Aps Forex Services Pvt Ltd vs Shakti International Fashion Linkers on 14 February, 2020

Equivalent citations: AIR 2020 SUPREME COURT 945, AIR 2021 SUPREME COURT 2814, AIRONLINE 2020 SC 889, AIRONLINE 2020 SC 188 (2020) 3 SCALE 631, (2020) 3 SCALE 631

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Bench: M. R. Shah, Ashok Bhushan

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 271 OF 2020

APS FOREX SERVICES PVT. LTD. .. App

Versus

SHAKTI INTERNATIONAL FASHION LINKERS & ORS. .. Respondent(s)

WITH
CRIMINAL APPEAL NO. 272 OF 2020

JUDGMENT

M. R. Shah, J.

CRIMINAL APPEAL NO. 271 OF 2020 Feeling aggrieved and dissatisfied with the impugned judgment and order dated 20.04.2018 passed by the High Court of Delhi in Crl. L.P. No.258 of 2018 by which the High Court has dismissed the said application for leave to appeal challenging the judgment and order of acquittal passed by the Learned Trial Court acquitting the original accused ☐ respondents herein for the offence under Section 138 of the Negotiable Instruments Act (for short, 'the N.I. Act') and thereby confirming the judgment and order of acquittal passed by the Learned

Trial Court, the original complainant has preferred the present appeal. CRIMINAL APPEAL NO. 272 OF 2020 Feeling aggrieved and dissatisfied with the impugned judgment and order dated 20.04.2018 passed by the High Court of Delhi in Crl. L.P. No.259 of 2018 by which the High Court has dismissed the said application for leave to appeal challenging the judgment and order of acquittal passed by the Learned Trial Court acquitting the original accused □respondents herein for the offence under Section 138 of the Negotiable Instruments Act (for short, 'the N.I. Act') and thereby confirming the judgment and order of acquittal passed by the Learned Trial Court, the original complainant has preferred the present appeal. CRIMINAL APPEAL NO. 271 OF 2020

2. According to the complainant, the appellant is in the business of sale and purchase of Foreign Exchange. That the original accused □respondents herein approached the appellant for issuance of Foreign Exchange Currency/USD Travel Currency Card. According to the original complainant □ appellant herein, a total sum of Rs.19,01,320/□was paid to the accused through VTM (Visa Travel Money Card) which came to be withdrawn by the accused on different days on 10.01.2014, 20.02.2014 and 22.02.2014. According to the complainant, the original accused □respondents herein paid Rs.6,45,807/□only leaving a balance of Rs.12,55,513/□ According to the complainant, the respondents accused issued four cheques total amounting Rs.9,55,574/□, which were issued in favour of the complainant. However, all the aforesaid cheques when presented, came to be dishonoured. According to the complainant thereafter the respondents issued one another cheque bearing No.374941 of Rs.9,55,574/□of the partnership firm namely Shakti International in discharge of the legal liability. According to the complainant when the same cheque was presented the same came to be dishonoured due to "STOP PAYMENT" vide bank memo dated 02.06.2014. Thereafter, the complainant sent a legal notice upon the original accused under Section 138 of the N.I. Act vide notice dated 07.06.2014. Despite the service of the notice, the accused did not make the payment of the cheque amount. Therefore, the original complainant □appellant herein filed the complaint before the Learned Metropolitan Magistrate. The Learned Metropolitan Magistrate also believed that the cheque was issued and the same was returned unpaid with remarks "STOP PAYMENT". The Learned Metropolitan Magistrate believed that the accused Sushil Kumar Sharma admitted his signature on the cheque. The Learned Metropolitan Magistrate also believed receipt of the demand notice by the accused persons and non□payment towards the said cheque. However, thereafter Learned Metropolitan Magistrate observed and held that there is no legal liability as the payment through the card is not established and proved; that the payments are prior to the issuance of the card. Resultantly, the Learned Metropolitan Magistrate dismissed the complaint by judgment and order dated 20.01.2017. Feeling aggrieved and dissatisfied with the judgment and order of acquittal passed by the Learned Trial Court acquitting the accused, the complainant preferred appeal before the Learned Sessions Court. Learned Sessions Court dismissed the said appeal on the ground that the same is not maintainable. Thereafter the complainant filed the appeal before the High Court. By the impugned judgment and order, the High Court dismissed the appeal and confirmed the order of acquittal passed by the Learned Trial Court. Hence, the original complainant has preferred the present appeal.

