Triyambak S.Hegde vs Sripad on 23 September, 2021

Author: A.S. Bopanna

Bench: A.S. Bopanna, Surya Kant, N.V. Ramana

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.849-850 OF 2011

Triyambak S. Hegde .…Appellant(s)

Versus

Sripad ….Respondent(s)

JUDGMENT

A.S. Bopanna,J.

1. The appellant is before this Court assailing the common order dated 01.12.2009 in Criminal Revision Petition No.1282/2006 connected with Criminal Revision Petition No.1481/2006 passed by the High Court of Karnataka. Through the said order the learned Single Judge has allowed Criminal Revision Petition No.1282/2006 filed No.1481/2006 filed by the appellant herein has been dismissed. Consequently, the conviction of the respondent, ordered by the learned Judicial Magistrate and affirmed by the learned Session Judge is set aside.

2. The case of the appellant is that the respondent who was known to him for the past few years approached the appellant and informed that due to his financial difficulty he intends to sell the house situate in Sirsi town. The appellant agreed to purchase the same for the negotiated total sale consideration of Rs.4,00,000/☐(Rupees four lakhs only). An agreement dated 06.06.1996 was executed by the respondent while receiving the advance amount of Rs.3,50,000/☐(Rupees three lakhs fifty thousand only). Subsequently, when the appellant made certain enquiries, he learnt that the house stood in the name of the father of the respondent and the respondent did not have the authority to sell the same. In that view, the appellant demanded the return of Rs. 3,50,000/☐ (Rupees three lakhs fifty thousand only) which he had paid as the advance amount. The respondent instead of paying the entire amount, issued a cheque dated 17.05.1998 for the sum of Rs. 1,50,000/☐ (Rupees one lakh fifty thousand only) being part of the amount. The appellant presented the cheque for realisation on 20.05.1998 when it came to be dishonoured with the endorsement 'insufficient

funds'.

3. The appellant therefore got issued a notice informing the respondent about the cheque being dishonoured and also demanding payment of the cheque amount. The respondent, though received the notice, failed to respond to the same. In that view, the appellant filed a complaint under Section 200 of the Criminal Procedure Code (for short 'CrPC') on 14.07.1998 in the Court of the Judicial Magistrate, First Class (for short 'JMFC') at Sirsi which was registered as Criminal Case No.790/2000. Through the said complaint the appellant sought prosecution of the respondent under Section 138 of the Negotiable Instruments Act, 1881 (for short 'N.I. Act'). The learned JMFC after providing opportunity to both the parties convicted the respondent through the judgment dated 09.06.2005 for the offence punishable under Section 138 of the N.I. Act; sentenced the respondent to undergo simple imprisonment for six months and to pay the fine of Rs. 2,00,000/- (Rupees two lakhs only). In default of payment of the fine amount, the accused was ordered to undergo simple imprisonment for a further period of three months. Out of the fine amount, Rs. 1,95,000/-(Rupees one lakh ninety-five thousand only) was ordered to be paid to the appellant as compensation.

4. The respondent herein claiming to be aggrieved by the said judgment dated 09.06.2005 passed by the JMFC, filed an appeal before the District & Sessions Judge, Uttara Kannada, Karwar in Criminal Appeal No.57/2005. The appellant herein also filed an appeal in Criminal Appeal No.65/2005 before the District and Sessions Judge seeking that the sentence imposed on the respondent by the Learned JMFC be enhanced, as the compensation of Rs. 1,95,000/-(Rupees one lakh ninety-five thousand only) ordered to be paid to the appellant is insufficient. The learned Sessions Judge having re-examined the matter and on reassessing the evidence dismissed both the appeals through separate judgments both dated 22.04.2006. The respondent herein, in that view, filed the Revision Petition in Criminal Revision Petition No.1282/2006 and the appellant herein filed the connected Revision Petition No.1481/2006 before the High Court. The learned Single Judge, as noted has allowed the Revision Petition filed by the respondent herein and set aside the conviction order passed by the learned JMFC, which had been confirmed by the learned Sessions Judge. It is in that background, these appeals have arisen for consideration.

