Kishan Rao vs Shankargouda on 2 July, 2018

Equivalent citations: AIR 2018 SUPREME COURT 3173, 2018 (8) SCC 165, 2018 CRI LJ 3613, (2018) 190 ALLINDCAS 208 (SC), (2018) 105 ALLCRIC 339, (2018) 190 ALLINDCAS 208, (2018) 2 ALD(CRL) 215, (2018) 2 NIJ 1, (2018) 2 ORISSA LR 733, (2018) 3 ALLCRILR 796, (2018) 3 ALLCRIR 2304, (2018) 3 BOMCR(CRI) 295, (2018) 3 CRILR(RAJ) 641, (2018) 3 CRIMES 167, (2018) 3 CURCRIR 133, (2018) 3 JCR 329 (SC), (2018) 3 JLJR 274, (2018) 3 MAD LJ(CRI) 498, (2018) 3 PAT LJR 313, (2018) 3 RECCRIR 746, 2018 (3) SCC (CRI) 544, (2018) 3 UC 1521, (2018) 4 CIVILCOURTC 201, 2018 (4) KCCR SN 417 (SC), (2018) 4 RAJ LW 3352, (2018) 71 OCR 662, (2018) 8 SCALE 341, 2018 ACD 813 (SC), 2018 CALCRILR 3 507, 2018 CRILR(SC MAH GUJ) 641, 2018 CRILR(SC&MP) 641, (2019) 1 MADLW(CRI) 279, (2019) 2 MH LJ (CRI) 558, (2019) 3 MAH LJ 604, (2019) 3 MPLJ 22, AIR 2018 SC(CRI) 925

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Bench: Ashok Bhushan, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.803 OF 2018
(ARISING OUT OF SLP(CRL.)NO.10030 OF 2016)

KISHAN RAO ... APPELLANT

VERSUS

SHANKARGOUDA ... RESPONDENT

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal has been filed against the judgment and order of the High Court dated 18.03.2016 by

which judgment, Criminal Revision Petition filed by the respondent-accused was allowed by setting aside the order of conviction and sentence recorded against the accused under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "Act 1881"). The parties shall be hereinafter Date: 2018.07.02 16:07:44 IST Reason:

referred to as described in the Magistrate's Court.

2. Brief facts of case are:

> The appellant(complainant) and the respondent (accused) were known to each other and had good relations. Accused approached the complainant for a loan of Rs.2,00,000/- for the purpose of his business expenses and promised to repay the same within one month. On 25.12.2005, complainant had paid sum of Rs.2,00,000/- as a loan. For repayment of the loan accused issued post dated cheque dated 25.01.2006 in the name of complainant for the amount of Rs.2,00,000/-. The cheque was presented for collection at Bank of Maharashtra Branch at Gulbarga which could not be encashed due to insufficient funds. At the request of the accused the cheque was again represented on 01.03.2006 for collection which was returned on 02.03.2006 by the Bank with the endorsement "insufficient funds".

3. A notice was issued by the complainant demanding payment of Rs.2,00,000/- which was received by the accused on 14.03.2006 to which reply was sent on 31.03.2006. A complaint was filed by the appellant alleging the offence under Section 138 of the Act, 1881. Cognizance was taken by the Magistrate. Accused stated not guilty of the offence, hence, trial proceeded. In order to prove the guilt, the complainant himself examined as PW.1 and examined two other witnesses PW.2 and Pw.3. He filed documentary evidence Exhs.P1 and P6, statement of the accused was recorded under Section 313 Cr.P.C. Thereafter, the case proceeded for defence evidence. Accused neither examined himself nor produced any evidence either oral or documentary. In the reply to the notice which was sent by the complainant, it was alleged that the said cheque was stolen by the complainant. The complainant was cross-examined by the defence. In the cross-examination defence denied accused's signatures on the cheque. The trial court rejected the defence of the accused that cheque was stolen by the complainant. The trial court drew presumption under Section 139 of the Act, 1881 against the accused. Accused failed to rebut the presumption by leading any evidence on his behalf. The offence having been found proved, the trial court convicted the accused under Section 138 of the Act, 1881 and sentenced him to pay a fine of Rs.2,50,000/- and simple imprisonment for six months.

4. The appeal was filed by the accused against the said judgment. The Appellate Court considered the submissions of the parties and dismissed the appeal by affirming the order of conviction.

5. Criminal Revision was filed by the accused in the High Court. The High Court by the impugned judgment has allowed the revision by setting aside the conviction order. The High Court held that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. Complainant aggrieved by the judgment of the High Court has come in this appeal.

6. Learned counsel for the appellant submits that the offence having been proved before the trial court by leading evidence, the conviction was recorded by the trial court after appreciating both oral and documentary evidence led by the appellant which order was also affirmed by the Appellate Court. There was no jurisdiction in the High court to re-appreciate the evidence on record and come to the conclusion that accused has been able to raise a doubt regarding existence of the debt or liability of the accused. He submits that the High court in exercise of jurisdiction under Section 379/401 Cr.P.C. can interfere with the order of the conviction only when the findings recorded by the courts below are perverse and there was no evidence to prove the offence against the accused. It is submitted that in exercise of the revisional jurisdiction the High Court cannot substitute its own opinion after re-appreciation of evidence.

