Uttam Ram vs Devinder Singh Hudan on 17 October, 2019

Equivalent citations: AIRONLINE 2019 SC 1285, 2019 (10) SCC 287, (2019) 14 SCALE 136, (2019) 2 ORISSA LR 1044, (2019) 3 UC 1696, (2019) 4 BANKCAS 291, (2019) 4 CIVILCOURTC 596, (2019) 4 CRIMES 440, (2019) 4 KER LJ 750, 2019 (4) KLT SN 43 (SC), (2019) 4 PAT LJR 386, (2019) 76 OCR 701, 2019 CRILR(SC MAH GUJ) 1203, 2020 (1) SCC (CRI) 154

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Bench: Hemant Gupta, L. Nageswara Rao

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1545 OF 2019
(ARISING OUT OF SLP (CRL) NO. 3452 OF 2019)

UTTAM RAM .....APPELLANT(S)

VERSUS

DEVINDER SINGH HUDAN & ANR .....RESPONDENT(S)

JUDGMENT

HEMANT GUPTA, J.

1. The appellant is aggrieved against an order passed by the High Court of Himachal Pradesh, Shimla on 17.12.2018, whereby, the order of dismissal of complaint under Section 138 of the Negotiable Instruments Act, 18811 by the learned Trial Court was not interfered with.

2. None has put appearance on behalf of respondent No. 1, despite service. Therefore, on 16.09.2019, this Court requested Ms. Liz Mathew, Advocate to assist the Court on behalf of respondent No.1.

1 for short the “Act”

3. The appellant owns apple orchard in District Kullu, Himachal Pradesh. The appellant also used to supply apple cartons, trays and other packing materials to other apple growers on cash and credit basis. He also owns commercial ropeway which connects various other apple orchards with the roadhead as a facility to the growers to carry their produce from the orchards to the market.

4. In the year 2011, respondent No. 1 purchased apple crops of various growers which was carried out through ropeway to the roadhead for further transportation. The packing material was procured by the respondent on credit basis from the appellant through his authorised agent Prem Chand son of Kumat Ram. In the month of September 2011, the accounts were finally settled between the appellant and the authorised agent of respondent No. 1 and a sum of Rs.5,38,856/- was found recoverable. A cheque No. 942816 dated 2.10.2011 was issued for the said amount, but the said cheque was returned by the bank on 11.10.2011 on presentation with the endorsement “insufficient funds”.

5. The appellant thereafter served a legal notice on 27.10.2011 under registered cover sent to the official and home addresses of respondent No. 1. But, in spite of receipt of the notice of 27.10.2011, no payment was made which led to filing of a complaint by the appellant.

6. The appellant in his complaint stated that total amount of Rs.7,86,300/- was found payable on account of bags, gunny bags and packing materials and after adjusting the payment of Rs. 2,47,444/-, an amount of Rs. 5,38,856/- was found to be payable to the appellant. The appellant has asserted that the said cheque No. 942816 dated 2.10.2011 was issued by the respondent.

7. In support of the complaint, apart from producing CW1 Dhiraj Kumar who produced the bank record of dishonour of cheque, the appellant examined himself as CW2 and also produced Prem Chand son of Kumat Ram, the agent of respondent as CW3. The respondent did not appear in witness box but examined Head Constable Ranjit Singh DW1.

8. Learned Trial Court dismissed the complaint for the reason that cheque amount was more than the amount alleged on the due date when cheque was presented. Therefore, the cheque cannot be said to be drawn towards discharge of whole or in part of any debt.

9. The appellant in his affidavit reiterated his assertions as were given in the complaint. In the cross-examination conducted by the respondent, the appellant stated that cheque in Exh.CW1/B was filled up by the respondent in October 2011 and that cheque was given by the respondent himself to him. Three persons, he himself, accused and the agent of the respondent sat together. He deposed that he was given up a filled-up cheque. He denied the suggestion that the accused did not issue the cheque Exh.CW1/B. He also denied the suggestion that Prem Chand misused the cheque of the accused because he has stolen the signed cheque book of the accused and that he has filled up a blank cheque.

