. The learned Counsel for the respondent further submitted that the respondent had placed on record guarantor's consent and confirmation letters Exhs. 22 and 23 bearing the date 5.12.1993 and the signature of complainant thereon. The learned Counsel submitted that since the accused was to raise a loan from the United Western Bank for which the accused wanted the complainant to offer himself as guarantor, the accused had obtained those guarantor's consent and confirmation letters from the complainant. These letters are admitted in his cross-examination to have been signed by the complainant. According to the learned Counsel for the respondent, the complainant insisted upon giving five signed blank cheques by way of security for offering himself as guarantor to the Bank, and this is how the five blank cheques came to be given. Therefore, according to the learned Counsel these cheques were not issued for any advance received by the accused, but were issued only by way of security for the loan for which the complainant was to offer himself a guarantor. However, since the accused did not at all take loan, there was no question of the complainant becoming a guarantor and, therefore, the cheques in question were without consideration. He therefore, submitted that the learned trial Judge had rightly observed in para-19 of the judgment that the story of the accused was more probable. The learned Counsel for the appellant submitted that it is curious that the forms have come from the custody of the accused and not from the Bank. This is duly explained by the learned Counsel for the respondent/accused, who states that since the accused had not at all applied for loan, the form was not submitted to the Bank and, therefore, it comes from the custody of the accused. The learned Counsel for the respondent submitted that these forms, coupled with the fact that the cheques were handed over to the complainant in the year 1993, would show that the

cheque in question was in fact issued by way of security and not for discharge of any debt or a legal liability. He submitted that the accused had thus, discharged the burden upon him to rebut presumption within Section 139 of the Act. 17. The learned Counsel for the appellant rightly pointed out that the accused has himself admitted under Section 313 that he had indeed received a sum of Rs. 1,08,000/-. A suggestion to this effect was also made to the complainant in his cross-examination. Had the matter rested there, it may have been open to the accused to stick to the story that the amount had been received by the accused towards the construction which the accused had carried out on behalf of the complainant. But the accused was not content at that, and summoned Chandak, for the construction of whose building the amount was said to have been paid. Said Chandak who was examined as defence witness, clearly stated that he had paid the amount by cheques drawn in favour of the accused and that cheques were only delivered through the complainant. If Chandak had issued cheques in the name of the accused there was no question of complainant making payment on behalf of Chandak to accused since in that case the complainant would not have received any amount from Chandak. Therefore whatever benefit the accused could have had of the two documents dated 5.12.1993 from the United Western Bank is lost by examining Chandak. The uneasiness of defence in explaining existence of cheque with complainant by raising stories of receiving payment from complainant for construction work of Chandak in reply to question No. 2 in statement under Section 313 of Cri.P.C, (contradicted by Chandak himself), and that of blank cheques having been delivered because complainant was to offer himself as surety, creates a doubt about the credibility of defence. Therefore, the statutory presumptions are not rebutted. 18. The learned Counsel for the respondent submitted that a cheque would not come within a definition of cheque or bill of exchange if it is not drawn for a certain sum of money. For this purpose, he relied on a decision of Andhra Pradesh High Court in case of Avon Organics Ltd. v. Poineer Products Limits and Ors. 2004(1) Crimes 567. The learned Counsel submitted that as held by Andhra Pradesh High Court, the complainant filling up amount portion and the date in a cheque amounted to a material alteration in a cheque without the consent of a authority who issued the cheque and rendered the cheque invalid. A cheque has been defined as a bill of exchange in Section 6 of the Negotiable Instrument Act. A bill of exchange is defined in Section 5 as an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money. Therefore, the High Court of Andhra Pradesh is right in holding that the cheque must be for payment of certain sum of money as required by Sections 5 and 6 of the Negotiable Instrument Act. However, there can also be no dispute that a cheque or bill of exchange is a negotiable instrument, as defined in Section 13 of the Act. In view of the provisions of Section 20 of the Act which were possibly not noticed by the Andhra Pradesh High Court, it is open to a person to sign and deliver a blank or incomplete instrument, and it is equally open for the holder to fill up blanks and specify the amount therein. This does not amount to any alteration in the cheque, since the cheque was not initially issued for any different specified sum which, was

