Presented on : 23/08/2016
Registered on :10/03/2017
Decided on :13/08/2019
Duration : 2Ys.11Ms.21Ds.

IN THE DISTRICT COURT OF BARAMATI DISTRICT- PUNE
(Presided over by Rajendra V. Lokhande Adhoc District Judge- 1)

Reg.Civil Appeal No. : 42/2017
CNR NO:MHPU14-000354-2017
Exh. :14

Anil Vitthalrao Jadhav .... **Appellant**
Age: 41 years, Occu.: Business, (Original Defendant)
R/at : Pawarwadi, near Aasu,
Taluka: Phaltan, Dist.- Satara

Versus

Frontier Automotives through .... **Respondent**
Proprietor Jagdish Shorilal Punjabi (Original Plaintiff)
Age: 38 years, Occu.: Business,
R/at: Marwad Peth, Baramati,
Taluka- Baramati, District- Pune.

Civil Appeal u/s 96 of the Code of Civil Procedure Code, 1908.

Appearance:
Advocate Shri. D.M. Lalbige for the Appellant.
Advocate Shri. P.P.Kulkarni for the Respondent.

J U D G M E N T

(Delivered on 13th August, 2019)

Challenge in this appeal given to judgment and decree passed in Regular Civil Suit No. 63/2012 passed by the Ld. 3Rd Jt. Civil Judge

Junior Division, Baramati on 02/07/2016. The parties are hereinafter referred as per their original status in the suit.

2] The facts giving rise to the plaintiff's case are that the plaintiff being proprietary firm is authorized dealer of sale of motorcycles and spare parts of Kinetic Engineering Ltd. Pune (hereinafter referred as ' Kinetic company ' only). The defendant being authorized sub-dealer of it used to purchase the motorcycles and spare parts from the plaintiff on credit. The amount of Rs. 5,00,000/- of the motorcycles and spare parts purchased from on credit, was due from the defendant to the plaintiff. For the payment of outstanding amount, the defendant issued a cheque of Rs. 5,00,000/- dt. 07/12/2004 which came to be dishonored. The plaintiff called upon the defendant to pay the said cheque amount by demand notice. In spite of receipt of notice, the defendant failed to pay amount. Hence, this suit for recovery of said amount.

3] By filing written statement, the defendant combated the suit. According to him, the suit is not within limitation. No any transaction has taken place, the question of issuance of cheque does not arise. The plaintiff has not filed the documents about dues of the defendant. No details of transactions are given. He has not received demand notice. Thus it is prayed to dismiss the suit.

4] Upon above facts, Ld. Trial Court, after hearing both parties and appreciating evidence on record, decreed the suit. The said decree is herein impugned by the defendant .

5] In view of above facts and circumstances of this case, the following points emerge for determination and their findings with reasons thereon are as under :

POINTS	**FINDINGS**
1. Whether an amount of Rs. 5,00,000/- is due from the defendant to the plaintiff ?	In the negative.
2. Whether the plaintiff entitled to recover the said amount with interest, if any ?	In the Negative.
3. Whether suit is within limitation ?	In the affirmative.
4. Whether an interference of this court under section 41 of Civil Procedure Code in impugned decree is warranted?	In the affirmative.
5. What order and decree ?	As per final order.

R E A S O N S

AS TO POINT NO.1& 2:

6] Ld. advocate for the defendant has submitted that admittedly, in Criminal Case for offence p/u/s 138 of the Negotiable Instrument Act (hereinafter referred as N.I. Act), Ld. J.M.F.C. had convicted the defendant in Summary Case No. 482/2005 and in appeal No. 45/2006 , Ld. Sessions Judge has acquitted the defendant holding that the defendant has succeeded in rebutting the presumptions available in favour of the plaintiff. He submitted that, the plaintiff has no any documentary evidence to show that an amount of Rs. 5,00,000/- is due from the defendant. According to him, cross examination of P.W. 1 Jagdish and documentary evidence on record, are sufficient to rebut the presumptions in favour of the plaintiff.

