

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

Criminal Application No.1819 of 2024

Deepak Devji Patel

Age : 63 years, Occ: Business

Residing at A-1102, Gokul building,
Borasapada Road, Opp. Devji Nagar,
New Sai Baba Nagar, Kandivali-West
Mumbai-400 067.

... Applicant.

Vs.

1. The State of Maharashtra

2. Suneel Dattatraya Mogre

Age:73 years, Occ: Professional,
R/a Bhagirathi Prasad, 99,
Ranade Road, Shivaji Park, Dadar,
Mumbai-400 028.

... Respondents.

Mr Aabad Ponda, Senior Advocate, i/b Kunal Ambulkar, for
the applicant.

Ms Sangita Phad, APP, for respondent No.1/State.

Mr Jatin P Karia (Shah), along with Mr DM Galani, Ms Dipti
Karia, Mr SM Munj and Ms Preeti SG, for respondent No.2.

Coram: R.N.Laddha, J.

Date: 14 January 2025.

P.C.:

The applicant is facing criminal charges in the Court of
56th Metropolitan Magistrate, Mumbai, in CC No.2350/
SC/2022, for an alleged offence under Section 138 of the
Negotiable Instruments Act, 1881 ('the NI Act'). It is alleged

that the applicant issued four cheques dated 31 March 2022 in favour of the second respondent/ complainant, totalling Rs.2,27,22,625/-. These cheques were returned unpaid upon deposit. As a result, after completion of legal formalities, the complainant filed a complaint claiming that the applicant had committed an offence under Section 138 of the NI Act. On 16 November 2024, during the defence evidence stage, the applicant filed an application praying that the dishonoured cheques in dispute and the alleged Promissory Note, by which the applicant/accused is said to have acknowledged the debt, be examined by a handwriting expert to confirm the authenticity of the applicant's signature. However, the learned Magistrate rejected this application on 26 November 2024, stating the following:

“8. It is pertinent to note that when the accused examined themselves for the first time, i.e. (DW No.1) Pravin Rambhia in CC No.2352/SS/2022 or (DW No.1) Deepak Patel in CC No.2350/SS/2022 the accused did not depose how their cheques went in the custody of the complainant. It was only when they again entered the witness box as a witness in each other's case, that they came up with the case that they had been to their CA and had called for the cheques at the CA's office. Further, their temporary staff Prakash Gurav took their cheques from their office to be brought to their CA's office but he misplaced the same while travelling with one Sunil Jawale, the office staff/employee of the

complainant. In short, the accused initially did not explain how their cheques travelled to the custody of the complainant but came up with an explanation later on.

9. The accused have admitted the fact of receiving a loan from the complainant and the interest paid by them before filing this case. The accused have not disputed the fact of paying interest @ 9% p.a. to the complainant. The dispute between the parties only remains whether the accused had agreed to pay 15% interest on the personal loan amount and only paid 9% and agreed to pay the remaining 6% at a later stage. To decide what interest rate was agreed between the parties there is sufficient material both oral and documentary on record. These facts, circumstances and admissions in these cases nullify any ground to send the cheques or promissory notes in Case No.2350/SS/2022 filed against Deepak Patel or Case No.2351/SS/2022 filed against Pravin Rambhia or Case No.2352/SS/2022 filed against Rambhia Pravin Damji HUF to be sent to a Forensic Expert.

10. Furthermore, the bank witness of accused is examined. Their account opening form is on record. The disputed cheques are dishonoured for the reason funds insufficient and not for the reason of signature differs. The accused could have taken their original specimen signatures from the bank to be examined by Jayant K Aher, Retired State Examiner, CID, Maharashtra privately. Consequently, the ratio laid down in

the case of Ajit Singh Chehuji Rathod (Supra) is squarely applicable to this case.

11. The accused have already examined themselves, the bank witness, neighbourer, CA of the complainant, and employee of the accused. Thereafter the accused making this application on the sole ground of denial of the signature on the cheque cannot be justifiable ground to refer the cheque to a handwriting expert or forensic expert. No other reasonable ground is made out by the accused in the application to send the disputed cheque to the handwriting expert. The application is filed to delay the time bound proceeding. Hence, I pass the following order.

ORDER

The application is rejected.”

2. Feeling aggrieved and dissatisfied by the aforesaid order, the applicant/ accused filed the present application.

3. Mr Aabad Ponda, the learned Senior Counsel appearing on behalf of the applicant, submits that when there is an allegation of cheque misuse by the complainant, even if a presumption under Sections 118-A or 139 of the NI Act can be made, the accused must be allowed to present evidence in rebuttal. Since the law places the burden of proof on the accused, he must be allowed to discharge this burden. The accused has the right to a fair trial and to defend himself, a fundamental right enshrined under Article 21 of the

Constitution of India. The right to present a defence or evidence is also recognised by the Parliament under Sub-section (2) of Section 243 of the Code of Criminal Procedure, 1973 ('CrPC'). According to the learned Senior Counsel, the nature of evidence should not be solely at the discretion of the Court. The accused is best positioned to determine how to prove his defence.

4. The learned Senior Counsel further submits that the applicant has no intention of delaying the trial and is prepared to conclude his defence by examining the expert within the given time-frame. The applicant already has an expert who can provide an opinion within one week. Therefore, the applicant should not be debarred from presenting evidence in support of his defence.