changed. Therefore, the decision of the Andhra Pradesh High Court in Avon Organics Ltd. case (supra) may not be helpful to the respondent for rebutting the presumptions under Section 139 and under Section 118 of the Act which require a presumption to be made that the negotiable instrument was made for the consideration shown on the instrument, on the date which it bears. 19. The learned Counsel for the respondent next submitted that the implication of Section 20 of the Act had been duly considered by the Andhra Pradesh High Court in Cement Agencies v. v. Vijaya Babu and Anr. 1997(4) Crimes 273. In that case by the end of financial year 1993-94 an amount of Rs. 16,790/- was payable by the accused and the accused issued cheque on 26.7.1994. It was dishonoured on 30th July, 1994 with an endorsement that it exceeds arrangements. The defence taken by the accused was that blank cheques were issued on 4.10.1991 and the complainant had acknowledged on the counter foil on the said cheques. First, question as to whether Section 20 of the Negotiable Instrument Act enables a holder in due course of inchoate instrument to put a date of his choice is not addressed in the judgment of the Andhra Pradesh High Court. When a drawer of a cheque delivers a signed cheque, he obviously gives an authority to the holder to put a date of his choice. Therefore, there would be no question of the instrument becoming time barred, since it would become time barred only from the date of issue, which, in view of the provision 118 would be the date on the cheque, which, under Section 20, the holder had the authority to fill. Hence, the decision of Andhra Pradesh High Court in M/s. Cement Agencies may also be not helpful to the respondent. 20. The observations of this Court in Chintaman Shundiraj v. Sadguru Narayan Maharaj Datta Sansthan and Ors. Aug., regarding expending the period of limitation in respect of payment of dishonoured cheque is not relevant for the decision of the present case. 21. The learned Counsel for the respond-ents submitted that on similar facts in Smt. Ashwini Satish Bhat v. Shri Jeevan Divakar Lolienkar and Anr. reported at 2000(5) Bom. C.R. 9, this Court had held that if a cheque was issued in 1996 for liability in 1991 it would have to be held that it was not for legally enforceable liability. In that case on 13th June, 1991, the accused had agreed to pay Rs. 1,53,724/- within a period of one year. The dishonoured cheque in question was issued by the accused on 19th July 1996. The accused took the defence that the cheque was not for legally enforceable liability, since there was no acknowledgment under Section 18 of the Limitation Act before the period of limitation was over and,' therefore, the liability assumed on 13th June, 1991 was not legally enforceable on 19th July, 1996 when the cheque was issued. The Magistrate acquitted the accused, and on appeal the High Court dismissed the appeal. The learned Counsel submitted that in view of this decision, where facts are exactly similar, the learned Magistrate must be held to have rightly concluded that the liability against the accused had become time barred on the date of issuance of the cheque and hence the presumption under Section 139 had been rebutted. 22. The learned Counsel for the appellant submitted that decision in Ashwini's case (supra) would not be applicable because the Court had not taken into consideration the provision of 25 of the Contract Act. He submitted that the same question has arisen before this Court in Narendra v.

Kanekar v. The Bardez-Taluka Co-op. Housing Mortgage Society Ltd. and Anr. . The Court had duly considered the decision rendered by this Court in Ashwini's case and concluded that since Section 25 Clause 3 of the Indian Contract Act permits a promise to be made in writing to pay debt which the creditor may have enforced but for the law of limitation, a cheque could be issued for a time barred debt and would amount to a promise covered by Clause 3 of Section 25 of the Contract Act. This Court had observed in Narendra Kanekar's case that Clause 3 of Section 25 of Contract Act revives the remedy to enforce payment of a time barred debt on a fresh promise to pay. Thus, if payment could be enforced the debt may be still have the character of legally enforceable debt. Taking such a view this Court had dismissed a revision filed by the accused, who had been convicted and sentenced under Section 138 of the Negotiable Instrument Act and whose appeal has been dismissed by the Court of Sessions. 23. Since a cheque is a promise made in writing to pay certain sum, it would be covered by Clause 3 of the Section 25 and, therefore, it would not be open for the accused to say that there is no legally enforceable liability. In view of this the learned Counsel for the appellant submitted that the learned Magistrate was in error in acquitting the accused holding that the cheque was not given for legally enforceable liability. Consequently, the acquittal of the respondent for offence punishable under Section 138 of Negotiable Instrument Act cannot be upheld. 24. I have heard both the Counsel for the appellant as well as respondent/accused on the question of sentence. The learned Counsel for the appellant wanted exemplary sentence of imprisonment to be imposed upon the respondent since the appellant has been kept out of the money due for last 10 years. The learned Counsel for the respondent submitted that the appellant had in fact sought by the cheque, not only the amount allegedly loaned, but also the interest thereon and, therefore, there was no question of the respondent being sentenced to an exemplary sentence. He submitted given the circumstances in which the transaction came to be entered into, and the fact that the parties have been litigating for the last 10 years, it would be appropriate to impose a minimum sentence which would meet the ends of justice. Considering that the cheque was for Rs. 2,22,000/- which includes interest upon the original sum of Rs. 1,08,000/- paid to the accused, it would be appropriate to award compensation which would ensure that the appellant is not put to any substantial loss. In fact under Section 117 of the Negotiable Instrument Act, to which the learned Counsel for the appellant made a reference, only an endorser is entitled to interest @ 18%, and only if he has paid the amount due on the instrument. The holder of an instrument is entitled to only the amount due, together with expenses properly incurred in presenting, noting and protesting the instrument. However, since Section 138 itself enables imposition of fine which may extend to twice the amount of cheque, the ends of justice would be met if compensation to be awarded takes care of the interest that the complainant would have earned had he been paid the amount by cheque in the year 1996. Considering this, a sentence of fine of Rs. 10,000/ - and direction to pay compensation Rs. 2,82,000/- (Rs. 2,22,000/- due on the cheque and Rs. 60,000/- towards loss of interest) would meet the ends of justice. The following order is therefore

passed; The appeal is allowed. The order passed by the learned Judicial Magistrate First Class, Court No. 2, Nagpur, acquitting respondent No. 1 Manohar K. Deshmukh of the offence punishable under Section 138 of the Negotiable Instrument Act, is set aside. Instead, respondent No. 1 Manohar K. Deshmukh is convicted of the offence punishable under Section 138 of the Negotiable Instrument Act and is sentenced to pay a fine of Rs. 10,000/ - (Rupees ten thousand), or in default, to undergo simple imprisonment for three months. In addition, respondent no 1 shall also pay to the complainant a sum of Rs. 2,82,000/- (Rs. Two lacs eighty two thousand) towards compensation. If respondent No. 1 Manohar K. Deshmukh does not comply with the sentence now imposed, the learned Magistrate shall take steps to have the sentence executed