10. CW3 Prem Chand deposed that the respondent purchased, on contract, apple in their area from apple growers including from the appellant for further sending them to Shimla, Chandigarh and Delhi. He deposed that appellant had to recover an amount of Rs.7,86,300/- and after adjustment of Rs.2,47,444/- the balance amount was payable by the respondent for which the settlement was arrived at in his presence when cheque No. 942816 was issued for a sum of Rs.5,38,856/- dated 2.10.2011.

11. In the cross-examination, he deposed that he used to keep an account of all the packing materials. He was suggested that the accused has kept cheque with him and he used to give to the growers. However, he categorically deposed that cheque Exh.CW1/B was given in his presence by the accused in Kuthwa. The account was settled prior to giving of cheque. He denied the suggestion that he lodged a report in police about missing cheque book in the year 2011. He deposed that the respondent has given cheque book by signing them. He denied the suggestion that the cheque in question was filled up as he colluded with the appellant. The respondent in his statement under Section 313 of the Code of Criminal Procedure2 denied the prosecution case. The relevant question No. 9 and the answer given by the respondent are as under:

> "Q.9 Why the present case has been made out against you accused?
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> Ans. This is a false case. My cheque has been misused."

12. DW1-Ranjit, Head Constable examined by the accused, has produced an entry dated 09.09.2011 regarding loss of his cheque book containing cheque Nos. 942801-942820.

13. The learned Trial Court returned a finding that mere production of entry Exh. DW1/A is not sufficient to prove that he has not issued the said cheque as such report could have been made with intention to create false evidence of the loss of cheque book. The court found that in fact if the cheque has been lost, the accused had several opportunities to lodge FIR qua the misuse of said cheque as he has signed acknowledgement of notice Exh.CW1/G. The learned Trial Court recorded the following findings:

> "....Thus, it stands proved beyond reasonable doubt that the cheque Ext. CW1/B was issued by the accused in favour of the complainant. Further, the dishonor of the cheque has also been proved through return memo Ext. CW1/C. Further the legal demand notice was also issued within a period of 30 days from the date of dishnour. Thereafter, the present complaint has been filled within the period of limitation."

14. Still further, the learned Trial Court held the presumption that the 2 for short the "Code" amount of cheque is legally enforceable debt, has not been rebutted when the following finding was returned:

> "....Neither any meaningful cross-examination of the complainant has been done on this point of his financial capacity. Accordingly, the aforesaid presumption has not been rebutted by the accused by proving that the complainant did not have the

requisite financial capacity. Accordingly, the said defence is rejected."

15. However, the learned Trial Court found contradiction in the number of cartons in the complaint as well as in the statement of the appellant. It was found that the cheque amount is more than the amount allegedly due on the date when cheque was presented, therefore, the complaint was dismissed. It held that there are three different versions as to the number of apple cartons, therefore, the alleged amount would have been less than the amount claimed by the complainant.

16. In an appeal, the High Court relied upon judgments reported as Hiten P. Dalal v. Bratindranath Banerjee 3, Kumar Exports v.

Sharma Carpets4 and Rangappa v. Sri Mohan5 to hold that the cheque shall be presumed to be for consideration unless and until, the Court forms a belief that the consideration does not exist or considers the non-existence of consideration was so probable that a prudent man would under no circumstances of the case, act upon the plea that the consideration does not exist. The High 3 (2001) 6 SCC 16 4 (2009) 2 SCC 513 5 (2010) 11 441 Court held as under:

"21. Now, adverting to the facts of the case, it would be noticed that respondent No. had raised various defences, but, the same were turned down by the learned Magistrate. However, it was only on the basis of the contradictions that too in the evidence led by the appellant himself that respondent No. 1 was ordered to be acquitted."

17. The High Court again referred to the contradictions regarding empty apple cartons and the rate per carton, to hold that the appellant has failed to prove guilt of the respondent beyond reasonable doubt.

18. We find that the approach of the learned Trial Court and that of the High Court is perverse; irrational as well as suffers from material illegality and irregularity, which cannot be sustained in complaint filed under Section 138 of the Act.

