

HIGH COURT OF GUJARAT**Bench: JUSTICE M. K. THAKKER****Date of Decision: 4th April 2024**

R/CRIMINAL APPEAL (AGAINST ACQUITTAL) NO. 250 OF 2023

**SHRIRAM TRANSPORT FINANCE CO. LIMITED THRO VIKAS
LAXMANBHAI PATIL ...APPELLANT(S)****VERSUS****STATE OF GUJARAT & ANR. ...RESPONDENT(S)****Legislation:**

Section 378 of the Criminal Procedure Code (Cr.P.C.)

Sections 118, 139 of the Negotiable Instruments Act

Section 313 of the Cr.P.C.

Section 4 of the Evidence Act

Subject: Appeal against acquittal in a case involving dishonor of cheque under Section 138 of the Negotiable Instruments Act.**Headnotes:**

Acquittal Appeal - Presumption under Negotiable Instruments Act - Burden of proof - Rebuttal of presumption - Appeal challenging judgment and order of acquittal under Section 378 of the Criminal Procedure Code (Cr.P.C.) - Complaint filed under Section 138 of the Negotiable Instruments Act (NI Act) for dishonor of cheque - Complainant alleged default in loan repayment by accused - Cheque issued towards part payment returned with endorsement of "Funds Insufficient" - Demand notice issued but not complied with by accused - Private complaint filed - Trial court acquitted accused - Appeal against acquittal.

Presumption under NI Act - Section 118 & 139 - Rebuttable presumption of consideration and discharge of debt - Duty of accused to rebut presumption - Burden of proof on accused - Complainant must establish legally enforceable debt - Accused need not disprove existence of consideration beyond reasonable doubt - Accused's burden to provide probable defense shifting

burden back to complainant - Accused's defense of full repayment dislodging presumption in complainant's favor.

Appellate Review - Powers in appeal against acquittal - Full power to review evidence - No restriction on reappraisal of evidence - Double presumption in favor of accused - Presumption of innocence reinforced by acquittal - Extensive powers of appellate court - Reluctance to interfere with acquittal not a limitation on review of evidence.

Decision – High Court confirms judgment and order of acquittal by 20th Additional Senior Civil and Additional Chief Judicial Magistrate, Surat – Appeal dismissed.

Referred Cases:

- M.S.Narayana Menon vs. State Of Kerala (2006) 6 SCC 39
- Chandrappa and others vs. State of Karnataka (2007) 4 SCC 415

Representing Advocates:

MR MANISH J PATEL (2131) for the Appellant(s)

MS.VRUNDA SHAH, ADDL. PUBLIC PROSECUTOR for the Respondent(s) No. 1

JUDGMENT

1. This appeal is filed under section 378 of the Criminal Procedure Code (hereinafter referred to as Cr.P.C.) challenging the judgment and order of acquittal passed in criminal case No.14868 of 2019 by the Learned 20th Additional Senior Civil and Additional Chief Judicial Magistrate, Surat dated 26-09-2022.
2. The case of the complainant is that, complainant is running a finance business in the name and style of Shriram Finance Company Limited and lending money by hypothecating the vehicle and executing the deeds. The accused had obtained a loan facility from the complainant's company on the vehicle bearing registration No. GJ-05-AU-7515 and the hypothecation cum

loan agreement was executed. As the accused committed default in payment of installment regularly, the complainant had informed the respondent-accused, and to discharge the liability of making the repayment of the loan amount, the cheque bearing No. 019221 of ICICI bank Kamrej branch, Surat was issued for an amount of Rs.4,20,000/- towards part payment. On depositing the said cheque, it was returned with an endorsement of "Funds Insufficient", therefore the demand notice was issued to the respondent-accused on 28-02-2019 which was served to the respondent-accused on 04-03-2019. However, the said demand notice was neither replied nor complied to, therefore a private complaint came to be filed for the offence punishable under section 138 of the Negotiable Instruments Act (hereinafter referred to as NI Act).

