Supreme Court of India Hiten P. Dalal vs Bratindranath Banerjee on 11 July, 2001 Author: Ruma Pal Bench: Ruma Pall, Brijesh Kumar, B.N.Kirpal CASE NO.: Appeal (crl.) 688 of 1995

PETITIONER: HITEN P. DALAL

Vs.

RESPONDENT: BRATINDRANATH BANERJEE

DATE OF JUDGMENT: 11/07/2001

BENCH: Ruma Pall, Brijesh Kumar, B.N.Kirpal

JUDGMENT: RUMA PAL, J The appellant was found guilty of an offence under Section 138 of the Negotiable Instruments Act, 1881 by the Special Court set up under the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 (referred to as, the "Act"). The appellant was sentenced to rigorous imprisonment for a term of one year and a fine for a sum of Rs. 1 lakh, in default to undergo further rigorous imprisonment for a term of three months. Aggrieved by the judgment and order of the Special Court, the appellant has preferred this appeal. In the course of the hearing of the appeal before this Court, learned counsel for the appellant raised a preliminary issue based on the language of sub Section 2 of Section 3 of the Act. It was contended that the jurisdiction of the Special Court was limited to offences committed between 1. 4. 1991 and on or before 6.6.1992 and the offence alleged having taken place after 6.6.92, the Special Court had no jurisdiction to try it. The Bench then hearing the appeal, recorded in its order dated 7.9.1999: "... ... ... Prima Facie we are not in agreement with the contention raised by the learned counsel for the appellant on first principles but the learned counsel for the appellant has brought to our notice a judgment of this Court in the case of Minoo Mehta vs. Sharak D. Mehta (1998) 2 SCC 418. In the aforesaid judgment on facts of that case this question possibly did not arise for consideration but even otherwise Their Lordships in paragraph 12 have come to the conclusion : 'Therefore, every offence pertaining to any transaction in securities which is covered by the sweep of the Act, that is if such transaction has taken place between 1.4.1991 and on or before 6.6.1992 would be subjected to the provisions of the Act regarding trial of such an offence.' Having held so in the later part of the said paragraph the Lordships have come to the conclusion: 'The offence referred to in sub-section (2) of Section 3 which is within the sweep of Section 7 of the Act must be on offence committed by any person and must have the following two characteristics: 1. Such offence must relate to transactions in securities; and 2 Such offence should be alleged to have been committed between 1.4.1991 and on or before 6.6.1992'. This statement of law is contrary to what their Lordships have said in the earlier paragraph as referred to earlier and we are not in agreement with the enunciation made in the second part of paragraph 12 quoted above. In this view of the matter, we think it appropriate that this appeal should be placed before a 3-Judge Bench." The matter was thereafter placed before this Bench and heard. The apparently contradictory observations

in Minoo Mehta V. Shavak D. Mehta, need resolution with reference to the provisions of the Act. The Act was promulgated on 6.6.92 to "provide for the establishment of a Special Court for the trial of offences relating to transactions in securities and for matters connected therewith or incidental thereto." The jurisdiction of the Special Court was specified in Section 7 and was limited to offences referred to in section 3(2) of the Act. Section 3(2) insofar as it is relevant provides: ".... Any offence relating to transactions in securities after the 1st day of April 1991 and on and before 6th June 1992...." The question is - does the period specified qualify the word "offence" or the word "transactions" ? If it is the former, the jurisdiction of the Special Court would be, as contended by the appellant, limited to offences committed within the period specified whenever the transactions may have taken place. The respondent has however contended that the period qualifies the word 'transactions' and that this was not only clear from the language of the statutory provisions but also supported by authority. In our view the respondent's submission is correct and must be accepted. The Statement of Objects and Reasons of the Act gives the background and the focus of the Act as : "large scale irregularities and malpractices were noticed in transactions in both the Government and other securities, indulged in by some brokers in collusion with the employees of various banks and financial institutions." The preamble to the Act also makes it clear that the purpose of the enactment was to deal with those particular transactions in securities. In sub-section (2) of Section 3 the statutory period occurs after the word transaction. If the period were to qualify the word 'offence' the section would have read "any offence after the 1st day of April and on or before 6th June 1992" From the language used it is apparent that the period relates to the transaction in securities and that the date of the offence is immaterial. Other sections of the Act also show that the object of the Act is those particular transactions which were carried out during a particular period of time. Thus Section 4 of the Act allows the Custodian, under certain circumstances to cancel "any contract or agreement entered into at any time after the first day of April 1991 and on or before the 6th June of 1992". The position has been further clarified by Section 9-A(1)(b) (introduced by way of amendment in 1994) which confers on the Special Court all the jurisdiction, powers and authority as were exercisable immediately before the commencement of the amended Act by any civil court in relation to, inter-alia, any matter or claim - "arising out of transactions in securities entered into after the 1st day of April 1991, and on or before the 6th day of June, 1992, in which a person is notified under sub- section (2) of Sec. 3 is involved as a party, broker, intermediary or in any other manner." In these circumstances the inevitable conclusion is that the ambit of the Special Courts jurisdiction, whether in criminal proceedings or in civil disputes is in respect of the transactions in securities entered into after the 1st day of April 1991 and on or before 6th day of June, 1992. That the period mentioned in Section 3(2) refers to the transactions and not to the offence is a view which found favour with this Court in Harshad Shantilal Mehta V. Custodian and Others A Bench of three-Judges of this Court after considering the various sections of the Act held "Therefore, the jurisdiction of the Special Court in civil as well as criminal

