

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.684 OF 2003**

Harendra Ramchandra Pathak)
Adult, Occ.: Business,)
residing at Rekha Apartment, Usha Nagar,)
Murbad Road, Kalyan, Taluka – Kalyan,)
District – Thane)Appellant/Complainant

V/s.

1. Dharmendra Ratan Mhatre)
Adult, Occ.: Business)
residing at Ratnasunit Bungalow)
Kopar Road, Near S.E.I. High School)
Building, Dombivli (W), Taluka – Kalyan,)
District – Thane)
2. The State of Maharashtra)Respondents/Accused

**WITH
CRIMINAL APPEAL NO.685 OF 2003**

Harendra Ramchandra Pathak)
Adult, Occ.: Business,)
residing at Rekha Apartment, Usha Nagar,)
Murbad Road, Kalyan, Taluka – Kalyan,)
District – Thane)Appellant/Complainant

V/s.

1. Rajendra Ratan Mhatre)
Adult, Occ.: Business)
residing at Ratnasunit Bungalow)
Kopar Road, Near S.E.I. High School)
Building, Dombivli (W), Taluka – Kalyan,)
District – Thane)
2. The State of Maharashtra)Respondents/Accused

Ms. Rajesh S. Datar for appellant in both appeals.

Mr. B.K. Bali a/w. Mr. Mohsin Khan i/b. Bali Associates for respondent no.1
in both appeals.

Ms. Anamika Malhotra, APP for respondent no.2 – State in both appeals.

CORAM : K.R.SHRIRAM, J.

DATE : 10th JANUARY 2020

ORAL JUDGMENT :

1 These are two appeals impugning an order and judgment dated 20th November 2002 passed by the Judicial Magistrate First Class, First Court, Kalyan, acquitting respondent no.1 in both appeals of offences punishable under Section 138 (*Dishonour of cheque for insufficiency, etc., of funds in the account*) of the Negotiable Instruments Act, 1881 (the said Act).

2 Mr. Datar and Mr. Bali state that these are two appeals which could be disposed together because both the appeals arise out of the same Memorandum of Understanding (MOU). Two separate appeals are filed because two separate complaints were filed as the accused in both the complaint were different, the complainant being common.

3 Complainant and two accused were shareholders of one Shree Sai Baba Sand Dredging Company Private Limited (the said Company). Complainant, through himself and through others, held 2000 fully paid equity shares in the said company. It is not necessary to go into the background of the companies and how it works, suffice to say complainant wanted to exit and offered to sell 2000 shares to the two accused. Complainant personally had only 400 shares in his name, whereas the remaining 1600 shares were held by his wife (400 shares), his son (400 shares), his friend one Rizwan Gulam Murtaja Dolare (400 shares) and Farbida Dolare (400 shares). The accused agreed to purchase the 2000 shares for lump sum consideration of Rs.18 lakhs. The understanding between the two parties were reduced to writing in the form of a

Memorandum of Association/Understanding dated 3rd September 1996. As per the MOU, two cheques of Rs.3 lakhs each dated 30th September 1996 and 31st October 1996 were issued. The balance Rs.12 lakhs were to be paid in installments by issuing 12 post dated cheques of Rs.1 lakh each. These 12 cheques were issued. Cheque no.030784 dated 1st December 1997 for Rs.1 lakh is the subject matter of the complaint in appeal no.684 of 2003. Four cheques, i.e., cheque no.087476 dated 1st November 1997, cheque no.087477 dated 1st January 1998, cheque no.087478 dated 1st February 1998 and cheque no.087479 dated 1st March 1998, each of Rs.1 lakh, are subject matter of the complaint in appeal no.685 of 2003. The MOU is short and it would be useful to reproduce the MOU and the same reads as under :

MEMORANDUM OF ASSOCIATION/UNDERSTANDING

This Memorandum of Association/Understanding entered at KALYAN this 3rd day of September, 1996 between:

1. Shri. RAJENDRA RATAN MHATRE, age about 29 years of the FIRST PART,

2. Shri. DHARMENDRA RATAN MHATRE, age about 26 years of the SECOND PART.

both the above parties residing at Ratna Sunit Bungalow, Kopar Road, Near S.I.P High School, Dombivli (W).