3. After recording the verification, the process came to be issued under section 204 of the Cr.P.C. upon the accused, and accused appeared and his plea was recorded below Exh.7 on 05-12-2019. Accused pleaded not guilty and claimed to be tried. To prove the case, the complainant along-with the complaint has examined himself below Exh.21 and produced documentary evidences in the nature of Power of Attorney below Exh.25, Copy of Accounts Statement Ex. 10, disputed cheques, notice memo respectively. On filing the closing pursis below Exh.26, further statement under section 313 of the Cr.P.C. was recorded wherein the accused pleaded that, though loan amount was repaid fully, a false case was filed to recover excessive rate of interest and penalty by misusing the security cheque which was lying with the finance company. In addition of above defence, the complainant was cross examined by the accused, that learned Trial Court after considering the cross examination as well as the documents which was placed on record including the arguments advanced by the Learned Advocates for the respective parties had passed the judgment and order of acquittal which is impugned before this Court.

4. Heard Learned Advocate Mr.Manish J.Patel alongwith Learned Advocate Ms.Namrata Mulchandani and as this case was decided at the admission stage, no notice was issued to the respondent No.2.
5. Learned Advocate Mr.Patel submits that, though presumption under section 118 and 139 of the NI Act provided under the Act was not rebutted by the respondent-accused, learned Trial Court has passed judgment and order of acquittal.
6. Learned Advocate Mr.Patel submits that respondentaccused had admitted the loan facility which was availed and the signature on the cheque, though prima facie proved by the Learned Advocate of the complainant and without rebutting the evidence which was produced in support of the complaint, judgment and order of the acquittal was passed.
7. Learned Advocate submits that learned Trial Court has failed in not considering the statement of accounts which was produced below Exh.10 and held that, complainant has failed in establishing the legally enforceable debt against respondent-accused without considering the law laid down by the Apex Court that catena of decision that the primary duty is on the respondent-accused to rebut the evidence and to establish the fact with regard to the issuance of the cheque, without discharging the duty by the respondent-accused, learned Trial Court has committed an error in convicting the respondentaccused.
8. Learned Advocate prays that without any cogent reasons, judgment and order of the acquittal was passed and the same deserves to be to be interfered with and the appeal is required to be allowed.
9. Considering the arguments advanced by the Learned Advocate for the respective parties the relevant provisions provided under the NI Act is required to be considered before entering into the merits of the case that is reproduced herein-below:-

Section 118 – Presumptions as to negotiable instruments

Until the contrary is proved, the following presumptions shall be made:

1. **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;
2. **as to date**; that every negotiable instrument bearing a date was made or drawn on such date;
3. **as to time of acceptance**; that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;
4. **as to time of transfer**; that every transfer of a negotiable instrument was made before its maturity;
5. **as to order of indorsements**; that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;
6. **as to stamp**; that a lost promissory note, bill of exchange or cheque was duly stamped;
7. **that holder is a holder in due course**; that the holder of a negotiable instrument is a holder in due course: Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an SP offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him.

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, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.]

Section 139 in The Negotiable Instruments Act, 1881

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.

10. The use of phrase that “until the contrary it is proved” under section 118 of the Act and use of the words “unless the contrary is proved” under section 139 of the Act read with definition of “may presume and shall presume” as given under section 4 of the Evidence Act makes it at once clear that presumption to be raised under both the provisions are rebuttable, when the presumption is rebuttable it only points out that party on whom the duty of going forward with evidence lies, on the fact presumed when the party has produced evidence fairly and reasonably tending to show that real fact is not as presumed, the purpose of presumption is over. What is presumption is discussed by the Apex Court in the case of ***M.S.Narayana Menon vs . State Of Kerala*** reported in **(2006) 6 SCC 39**, a discussion with regard to the same is reproduced herein below:-

40. "In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, at page 3697, the term 'presumption' has been defined as under:

"A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known.