matters is in respect of transactions during the statutory period of 1.4.1991 to 6.6.1992; and in relation to the properties attached, of a notified person. The entire operation of the said Act, therefore, revolves around the transactions in securities during this statutory period." In our opinion the decision in Mino Mehta V. Shavak D. Mehta (supra), does not decide to the contrary. In that case shares had been lodged with the accused by the complainant in December 1991. The accused was to arrange the sale of the shares and to pay the sale proceeds to the complainant. In January, 1992 the accused sold the shares and misappropriated the sale proceeds. Thus the transactions in securities as well as the offence of misappropriation had both taken place during the period specified in Section 3 sub-section (2). The only issue before the Court was whether the Special Court would have jurisdiction to deal with offences even if the accused was not notified by the Custodian. The learned Judges decided the issue in the affirmative. While reaching its conclusion, the Court observed: " .....The scheme of Section 7, in the light of the Preamble of the Act and the main purpose for enactment of the Act, appears to be that all criminal proceedings pertaining to prosecutions in connection with the accused involved in transactions in securities during the relevant period will lie before the Special Court and not before ordinary courts as the section starts with a non obstante clause stating that notwithstanding anything contained in any other law, only Special Courts will have exclusive jurisdiction to try such offences." Because the offence and the transactions overlapped, the learned Judges did not make a distinction between the transaction and the offence when they summed up their conclusions by saying : "The offence referred to in, sub-section (2) of Section 3, which is within the sweep of Section 7 of the Act must be an offence committed by any person and must have the following two characteristics: 1. Such offence must relate to transactions in securities; and 2. Such offence should be alleged to have been committed between 1.4.1991 and on or before 6.6.1992." The use of the word 'offence' in item 2 was an obvious error because what was meant has been made clear by the Court in paragraph 15 of the judgment which reads: "Before parting with this case we may state that the learned Senior Counsel for the appellant also submitted that the offence alleged against the appellant was not relating to any transaction in securities during the relevant time but qua the sale consideration alleged to have been received by the appellant out of the said transaction and for which alleged offence under Section 409 prosecution is sought to be launched against the appellant. It is difficult to agree with this contention. A conjoint reading of the recitals in the complaint which obviously must be assumed to be true at this stage would show that the accused is alleged to have entered into transaction in securities, namely, the shares during the relevant period and out of the said transaction is alleged to have received sale proceeds which he has not handed over or transmitted to the complainant who claims to be entitled to the said amount. Thus the offence alleged is certainly relating to the transaction in securities as said to have been entered into by the accused during the relevant period." It is clear therefore that the summing up did not correctly reflect the actual view of the Court. In the present case the four cheques which are the subject matter of the criminal proceedings

