V´ITEM No.IB Court No.8 SECTION IIA
(For judgment)

S U P R E ME C O U R T O F IN D IA
RECORD OF PROCE EDINGS

Criminal Appeal No.2045 of 2008 in SLP(Crl.)No.955/2007

M/S. KUMAR EXPORTS Appellant (s)

VERSUS

M/S. SHARMA CARPET S Respondent (s)

Date : 16/12/2008 The matter was called on for Judgment today.

For Appellant (s) Mr. K.C. Bajaj, Adv.
Mr. Sanjeev Malhotra, Adv.
Mr. Himanshu Bajaj, Adv.
Mr. Paradeep Shukla, Adv.

For Respondent (s) Ms. Lalita Kaushik, Adv.

Hon'ble Mr. Justice J.M. Panchal pronounced the judgment of the Bench comprising Hon'ble Mr. Justice R.V. Raveendran and His Lordship.
Leave granted.
The appeal is allowed in terms of the signed judgment.

(PAWAN KUMAR) (ANAND SINGH)
COURT MASTER COURT MASTER
(signed reportable judgment is placed on the file)

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 2045 OF 2008
(Arising out Special Leave Petition (Criminal) No. 955 of 2007)

M/s. Kumar Exports ... Appellant

Versus

M/s. Sharma Carpets ... Respondent

J U D G ME N T

J.M. Panchal, J.

1. Leave granted.

2. The instant appeal is directed against judgment dated November 23, 2006, rendered by the learned Single Judge of Punjab and Haryana High Court, in Criminal Appeal No. 946 SBA of 2004, by which the

judgment dated December 6, 2003, pas sed by the learned Judicial Magistrate I Clas s, Karnal, in Criminal Complaint No. 178 of 2001, acquitting the appellant under Section 138 of the Negotiable Instruments Act, 1881 ('the Act' for short), is set aside and after convicting the appellant under Section 138 of the Act the matter is remitted to the learned Magistrate to pas s appropriate order of sentence.

3. Jai Bhagwan Sharma, proprietor of M/s. Sharma Carpets, the respondent herein, deals in carpets. Rajinder Kumar, proprietor of M/s. Kumar Exports, the appellant herein, is carrying on busines s at Panipat. It is the case of the respondent that the appellant purchased handtufted woolen carpets from him on August 6, 1994, cost of which was Rs.1,90,348.39. According to the respondent, the appellant issued two cheques, i.e., one cheque bearing No. 052912 dated August 25, 1994 for a sum of Rs.1,00,000/- and another cheque bearing No. 052913 dated September 25, 1994 for an amount of Rs.90,348.39 drawn on Panipat branch of Union Bank of India, for discharge of his liability. The case of the respondent is that the cheques were deposited in the bank by him for encashment, but those cheques were received back unpaid with remarks "insufficient funds". It is the case of the respondent that the fact that the cheques were dishonoured for insufficient funds was brought to the notice of the appellant and on the request of the appellant, the cheques were again presented for encashment in the bank on January 5, 1995, but they were again dishonoured due to lack of funds in the account of the firm of the appellant. What is claimed by the respondent is that under the circumstances he had served statutory notice dated January 19, 1995 calling upon the appellant to make payment of the amount due but neither the appellant had replied the said notice nor made payment of the amount due. The respondent, therefore, filed Criminal Complaint No. 178 of 2001 in the court of the learned Judicial Magistrate 1 st Clas s, Karnal and prayed to convict the appellant under Section 138 of the Act.

4. On service of summon s the appellant appeared before the Court. His defence was that the bill produced by the respondent indicating sale of

woolen carpets was a fictitious one and that blank cheques with his signatures were taken from him by the respondent to enable the respondent to purchase the raw material for him. According to the appellant the cheques were in the form of advance payment for supply of carpets, but the respondent had failed to deliver the goods to him. The appellant alleged that the respondent had stopped manufacturing carpets and as the cheques were not issued in discharge of any liability, he was not liable to be convicted under Section 138 of the Act.