5. We have heard Mr. Rajesh Inamdar, learned counsel for the appellant, Mr. G.V. Chandrasekar, learned counsel for the respondent and perused the appeal papers.

6. Before the learned Magistrate, the appellant had examined himself as PW1 and got marked the documents at Exhibits P1 to P6. The deposition of the appellant as PW1 indicated that the appellant and the respondent were known to each other for about 7 to 8 years prior to the transaction in question. In that view, in the year 1996 the respondent approached the appellant, explained his financial difficulties and due to his financial need, offered to sell the property situate in Sirsi. In that light, the price was finalised at Rs. 4,00,000/-(Rupees four lakhs only) and on executing an agreement dated 06.06.1996 (Exhibit P-6), the advance amount of Rs. 3,50,000/-(Rupees three lakhs fifty thousand only) was paid. The balance amount of Rs. 50,000/-(Rupees fifty thousand only) was to be paid at the time of registration and the transaction was to be completed within six months. It is alleged that the respondent kept on postponing the registration on one pretext or the

other. Therefore, on an enquiry the appellant learnt that the property was in fact in the name of the father of the respondent and the respondent was not the absolute owner. Since the respondent was not authorised to sell, the appellant proceeded to cancel the agreement and demanded to pay back the advance amount. In that view, the cheque dated 17.05.1998 (Exhibit P□2) was drawn by the respondent for the sum of Rs. 1,50,000/□(Rupees one lakh fifty thousand only) which was towards part of the advance amount paid by him. The cheque on being presented was however dishonoured. The memo issued by the bank was marked as Exhibit P□3. The notice issued by the appellant and the postal receipt was marked as Exhibits P□4 and P□5. The respondent did not choose to tender any rebuttal evidence in the Court of JMFC, though he disputed the incriminating circumstances which were put to him while recording the statement under Section 313 of the CrPC.

7. In that background, the learned JMFC on taking note that the signature on the agreement dated Exhibit P□6, more particularly on the cheque at Exhibit P□2 being admitted, it raised presumption under Section 118 and 139 of the N.I. Act, which had not been rebutted. Therefore, the learned JMFC convicted the respondent. As noted, the learned Sessions Judge on re□appreciating the evidence had confirmed the conviction and sentence. The respondent however put forth the contention in the Revision Petition only at the time of argument, that the appellant did not pay the amount but his signature had been secured on the cheque (Exhibit P□2) and the agreement (P□6) under peculiar circumstances. It was contended on his behalf that he was a party to a case in the Court of the Civil Judge, Sirsi wherein he had engaged the services of an advocate by name Mr. Rama Joshi. It was his further case that Mr. Vishwanath Hegde who is the junior of Mr. Rama Joshi happens to be the relative of the appellant herein. He, thus being in a dominant position had obtained the signature.

8. The learned Single Judge having accepted the said contention which was raised in the Revision for the first□time during arguments proceeded to hold that the appellant had not discharged the burden of proving that he had paid Rs. 3,50,000/□(Rupees three lakhs fifty thousand only) to the respondent and that the cheque had been issued towards payment of a part of the same. The learned Single Judge was also of the opinion that the agreement at Exhibit P□6 cannot be believed, as well.

9. Mr. Rajesh Inamdar, the learned counsel appearing on behalf of the appellant has contended that the signature on the documents at Exhibit P□6 and the cheque at Exhibit P□2 is not disputed by the respondent. In that view, it is contended that the learned JMFC was justified in raising a presumption against the respondent and convicting him since there was no rebuttal evidence or contrary material whatsoever. It is contended that the document at Exhibit P□6 was relied to indicate that there was a transaction entered into between the parties towards which the payment was made but the manner in which the High Court has adverted to the said document is beyond the scope of the requirement in a proceeding under Section 138 of the N.I. Act. In that circumstance, it is contended that the learned Single Judge has proceeded at a tangent and has set aside the concurrent judgments of the courts below, though limited scope was available in a Revision Petition.

