

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1033 OF 2003**

Smt. Tasneem Murshedkar Mazhar)
Age about 37 Yrs.)
Occ.: Proprietress of Royal Travels, Royal)
Villa, Plot No.186/B, Sector No.19, GES,)
Koparkhairani, Navi Mumbai – 400 701)Appellant/Complainant

V/s.

1. Shri Ramesh S/o. Dhanraj Mahajan)
Trimurti Medical & Gen. Stores,)
Rubi Complex, Shop No.7, below Shridhar)
and Gandhi Hospitals, Sector – 5,)
Airoli, Navi Mumbai and Plot No.R-1/55,)
Sector – 4, Airoli, Navi Mumbai)
2. The State of Maharashtra)Respondents/Accused

Mr. Rohan Sawant, an Advocate appointed by the Court as Amicus Curiae.
Ms. Pallavi Dabholkar, APP for State/respondent no.2.

**CORAM : K.R.SHRIRAM, J.
DATE : 2nd JANUARY 2020**

ORAL JUDGMENT :

1 Appellant is the original complainant, who had filed summary criminal case no.76 of 1999 before the Judicial Magistrate First Class, Vashi, against respondent no.1 for commission of offence 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 According to complainant, respondent was in need of money and in the year 1997-1998 appellant gave a loan of various sums totalling to Rs.4,50,000/-. According to complainant, accused undertook to repay this amount of Rs.4,50,000/- by August 1998. Accused, however, did not repay the amount on time but in September 1998, complainant received a cheque

for Rs.4,50,000/- and the cheque was dated 26th November 1998. This cheque, when deposited, came to be dishonoured with the endorsement “not arranged for”. A statutory notice was issued through complainant’s advocate’s letter dated 10th December 1998 to which a baseless reply was received and hence, the complaint came to be lodged. The Trial Court after considering the evidence came to the conclusion that complainant has failed to prove that there was legally enforceable debt/liability and acquitted accused by an order and judgment dated 22nd July 2003, which is impugned in this appeal.

3 Accused has not been represented. Even complainant is absent. The State, respondent no.2, however, is represented. Therefore, the Court appointed Mr. Rohan Sawant, Advocate, as Amicus Curiae. I have to note the contributions of Mr. Sawant has been immense.

4 The stand of the defence has been that accused did not know who Ms. Tasneem Murshedkar, complainant, was and therefore, the allegation that she gave a loan of Rs.4,50,000/- also is false. It is the case of the defence that one Sanjay Alizar (Jain) (PW-2), in whose presence complainant claims to have given loan, was a business partner of the accused and both of them as per Partnership Deed made by them in April 1993 were carrying on business of wholesale medical and general items. Sanjay Alizar had 50% shares in the partnership and as such is also jointly and severally liable for the liabilities of the firm. According to the defence, Sanjay Alizar (Jain) had taken a blank cheque signed by accused some time

in May 1997 to be handed over to a third party one Mr. Jitu Mhatre for a mutually agreed transaction. After the cheque was given to Sanjay Alizar, disputes arose between accused and Sanjay Alizar and it appears that the blank cheque has been dishonestly handed over by Sanjay Alizar to complainant. According to accused, it is nothing but an act of deception on the part of Sanjay Alizar and fraud being played upon him. It is also alleged that complainant and Sanjay Alizar are close friends living in the same house and therefore, they have colluded with each other and entered into a conspiracy to harass or take revenge against the accused.

5 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.

6 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.

7 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

1. (2019) 5 SCC 418

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.

8 Complainant led evidence of four witnesses, viz., complainant herself as PW-1, Sanjay Alizar as PW-2, one Nitin Janardan Mhatre as PW-3 and one bank employee Shri Liyakat Parkar as PW-4. The accused gave evidence of himself as DW-1. PW-1 in the examination in chief has stated that from last four years accused demanded cash amount of Rs.5,00,000/- for the construction of a house and she gave a friendly loan of Rs.4,50,000/- to the accused in installments. According to complainant, the amount was paid in the presence of Sanjay Alizar (PW-2) and one Dr. Patil, who has not been examined. In the cross examination, complainant has admitted that she has no documentary evidence to show that accused demanded Rs.5,00,000/- for the construction of a house but at the same time states that she has receipt to show she paid Rs.4,50,000/- in installments to the accused. There is no receipt, however, produced in evidence. In the cross examination, PW-1 also admits that she has not submitted any documentary evidence like bank account statements for the year 1997 and 1998 to prove either withdrawal of the amount or giving the amount to accused. Complainant also admits that there is no documentary evidence to show that accused agreed to repay the amount at the end of August 1998. PW-1 also admits that there is no evidence in writing to show that she demanded

the money several times from accused before the notice dated 10th December 1998. Complainant admits that she was not paying income tax for the year 1997 and 1998. Complainant also admits that the accused had lodged one complaint against her and Sanjay Alizar (PW-2) to the Commissioner of Police and also at Rabale Police Station and she was called in the Rabale Police Station in respect of the complaint.

9 PW-2, Sanjay Alizar, though takes the side of complainant and supports the case of complainant and says complainant paid before him the amount of Rs.4,50,000/- in installments on different dates, in the cross examination PW-2 says he does not know in how many installments the amount was given by complainant to accused. PW-2 also admits that the cheque issued was of the partnership firm. PW-2 also admits that a complaint has been lodged against him and complainant by accused at Rabale Police Station and to the Commissioner of Police in respect of misuse of cheque in question and Police had also interrogated them.

10 The defence's case was the blank cheque was given to be handed over to one Jitu Mhatre. PW-2 admits that he knew Jitu Mhatre. PW-2 also admits that there were disputes between him and accused and the partnership broke in the year 1998. The fact that accused has also lodged complaint against complainant and PW-2 read with the fact that PW-2 has admitted that he was aware of Jitu Mhatre indicates that the stand of the defence cannot be dismissed as an after thought or cooked up.

11 Complainant admits that there is no evidence of the amounts being withdrawn from any bank or being handed over to accused. Complainant says that she has receipt to show that she paid Rs.4,50,000/- in installments to accused but no such receipt is produced. Complainant also says that there is no evidence to show that she had Rs.4,50,000/- to pay to accused and also admits that she was not even paying income tax. Admittedly, there are disputes between Sanjay Alizar and accused. PW-2 says in the examination in chief that all installments were given in his presence but in the cross examination PW-2 says he does not know in how many installments it was given. All these go to prove that the accused had raised a probable defence that the complainant has not proved that there was legally enforceable debt or liability.

12 The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka***² 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, reappraise 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

2. (2007) 4 SCC 415

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."

13 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.

14 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.

15 Appeal dismissed.

(K.R. SHRIRAM, J.)