7] As against that Ld. Advocate for the plaintiff submitted that the defendant has not denied issuance of cheque of Rs. 5,00,000/- to the plaintiff. He submitted that an issuance of cheque is sufficient to draw presumption that the cheque was issued for payment for consideration and for legal enforceable debt. The documentary evidence corroborate the plaintiff's case. The defendant has not rebutted the presumptions under section 118 and 139 of the N.I.Act.

8] P.W. 1 Jagdish, the plaintiff's proprietor, has deposed that the defendant being sub-dealer purchased the motorcycles of Kinetic Company and its spare parts from him on credit. According to him, the amount of Rs. 5,00,000/-of it, is due to the plaintiff from the defendant. In order to pay said outstanding amount, the defendant issued cheque (Exh.48)of Rs.5,00,000/- dt. 07/12/2004 drawn on Baramati Sahakari Bank branch Phaltan, which came to be dishonoured with remarks as “ Not arranged for ” (Exh.49). The plaintiff demanded the said amount by issuance of demand notice dt. 10/01/2005 (Exh.50). The defendant received that notice on 16.01.2015 (Exh. 52), but he failed to pay the said amount to the plaintiff .

9] The defendant in WS, has denied the factum of issuance of cheque. However in cross examination, he has admitted issuance of cheque. As per sec. 118 of the N.I. Act, it shall be presumed, until the contrary is proved, that every negotiable instrument was drawn for consideration. As per sec. 139 of the N.I.Act, it shall be presumed ,unless the contrary is proved, that the holder of the cheque received the cheque, for the discharge of debt or liability. The defendant can rebut the said presumptions by raising defence about the non existence of consideration or legal enforceable debt. It is not necessary for him to step in witness box or adduce evidence. He can rebut the presumptions on the basis of material produced by the plaintiff on record. Ld. Trial Court has referred the case of **Bharat Barrel & Drum Manufacturing Company Vs Amin Chand Pyarelal AIR 1999 SC 1008**, wherein the Hon'ble Supreme Court has held that, "Once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour."

10] In this light, the case of **Kumar Exports Vs. Sharma Carpets reported in AIR 2009 SC 1518,** is also very relevant to be referred to, wherein the Hon'ble Supreme Court observed that ,

“ 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. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. 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. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

11] In view of above legal position, in present case, in view of sec. 118 and 139 of the N. I. Act, the presumptions have to be drawn that the defendant has issued cheque to the plaintiff for consideration and for discharging legally enforceable debt or liability. Now the question for determination is whether the defendant has rebutted the said presumptions raised u/s 118 & 139 of the N.I. Act. The burden is upon the defendant to prove non existence of consideration or legal enforceable debt.

12] The defendant has deposed in his evidence in consonance with written statement. He has denied the alleged transaction took place between him and plaintiff. He has stated that, the plaintiff has not given details of transactions between them. In cross-examination he has admitted that he has issued cheque to the plaintiff. However, he has stated that it was blank cheque.

13] The evidence P.W.1 Jagdish is nothing but replica of the plaint. He has relied upon documentary evidence consisting of the receipts at Exh. 61 to 69 and bill receipts at Exh.-70 to 79 so as to prove the outstanding amount of Rs. 5,00,000/- from the defendant. On perusal of cross-examination of plaintiff, it finds that he has admitted that, he has not maintained account about the transactions of the sale of motorcycles and spare parts of Kinetic Company even though he is authorized dealer and the defendant is sub-dealer of the said company. Even, on showing him the receipts at Exh.- 61 to 79, P.W.1 Jagdish could not give detail particulars of the transactions with the defendant. He has also admitted in his cross-examination that the defendant's name is not mentioned in receipts at Exh-61 to 69. Thus the documentary evidence at Exh. 61 to 79 on record does not prove that the amount of Rs. 5,00,000/- is due from the defendant to the plaintiff.