3. Learned Counsel appearing on behalf of the appellant has vehemently submitted that in the facts and circumstances of the case both the Learned Trial Court as well as the High Court have committed a grave error in acquitting the original accused for the offence under Section 138 of the

N.I. Act.

3.1 It is further submitted by Learned Counsel appearing on behalf of the original complainant – appellant herein that both the Courts below have not appreciated and/or considered the presumption in favour of the complainant under Section 139 of the N.I. Act. It is further submitted by Learned Counsel appearing on behalf of the complainant that both the Courts below have materially erred in acquitting the accused. It is submitted that the accused had admitted issuance of the cheque as well as the signature on the cheque. It is submitted that therefore there is a presumption under Section 139 of the N.I. Act in favour of the complainant. It is submitted that thereafter the onus would be upon the accused to rebut the presumption and for that, the accused has to lead the evidence. It is submitted that in the present case no evidence has been led on behalf of the accused to rebut the presumption. It is submitted that the presumption mandatory by Section 139 of the N.I. Act includes the presumption that there exists a legally enforceable debt or liability and therefore both the Courts below have materially erred in acquitting the accused. In support of the above, reliance is placed on the decisions of this Court in the case of Rangappa vs. Sri Mohan, (2010) 11 SCC 441 and Kisan Rao vs. Shankargouda, (2018) 8 SCC 165.

3.2 It is further submitted by Learned Counsel appearing on behalf of the complainant that even at the time of framing of the charge against the accused and when his statement was recorded, the accused had admitted that he had taken services of the Foreign Exchange and Travel Card. It is submitted that he had also admitted that he had made part payment in discharge of the said liability and some amount was remaining. It is submitted that therefore the accused was required to lead the evidence and prove that the entire amount due and payable has been paid. It is submitted that therefore in view of the presumption under Section 139 of the N.I. Act, the Learned Trial Court ought to have convicted the accused for the offence under Section 138 of the N.I. Act. It is submitted that therefore the High Court has erred in confirming the acquittal.

4. The present appeal is vehemently opposed by the learned counsel appearing on behalf of the accused.

4.1 It is vehemently submitted by Learned Counsel appearing on behalf of the original accused that in the facts and circumstances of the case both the courts below have not committed any error in acquitting the accused.

4.2. It is further submitted that it is true that the cheque was issued, but the same was issued towards the security. It is submitted that as such the complainant misused the cheque to recover the dues of business from Ranger Export of India. It is submitted that there is a specific finding given by the Learned Trial Court that the complainant failed to prove the legal liability and/or the dues of the accused for which the cheque was issued. 4.3 It is submitted by Learned Counsel for the accused that in the present case the accused has rebutted the presumption under Section 139 of the N.I. Act and has demonstrated and proved that there was no legal liability and/or the dues, due and payable to the complainant.

4.4. Relying upon the decision of this Court in Basalingappa vs. Mudibasappa, (2019) 5 SCC 418, it is submitted that as held by this Court once there is probable defence on behalf of the accused, thereafter the burden shifts on the complainant to prove his financial capacity and other facts.

4.5 Making the above submissions and relying upon the cases, it is prayed to dismiss the present appeal.

5 We have heard the learned counsel appearing on behalf of the respective parties at great length.

5.1 We have considered minutely the evidence on record, both oral as well documentary. We have also considered and gone through the judgment and order passed by the Courts below acquitting the respondents accused for the offence under Section 138 of the N.I. Act.

