IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC. APPLICATION NO. 10851 of 2025
(FOR LEAVE TO APPEAL)
In
F/CRIMINAL APPEAL NO. 19094 of 2025

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BHAVUBHA BECHAR SINH CHAVDA
Versus
STATE OF GUJARAT & ANR.

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Appearance:
DR. HIREN S SOMAIYA(8031) for the Applicant(s) No. 1
MS CM SHAH, APP for the Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE S.V. PINTO**

Date : 19/06/2025

ORAL ORDER

1. The present application is filed by the applicant – original complainant seeking leave to file an appeal against the judgment and order dated 12.03.2025 passed by the learned 2nd Additional Judicial Magistrate First Class, Dholka (hereinafter referred to as the "learned Trial Court") in Criminal Case No. 1181 of 2009, whereby the respondent No. 2 - original accused came to be acquitted from the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the N I Act").

1.1 The respondent No. 2 is hereinafter referred to as "the accused" as he stood in the original case for the sake of

convenience, clarity and brevity.

2. The brief facts culled out from the memo of the present application as well as the impugned judgment and order and paper book filed by the applicant are as under:

2.1 The applicant filed a complaint against the accused under Section 138 of the Act, as the accused had taken a hand loan of Rs.15,00,000/- from the applicant and the accused had issued cheque No.011511 and cheque No.11512 for the amount of Rs.2,55,000/- each dated 01.12.2008, cheque No.008978 for the amount of Rs.2,40,000/- dated 15.04.2009 and cheque No.142995 for the amount of Rs.7,50,000/- dated 04.05.2009 from his account with The District Co-operative Bank Ltd, Kalikund, Dholka Branch. The applicant deposited cheque No. 142995 for the amount of Rs.7,50,000/- dated 04.05.2009 in his account with The Ahmedabad District Co-operative Bank Ltd, Kalikund, Dholka Branch and the cheque was dishonored and the reason mentioned in the return memo was “Funds Todays Opening Balance Insufficient”. The applicant sent the statutory demand notice to the accused on 23.05.2009 which was duly served but no payment was

made. The applicant filed the criminal complaint before the Court of the Judicial Magistrate First Class, Dholka under Section 138 of the N I Act, 1881 which was registered as Criminal Case No. 1181 of 2009.

2.2 The accused was served with the summons and the accused appeared before the learned Trial Court and his plea was recorded at Exh.12 and the entire evidence of the applicant was taken on record. The applicant was examined on oath and 07 documentary evidences were produced in support of his case and after the closing pursis was filed, the further statement of the accused under Section 313 of the Code of Criminal Procedure was recorded wherein the accused stated that he has not issued any cheque in favor of the applicant and a false complaint has been filed. The accused refused to step into the witness box but examined one witness on oath at Exh.28 and produced 02 documentary evidences in his defence and after the arguments of the learned advocates for both the parties were heard, by the impugned judgment and order, the learned Trial Court acquitted the accused from the offence under Section 138 of the N I Act.

3. Being aggrieved and dissatisfied with the same, the applicant has preferred the present application seeking leave to appeal mainly stating that the learned Trial Court has not properly interpreted the evidence and has misread the evidence and the impugned judgment is perverse, erroneous and contrary to law.

4. Heard learned advocate Mr. Hiren S. Somaiya appearing for the applicant, learned APP Ms.C.M.Shah for the respondent – State.

5. Learned Advocate Mr. Hiren S. Somaiya for the applicant submits that the learned Trial Court has not appreciated that the applicant has successfully established that the cheque in question was issued by the accused from the bank account maintained by him. The applicant has proved that the cheque was written by the accused and it was dishonoured and as the applicant is the holder in due course of the cheques in question the statutory presumption under Section 139 of the N I Act is to be drawn in favour of the applicant. The learned Trial Court has not appreciated the provisions of Section 118 and 138 of the N I Act in proper perspective. The fact of the amount paid by the applicant

to the accused is not negated, but the learned Trial Court has disbelieved the same. The accused had failed to rebut the presumption and hence the judgment and order of acquittal is bad in law and the leave to appeal must be granted.

6. Learned Ms. C. M. Shah for the respondent – State has submitted that the learned Trial Court has appreciated all the evidence in detail in light of the citations referred to in the judgment and has passed the judgment and order of acquittal which is proper and no interference is required and hence the application for leave to appeal must be rejected.

7. With regard to the facts in the present case, it would be fit to refer to the observations made the Apex Court in Rangappa vs Sri Mohan reported in 2010 11 SCC 441 in para 14 which reproduced as under:

> "14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence

wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

7.1 The Apex Court in the case of Basalingappa vs. Mudibasappa reported in 2019 0 AIR(SC) 1983 has observed in Para 23 and 28 as under:

"23. 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.

24. xxxx
25. xxxx
26. xxxx
27. xxxx

28. We are of the view that when evidence was led before the Court to indicate that apart from loan of Rs. 6 lakhs given to the Accused, within 02 years, amount of Rs. 18 lakhs have been given out by the complainant and his financial capacity being questioned, it was incumbent on the complainant to have explained his financial capacity. Court cannot insist on a person to lead negative evidence."