3. SHRI.HARENDRA RAMCHANDRA PATHAK, age about 42 years, residing at Rekha Apartments, 3rd floor, Usha Nagar, Murbad Road, Kalyan (W) of the THIRD PART.

Whereas the aforesaid parties are shareholders of Shree Sai Baba Sand Dredging Company Private Limited.

AND WHEREAS Shri. Harendra Ramchandra Pathak expressed his desire to sell and Shri. Rajendra and Shri. Dharmendra Ratan Mhatre expressed their desire to purchase his shares held in Shree Sai Baba Sand Dredging Company Private Limited.

AND WHEREAS the details of shareholding of Shri.Harendra Ramchandra Pathak in Shree Sai Baba Sand Dredging Company

Private Limited are as follows :-

<i>No.of</i>	<i>Distinctive No</i>		<i>Face</i>
<i>Shares held</i>	<i>From</i>	<i>To</i>	<i>Value</i>
400	2401	2800	40000
400	5601	6000	40000
400	7201	7600	40000
400	0001	0400	40000
400	0401	0800	40000

AND WHEREAS the price of the shares is fixed up at Rs.18.00 lacs.

NOW THEREFORE THIS PRESENTS WITNESS AND IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:-

1. Shri. H. R. Pathak agrees to sell and Shri. Rajendra and Shri Dharmendra Ratan Mhatre agree to purchase the shares held by Shri. Harendra Ramchandra Pathak in Shree Sai Baba Sand Dredging Company Private Limited for an agreed lumpsum consideration of Rs. 18.00 Lacs. The said sum of Rs.18.00 lacs shall be paid to Shri. H. R. Pathak as mentioned in Schedule 'A' hereunder written.

2. It is mutually decided that Shri. Harendra Ramchandra Pathak shall sign a letter of resignation from his Directorship/chairmanship of Shri. Sai Baba Sand Dredging Company Private Limited and also transfer forms in respect of the shares; and the said resignation letter and original shares alongwith the transfer forms, duly filled and signed shall be kept in the custody of a third person, who will release the same to Shri. Rajendra and Shri. Dharmendra Ratan Mhatre only after the full and final payment is made to Shri. Harendra Ramchandra Pathak as mentioned in the Schedule 'A' annexed hereto.

Schedule 'A'

Schedule of payments of Rs. 18.00 lacs to made to Shri. H.R. Pathak:-

Rs.300000 /- by Chq.No. 171714 dated 30.09.1996.

Rs.300000/- by Chq.No. 171715 dated 31.10.1996.

Both cheques drawn on Parsik Janata Sahakari Bank Ltd, Agroli, Kokan Bhavan, New Bombay – 400 614.

Rs.100000/- by Chq.No. 087476 dated 01-11-1997 drawn on Central Bank, Dombivili (E) – 421 202.

Rs.100000/- by Chq.No.030784 dated 01-12-97 drawn on Parsik Janata Sahakari Bank Ltd., Agroli, Kokan Bhavan, New Bombay – 400614.

Rs.100000/- by Chq.No.087477 dated 01-01-98

Rs.100000/- by Chq.No.087478 dated 01-02-98

Rs.100000/- by Chq.No.087479 dated 01-03-98

Rs.100000/- by Chq.No.087480 dated 01-04-98

Rs.100000/- by Chq.No.087481 dated 01-05-93 drawn on Central Bank Dombivli (E)421 202.

Rs.100000/- by Chq.No. 030785 dated 01-06-98

Rs.100000/- by Chq.No.030786 dated 01-07-98

Rs.100000/- by Chq.No.030787 dated 01-08-98

Rs.100000/- by Chq.No.030788 dated 01-09-98

Rs.100000/- by Chq.No.030789 dated 01-10-98 Drawn on Parsik Janata Sahakari Bank Ltd.Agroli, Kokan Bhavan, New Bombay- 400 614

IN WITNESS WHEREOF THE PARTIES HERETO HAVE HEREUNTO SET AND SUBSCRIBED THEIR RESPECTIVE HANDS ON THE DAY AND YEAR FIRST HEREINABOVE WRITTEN

SIGNED AND DELIVERED BY THE WITHINNAMED

SHRI .RAJENDRA RATAN MHATRE

Party of the First Part,

In presence of

SHRI DHARMENDRA RATAN MHATRE

Party of the second part,

In presence of

SHRI HARENDRA RAMCHANDRA PATHAK

Party of the third part,

In presence of

4 We have to keep in mind that the entire 2000 shares do not belong to complainant, as complainant owned only 400 shares, and the agreed lump sum consideration of Rs.18 lakhs is for all the 2000 shares.

