



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.4694 OF 2008

Sanjay Mishra .. Applicant

Versus

Ms.Kanishka Kapoor @ Nikki
& Anr. .. Respondents

Mr.Ashok Mundargi, Sr. Counsel with Mr.Shailesh
Kabtharia for the applicant.

Ms.A.T.Jhaveri, A.P.P for the State.

CORAM : A.S.OKA, J.

DATE : 24th February 2009.

JUDGMENT:

. The submissions of the learned senior counsel appearing for the applicant were heard in support of this application under sub-section 4 of section 378 of the Code of Criminal Procedure, 1973.

2. The applicant is the complainant. The applicant filed a complaint against the 1st respondent alleging commission of offence under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act).

3. With a view to appreciate the submissions made



by the learned senior counsel appearing for the applicant, it will be necessary to refer to the facts of the case in brief. According to the case of the applicant the 1st respondent approached him in September 2004 through one Mrs.Kalayni Singh. The said Mrs.Kalyani Singh was known to the applicant. The 1st respondent represented that she was in need of financial assistance and she agreed to return the amount advanced within a period of three months to the 1st respondent. The applicant advanced a friendly loan of Rs.15 lacs to the 1st respondent. She executed a hundi on 15th September 2004 in the sum of Rs.15 lacs and also issued a cheque dated 28th December 2004 favouring the applicant. The said cheque was dishonoured and after issuing notice, the present complaint was filed by the applicant. The learned trial Judge passed an order of acquittal. The learned Judge held that the applicant has failed to establish that the cheque was issued by the 1st respondent in discharge of legal liability of the loan amount. The learned Judge observed that the 1st respondent has denied her signatures on the bill of exchange as well as the cheque subject matter of the complaint. The learned Judge has taken into account various circumstances borne out by the evidence on record and has passed order of acquittal. The learned



Judge also considered the admission of the applicant that the amount advanced was an unaccounted amount which was not disclosed to the Income Tax Authority.

4. The learned senior counsel appearing for the applicant submitted that there is evidence on record to show that the 1st respondent accepted the liability to repay the loan of Rs.15 lacs. He submitted that the defence that the cheque and bill of exchange has not been signed by the 1st respondent has not been substantiated. When attention of the learned senior counsel appearing for the applicant was invited to the categorical admission of the applicant that the entire amount subject matter of the loan was an unaccounted cash amount which was not disclosed in the Income Tax Return, he submitted that this is no ground to hold that the presumption under section 139 of the said Act stands rebutted. He submitted that even assuming that the amount advanced was an unaccounted money, at the most the applicant will face an action under the Income Tax Act, 1961 but this is not a ground to say that the presumption under section 139 of the said Act stood rebutted. He submitted that as the liability to repay a sum of Rs.15 lacs on the part of the 1st respondent was established, the learned Judge has committed an error by



acquitting the 1st respondent.

5. He submitted that mere fact that the amount advanced is not disclosed in the Income Tax Returns by itself cannot rebut the presumption under section 139 of the said Act in every case. He has placed reliance on a decision of this Court dated 16th January 2009 in Criminal Application No.3964 of 2007 (R.R.Dubey Vs. Shamprakash Mishra & Ors.).

6. I have given careful consideration to the submissions. I have perused a copy of the complaint and notes of evidence. In the cross-examination, the applicant has categorically stated thus:

".... The entire amount was given in cash. The entire amount was my cash amount. The cash amount was kept at my Chembur's residence. At that time, it was unaccounted. I had not disclosed this amount to the Income Tax after giving the loan till date. There was no agreement for interest on the amount given." (Emphasis added)



The complaint was filed in the year 2005. The evidence of the applicant was recorded on 28th February 2006. The applicant admitted that the amount allegedly paid by him to the 1st respondent by way of loan was a cash amount kept at his residence and at that time it was an unaccounted amount. He categorically admitted that till date (i.e. till 28th February 2006) he has not disclosed the amount to the Income Tax. According to the case of the complainant, he had advanced loan on 14th September 2004 which was repayable within 90 days. Thus, on 14th September 2004 the amount allegedly paid by him to the 1st respondent was stated to be an unaccounted amount which was kept at the residence of the applicant. Moreover, till February 2006, when the evidence was recorded, the said amount was not disclosed in the Income Tax Returns of the applicant. Thus it continued to be an unaccounted amount.

7. It is true that merely because amount advanced is not shown in Income Tax Return, in every case, one cannot jump to the conclusion that the presumption under section 139 of the said Act stands rebutted. There may be cases where a small amount less than a sum of Rs.20,000/- is advanced in cash by way of loan which may



be repayable within few days or within few months. A complainant may not show the said amount in the Income Tax Return as it is repayable within few days or few months in the same financial year. In such a case the failure to show the amount in the Income Tax Return may not by itself amount to rebuttal of presumption under section 139 of the said Act. If in a given case the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, the failure to disclose the amount in Income-Tax return or Books of Accounts of the complainant may be sufficient to rebut the presumption under section 139 of the said Act.

8. In the present case, the amount was allegedly advanced in September 2004. The amount is a large amount of Rs.15 lacs. This is a case where not only that there is a failure to disclose the amount of loan in the Income Tax Return of the applicant till the year 2006 but there is a categorical admission on the part of the applicant that the amount was an "unaccounted" amount.