19. A negotiable instrument including a cheque carries presumption of consideration in terms of Section 118(a) and under Section 139 of the Act. Sections 118(a) and 139 read as under:

"118. Presumptions as to negotiable instruments.- Until the contrary is proved, the following presumptions shall be made:--

(a) of consideration —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;....

xxx xxx xxx

139. Presumption in favour of holder.—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."

20. The Trial Court and the High Court proceeded as if, the appellant is to prove a debt before civil court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. A dishonour of cheque carries a statutory presumption of consideration. The holder of cheque in due course is required to prove that the cheque was issued by the accused and that when the same presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability.

21. There is the mandate of presumption of consideration in terms of the provisions of the Act. The onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act which reads as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. — Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall...."

22. In Kumar Exports, it was held that mere denial of existence of debt will not serve any purpose but accused may adduce evidence to rebut the presumption. This Court held as under:

"20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same

time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act." (emphasis supplied)

23. In a judgment reported as Kishan Rao v. Shankargouda6, this Court referring to Kumar Exports and Rangappa returned the following findings:

"22. Another judgment which needs to be looked into is Rangappa v. Sri Mohan [Rangappa v. Sri Mohan, (2010) 11 SCC 441 : (2010) 4 SCC (Civ) 477 : (2011) 1 SCC (Cri) 184] . A three-Judge Bench of this Court had occasion to examine the presumption under Section 139 of the 1881 Act. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paras 26 and 27: (SCC pp. 453-54) "26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat [Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166] , may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the

6 (2018) 8 SCC 165 nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof."

24. In a judgment reported as Bir Singh v. Mukesh Kumar7, this Court held that presumption under Section 139 of the Act is a presumption of law. The Court held as under:

> "20. Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution 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 and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact as held in Hiten P. Dalal [Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16 : 2001 SCC (Cri) 960] .
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> 33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.
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> xxx xxx xxx

7 (2019) 4 SCC 197

> 36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

25. In other judgment reported as Rohitbhai Jivanlal Patel v. State of Gujarat and Another8 this Court held as under:

> "18. So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 the NI Act is concerned, apparent it is that the accused-appellant could not deny his signature on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs. 3 lakhs each. The said cheques were presented to the Bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The Trial Court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the accused-appellant to establish a probable defence so as to rebut such a presumption."
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> 20. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its nonexistence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasized that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as 8 AIR 2019 SC 1876 envisaged under Section 118 and 139 of the NI Act.....
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> 32. The result of discussion in the foregoing paragraphs is that the major considerations on which the Trial Court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the Trial Court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into consideration the views of the Trial Court and after examining the evidence on record as a whole, found that the findings of the Trial Court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter."

26. In view of the judgments reported to above, we find that the respondent has not rebutted the presumption of consideration in issuing the cheque on 2.10.2011 inter alia for the following reasons:

> 1. Statement of the CW3, that he was not an agent of the respondent, has not been challenged by the respondent in the cross examination.

2. The statement of the appellant as CW2 that the cheque was handed over by the respondent personally remains unchallenged.

3. The respondent has not denied even in his statement that the cheque was not issued by him. The cross examination of the witnesses produced by the appellant also does not show that the signatures on the cheque by him have not been disputed.

4. The respondent relies upon entry recorded with the police on 09.09.2011 that the cheque book was lost. However, the respondent has not lodged any FIR in respect of loss of cheque, even after the notice of dishonour of cheque was received by him on 27.10.2011. The mere entry is not proof of loss of cheque as is found by the learned Trial Court itself as it is self-serving report to create evidence to avoid payment of cheque amount.

5. The respondent has not appeared as witness to prove the fact that the cheque book was lost or that cheque was not issued in discharge of any debt or liability.

6. The statement of accused under Section 313 of the Code is only to the effect that the cheque has been misused. There is no stand in the statement that the cheque book was stolen.

7. The statement of accused under Section 313 is not a substantive evidence of defence of the accused but only an opportunity to the accused to explain the incriminating circumstances appearing in the prosecution case of accused.

