

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 373 OF 2007

Deepak s/o Shamsundar Sarda
age 25 years, occ. agril, & business
r/o Vaijapur, tq. Vaijapur
Dist. Aurangabad.

.. PETITIONER

VERSUS

1. Baban s/o narayanrao Chormare
age 45 years, occ. service
r/o Ambelohal, Tq. Gangapur
Dist. Aurangabad.

2. The State of Maharashtra

.. RESPONDENTS

Mr. M.G. Mustafa, advocate for petitioner.
Mr. A.R. Kale, APP for the State.
Mr. P.N. Sonpethkar, advocate for respondent no. 1.

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**CORAM : V.K. JADHAV, J.
DATE : 21st SEPTEMBER, 2016.**

JUDGMENT :

1. Heard.

2. Rule. Rule made returnable forthwith.

3. Being aggrieved by the judgment and order passed by the learned
Additional Sessions Judge, Aurangabad, dated 22nd September, 2006, in

Criminal Revision Application No. 130/2006, the original complainant has preferred this writ petition.

4. Brief facts giving rise to the present writ petition are as follows :

Petitioner - original complainant filed private complaint before the Judicial Magistrate First Class, Vaijapur, alleging therein that the respondent-accused is his friend and he was in need of an amount of Rs.70,000/- for payment of private dues and for other purposes. Respondent-accused no. 1 requested him for the said amount in the month of August 2005. Even, respondent-accused had promised petitioner-complainant for repayment of said amount within a month. Thus, petitioner-complainant had paid the amount of Rs.70,000/- to him on 28.08.2005 by accepting cheque of Rs.70,000/- dated 27th September, 2005. However, after presenting said cheque in the bank, it was returned with the endorsement of "insufficient funds" in the account maintained by respondent-accused. It has further alleged in the complaint that thereafter within stipulated time, petitioner-complainant issued legal notice to respondent-accused calling upon him to pay amount under the cheque however, respondent-accused had not bothered to reply said notice. Thus, petitioner-complainant was constrained to file complaint before the Court against accused for the offence punishable under section 138 of the Negotiable Instrument Act.

Learned Judicial Magistrate, First Class, Vaijapur, by order dated 9th March, 2006, after recording the verification statement of the complainant and on perusal of the documents submitted alongwith complaint, issued process against respondent-accused under section 138 of the Negotiable Instrument Act as the learned Magistrate found sufficient ground to proceed. Being aggrieved by the same, respondent-accused preferred Criminal Revision Application No. 130/2006 before the Sessions Court, Aurangabad and, the learned Additional Sessions Judge, Aurangabad, by impugned order dated 22nd September, 2006, allowed the application and set aside the order passed by the Magistrate and discharged respondent-accused from the charge levelled against him. Hence this writ petition.

5. Learned counsel for petitioner submits that the learned Additional Sessions Judge has considered the defence of respondent-accused and accordingly allowed said revision application. Learned counsel submits that respondent-accused has challenged the order of issuance of process passed by the Magistrate and the learned Additional Sessions Judge should have considered said challenge to the limited extent of the order passed by the Magistrate issuing process against accused under section 138 of the Negotiable Instrument Act. Learned counsel submits that even respondent-accused had not bothered to reply the demand notice issued by petitioner-complainant. Respondent-accused has produced before the Additional Sessions Judge the xerox copies of Isar Pavati of the agreement and also xerox copies of the legal notice issued by him to the petitioner-complainant. Learned counsel submits that even though complainant is not subjected to

cross examination on the basis of these documents and, even though original documents are not produced before the Court and proved, the learned Additional Sessions Judge has considered said documents and accordingly allowed the revision application. Learned counsel submits that the judgment and order passed by the Additional Sessions Judge is not proper, correct and legal and the same is thus liable to be quashed and set aside.

6. Learned counsel for respondent-accused submits that respondent-accused has challenged the order of issuance of process and accordingly brought to the notice of the the learned Additional Sessions Judge the real transaction between the parties in the year 2006. In view of pronouncement of the Hon'ble Supreme Court in the case of Adalat Prasad Vs. Rupal Jindal reported in **2004(4) Mh.L.J. 294**, respondent-accused was not at liberty to appear before the Magistrate and file application for recalling the order of issuance of process. Thus, respondent-accused by producing such documents before the Additional Sessions Judge, brought to the notice of the Court that in view of real transaction between the parties with some ulterior motive, the petitioner-complainant has used blank cheque and filed false complaint before the Magistrate. Learned counsel submits that the learned Additional Sessions Judge, Aurangabad has therefore rightly allowed the revision application and set aside the order of issuance of process passed by the Magistrate. Learned counsel submits that there is no substance in the writ petition and, the writ petition is thus liable to be dismissed.

7. It is needless to say that the scope of enquiry as provided under section 202 of the Code of Criminal Procedure is extremely limited and, while issuing process the Court has to apply its mind to find whether prima facie case is made out or not. In the instant case, petitioner-complainant in support of his complaint, produced original cheque, intimation given by the bank about insufficiency of funds in the account maintained by respondent-accused, office copy of demand notice issued to respondent-accused and acknowledgement postal receipt thereof before the Magistrate. Learned Magistrate after recording verification statement of petitioner-complainant and on perusal of aforesaid documents found that prima facie case is made out against respondent-accused and accordingly, issued process for offence punishable under section 138 of the Negotiable Instrument Act.

8. In revision, respondent-accused has produced before the Court xerox copies of Isar Pavati agreement executed between him and petitioner-complainant. According to respondent-accused, by that transaction petitioner-complainant agreed to sell his Tata Sumo vehicle for certain amount and since there was a charge of loan of bank on the said vehicle, cash amount of Rs.18,634/- was paid at the time of agreement and it was further recited in the agreement to pay remaining amount within one year alongwith interest. By referring to said agreement, respondent-accused has also brought to the notice of learned Additional Sessions Judge that accused-respondent has also given three cheques of Bank of Maharashtra to the complainant as a security for the said amount. Respondent-accused

may have a good case in the trial however, the learned Additional Sessions Judge has committed a grave mistake of law in considering xerox copies of the documents produced by respondent-accused. It is needless to say that if respondent-accused wants to rely upon certain documents, he has to produce the original documents before the Court and is required to prove the same. Furthermore, those documents are required to be brought to the notice of the petitioner-complainant and he should be given opportunity to say something in respect of the said document.

9. In view of above, the judgment and order passed by the Additional Sessions Judge, Aurangabad does not stand and the same is liable to be quashed and set aside. Accordingly, I proceed to pass the following order :

ORDER

1. Criminal Writ Petition is hereby allowed.
2. Judgment and order passed by the learned Additional Sessions Judge, Aurangabad, dated 22nd September, 2006, in Criminal Revision Application No. 130/2006 is hereby quashed and set aside.
3. Summary Criminal Case No. 229/2006 shall be restored to its original position and the learned Magistrate is hereby directed to proceed with the said case in accordance with law.
4. Parties shall appear before the Magistrate on 21st October, 2016.

5. R & P be returned to the Trial Court forthwith.

6. Rule made absolute. Writ petition is accordingly disposed of.

(V. K. JADHAV)
JUDGE

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