10. Mr. G.V. Chandrasekar, the learned counsel for the respondent submitted that the trial court and the lower appellate court has not examined the case in its correct perspective. Instead, merely because the signature on the cheque was admitted the courts jumped to the conclusion by raising a

presumption, though there was no evidence on record to show that the appellant possessed the funds and the same had been actually paid by him to the respondent to constitute legally recoverable debt. It is contended that the High Court was justified in examining and concluding with regard to the circumstance under which the cheque had been signed and, in that light, had set aside the conviction. The order therefore does not call for interference is his contention.

11. From the facts arising in this case and the nature of the rival contentions, the record would disclose that the signature on the documents at Exhibits P□6 and P□2 is not disputed. Exhibit P□2 is the dishonoured cheque based on which the complaint was filed. From the evidence tendered before the JMFC, it is clear that the respondent has not disputed the signature on the cheque. If that be the position, as noted by the courts below a presumption would arise under Section 139 in favour of the appellant who was the holder of the cheque. Section 139 of the N.I. Act reads as hereunder: □"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."

12. Insofar as the payment of the amount by the appellant in the context of the cheque having been signed by the respondent, the presumption for passing of the consideration would arise as provided under Section 118(a) of N.I. Act which reads as hereunder: □"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."

13. The above noted provisions are explicit to the effect that such presumption would remain, until the contrary is proved. The learned counsel for the appellant in that regard has relied on the decision of this court in K. Bhaskaran vs. Sankaran Vaidhyan Balan & Anr.(1999) 7 SCC 510 wherein it is held as hereunder: □"9. As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. The Trial Court was not persuaded to rely on the interested testimony of DW□1 to rebut the presumption. The said finding was upheld by the High Court. It is not now open to the accused to contend differently on that aspect."

14. The learned counsel for the respondent has however referred to the decision of this Court in Basalingappa vs. Mudibasappa (2019) 5 SCC 418 wherein it is held as hereunder: □"25. We having noticed the ratio laid down by this Court in the above cases on Sections 118 (a) and 139, we now summarise the principles enumerated by this Court in following manner:

> 25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come in the witness box to support his defence.

26. Applying the preposition of law as noted above, in facts of the present case, it is clear that signature on the cheque having been admitted, a presumption shall be raised under Section 139 that the cheque was issued in discharge of debt or liability. The question to be looked into is as to whether any probable defence was raised by the accused. In cross-examination of PW1, when the specific question was put that cheque was issued in relation to loan of Rs.25,000 taken by the accused, PW1 said that he does not remember. PW1 in his evidence admitted that he retired in 1997 on which date he received monetary benefit of Rs.8 lakhs, which was encashed by the complainant. It was also brought in the evidence in the evidence that in the year 2010, the complainant entered into a sale agreement for which he paid an amount of Rs.4,50,000 to Balana Gouda towards sale consideration. Payment of Rs.4,50,000 being admitted in the year 2010 and further payment of loan of Rs.50,000 with regard to which Complaint No.119 of 2012 was filed by the complainant, copy of which complaint was also filed as Ext. D-2, there was burden on the complainant to prove his financial capacity. In the year 2010-2011, as per own case of the complainant, he made payment of Rs.18 lakhs. During his cross-examination, when financial capacity to pay Rs. 6 lakhs to the accused was questioned, there was no satisfactory reply given by the complainant. The evidence on record, thus, is a probable defence on behalf of the accused, which shifted the burden on the complainant to prove his financial capacity and other facts."

15. In that light, it is contended that the very materials produced by the appellant and the answers relating to lack of knowledge of property details by PW-1 in his cross-examination would indicate that the transaction is doubtful and no evidence is tendered to indicate that the amount was paid. In such event, it was not necessary for the respondent to tender rebuttal evidence but the case put forth would be sufficient to indicate that the respondent has successfully rebutted the presumption.

