

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.686 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 This is an appeal impugning an order and judgment dated 21st November 2001 passed by the Judicial Magistrate First Class, First Court, Kalyan, acquitting respondent no.1 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 It is appellant's case that appellant and respondent no.1 had business relations. Complainant states that accused was liable to pay to complainant some amount of money on account of several transactions and after taking accounts, accused agreed to pay to complainant a sum of

Rs.32 lakhs. Complainant states that accused issued a cheque for Rs.32 lakhs bearing no.522850 dated 3rd May 1999 drawn on Abhudaya Co-operative Bank Limited, Vashi branch. This cheque, when deposited, came to be dishonoured with the endorsement “refer to drawer”. Appellant issued a notice dated 11th September 1999 through his advocate as required under Section 138 of the said Act. Despite receipt of notice, the amount was not paid and hence the complaint came to be filed. Respondent denied liability and claimed to be tried. Respondent came with a defence that the cheque does not bear his signature and in the statement recorded under Section 313 of the Code of Criminal Procedure, respondent has stated that he did not issue the cheque and nothing was payable to appellant. In the statement recorded under Section 313 of the Code of Criminal Procedure, respondent had denied that he issued any cheque for Rs.32 lakhs to appellant. In the cross examination of PW-1, it has been suggested by defence that accused used to leave blank cheques with complainant for business purposes signed by him. In order to establish the guilt of the accused, complainant gave evidence of himself as PW-1. Two other witnesses have deposed, who were Bank employees, to prove the cheque.

3 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.

4 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 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.

1. (2019) 5 SCC 418

5 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.

6 Accused did not lead any evidence to show that the signature on the cheque is not the way he normally signs. Therefore, the Trial Court accepted and rightly so, that the signature was that of respondent no.1. In the cross examination, for the first time, complainant (PW-1) stated that the name, amount and date mentioned in the cheque were not in the hand writing of accused. It is settled law that any party approaching the Court should approach the Court with clean hands. We have to keep in mind that the accused has denied in his Section 313 statement having issued the cheque and in the cross examination, suggestion has been given to PW-1 that when there were business relations existing between him and accused, accused has left signed blank cheques with complainant. The approach of defence is that complainant misused one of the cheque and filled up the details. When we correlate this with the admission of PW-1 during his cross

examination, that the other details in the cheque, i.e., his name, amount in words and figures and date were not in the hand writing of the accused, in my view, it satisfies the presumption of preponderance of probabilities of the stand taken by the accused. As held in ***Basalingappa V/s. Mudibasappa***², the onus is on the accused to raise the probable defence and the standard of proof for rebutting the presumption under Section 139 of the said Act is that of preponderance of probabilities. I would go a step further and say that PW-1 could have stated this fact when his evidence in examination in chief was recorded but he choose to keep quite. It is also not his case in the complaint that pursuant to the agreement, accused authorized him to fill up the blank cheque for Rs.32 lakhs. In the cross examination, PW-1 says that the particulars/details in the cheque were written by somebody else other than the accused and some employee of the accused had written the particulars. He could have stated all this in the complaint or when his examination in chief was recorded. Complainant has not even led evidence to show who was that employee. Complainant only says some employee. It is necessary to note that the Court must be satisfied from the allegations in the complaint and from the evidence adduced that the cheque was made, prepared or created by accused. The Court must be convinced with the order in writing, which is found in the cheque, was made by accused himself or by some other person at the instance of accused or under his instructions. Even if such other person cannot be identified or examined, complainant can still prove execution by circumstantial evidence. Complainant has not led evidence to

2. (2019) 5 SCC 418

that effect.

8 Moreover, no evidence to speak off is led as to how this figure of Rs.32 lakhs have arrived at and what was the oral agreement. A bald statement is made based on oral agreement that amount of Rs.32 lakhs was payable. In the cross examination, it has also come on record that a separate civil suit was filed by respondent no.1 against complainant and in that suit, complainant filed counter claim. That suit and counter claim was filed before the present complaint was filed because the suit is bearing no.112 of 1998 whereas, the complaint has been filed only on 16th October 1999. Mr. Datar also agrees that the suit and counter claim were filed before the present complaint was filed. A certified copy of the counter claim is at Exhibit 21. In the cross examination, appellant admits that he has not made any reference to this Rs.32 lakhs in his counter claim. PW-1 also agrees that he did not produce any documentary evidence to show that this cheque of Rs.32 lakhs was issued by respondent no.1 in respect of a transaction with him regarding two firms and one company.

9 Admittedly there are disputes between the parties. The above only prove that accused has raised a probable defence that complainant has not proved that there was legally enforceable debt or liability.

10 The Apex Court in *Chandrappa & Ors. V/s. State of Karnataka*³ 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.

3. (2007) 4 SCC 415

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.”

11 There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to 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, accused having secured acquittal, the presumption of his 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.

12 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 order of acquittal, in my view, cannot be interfered with. I cannot find any fault with the judgment of the Trial Court.

13 Appeal dismissed.

(K.R. SHRIRAM, J.)