A presumption is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof.

A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof. It follows, therefore that a presumption of any fact is an inference of that fact from others that are known". (per ABBOTT, C.J., R. v. Burdett, 4 B. & Ald, 161) The word 'Presumption' inherently imports an act of reasoning a conclusion of the judgment; and it is applied to denote such facts or moral phenomena, as from experience we known to be invariably, or commonly, connected with some other related facts. (Wills on Circumstantial Evidence) A presumption is a probable inference which common sense draws from circumstances usually occurring in such cases.

The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made."

Having noticed the effect of presumption which was required to be raised in terms of [Section 118\(a\)](#) of the Act, we may also notice a decision of this Court in regard to 'presumption' under [Section 139](#) thereof".

11. Now keeping in mind the above aspects, if facts of the present case is examined, then it is the case of the complainant that complainant had provided financial facility to the respondent-accused and in default of payment, cheque which was issued was deposited in the bank of Rs.4,20,000/- as a part payment and on dishonoring the same, a private complaint came to be filed. To rebut the presumption which is in favor of the complainant, respondent-accused had stated in further statement that though the amount which was availed was fully paid, to get the excessive rate of interest and the penalty charges, the security cheque was deposited with the bank. In the complaint, the averment made appears to be in a casual manner,

there were no details with regard to how much amount of loan was provided, for which vehicle it was provided, neither produced any copy of the RC book alongwith the complaint. The loan officer who sanctioned the loan was not examined. The person who deposed before the Court states that he is not aware about any details with regard to sanctioning of loan. No memorandum or resolution was produced to show that, he was authorized to file the complaint by the company. With regard to the advance cheque, when the query was raised, he said that as the accused did not approached me for applying the loan, I cannot say that the cheque was given as an advance payment to the financial company or not. On perusing the Exh.10 i.e. statement of accounts, the learned Trial Court observed that total dues is stated to have been Rs.5,00,000/- out of which the respondent-accused had paid Rs.3,56,468/-, however the cheque which was deposited with the bank was of Rs.4,20,000/-. In the cross examination he admitted that no debit note was produced, neither any penalty was imposed, therefore the suggestion or defence which is placed by respondent-accused with regard to the misusing of security cheque, appears to be a probable defence.

12. To rebut the statutory presumption as per the judgment laid down by the Apex Court in various decision it is held that accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in criminal trial. The accused may adduce direct evidence to prove that note in question was not supported by the consideration and that there was no debt or liability to be discharged by the matter, 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. The accused has to bring on record record something which is probable defence for getting the burden of proof shifted on the complainant. To disprove the presumption the accused should bring on record the facts and circumstances upon consideration of which the court may either believe that the consideration and

debt did not exist or that non existence was so probable that a prudent man would under circumstances of the case act upon the plea that they did not exist. Considering the defence which was raised and established during the cross examination, it appears that accused had dislodged the presumption which is in favor of the complainant and the burden of proof which was again shifted on the complainant, and therefore the complainant failed to establish the case. In view of the same there was no illegality and impropriety in the order passed by the learned Trial Court acquitting the respondent accused.

13. This being an acquittal case as per the guideline issued by the Apex Court in the case of ***Chandrappa and others vs. State of Karnataka***, reported in **(2007) 4 SCC 415** wherein the general principles were laid down regarding the powers of the Appellate Court while dealing with the appeal against an order of the acquittal, which are reproduced hereinbelow:

“(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The [Code of Criminal Procedure](#), 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused

having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.”

14. In view of the above discussion, this appeal fails and the judgment and order of acquittal dated 26-09-2022 passed by the 20th Additional Senior Civil and Additional Chief Judicial Magistrate, Surat, Ahmedabad in Criminal Case No.14868 of 2019 is hereby confirmed. Record and Proceedings be sent back to the concerned learned trial Court.

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