5. In order to prove his case the respondent examined himself as CW-3 and produced the cheques dishonoured at Ex. CW-2/A and CW-2/B, statutory notice at Ex. C-4, carbon copy of bill at CW-2/C, etc. He examined two witnes se s to prove the presentation and dishonour of the cheques. No other witnes s was examined by him in support of his case pleaded in the complaint against the appellant. The appellant examined himself to substantiate his defence as DW-1. He also examined one Mr. Om Prakash, serving as a clerk in the Sales Tax Department, as DW-2, who stated before the Court that the respondent's firm had filed sales tax return for the Asse s s m ent Year 1994- 95 declaring that no sale or purchase of woolen carpets had taken place and, therefore, no sales tax was deposited. The said witnes s also produced an affidavit filed by the respondent as Ex.D-1 wherein the respondent had stated on oath that no sale or purchase of woolen carpets had taken place during the Asse s s m ent Year 1994- 95.

6. On appreciation of evidence the learned Magistrate held that the execution of the cheques was admitted by the appellant and that it was proved by the respondent that those cheques were dishonoured on account of insufficient funds. However, the learned Magistrate concluded that it was not proved by the respondent that the cheques were issued by the appellant for discharge of a debt or liability. The learned Magistrate noticed that the bill produced at Ex. CW-2/C did not bear the signature of the appellant as buyer to acknowledge its acceptance or correctnes s. The learned Magistrate also noted that no corroborative evidence in the form of account books was produced by the respondent and it was, therefore, doubtful whether in fact the respondent had delivered any goods to the appellant. The learned Magistrate referred to the testimony of witnes s from the Sales Tax

Department and concluded that as no transaction of sale of woolen carpets was effected by the respondent during the Asse s s m ent Year 1994- 95, the defence pleaded by the appellant was probablised. In view of abovementioned conclusions, the learned Magistrate acquitted the appellant by judgment dated December 6, 2003.

7. Feeling aggrieved, the respondent preferred Criminal Appeal No. 946 SBA of 2004 in the High Court of Punjab and Haryana at Chandigarh. The learned Single Judge, who heard the appeal, was of the opinion that in terms of Section 139 of the Act there was a presumption that the cheques received by the respondent were for the discharge of a debt or liability incurred by the appellant that execution of cheques was admitted by the appellant and that the appellant did not place material to rebut such presumption as a result of which, he was liable to be convicted under Section 138 of the Act. The learned single Judge concluded that if the defence put forth by the appellant was true, he would have issued instructions to 'stop payment of the cheques' instead of allowing the cheques to be presented and dishonoured. He was also of the view that the affidavit of complainant (appellant herein) that there was no transaction during 1994- 95, was not a relevant circumstance. Accordingly, the learned Single Judge convicted the appellant under Section 138 of the Act and remitted the matter to the trial court for pas sing appropriate order of sentence, after hearing the appellant and the respondent. Feeling aggrieved, the appellant has approached this Court by way of filing the instant appeal.

8. We heard the learned counsel for the parties at length and considered the record of the case.

9. In order to determine the question whether offence punishable under Section 138 of the Act is made out against the appellant, it will be neces s ary to examine the scope and ambit of presumptions to be raised as envisaged by the provisions of Sections 118 and 139 of the Act. In a suit to enforce a simple contract, the plaintiff has to aver in his pleading that it was made for good consideration and must substantiate it by evidence. But to this rule, the negotiable instruments are an exception. In a significant departure from the general rule applicable to contracts, Section 118 of the Act provides certain

presumptions to be raised. This Section lays down some special rules of evidence relating to presumptions. The reason for these presumptions is that, negotiable instrument pas s e s from hand to hand on endorsement and it would make trading very difficult and negotiability of the instrument impos sible, unles s certain presumptions are made. The presumption, therefore, is a matter of principle to facilitate negotiability as well as trade. Section 118 of the Act provides presumptions to be raised until the contrary is proved (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of indorsements, (vi) as to appropriate stamp and (vii) as to holder being a holder in due course. Section 139 of the Act provides that it shall be presumed, unles s 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. 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 Indian Evidence Act all presumptions must come under one or the other clas s of the three clas s e s 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 a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a proces s 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". Section 4 of the Evidence Act inter-alia defines the words ‘may presume’ and ‘shall presume as follows: -

"(a) ‘may presume’ - Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unles s and until it is disproved or may call for proof of it.

(b) ‘shall presume’ - Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unles s and until it is disproved."