were admittedly executed by the appellant on 24.12.1991, 26.12.1991, 17.2.1992, and 27.3.1992 i.e. within the statutory period. The cheques were drawn on the Andhra Bank in favour of the Standard Chartered Bank (briefly referred to as 'the Bank') for the sums of Rs.27 Crores, Rs.14.5 Crores, Rs.17 Crores, and Rs.19,95,75,000/- respectively. According to the Bank the cheques were issued for payment of loss suffered by the Bank arising out of transactions in securities entered into by the Bank through or at the instance of the appellant during the statutory period. According to the Bank on 21.5.1992 all four cheques were returned dishonoured by the Andhra Bank with the remark "Not arranged for". The Bank served notices on the appellant under Section 138 of the Negotiable Instruments Act on 31.5.1992 and 1.6.1992 calling upon the appellant to make payment in respect of the four cheques within 15 days from the date of the receipt of the notices. The appellant did not pay. The transactions as alleged being within the statutory period, the Special Court had the jurisdiction to entertain the complaint and the preliminary objection of the appellant is, in the circumstances, rejected. On the merits of the case also, we do not find any reason to interfere with the decision of the Special Court. In the complaint filed on behalf of the Bank by one Bratindranath Banerjee (the respondent herein), on 14th July, 1992, it was alleged that the appellant was acting as a broker in respect of security transactions between the Bank and other banks and financial institutions. According to the complaint the appellant had issued the four cheques in discharge of his liabilities to the Bank. The four cheques were presented to Andhra Bank but were dishonoured. A First Information Report was lodged against the appellant and others. In the written statement filed by the appellant under Section 247 of the Code of Criminal Procedure it was said that pursuant to an oral information from the Bank's officer that the Bank was working on some new scheme and methods of augmenting its income and request for assistance for the same, the appellant agreed to "certain formalities and adjustments as and when required". Pursuant to this arrangement, the appellant had executed and sent several cheques to the bank including the four cheques (Ext. B, C, D & E) which related to certain intended transactions of purchase of security by the appellant from the Standard Chartered Bank. According to the appellant none of these intended transactions actually materialised and as a result the cheques were never to be acted upon or encashed. It was denied that the appellant was liable to make any payment in respect of the four cheques. According to the appellant although the transactions had not taken place and the cheques should have been returned the four cheques were not returned back to the appellant by the Bank through oversight. It is unnecessary to consider the various preliminary stages of the Trial before the Special Court except to note that charges were framed on 26th August 1992 by the Special Court against the appellant under Section 138 of the Negotiable Instruments Act, 1881. That the four cheques were executed by the appellant in favour of the Standard Chartered Bank (hereafter referred to as the Bank), has not been denied nor was it in dispute that the cheques were dishonoured because of insufficient funds in the Appellants' account with the drawee, viz. Andhra Bank. Because of the admitted execution of the four cheques by the appellant, the Bank was entitled

to and did in fact rely upon three presumptions in support of its case, namely, under Sections 118, 138 and 139 of the Negotiable Instruments Act. Section 118 provides, inter-alia, that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration. The presumption which arises under Section 138 provides more specifically that where any cheque drawn by a person on an account for payment of any amount of money for the discharge in whole or in part of any debt or other liability, is returned by the drawee bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque, such persons shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to twice the amount of the cheque, or with both. The nature of the presumption under Section 138 is subject to the three conditions specified relating to presentation, giving of the notice and the non payment after receipt of notice by the drawer of the cheque. All three conditions have not been denied in this case. The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that "it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability". The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras vs. A. Vaidyanatha Iyer AIR 1958 SC 61, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after 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" . Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'. Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram vs Custodian, Evacuee Property, Bombay AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in Dhanvantrai Balwantrai Desai vs State of Maharashtra AIR 1964 SC 575, where this Court reiterated the principle enunciated in State of Madras vs Vaidyanath Iyer (Supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted. . . . . " [See also V.D. Jhingan vs. State of Uttar Pradesh AIR 1966 SC 1762; Sailendranath Bose vs. The State of Bihar AIR 1968 SC 1292 and Ram Krishna Bedu Rane vs. State of Maharashtra 1973 (1) SCC 366.] We will therefore have to consider whether in the case before us, the appellant had supported his defence by any proof sufficient to rebut the presumption drawn against him. At the trial three witnesses were examined in support of the Bank's case. The first was a Mr. Derek Reed (PW 1), the Bank's Group Security Adviser. Mr. Reed deposed that he had come to India with instructions from the Bank to investigate the fraud which appeared to have been perpetrated in Bombay in which several banks including the Bank were involved. In the course of investigation he found the four cheques Ext. B, C, D & E from the desk of an officer of the Bank who has since been dismissed because of his involvement in the fraud. The Bank's second witness was Mr. S. Gyananavinayagam (PW2).He was the Manager, Operations in Andhra Bank. He deposed that the four cheques were dishonoured on the ground of insufficient funds in the appellant's account. The third witness Mr. Bratindra Nath Baner-