14] P.W. 1 Jagdish admits in his cross-examination that an audit of company is to be made every year and it is shown in balance-sheet of the company that an amount of Rs. 5,00,000/- is due from the defendant to the plaintiff. He has not produced on record audit report as well as balance-sheet. Even he has gone to state he has not mentioned outstanding amount of Rs.5,00,000/- from the defendant in his income tax returns since year 2001 to 2004. Thus, it is apparent that the plaintiff has not maintained account of transactions of motorcycles and spare parts sold out to the defendant on credit, even though the plaintiff proprietary concern is authorized dealer and the defendant is sub-dealer. He has also not shown said outstanding amount in his income tax return. Thus, unaccounted amount of Rs. 5,00,000/- cannot be legally recoverable debt from the defendant . The cross-examination of the P.W. 1 Jagdish and documents produced by the plaintiff are sufficient to rebut the presumptions under section 118 and 139 of N.I. Act. Thus, the defendant has discharged onus upon him to prove non existence of consideration or legal enforceable debt.

15] Thus, the onus is reversed upon the plaintiff to prove that there was legally recoverable debt of Rs. 5,00,000/- from the defendant and for that purpose the defendant has issued the cheque. Except bare words of P.W. 1 Jagdish, there is no evidence to establish the transactions of Rs 5,00,000/- between the plaintiff and defendant on credit. P.W. 2 Prakash, being plaintiff's worker, has no knowledge about outstanding amount of the defendant. The documents at Exh.-61 to 79 do not prove that the amount of Rs. 5,00,000/- is due from the defendant to the plaintiff. Even the said amount has not been shown in audit report, balance-sheet and income tax return. Furthermore, the plaintiff has not informed about outstanding amount of Rs. 5,00,000/- of the defendant to Kinetic Company. Mere defendant did not reply the demand notice and did not demand back his cheque from the plaintiff, on that count it cannot be inferred that the amount of Rs. 5,00,000/- is due from the defendant to the plaintiff. Even, the defendant did not take proper defence about issuance of cheque, it does not mean that the plaintiff has proved it's case. Thus the plaintiff fails to prove that the amount of Rs. 5,00,000/- is due from the defendant to the plaintiff. Consequently the plaintiff is not entitled to recover it from the defendant. Hence I answer the point Nos. 1 and 2 in the negative.

POINT NO. 3 :

16] The cheque was issued on 07/12/2004. It was dishonoured on 16/12/2004. Notice was sent to defendant on 10/01/2015. It was received by defendant on 16/01/2015. Therefore suit is perfectly filed within period of limitation of three years. Thus, I answer the point No. 3 in the affirmative.

POINT NO.4:

17] On analysis of entire evidence on record and discussion made above, I have come to the conclusion that Ld. Lower Court has not appreciated the evidence of both parties in true perspective and wrongly decreed the suit. The said decree needs to be set aside by making an interference under Order 41 of C.P.C.. Thus, appeal deserves to be allowed. Hence, I answer the point no.4 in the affirmative and for point no.5, the following order is passed.

<u>: O R D E R :</u>

1) Appeal stands allowed.

2) Judgment & Decree in R.C.S. No.63/2012 passed by Ld. 3Rd Jt.C.J.J.D. Baramati dated 02.07.2016 is hereby quashed & set aside.

3) Suit R.C.S. No. 63/2012 stands dismissed with costs.

4) A decree be drawn up accordingly.

(Dictated and pronounced in open Court)

(Rajendra V. Lokhande)
Adhoc District Judge-1 &
Addl. Sessions Judge, Baramati.

Date : 13/08/2019

<u>Certificate</u>

I affirm that the contents of the PDF file Judgment are same word to word as per the original Judgment.

Name of steno	: B.D. Gaikwad, Steno. (Grade -1)
Court	: Adhoc D.J.-1 & Addl. Sessions Judge, Baramati
Date	: 13/08/2019
Order signed by Presiding Officer on	: 13/08/2019
Order uploaded on	: 14/08/2019