In the former case the Court has an option to raise the presumption or not, but in the latter case, the Court must neces s arily raise the presumption. If in a case the

Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions cease s and the fact is presumed, unles s and until it is disproved.

10. Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that unles s the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability. 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.

11. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unles s 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 pas sing 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 circumstance s 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 case s, 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.

12. The defence of the appellant was that he had agreed to purchase woolen carpets from the respondent and had issued the cheques by way of advance and that the respondent did not supply the carpets. It is the specific case of the respondent that he had sold woolen carpets to the appellant on 6.8.1994 and in discharge of the said liability the appellant had issued two cheques, which were ultimately dishonoured. In support of his case the respondent produced the carbon copy of the bill. A perusal of the bill makes it evident that there is no endorsement made by the respondent accepting the correctnes s of the contents of the bill. The

bill is neither signed by the appellant. On the contrary, the appellant examined one official from the Sales Tax Department, who positively as serted before the Court that the respondent had filed sales tax return for the Asse s s m ent Year 1994- 95 indicating that no sale of woolen carpets had taken place during the said Asse s s m ent Year and, therefore, sales tax was not paid. The said witnes s also produced the affidavit sworn by the respondent indicating that during the year 1994-95 there was no sale of woolen carpets by the respondent. Though the complainant was given sufficient opportunity to cros s- examine the said witnes s, nothing could be elicited during his cros s- examination so as to create doubt about his as s ertion that no transaction of sale of woolen carpets was effected by the respondent during the year 1994- 95. Once the testimony of the official of the Sales Tax Department is accepted, it becomes evident that no transaction of sale of woolen carpets had taken place between the respondent and the appellant, as alleged by the respondent. When sale of woolen carpets had not taken place, there was no existing debt in discharge of which, the appellant was expected to issue cheques to the respondent. Thus the accused has discharged the onus of proving that the cheques were not received by the holder for discharge of a debt or liability. Under the circumstances the defence of the appellant that blank cheques were obtained by the respondent as advance payment also becomes probable and the onus of burden would shift on the complainant. The complainant did not produce any books of account or stock register maintained by him in the course of his regular busines s or any acknowledgement for delivery of goods, to establish that as a matter of fact woolen carpets were sold by him to the appellant on August 6, 1994 for a sum of Rs.1,90,348.39. Having regard to the materials on record, this Court is of the opinion that the respondent failed to establish his case under Section 138 of the Act as required by law and, therefore, the impugned judgment of the High Court is liable to be set aside.

13. This Court has also noticed a strange and very disturbing feature of the case. The High Court, after convicting the appellant under Section 138 of the Act, remitted the matter to the learned Magistrate for pas sing appropriate order of sentence. This course, adopted by the learned Single Judge, is unknown to law. The learned Single Judge was hearing an appeal from an order of acquittal. The powers of the Appellate Court, in an appeal from an order of acquittal, are enumerated in Section 386(a) of the Code of Criminal Procedure, 1973. Those powers do not contemplate that an Appellate Court, after recording conviction, can remit the matter to the

trial court for pas sing appropriate order of sentence. The judicial function of imposing appropriate sentence can be performed only by the Appellate Court when it reverses the order of acquittal and not by any other court. Having regard to the scheme of the Code of Criminal Procedure, 1973 this Court is of the view that after finding the appellant guilty under Section 138 of the Act, the judicial discretion of imposing appropriate sentence could not have been abdicated by the learned Single Judge in favour of the learned Magistrate. Having found the appellant guilty under Section 138 of the Act it was the bounden duty of the High Court to impose appropriate sentence commensurate with the facts of the case. Therefore, we do not approve or accept the procedure adopted by the High Court. Be that as it may, in this case, we have found that reversal of acquittal itself was not justified.

14. For the foregoing reason s the appeal is allowed. The judgment and order dated November 23, 2006, rendered by the learned Single Judge of Punjab and Haryana High Court at Chandigarh in Criminal Appeal No. 946 SBA of 2004 convicting the appellant under Section 138 of the Act, is set aside and judgment dated December 6, 2003, rendered by the learned Judicial Magistrate I Clas s, Karnal in Criminal Complaint No. 178 of 2001 acquitting the appellant, is restored.

.....J.
[R.V. Raveendran]

.....J.
[J.M. Panchal]

New Delhi;
December 16, 2008.