Therefore, there is no evidence to rebut the presumption that the cheque was issued for consideration.

27. Once the agent of the respondent has admitted the settlement of due amount and in absence of any other evidence the Trial Court or the High Court could not dismiss the complaint only on account of discrepancies in the determination of the amount due or oral evidence in the amount due when the written document crystalizes the amount due for which the cheque was issued.

28. The accused has failed to lead any evidence to rebut the statutory presumption, a finding returned by both the Trial Court and the High Court. Both Courts not only erred in law but also committed perversity when the due amount is said to be disputed only on account of discrepancy in the cartons, packing material or the rate to determine the total liability as if the appellant was proving his debt before the Civil Court. Therefore, it is presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the appellant received the same in discharge of an existing debt. The onus, thereafter, shifts on the accused- appellant to establish a probable defence so as to rebut such a presumption, which onus has not been discharged by the respondent.

29. Learned counsel for the respondent has referred to the judgment reported in M. S. Narayana Menon v. State of Kerala9 that evidence adduced by the complainant can be relied upon to rebut the presumption of consideration. However, said judgment has no applicability to the facts of the present case as the Trial Court has found that the presumption is not rebutted but still the Trial Court 9 (2006) 6 SCC 39 dismissed the complaint for the reason that the appellant has failed to prove the amount mentioned in the cheque as due amount. Once the cheque is proved to be issued it carries statutory presumption of consideration. Then the onus is on the respondent to disprove the presumption at which the respondent has miserably failed.

30. In Kumar Exports evidence to rebut the presumption was led and accepted by the Court. In these circumstances, it was held that the burden shifts back to the complainant and the presumption under the Act will not again come to his rescue. However, in the present case, the presumption of consideration has not been rebutted by the respondent even on the basis of the evidence laid by the appellant. The difference in the number of cartons supplied or the rate charged is not relevant when the accounts were settled in writing to rebut the presumption of consideration of issuance of a cheque.

31. In Vijay v. Laxman and another 10 this Court found grave discrepancies in the case of the complainant and that no case is made out for when the High Court had set aside the conviction on the basis of clear evidence giving rise to the perverse findings.

32. Learned counsel appearing for the respondent also referred to M. S. Narayana Menon and K. Prakashan v. P. K. Surenderan 11 that if two views are possible, the appellate court shall not reverse 10 (2013) 3 SCC 86 11 (2008) 1 SCC 258 a judgment of acquittal only because another view is possible to be taken. Learned counsel also relies upon a judgment reported as John K. Abraham v. Simon C. Abraham 12 that mere fact that the statutory notice was not replied cannot prejudice to the case of the respondent. We do not find any merit in the arguments raised by the learned counsel for the respondent. In fact, the findings recorded by the courts below are total misreading of the statutory provisions more so when the respondent has not led any evidence to rebut the presumption of consideration. Cross- examination on the prosecution witness is not sufficient to rebut the presumption of consideration. Mere discrepancies in the statement in respect of the cartons, trays or the packing material or the rate charged will not rebut the statutory presumption which is proved by CW3 Prem Chand.

33. The conclusion drawn by the Trial Court and the High Court to acquit the respondent is not only illegal but being perverse is totally unsustainable in law. Before concluding, we would like to put on record that Ms. Mathew has ably assisted this Court in canvassing that the order passed by the High Court does not warrant any interference in the present appeal against acquittal.

34. Consequently, the present appeal is allowed, order passed by the High Court is set aside. The respondent is held guilty of dishonour 12 (2014) 2 SCC 236 of cheque for an offence under Section 138 of the Act. The respondent shall pay Rs.10,77,712/- as fine i.e. twice of the amount of cheque of Rs.5,38,856/- and a cost of litigation of Rs.1,00,000/- within three months. If the amount of fine and the costs are not paid within three months, the respondent shall undergo imprisonment for a

period of six months.

.....J. (L. NAGESWARA RAO) .....J. (HEMANT GUPTA) NEW DELHI;

OCTOBER 17, 2019.