5.2. What is emerging from the material on record is that the issuance of cheque by the accused and the signature of the accused on the said cheque are not disputed by the accused. The accused has also not disputed that there were transactions between the parties. Even as per the statement of the accused, which was recorded at the time of the framing of the charge, he has admitted that some amount was due and payable. However, it was the case on behalf of the accused that the cheque was given by way of security and the same has been misused by the complainant. However, nothing is on record that in the reply to the statutory notice it was the case on behalf of the accused that the cheque was given by way of security. Be that as it may, however, it is required to be noted that earlier the accused issued cheques which came to be dishonoured on the ground of 'insufficient funds' and thereafter a fresh consolidated cheque of Rs. Rs.9,55,574/□was given which has been returned unpaid on the ground of "STOP PAYMENT". Therefore, the cheque in question was issued for the second time. Therefore, once the accused has admitted the issuance of cheque which bears his signature, there is presumption that there exists a legally enforceable debt or liability under Section 139 of the N.I. Act. However, such a presumption is rebuttable in nature and the accused is required to lead the evidence to rebut such presumption. The accused was required to lead evidence that the entire amount due and payable to the complainant was paid.

6. On the presumption under Section 139 of the N.I. Act few decisions of this Court are required to be referred to and considered.

6.1 In the case of K.N. Beena vs. Muniyappan, (2001) 8 SCC 458, it is observed and held by this Court that under Section 118 of the N.I. Act, unless the contrary is proved, it is to be presumed that the negotiable instruments (including a cheque) had been made or drawn for consideration. It is further observed and held that under Section 139, the Court has to presume, unless the contrary is proved, that the holder of the cheque received the cheque for discharge, in whole or in part, of a debt or liability. It is further observed that thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that the cheque has not been issued for a debt or liability is on the accused.

6.2 In the case of Rangappa (supra) again, this Court had an occasion to consider the presumption of existence of a legally enforceable debt or liability under Section 139 of the N.I. Act. In the aforesaid decision, after considering other decisions of this Court on Section 118(a) and 139 of N.I. Act, it is observed and held that there exists a presumption which favours the complainant. It is further observed that the presumption under Section 139 of the N.I. Act is in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein there is existence of legally enforceable debt or liability can be contested. In Paragraph 27 this Court observed and has held as under:

> "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." 6.3 In the case of Kishan Rao (Supra) after considering the decision of this Court in the case of Kumar Exports vs. Sharma Carpets, (2009) 2 SCC 513, it is observed and held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. This Court in paragraph 19 of that judgment considered paragraph 14, 15, 18 & 19 of the decision in the case of Kumar Exports (Supra) as under:
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> 19. This Court in Kumar Exports v. Sharma Carpets (Supra), had considered the provisions of the Negotiable Instruments Act as well the Evidence Act. Referring to Section 139, this Court laid down the following in paras 14, 15, 18 and 19:
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> "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.
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> 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".

* * *

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." 6.4 Now so far as the reliance is placed by Learned Counsel appearing on behalf of the accused on the decision of this Court in the case of Basalingappa (supra), on going through the said decision, we are of the opinion that the said decision shall not be applicable to the facts of the case on hand and/or the same shall not be of any assistance to the accused. In that case before this Court, the defence by the accused was that the cheque amount was given by the complainant to the accused by way of loan. When the proceedings were initiated under Section 138 of the N.I. Act the accused denied the debt liability and the accused raised the defence and questioned the financial capacity of the complainant. To that, the complainant failed to prove and establish his financial capacity. Therefore, this Court was satisfied that the accused had a probable defence and consequently in absence of complainant having failed to prove his financial capacity, this Court acquitted the accused. In the present case, the accused never questioned the financial capacity of the complainant. We are of the view that whenever the accused has questioned the financial capacity of the complainant in support of his probable defence, despite the presumption under Section 139 of the N.I. Act about the presumption of legally enforceable debt and such presumption is rebuttable, thereafter the onus shifts again on the complainant to prove his financial capacity and at that stage the complainant is required to lead the evidence to prove his financial capacity, more particularly when it is a case of giving loan by cash and thereafter issuance of a cheque. That is not a case here.