5 It so happened that complainant deposited the five cheques, which are subject matter of these two complaints, and all cheques were dishonoured for insufficient funds. Complainant issued a notice, which is at Exhibit 11 in appeal no.684 of 2003 and an identical notice, which is at

Exhibit 17, was sent in appeal no.685 of 2003 except the cheque numbers and the date of cheques defer. A reply was sent by the accused and the reply is at Exhibit 13 in appeal no.684 of 2003 and an identical reply, which is at Exhibit 18, has been sent in appeal no.685 of 2003 denying liability. In short, what is stated in the reply is the amounts under the cheques have not become due as there were preconditions to be complied with by complainant, which complainant had not complied. Complainant, thereafter, filed the complaints but I have to note that in the complaint, complainant has not dealt with the stand taken by the accused in reply to the statutory notice.

6 Process was issued and accused denied liability and claimed to be tried. In both the complaints, complainant led evidence of three witnesses, the first witness being himself as PW-1 and the other two are from the Bank to prove the cheques being deposited and dishonoured. The respondents have not disputed that the cheques, which are subject matter of the two complaints, have been issued. There is also no disputes that the cheques were dishonoured. It is also not disputed that a statutory notice under Section 138 of the said Act was issued by complainant because there is also a reply sent to the statutory notice. Mr. Datar submitted that therefore, under Section 139 of the said Act, there is a presumption that the cheques issued were for discharge of a debt/liability. Mr. Bali immediately rebutted saying that this presumption is certainly a rebuttable presumption.

7 Under Section 138 of the said Act where any cheque drawn by a person on an account maintained by him is drawn in favour of another person for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, the said person shall 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. Explanation to Section 138 provides “For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability”. The key word is legally enforceable debt or other liability.

8 Section 139 of the said Act provides for presumption in favour of holder and it says it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. It is settled law that this presumption is rebuttable and the onus is on the accused to raise the probable defence. The Apex Court in ***Basalingappa V/s. Mudibasappa***¹ summarized the principles enumerated by the Apex Court in many matters. Paragraph 25 of the said judgment reads as under :

25. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i) 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.

(ii) 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.

(iii) To rebut the presumption, it is open for the accused to rely on

1. (2019) 5 SCC 418

evidence led by him or 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.

(iv) 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.

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

9 Therefore, the standard of proof for rebutting the presumption is that of preponderance of probabilities and not beyond reasonable doubt. To rebut the presumption, it is open for the accused to rely on evidence led by him or 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. It is not necessary for the accused to come in the witness box in support of his defence because Section 139 imposed an evidentiary burden and not a persuasive burden. With this settled position in law, let us proceed further.

10 The subject matter of the entire dispute is the MOU. Strangely, complainant is relying on the amounts payable based on the MOU but chooses not to produce the MOU. In the cross examination, complainant admits that he executed the said MOU dated 3rd September 1996 for selling 2000 shares, which were with him, including shares of his wife, son, friend Mr. Dolare and his wife. At the same time, for reasons I am unable to fathom, complainant says he is not inclined to produce the MOU in these proceedings

because he has produced it in a civil suit, which had already been filed. Mr. Datar states that Mr. Bali's clients had filed a suit for Rs.6 lakhs and for cancellation of MOU, which was dismissed and complainant's counter claim to recover the entire Rs.18 lakhs was decreed. Mr. Datar states that Mr. Bali's clients have challenged the dismissal of their suit and granting of decree in the counter claim. Mr. Datar states that during the pendency of the counter claim, Mr. Bali's clients deposited a sum of Rs.12 lakhs with the Trial Court, which was invested by the registry. Mr. Datar states that that amount has been withdrawn by his clients upon furnishing a bank guarantee. Mr. Bali adds that the entire decretal amount has been deposited together with costs etc.

11 The Trial Court after considering the evidence and the documents and the facts and circumstances of the case, dismissed the complaint on the basis that there is no legally enforceable debt or other liability.