7. It is submitted that the presumption under Section 139 was rightly drawn against the accused and accused failed to rebut the said presumption by leading evidence. There was no ground for setting aside the conviction order.

8. Although, the respondent was served but no one appeared at the time of hearing.

9. We have considered the submissions of the appellant and perused the records.

10. The trial court after considering the evidence on record has returned the finding that the cheque was issued by the accused which contained his signatures. Although, the complainant led oral as well as documentary evidence to prove his case, no evidence was led by the accused to rebut the presumption regarding existence of debt or liability of the accused.

11. This Court has time and again examined the scope of Section 397/401 Cr.P.C. and the ground for exercising the revisional jurisdiction by the High Court. In State of Kerala vs. Puttumana Illath Jathavedan Namboodiri, 1999 (2) SCC 452, while considering the scope of the revisional jurisdiction of the High Court this Court has laid down the following:

> "5.....In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by reappreciating the oral evidence....."

12. Another judgment which has also been referred to and relied by the High Court is the judgment of this Court in Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke and others, 2015 (3) SCC 123. This Court held that the High Court in exercise of revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or wholly unreasonable or there is non-consideration of any relevant material, the order cannot be set aside merely on the ground that another view is possible. Following has been laid down in paragraph 14:

> ”14.....Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 CrPC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction.”

13. In the above case also conviction of the accused was recorded, the High Court set aside the order of conviction by substituting its own view. This Court set aside the High Court’s order holding that the High Court exceeded its jurisdiction in substituting its views and that too without any legal basis.

14. Now, we proceed to examine order of the High Court in the light of the law as laid down in the above mentioned cases. The High Court itself in paragraph 40 has given its reasons for setting aside the order of conviction, it has observed that though perception of a person differs from one another with regard to the acceptance of evidence on record but in its perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. It is relevant to notice what has been said in paragraph 40 of the judgment which is to the following effect:

> ”40. In view of the above said “facts and circumstances, though perception of a person differs from one another with regard to the acceptance of evidence on record but in my perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability particularly with reference to the alleged transaction dated 25.12.2005 as alleged by the complainant. Hence, in my opinion the High Court has full power to interfere with such judgment of the Trial Court as subject matter exactly falls within the parameters of Section 397 of the Code and also guidelines of the Apex Court as noted in the above said decisions. Therefore, I am of the considered opinion the Trial Court and the First Appellate Court have committed serious error in merely proceeding on

> the basis of the presumption under Section 139 of the Act and also on the basis that, the accused has not proved his defence with reference to the loss of cheque etc. Hence, I answered the point in the affirmative and proceeded to pass the following:
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> ORDER The revision petition is hereby allowed. Consequently, the judgment and sentence passed by the III-Addl. Civil Judge (Jr.Dn.) & JMFC, Kalaburagi in C.C.No.1362/2006 which is affirmed by Fast Track Court – 1 at Kalaburagi in Cr.A.No.46/2009 are hereby set aside. Consequently, the accused is acquitted of the charges levelled against him under Section 138 of N.I.Act. If any fine amount is deposited by the accused/petitioner, the same is ordered to be refunded to him...."

15. The High Court has not returned any finding that order of conviction based on evidence on record suffers from any perversity or based on no material or there is other valid ground for exercise of revisional jurisdiction. There is no valid basis for the High Court to hold that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. The appellant has proved the issuance of cheque which contained signatures of the accused and on presentation of the cheque, the cheque was returned with endorsement "insufficient funds". Bank official was produced as one of the witnesses who proved that the cheque was not returned on the ground that it did not contain signatures of the accused rather it was returned due to insufficient funds. We are of the view that the judgment of High Court is liable to be set aside on this ground alone.

16. Even though judgment of the High Court is liable to be set aside on the ground that High Court exceeded its revisional jurisdiction, to satisfy ourselves with the merits of the case, we proceeded to examine as to whether there was any doubt with regard to the existence of the debt or liability of the accused.

17. Section 139 of the Act, 1881 provides for drawing the presumption in favour of holder. Section 139 is to the following effect:

> "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."

18. This Court in Kumar Exports vs. Sharma Carpets, 2009 (2) SCC 513, had considered the provisions of Negotiable Instruments Act as well Evidence Act. Referring to Section 139, this Court laid down following in paragraphs 14, 15, 18 and 19:

> "14. Section 139 of the Act 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.
>
> 15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient

> evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".
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> 18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability.

A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

19. This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20:

> "20....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…"

20. In the present case, the trial court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

21. Another judgment which needs to be looked into is Rangappa vs. Sri Mohan, 2010 (11) SCC 441. A three Judge Bench of this Court had occasion to examine the presumption under Section 139 of the Act, 1881. 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 paragraphs 26 and 27:

> "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, (2008) 4 SCC 54, 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 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 or proof."

22. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW.1, himself has not been explained by the High court.

23. In view of the aforesaid discussion, we are of the view that the High Court committed error in setting aside the order of conviction in exercise of revisional jurisdiction. No sufficient ground has been mentioned by the High Court in its judgment to enable it to exercise its revisional jurisdiction for setting aside the conviction.

24. In the result, the appeal is allowed, judgment of the High Court is set aside and judgment of trial court as affirmed by the Appellate Court is restored.

.....J. (A.K. SIKRI) .....J. (ASHOK BHUSHAN) NEW DELHI, JULY 02, 2018.