7. Coming back to the facts in the present case and considering the fact that the accused has admitted the issuance of the cheques and his signature on the cheque and that the cheque in question was issued for the second time, after the earlier cheques were dishonoured and that even according to the accused some amount was due and payable, there is a presumption under Section 139 of the N.I. Act that there exists a legally enforceable debt or liability. Of course such presumption is rebuttable in nature. However, to rebut the presumption the accused was required to lead the evidence that full amount due and payable to the complainant has been paid. In the present case, no such evidence has been led by the accused. The story put forward by the accused that the cheques were given by way of security is not believable in absence of further evidence to rebut the presumption and more particularly the cheque in question was issued for the second time, after the earlier cheques were dishonoured. Therefore, both the courts below have materially erred in not properly appreciating and considering the presumption in favour of the complainant that there exists legally enforceable debt or liability as per Section 139 of the N.I. Act. It appears that both, the Learned Trial Court as well as the High Court, have committed error in shifting the burden upon the complainant to prove the debt or liability, without appreciating the presumption under Section 139 of N.I. Act. As observed above, Section 139 of the Act is an example of reverse onus clause and therefore once the issuance of the cheque has been admitted and even the signature on the cheque has been admitted, there is always a presumption in favour of the complainant that there exists legally enforceable debt or liability and thereafter it is for the accused to rebut such presumption by leading evidence.

8. In view of the reasons stated above, the impugned judgment and order passed by the High Court and that of the Metropolitan Magistrate acquitting the original accused □respondents herein for the offence under Section 138 of the N.I. Act cannot be sustained and the same deserves to be quashed and set aside and are accordingly quashed and set aside. The original accused □respondents herein are held guilty for the offence under Section 138 of the N.I. Act. All the original accused □ respondents herein are therefore, convicted under Section 138 of the N.I. Act. Original Accused No.2 to 4 Respondent No.2 to Respondent No.4 herein are sentenced to undergo three months simple imprisonment with a fine of Rs.10,000/□each and in default thereof to undergo further one month simple imprisonment. The original accused □respondents herein are also directed to pay a sum of Rs.19,11,148/□to the original complainant by way of compensation to be paid within a period of eight weeks from today.

9. Present appeal is accordingly allowed.

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10. Now so far as this appeal arising out of the impugned judgment and order passed by the High Court in Crl. L.P. No. 259/2018 arising out of the judgment and order passed by the learned trial Court in Criminal Complaint No. 62/15 (new no. 613738/16) acquitting the original accused for the offence under Section 138 of the N.I. Act is concerned, the only difference is with respect to the cheques amount. In the present case, four cheques each of Rs. 1,00,000/□were issued which came to be dishonoured. Except the cheques amount, there is no difference.

11. For the reasons stated in Criminal Appeal No. 271 of 2020 which has been allowed today, this appeal is also allowed. The impugned judgment and order passed by the High Court as well as that of the trial Court acquitting the original accused – respondents herein for the offence under Section 138 of the N.I. Act cannot be sustained and the same deserves to be quashed and set aside and are accordingly quashed and set aside. The original accused □respondents herein are held guilty for the offence under Section 138 of the N.I. Act. All the original accused □respondents herein are therefore, convicted under Section 138 of the N.I. Act. Original Accused No.2 to 4 □Respondent No.2 to Respondent No.4 herein are sentenced to undergo three months simple imprisonment with a fine of Rs.10,000/□each and in default thereof, to undergo further one month simple imprisonment. The original accused □respondents herein are also directed to pay a sum of Rs.8,00,000/□to the original complainant by way of compensation to be paid within a period of eight weeks from today.

.....J. (ASHOK BHUSHAN) .....J. (M. R. SHAH) New Delhi;

February 14, 2020.