12 The entire case depends on the interpretation of the MOU. Before we proceed further, we have to also note that it is settled law that if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the Trial Court (*Chandrappa & Ors. V/s. State of Karnataka*²). It is also settled law that although High Court can reappraise the evidence and conclusions drawn by the Trial Court an order of acquittal can be interfered with only when the judgment is perverse. The word "perverse" in terms as

2. (2007) 4 SCC 415

understood in law has been considered in *Gamini Bala Koteswara Rao and others V/s. State of Andhra Pradesh through Secretary*³ and the same has also been relied upon in *Basalingappa (Supra)*.

13 Therefore, we have to consider whether the conclusion arrived at by the Trial Court is possible on the basis of evidence on record or whether the conclusion arrived at by the Trial Court is perverse. Having considered the impugned judgment, in my opinion, the conclusion arrived at by the Trial Court is a reasonable conclusion and cannot be termed as perverse.

14 According to PW-1 accused had handed over 12 cheques as mentioned in the MOU to Mr. Sarangdhar, the Chartered Accountant of the said company. PW-1 says that accused also handed over to him two cheques of Rs.3 lakhs. PW-1 also admits that accused issued all the cheques on 3rd September 1996 as per the MOU and he has collected all the cheques from Mr. Sarangdhar, the Chartered Accountant. PW-1 admits in his cross examination that he did not inform the accused that he collected the cheques from Mr. Sarangdhar. PW-1 also states in his cross examination that he does not know whether the shares were transferred in the name of accused or whether all shares still stand in his name or in the name of his wife or in the name of his son or in the name of his friend etc. PW-1 says he does not know whether the position of the shares is still as it is as it was prior to 3rd September 1996. The Trial Court after considering the MOU, has come to a conclusion that the time to make the payment had not arisen because as per Clause (2) of the MOU, it was mutually decided that complainant shall

3. (2009) 10 SCC 636

sign a letter of resignation from his Directorship of the said company, and also transfer forms in respect of the shares and the said resignation letter and original shares alongwith the transfer forms duly filled and signed shall be kept in the custody of Mr. Saranghar, the Chartered Accountant, who will release the same to the accused only after the full and final payment is made to the complainant as mentioned in Schedule 'A' of the MOU. Complainant has not produced any evidence to show that he had deposited the letter of resignation from his Directorship of the company and also the share transfer forms together with original shares with Mr. Sarangdhar. Infact complainant says he does not even know whether the shares are transferred in the name of accused or whether they all stand in his name and in the name of others. The reason why the Escrow agent arrangement, as mentioned in paragraph 2 of the MOU, was arrived at was to only safeguard the interest of both the parties. It should not happen that accused make the payments but complainant does not resign from the company and hand over the original share certificates together with duly filled and signed share transfer forms. It should also not happen that complainant would submit or hand over the letter of resignation together with original share certificates and the share transfer forms duly filled and signed to accused but accused do not make the payments. This protective mechanism was created to protect the interest of both the parties. As per the impugned judgment and in my view also, complainant would have been entitled to receive the amounts only if he had fulfilled his side of the obligations. His obligation was to surrender the share

certificates with duly signed transfer forms and the letter of resignation to the Escrow agent and in exchange thereof, collect the cheques. In my view, this should have been done simultaneously but complainant says he does not know whether the shares are in his name or in the name of the accused. The situation would have been different if the resignation letter and the shares with the share transfer forms had been handed over to accused and to prove that complainant should have called the Escrow agent Mr. Sarangdhar as his witness. But for reasons best known to complainant, Mr. Sarangdhar was not called to testify. It is settled law that if the material witness is not called to testify, it would result in prejudice to others.

15 Therefore, the conclusion arrived at by the Trial Court is a reasonable conclusion and I see no reason to interfere.

16 The Apex Court in Chandrappa (*Supra*) in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappreciate 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 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 the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

17 There is an acquittal and therefore, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to the accused 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 acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court observed that the prosecution had failed to prove its case.

18 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The orders of acquittal, in my view, cannot be interfered with. I cannot find any fault with the judgments of the Trial Court.

19 Both appeals dismissed.

(K.R. SHRIRAM, J.)