5. In support of his contentions, Mr Ponda relies upon the decisions in (i) *Balasaheb Barku Kolhe Vs Jagdish Tryambakrao Mandlik*¹; (ii) *Nandkumar Vs Vishwas*²; (iii) *Prakash Sevantilal Vora Vs State of Maharashtra*³; (iv) *Ajitsinh Chehuji Rathod Vs State of Gujarat*⁴; (v) *G. Someshwar Rao Vs Samineni Nageshwar Rao*⁵; (vi) *T. Nagappa Vs Y.R.*

1. (2015) 2 Mah LJ 56

2. (2012) 2 Mah LJ 388

3. 2011 SCC OnLine Bom 45

4. (2024) 4 SCC 453

5. (2009) 14 SCC 677

Muralidhar⁶; and (vii) Kalyani Baskar Vs M.S. Sampooram⁷.

6. Mr Jatin Karia, the learned Counsel representing respondent No.2, submits that the oral and documentary evidence on record clearly show that the applicant/ accused lacks a credible or substantial defence and has delayed the trial by summoning and examining unnecessary defence witnesses. The learned Counsel further submits that the complainant is a 74-year-old senior citizen and Advocate currently suffering from cancer and that the application to send the disputed cheques to a handwriting expert is merely a tactic to delay the trial. The certified copy of the specimen signature maintained by the bank can be obtained through a Court order and compared with the signature on the cheques by exercising powers under Section 73 of the Indian Evidence Act, 1872. The applicant should not be allowed to prolong the trial by filing frivolous applications.

7. The learned Counsel further submits that according to the cheque return memos, the cheques were returned unpaid due to insufficient funds, not because the signature differed from the specimen signature on record with the bank. The summary nature of proceedings under Section 138 of the NI Act contemplates that the trial should conclude within six

6. (2008) 5 SCC 633

7. (2007) 2 SCC 258

months. Moreover, handwriting expert's evidence is inherently opinion-based and cannot be deemed conclusive. The applicant's failure to respond to the statutory notice under Section 138 of the NI Act implies a lack of merit in the applicant's version.

8. To bolster his submissions, Mr Karia cites the decisions in *(i) Prakash Sevantil Vora (supra)*, *(ii) Ajitsinh Chehuji Rathod (supra)*, *(iii) P.J. Francis Vs A. Pradeep⁸*; *(iv) Pandit Ishwari Prasad Misra Vs Mohd. Isa⁹*; and *(v) Rangappa Vs Sri Mohan¹⁰*.

9. This Court has given anxious consideration to the rival submissions canvassed across the Bar and perused the material placed on the record.

10. It is undisputed that the accused's right under Sub-section (2) of Section 243 CrPC is not absolute. This right cannot be used to delay the proceedings, and any application must serve the cause of justice, not undermine it. In the present case, the applicant/ accused has raised a consistent defence that the disputed cheques do not bear his signatures.

11. Section 243(2) CrPC clearly states that a Magistrate

8. 2004 SCC OnLine Ker 301

9. 1962 SCC OnLine SC 88

10. (2010) 11 SCC 441

conducting an enquiry for a triable offence does not exceed his powers if, in the interest of justice, he directs documents to be sent for comparison by a handwriting expert. This allows the Magistrate to compare the disputed signature of the accused with the expert's assistance. The applicant is entitled to challenge the complainant's case and the cheques relied upon by the complainant to initiate criminal proceedings hold significant potential as rebuttal evidence. By declining to examine the handwriting expert, the Magistrate has deprived the applicant of an opportunity to contest the complainant's claim, and the applicant cannot be convicted without being given the chance to present his evidence, as allowing him to present his evidence constitutes a denial of a fair trial. A fair trial requires that the accused be given reasonable and lawful opportunities to establish his innocence. The right to present evidence in one's defence is a valuable right and denying this right undermines the principles of a fair trial. A profitable reference in this regard can be made to the decision of the Hon'ble Supreme Court in ***Kalyani Baskar*** (*supra*).

12. It is undeniable that the accused should not be permitted to delay the trial unnecessarily. In the present case, the material on record does not indicate that the applicant has delayed or prolonged the trial. However, to address the

complainant's concerns about potential delays, Mr Ponda has assured this Court that, within two days from today, the handwriting expert will visit the trial Court to photograph and examine the disputed documents, providing an opinion within one week. Subsequently, the applicant will complete his defence evidence within the following week and present his arguments immediately thereafter without seeking any adjournments. The learned Senior Counsel further submits that the applicant has filed an application to transfer the case from the 58th Court of the learned Magistrate, Mumbai, to another Court. This application will be withdrawn tomorrow, i.e. 15 January 2025, and the applicant will proceed with the trial before the same learned Judge. The applicant commits to cooperating fully with the trial Court to ensure the expeditious disposal of the case.

13. In light of the above, the impugned order passed by the learned Magistrate is quashed and set aside. The learned Magistrate is directed to take the necessary steps as observed above.

14. It is clarified that this Court has not examined the merits of the case, and the observations made herein are limited solely to the determination of the present application.

[R.N. Laddha, J.]