16. On the position of law, the provisions referred to in Section 118 and 139 of N.I. Act as also the enunciation of law as made by this Court needs no reiteration as there is no ambiguity whatsoever. In, Basalingappa vs. Mudibasappa (supra) relied on by the learned counsel for the respondent, though on facts the ultimate conclusion therein was against raising presumption, the facts and circumstances are entirely different as the transaction between the parties as claimed in the said case is peculiar to the facts of that case where the consideration claimed to have been paid did not find favour with the Court keeping in view the various transactions and extent of amount involved. However, the legal position relating to presumption arising under Section 118 and 139 of N.I. Act on signature being admitted has been reiterated. Hence, whether there is rebuttal or not would depend on the facts and circumstances of each case.

17. In the instant facts, as noted, the case put forth was that there was a transaction between the parties where the respondent had agreed to sell the house towards which an advance amount of Rs.3,50,000/□(Rupees three lakhs fifty thousand only) was paid. The cheque issued by the respondent was towards part repayment of the advance amount since the appellant realized that the respondent did not have proper title to the property and the transaction could not be carried forward. Since the signature on the agreement (Exhibit P□6) and more particularly the dishonored cheque (Exhibit P□2) was not disputed, the presumption as provided in law had arisen. Such presumption would remain till it is rebutted. The question however is as to whether, either from the material available on record or the nature of contentions put forth it could be gathered that the presumption had been rebutted by the respondent. As noted by the High Court, the contention of the respondent was that the relative of the appellant was the junior in the office of his advocate, Mr. Rama Joshi, who represented the respondent in a civil case. In that light, it was further contended that due to such dominant position, the respondent was made to sign on the agreement and the cheque though the money had not been paid. The said story was urged for the first time before the High Court. There is no such suggestion or admission to that effect as contended by the learned counsel for the respondent. In fact, the suggestion made to PW1 in his cross□examination is to contend that the cousin of the appellant was an advocate and as to whether he had consulted him before entering into the agreement, to which PW1 has answered that he did not find the need to do so. The admission that his cousin is an advocate does not lead to the conclusion that he had admitted that he was in a dominant position.

18. The Learned Single Judge however while accepting the said story has referred to certain discrepancies in the agreement (Exhibit P□6) relating to the details of the property and the appellant having admitted with regard to not having visited the property or having knowledge of the location of the property. Such consideration, in our opinion, was not germane and was beyond the scope of the nature of litigation. The validity of the agreement in the manner as has been examined by the learned Single Judge may have arisen if the same was raised as an issue and had arisen for consideration in a suit for specific performance of the agreement. The decision in K. Chinnaswamy Reddy vs. State of Andhra Pradesh and Anr. AIR 1962 SC 1788 relied on by the learned counsel for the respondent would not be of assistance in the present facts. Firstly, in the said decision this Court has expressed the limited power available to the High Court in Revision Petition. Even otherwise, we have disapproved the manner in which the learned Single Judge has proceeded to examine the matter on contentions which were not raised as a foundation before the Trial Court. In the instant

case, the said agreement (Exhibit P□6) had been relied upon only to the limited extent to indicate that there was a transaction between the parties due to which the amount to be repaid had been advanced. To that extent the document had been proved in evidence and such evidence had not been discredited in the cross□examination.

19. Further, though the respondent had put forth the contention that a relative of the appellant was the junior of his advocate and he has used his dominant position to secure the signature on the cheque, there is absolutely no explanation whatsoever to indicate the reason for which such necessity arose for him to secure the signatures of the respondent, if there was no transaction whatsoever between the parties. That apart, the said story even to be examined was put forth for the first time before the High Court. As is evident from the records the notice issued by the appellant intimating the dishonorment of the cheque and demanding payment, though received by the respondent has not been replied. In such situation, the first opportunity available to put forth such contention if true was not availed. Even in the proceedings before the learned JMFC, the respondent has not put forth such explanation in the statement recorded under Section 313 of CrPC nor has the respondent chosen to examine himself or any witness in this regard. The said contention had not been raised even in the appeal filed before the learned Sessions Judge.