jee (PW 3) was the Director of the Bank in-charge of the India Task Force set up by the Bank to investigate the fraud. His was the primary evidence relied upon by the Bank. Broadly speaking, Mr. Banerjee deposed that there were two main areas of fraud perpetrated by the appellant. According to him the first fraud committed by the appellant related to large amounts paid by the Bank at the instance of the appellant or through him, for which the Bank had failed to receive any security or valid bank receipts. The second fraud pertained to the actual purchase and sale of securities at the instance of the appellant and the failure of the appellant to pay the Bank the difference between the contract rate and delivery rate of the securities. He verified the statements pertaining to the transactions between the appellant and the Bank prepared on the basis of the Bank's books of account and other records maintained in the usual course of the business of the Bank. All the statements (Ex. O, P Q and T) were tendered in evidence and marked as exhibits without any objection by the appellant. The first statement pertained to the period between 8.11.1991 and 18.12.1991 and showed the contract rates, delivery rates, the rates of difference and the amount of difference of securities mentioned. The statement along with the deal slips, cost memos, instruction issued by the Reserve Bank of India and entry in a clearing sheet in respect of four deal slips were marked as Ext. 'O'. Out of Ext. 'O', difference of rates covered by four deal slips had been settled by the appellant by giving a cheque for Rs.15 crores. The balance amount on this account was Rs.45,77,40,250/-. The second statement prepared and vouched for by Mr. Banerjee was Ext. 'P' prepared in connection with transactions between 28.12.1991 and 17.2.1992. The statement was supported by 18 deal slips. The liability of the appellant on this account was claimed to be Rs.56,50,50,000/-. Ext. 'P' was subsequently corrected by Ext. 'T' which gave the figure of appellant's liability for the period covered by Ext. 'P' as Rs.39,50,50,000/-. The third statement was marked as Ext. 'Q'. This gave particulars of the claim for the period 21.2.1992 to 27.3.1992. The appellants liability for this period was claimed to be Rs.30,97,34,135/-. Ext. 'Q' was supported by five deal slips. All the deal slips which were printed forms and serially numbered showed the contract rate and the delivery rates.. They were prepared by dealers of the Bank. Mr. Banerjee also stated that the use of the abbreviation 'DIR' in the column which required the name of the Broker, referred to the Appellant. The witness also showed that in respect of certain transactions where the contract rate was less than the delivery rate, the appellant was paid by the Bank. In dealing with the appellant's case namely that the cheques had been given for intended deals which had never taken place, Mr. Banerjee said that he had gone through all the deal slips which had been brought with him to the Court and that there was no evidence of any cancellation of any deal between the appellant and the Bank. In the course of his examination, Mr. Banerjee also gave evidence of payment made by the Bank to the appellant amounting to Rs.1240 crores and of the loss suffered by the Bank on account of the non-furnishing of bank receipts/securities. Two further witnesses were produced by the Bank. One proved the appellant's account with the Bank and the second proved the Appellant's account with Andhra Bank for the relevant period. As far as the

