IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 131 OF 2014

Mrs. Hemlata Bhausaheb Janjire
Age 33 years, Occ. Business
R/at 3B/26, Aditya Garden City,
Near Pune Banglore Highway, Warje,
Pune – 411 058 .. Applicant

v/s.

1. Mr. Jaydeep Pukhraj Jain
Age 35 years, Occ. Business
R/at 5th Floor, White House, 1482,
Sadashiv Peth, Tilak Road,
Pune – 411 030

2. The State of Maharashtra .. Respondents

Mr. Vikas Shivarkar for the applicant
Mr. J. Shekhar for respondent no.1
Mr. J.H. Ramugade, APP for the respondent State

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : 11th SEPTEMBER, 2015
PRONOUNCED ON : 30th NOVEMBER, 2015

JUDGMENT : -

1. The applicant accused has challenged the judgment dated 11.03.2014 whereby the learned Additional Sessions Judge, Pune,

dismissed the Criminal Appeal No.142 of 2012 and thus dismissed the prayer to set aside the conviction and sentence imposed by the learned J.M.F.C. 33rd Court, Pune by judgment and order dated 28.03.2012 in S.C.C. No. 35993 of 2010 for the offence under Section 138 of the N.I. Act.

2. The brief facts necessary to decide this revision application are as under:-

The respondent complainant was holding 20,000/- equity shares having distinctive numbers 001001 to 021000 of Indotech India Pvt. Ltd. The applicant accused was desirous of purchasing the share holding of the complainant. Accordingly, the applicant accused entered into an agreement dated 15.10.2010 with the respondent complainant for purchase of the said shares for Rs.21,60,000/- irrespective of the market price. The applicant accused had paid Rs.10,000/- towards earnest price and agreed to pay the balance consideration of Rs.21,50,000/- by 15.04.2010.

3. The applicant accused issued a cheque dated 15.04.2010 for

Rs.21,50,000/- towards payment of the said consideration with instructions to present it to the bank on or after 31.05.2010. The respondent complainant presented the cheque with his bankers on 03.06.2010 and again on 02.08.2010 but the same was dishonoured for "insufficient funds". By notice dated 25.08.2010, the respondent complainant called upon the applicant accused to pay the cheque amount. The applicant accused having failed to pay the cheque amount, the respondent complainant filed the Complaint being C.C. No.35993 of 2010 before the learned J.M.F.C. Pune under Section 138 of the N.I. Act.

4. By order dated 24.12.2010, the learned Magistrate issued process under Section 138 of the N.I. Act. Upon being served with summons, the applicant accused put in her appearance, pleaded not guilty and claimed to be tried. The respondent complainant examined himself and two bank officials as his witnesses. The statement of the applicant accused was recorded under Section 313 of the Cr.P.C. The defence of the applicant is that the subject cheque was issued as a security. The applicant accused denied that she is

liable to pay the cheque amount to the respondent complainant.

5. The learned Magistrate upon considering the evidence adduced by the respondent respondent complainant, held the applicant accused guilty of the offence under Section 138 of the N.I. Act and sentenced her to suffer rigorous imprisonment for six months and to pay compensation of an amount of dishnoured cheque i.e. Rs.21,50,000/- on or before 28.04.2012, in default, to suffer rigorous imprisonment for two months. Being aggrieved by the said order, the applicant accused preferred an appeal being Criminal Appeal No. 142 of 2012 before the learned Additional Sessions Judge, Pune. By judgment dated 11.03.2014, the learned Sessions Judge dismissed the said appeal. Being aggrieved by the said order, the applicant accused has filed this revision application.

6. The learned Counsel for the applicant has submitted that the applicant accused had not entered into any transaction in respect of the shares of Indotech India Pvt. Ltd. The learned Counsel for the applicant has further submitted that the applicant accused has not

received any shares mentioned in the agreement and hence, the applicant accused was not liable to pay any consideration and that the cheque was not issued towards legally enforceable debt. Relying upon paragraph 10 of the judgment of the Apex Court in ***Indus Airways Pvt. Ltd. Vs. Magnum Aviation Pvt. Ltd. 2014, LawSuit(SC) 252,*** Mr. Shivarkar, the learned Counsel for the applicant accused contends that since the cheques were not issued towards legally enforceable debt, the applicant accused cannot be held guilty of the offence under Section 138 of the N.I. Act.

7. The learned Counsel for the respondent complainant has submitted that the cheque in question was issued for consideration arising out of the agreement dated 15.01.2010. The said cheque has been dishonoured and that the applicant accused has not paid the cheque amount despite the receipt of the statutory notice. The learned Counsel for the respondent complainant has urged that ingredients of the offence under Section 138 of the N.I. Act are fully satisfied and hence, no interference is warranted.

8. I have considered the submissions advanced by the learned Counsels for the respective parties and perused the records. It is not in dispute that the applicant accused and the respondent complainant had entered into an agreement dated 15.01.2010. A perusal of the said agreement reveals that the respondent complainant and the applicant accused had agreed to sell / purchase 20,000 equity shares of Rs.100/- each with distinctive numbers 001001 to 021000 of the company Indotech Industries Pvt. Ltd. for total consideration of Rs.21,60,000/-. In part consideration of the said transaction, the applicant accused had paid Rs.10,000/- and agreed to pay the balance amount on or before 15.04.2010. The respondent complainant had agreed to handover the original share certificates to the applicant accused on the date of completion of transaction i.e. on the date of the receipt of money. The respondent complainant had further agreed to take all required steps to effect the sale of shares, in the event the shares were in demate mode. Both parties had agreed that the time was the essence of contact. Clause 7 of the agreement further stipulates that in the event, the consideration was not paid

within the specified period, the amount of Rs.10,000/- would stand forfeited and the applicant accused would have no right to the equity shares and further the respondent complainant would be at the liberty to dispose of or transfer the shares to any other person within 15 days from lodgment of transfer deeds.

9. The subject cheque, according to the respondent complainant was issued towards the balance payment of the sale consideration, specified in the said agreement. In the cross-examination, the respondent complainant has stated that the said agreement is partly false without actually specifying as to which part was false. It is also not the case of the respondent complainant that the applicant accused had taken steps to transfer the shares or that the equity shares were actually transferred in favour of the applicant accused. It is thus evident that the said agreement has not been acted upon and subsequently, the respondent complainant has already sold the shares to a third party. It, therefore, follows that there was no existing debt or liability as on the date of filing of the complaint. At this stage, it would be advantageous to refer to the decision of the

Apex Court in ***Indus Airways Pvt. Ltd. Vs. Magnum Aviation Pvt. Ltd. 2014, LawSuit(SC) 252,*** wherein the Apex Court has held that :-

> *"13. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability." ….*

10. In the instant case, the cheque was issued towards purchase of shares. The sale transaction was not completed and had not reached its logical conclusion. Hence, there was no existing legally enforceable debt as on the date of the accrual of the alleged cause of action. The cheque was, therefore, not drawn towards an existing liability. Consequently, the applicant accused cannot be fastened with

criminal liability.

11. Under the circumstances and in view of the discussion supra, the Revision Application is allowed. The impugned judgment dated 11.03.2014 in Criminal Appeal No.142 of 2012 and the judgment dated 28.03.2012 in S.C.C. No. 35993 of 2010 passed by J.M.F.C. 33rd Court, Pune are hereby set aside. The applicant accused is acquitted of the offence under Section 138 of the N.I. Act. Bonds stand discharged.

(ANUJA PRABHUDESSAI, J.)