8. In light of the above settled principles of law and considering the arguments advanced by the learned advocates for

the parties and on perusal of the record of the case the affidavit of examination in chief of the complainant has been produced at Exh.17 wherein the complainant has narrated the facts of the complaint on oath. During the cross examination of the applicant by the learned advocate for the accused the applicant has stated that he files his Income Tax Returns, but does not have any books of accounts with him, and he has not shown in his Income Tax Returns that he has financial transactions with the accused. That he does not know whether the accused is engaged in the business of finance, but in the complaint, he has stated that the accused is engaged in the business of finance. That prior to this transaction, he did not enter into any transaction with the accused and has not submitted any evidence about his salary during the year 2008 - 2009. That he did not withdraw the amount of Rs.15,00,000/- from the bank, and when he had advanced the amount of Rs.15,00,000/- to the accused, he did not find it necessary to execute any deed, voucher, promissory note etc. That he did not find it necessary to have any witness for the financial transaction with the accused, and he has not produced any evidence that he had the amount of Rs.15,00,000/- in cash lying in his house. That he had given the

amount of Rs.15,00,000/- without interest to the accused and he had taken a power of attorney for the land of the accused, but he has not produced the power of attorney before the learned Trial Court. The applicant has admitted that he has filed the present case for the cheque was dated 04.05.2009 and he had kept the cheque with him for fourteen days and had not deposited the cheque in the bank till then. The signature in the cheque is made in both, the English and Gujarati languages. That he is an accused along with others in Criminal Case No.1389 of 2009 filed by the Dharmendrasinh Kesrisinh Dodiya - the accused in this case. That he does not know whether the case was filed as he and the other accused of Criminal Case No.1389 of 2009 were threatening to kill the wife and children of the accused and because of their threats, the accused had written a suicide note and had tried to commit suicide. From the record of the case, it transpires that after the cheque returned unpaid the demand statutory notice was served to the accused. As per the say of the applicant, the accused had taken an amount of Rs.15,00,000/- from the applicant on 01.12.2008 and had executed a deed regarding his agricultural land and that he had taken the amount on loan from the applicant. The

accused had given cheque No.142995 for the amount of Rs.7,50,000/- dated 04.05.2009 from his account with The District Co-operative Bank Ltd, Kalikund, Dholka Branch but the cheque had returned unpaid with the endorsement "Funds Todays Opening Balance Insufficient". After the demand statutory notice was given as the amount was not paid the applicant filed Criminal Case No. 1181 of 2009 in the Court of the Judicial Magistrate First Class, Dholka.

8.1. In the further statement of the accused recorded under the section 313 of the Code of Criminal Procedure, the accused has mainly denied all the evidence of the applicant and has stated that there was no legally enforceable due amount from him to the applicant and he had not taken any money from the applicant, but the applicant had threatened to kill him and kidnap his wife and children and had taken the cheque from him and had thereafter misused the same. The accused refused to step into the witness box but examined one witness Rakesh Malharao Sarvodaya, the Investigating Officer of Dholka Police Station II C R No. 18 of 2009 filed by the accused under Sections 504, 506(2) and 114 of the IPC

against the applicant and 15 others wherein the applicant is accused No. 7 in the case. The FIR filed by the accused is produced at Exh.31 and the suicide note written by the accused is produced at Exh.30. After the complaint was filed by the accused, the Investigating Officer investigated offence and filed the chargesheet before the Court of the Judicial Magistrate First Class, Dholka which came to be registered as Criminal Case No.1389 of 2009 and the matter was pending for trial before the learned Trial Court.

9. In the entire evidence on record the applicant has not been able to prove that the amount of Rs.15,00,000/- was given to the accused and during the cross-examination, the accused has successfully challenged the financial capacity of the applicant. It is the case of the applicant that the accused had taken the amount of Rs.15,00,000/- as hand loan from him, but there is no of evidence that the applicant had the financial capacity to give the amount of Rs.15,00,000/-, the accused in cash on 01.12.2008. The applicant has categorically stated that he has not shown the amount in his Income Tax Returns and there is no evidence on record to suggest

that the applicant had the financial capacity and he could advance the huge amount of Rs.15,00,000/- in cash to the accused. Moreover, the applicant has stated that the power of attorney for the immovable property of the accused was executed on the date when the amount was advanced, but no such document has been produced on record. During the cross-examination of the applicant by the learned advocate for the accused, the presumption has been successfully rebutted and thereafter no evidence has emerged on record from the applicant to prove his case beyond reasonable doubts.

9.1 The accused has raised a defence that the cheque in question was forcibly taken from him by the applicant and the applicant was charging huge amount as interest and the accused had filed a criminal complaint against the applicant and others for threatening to kill and kidnap his wife and children and he had consumed some medicine and attempted to commit suicide. The accused has produced the suicide note at Exh.30 and the copy of the FIR at Exh.31 and has examined witness Rakesh Malharao Sarvodaya, the Investigating Officer of Dholka Police Station II C R

No. 18 of 2009 filed by the accused under Sections 504, 506(2) and 114 of the IPC. The criminal trial against the applicant is pending before the learned trial court and even though the applicant is accused No. 7 in the matter and is facing trial, during the cross examination, he has denied that he has knowledge that such a case has been filed against him. From the evidence produced on record, the accused has succeeded in raising a probable defence and rebutting the presumption raised in favour of the applicant.

10. The learned Trial Court has appreciated all the evidence produced on record and has concluded that the applicant has not proved the legally enforceable debt and has concluded that from evidence on record the applicant has successfully rebutted the presumption under Section 139 of the N I Act in light of the judgment of the Apex Court in Rangappa (supra) and Basalingappa(supra). The accused had created a reasonable doubt and the applicant has failed to produce reliable and cogent evidence on record about the amount of cheque being the legally recoverable debt from the accused and the applicant has not proved his case beyond reasonable doubt and, in light of the

above observation, the learned Trial Court has passed the impugned judgment and order of acquittal, which is just and proper and does not require any interference of this Court.

11. Consequently, the present application seeking leave to present an appeal fails and is hereby dismissed.

12. Record and proceedings, if any, be sent back to the learned Trial Court forthwith.

13. Since the leave to prefer appeal is rejected, no order is required to be passed in the Criminal Appeal, which is at filing stage and the same stands disposed accordingly.

(S. V. PINTO,J)

F.S. KAZI