9. Before dealing with the aspect of rebuttal of presumption, it will be necessary to refer to the



ingredients of section 138 of the said Act. It will be necessary to refer to a recent decision of the Apex Court in the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde [(2008) 4 Supreme Court Cases 54]. The case before the Apex Court arose out of a complaint under section 138 of the said Act. The applicant before the Apex Court was accused of an offence under section 138 of the Act. The submission before the Apex Court was that the essential requirement of section 138 was that there has to be a legally enforceable debt. The Apex Court referred to the provisions of section 271D of the Income Tax Act, 1961 which reads thus:

"271-D. Penalty for failure to comply with the provisions of section 269-SS.-(1) If a person takes or accepts any loan or deposit in contravention of the provisions of section 269-SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner."



In paragraph 29 of the decision, the Apex Court referred to the ingredients of the offence under section 138. Paragraph 29 reads thus:

"29. Section 138 of the Act has three ingredients viz.:

(i) that there is a legally enforceable debt;

(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds."

In paragraphs 30 and 31 the Apex Court dealt with the presumption under section 139 of the said Act. Paragraphs 30 and 31 read thus:

"30. The proviso appended to the said section



provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

31. The courts below, as noticed hereinbefore, proceeded on the basis that section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct." (Emphasis added)

10. Thus, what has been held by the Apex Court is



that section 139 of the said Act merely raises a presumption in regard to the second aspect of the matter, namely, that the cheque was drawn in discharge of debt or other liability. The Apex Court specifically held that the existence of legally recoverable debt is not a matter of presumption under section 139 of the said Act. The Apex Court specifically held that section 139 merely raises a presumption in favour of holder of cheque that the same has been issued for discharge of any debt or liability. Thus, even if presumption is not rebutted, in order to attract section 138 of the said Act, the debt has to be a "legally enforceable debt" as is clear from the explanation to section 138 which provides that for the purposes of the said section the debt or other liability means a legally enforceable debt or other liability.

11. The Apex Court also reiterated well established legal position that for rebutting the presumption under section 139 of the said Act, it is not necessary in every case for the accused to step into the witness box. The Apex Court held that the standard of proof on the part of the accused and that of prosecution in a criminal case is different. The prosecution has to prove the guilt of an accused beyond reasonable doubt,



but the standard of proof so as to prove a defence is "preponderance of probability". Inference of preponderance of probabilities can be drawn even by reference to circumstances. In paragraph 44 the Apex Court observed thus:

". The presumption of innocence is a human right (See *Narendra Singh v. State of M.P.*, *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra* and *Rajesh Ranjan Yadav v. CBI.*) Article 6(2) of the European Convention on Human Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused's rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may



be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. ..." (Emphasis added)

In paragraph 45 the Apex Court held thus:

"45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important



principles of legal jurisprudence, namely, presumption of innocence as human rights and the doctrine of reverse burden introduced by section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same." (Emphasis added)

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The Apex Court held that presumption of innocence forms part of human rights and therefore the doctrine of reverse burden introduced by section 139 has to be delicately balanced.

12. Now turning back to the facts of the present case, assuming that the presumption under section 139 of the said Act regarding existence of debt or liability is not rebutted, in order to attract section 138, the debt or liability has to be a "legally recoverable" debt or liability. As held by the Apex Court in the case of Krishna Bhat (supra) there is no presumption under section 139 of the said Act that the debt is a legally recoverable debt. In the case of Goa Plast (P) Ltd.



Vs. Chico Ursula D'Souza [(2004) 2 Supreme Court Cases 235] the Apex Court reiterated that a debt or liability subject matter of section 138 means a legally enforceable debt or liability.

13. In the present case, there is a categorical admission that the amount allegedly advanced by the applicant was entirely a cash amount and that the amount was "unaccounted". He admitted not only that the same was not disclosed in the Income Tax Return at the relevant time but till recording of evidence in the year 2006 it was not disclosed in the Income Tax Return. By no stretch of imagination it can be stated that liability to repay unaccounted cash amount is a legally enforceable liability within the meaning of explanation to section 138 of the said Act. The alleged debt cannot be said to be a legally recoverable debt.

14. In the case of Dalmia Cement (Bharat) Ltd Vs. Galaxy Traders & Agencies Ltd & Ors. [(2001) 6 Supreme Court Cases 463], the Apex court has referred to the object of section 138. Paragraph 3 of the said decision reads thus:



"3. The Act was enacted and section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile



instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. **The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country.**" (Emphasis added)

15. The Apex Court has held that the laws relating to the said Act are required to be interpreted in the light of the object intended to be achieved by it despite there being deviation from general law. The Apex Court expressed that the object of section 138 of the said Act was to ensure that commercial and mercantile activities are conducted in smooth and healthy manner. The explanation to section 138 of the said Act clearly provides that a debt or other liability



referred to in section means a legally enforceable debt or other liability. The alleged liability to repay an unaccounted cash amount admittedly not disclosed in the Income Tax Return cannot be a legally recoverable liability. If such liability is held to be a legally recoverable debt, it will render the explanation to section 138 of the said Act nugatory. It will defeat the very object of section 138 of the Act of ensuring that the commercial and mercantile activities are conducted in a healthy manner. The provision of section 138 cannot be resorted to for recovery of an unaccounted amount. A cheque issued in discharge of alleged liability of repaying "unaccounted" cash amount cannot be said to be a cheque issued in discharge of a legally enforceable debt or liability within the meaning of explanation of section 138 of the said Act. Such an effort to misuse the provision of section 138 of the said Act has to be discouraged.

16. Considering the aforesaid admission of the applicant, the conclusion recorded by the learned trial Judge that the applicant has failed to establish that the cheque was issued towards discharge of a legally recoverable debt is correct.



17. No case is made out for grant of leave.
Application is rejected.

(A.S. Oka, J)

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