20. Further, the story as put forth apart from being an afterthought, ex facie appears to be contrary to the records since the contention on behalf of the respondent is that the dominant position of the junior advocate in the office of Mr. Rama Joshi was used to secure the signature when the respondent had engaged the said advocates in an earlier civil case. From the cause title in the present case, in Criminal Case No.790/2000 before the JMFC, it is seen that Mr. Rama Joshi is the same learned advocate who had defended the respondent in this litigation. If what was being stated was the true fact, the respondent would have brought the same to the notice of the said advocate and in such situation would not have engaged the same advocate against whose junior he had a grievance and engage him to represent the case relating to dishonor cheque which was of the same subject matter. Further, if the cheque was secured in such circumstance and was not voluntary, it is difficult to comprehend as to why it would have been drawn for Rs.1,50,000/□(Rupees one lakh fifty thousand only) only when it is the case of the appellant that the advance amount paid was Rs.3,50,000/□(Rupees three lakh fifty thousand only) and had to get back the entire advance paid. The natural conduct would have been to secure for the full amount if that was the situation. Keeping all these aspects in view, the case put forth by the respondent does not satisfy the requirement of rebuttal even if tested on the touchstone of preponderance of probability. Therefore, in the present facts it cannot be held that the presumption which had arisen in favour of the appellant had been successfully rebutted by the respondent herein. The High Court therefore was not justified in its conclusion.

21. Having arrived at the above conclusion, it would be natural to restore the judgment of the Learned JMFC. Though in that regard, we confirm the order of conviction, we have given our thoughtful consideration relating to the appropriate sentence that is required to be imposed at this stage, inasmuch as; whether it is necessary to imprison the respondent at this point in time or limit the sentence to imposition of fine. As noted, the transaction in question is not an out and out commercial transaction. The very case of the appellant before the Trial Court was that the

respondent was in financial distress and it is in such event, he had offered to sell his house for which the advance payment was made by the appellant. The subject cheque has been issued towards repayment of a portion of the advance amount since the sale transaction could not be taken forward. In that background, what cannot also be lost sight of is that more than two and half decades have passed from the date on which the transaction had taken place. During this period there would be a lot of social and economic change in the status of the parties. Further, as observed by this Court in Kaushalya Devi Massand vs. Roopkishore Khore (2011) 4 SCC 593, the gravity of complaint under N.I. Act cannot be equated with an offence under the provisions of the Indian Penal Code, 1860 or other criminal offences. In that view, in our opinion, in the facts and circumstances of the instant case, if an enhanced fine is imposed it would meet the ends of justice. Only in the event the respondent□accused not taking the benefit of the same to pay the fine but committing default instead, he would invite the penalty of imprisonment. Hence, appropriate modification is made to the sentence in the manner as indicated hereinbelow:

22. For all the aforestated reasons, the following order;

(i) The order dated 01.12.2009 passed by the High Court in Criminal Revision Petition No. 1282/2006 and 1481/2006 are set aside.

(ii) The conviction ordered in C.C. No.790/2000 by the learned JMFC is restored.

(iii) The sentence to undergo simple imprisonment for six months and fine of Rs.2,00,000/□ (Rupees two lakhs only) is however modified. The Respondent/Accused is instead sentenced to pay the fine of Rs.

2,50,000/□(Rupees two lakhs fifty thousand only) within three months. In default of payment of fine the Respondent/Accused shall undergo simple imprisonment for six months.

(iv) From the fine amount, a sum of Rs.

2,40,000/□(Rupees two lakhs forty thousand only) shall be paid to the Appellant/Complainant as compensation.

(v) The Appeals No.849□850/2011 are accordingly allowed in part.

(vi) The pending applications, if any, stand disposed of.

.....CJI (N.V. RAMANA) .....J. (SURYA KANT) .....J. (A.S. BOPANNA) New Delhi, September 23, 2021