appellant's defence was concerned, he did not enter the witness box to support his case that the four cheques in particular had been given in respect of any arrangement or in respect of any transactions which did not materialise. The four witnesses called by the Appellant apart from those subpoenaed to produce documents, were Mr. Ramesh Laxman Kamat (DW 1) Mr. S.R. A. Rao (DW 2), Mr. G. D. Bhalla (DW 3) and Mr. G. CKC Talukdar (DW. 4). The Special Court found that the evidence of DW 1 was not credit-worthy and that "almost all points including inconsequential points and points which could not be denied, (he) prevaricated ..... (and) ..... sought to deny the truth until truth could no longer be denied." DW 1 was then a Deputy General Manager of the State Bank of India (referred to as SBI). He had sought to contend that a number of transactions mentioned in the four statements viz. Exs. O, P and Q were ready forward transactions between the Bank and SBI, and did not reflect the sale and purchase of securities. It was a case which he was unable to substantiate with reference to the documents already on record or produced from the custody of the CBI. The documents produced by the witness himself were found by the Special Court to be suspect. The second witness for the defence, Mr. SRA Rao also sought to establish that one transaction in Ex.O was non-existent or a dummy transaction. The third defence witness,Mr. G.D. Bhalla, Branch Manager of Andhra Bank, proved that the appellant had made payments of several crores to the Bank. The fourth witness, G.K. Talukdar, a staff officer of the Reserve Bank of India produced a list stipulating contract rates of several securities, in an attempt to show that the contract rates claimed by the Bank were not correct. It was not stated that the list applied to the Bank or that other rates could not be contracted for. The brunt of the evidence given by the appellant's witnesses was as to the nature of the transactions between the appellant and the Bank. However, not one of the defence witnesses gave any evidence in support of the only defence of the Appellant, namely that the four cheques in question had been given towards intended transactions which did not take place. No one said why the appellant had executed and delivered the particular cheques to the Bank or that the appellant had not given the four cheques to discharge his debts to the Bank. Nor did any defence witness claim that the cheques were given an account of any ready forward transactions. In fact, DW 1 in cross- examination admitted that it was not the practice of a purchasing party to hand over cheques in advance. The appellant alone could have said why he had admittedly executed the four cheques, handed them over to the Bank and never asked for their return. He did not choose to do so. As said by the Special Court : "Thus according to the Accused, the cheques Exs. B and C were delivered on 23rd December 1991. This ostensibly was for intended purchases of 2 crores and 1.08 crores Units. According to him the cheque Ex. D was given on 17th February 1992. This ostensibly for intended purchase of 1,22,50,000 Units. The Ex. E was allegedly given on 27th March 1992 for intended purchase of 7 crore Units of Can Star and 10 crore Units of Can Premium. Apart from what is stated in the Written Statement there is no evidence or proof in support of this case." The burden was on the appellant to disapprove the presumptions under Ss. 138 and 139 a burden which he failed

to discharge at all. The averment in the written statement of the appellant was not enough. Incidentally, the defence in the written statement that the four cheques were given for intended transactions was not the answer given by the Appellant to the notice under Section 138. Then he had said that the cheques were given to assist the Bank for restructuring (Ex.H). It was necessary for the appellant at least to show on the basis of acceptable evidence either that his explanation in the written statement was so probable that a prudent man ought to accept it or to establish that the effect of the material brought on the record, in its totality, rendered the existence of the fact presumed, improbable. (Vide Trilok Chand Jain Vs. State of Delhi 1975 (4) SCC 761). The appellant has done neither. In the absence of any such proof the presumptions under Sections 138 and 139 must prevail. We may also mention here that in proceedings initiated by the Bank to recover monies from the appellant in connection with the first area of fraud mentioned by B. Banerjee (PW 3), this Court in Standard Chartered Bank vs. Custodian (2000 (6) SCC 427) upholding the decision of the Special Court, found that the appellant was liable to pay the Bank a sum of Rs.280.00 crores which is several times the amount covered by the four cheques in question. The argument of the Appellant before the Special Court that no offence under section 138 had in fact been committed because he could not have paid within the period of 15 days after receipt of the notice even if he wanted to, was rightly rejected. The appellant's submission was based on the fact that he had been notified by the Custodian under section 3 of the Act and all his properties had consequently stood attached. But, as observed by the Learned Special Court, the Special Court had before it a number of applications by a number of parties asking for permission to fulfill their obligations under contracts. In some cases the Court had granted them. There was nothing which prevented the Appellant from applying to the Special Court for permission to fulfill his obligations or to pay off his debts under the cheques Exs. B, C, D & E. No attempt had been make by the Appellant to make any payment towards the dishonoured cheques. The appellant would not have paid even if he could have. This is clear not only from the correspondence, and the appellant's conduct but also from his defence of total denial of liability. The argument was therefore wholly academic. The Special Court found the appellant's defence improbable and the evidence adduced at his instance flawed and unbelievable. After meticulously scanning both the oral and documentary evidence and ultimately drawing on the presumptions statutorily provided under sections 118, 138 and 139 of the Negotiable Instruments Act, the appellant was found guilty. For the reasons stated earlier, there is no ground for us to decide differently and to differ from the view taken by the Special Court in holding the appellant guilty of the offence with which he was charged. We therefore affirm the conviction and sentence imposed on the appellant by the Special Court and dismiss the appeal with costs assessed at Rs.10,000/-.