

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

CRIMINAL REVISION APPLICATION NO. 139 OF 2016

WITH

CRIMINAL WRIT PETITION NO. 700 OF 2016

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CRIMINAL REVISION APPLICATION NO. 139 OF 2016

Vijaykumar Gulabchand Baldava ..Applicant
Age. 55 years, Occ. Business,
R/o. Marvadi Galli, Shevgaon,
Tq. Shevgaon, Dist. Ahmednagar.

Versus

1. Prakash Ambadas Kulkarni ..Non-applicants
Age.65 years, Occ. Retired & Agri.
R/o. Old Press, Shevgaon,
Tq.Shevgaon, Dist. Ahmednagar.
2. State of Maharashtra

WITH

CRIMINAL WRIT PETITION NO. 700 OF 2016

Vijaykumar Gulabchand Baldava ..Petitioner
Age. 55 years, Occ. Business,
R/o. Marvadi Galli, Shevgaon,
Tq. Shevgaon, Dist. Ahmednagar.

Versus

1. Prakash Ambadas Kulkarni ..Respondents
Age.65 years, Occ. Retired & Agri.
R/o. Old Press, Shevgaon,
Tq.Shevgaon, Dist. Ahmednagar.
2. State of Maharashtra

Mr.P.R. Katneshwarkar, Advocate h/f. Mr.Nikhil Jaju, Advocate for the applicant/petitioner.
Non-applicant No.1/respondent No.1 in person.
Mr.A.V. Deshmukh, A.P.P. for non-applicant/respondent-State.

CORAM : Z.A. HAQ, J.
DATED : 21.12.2016

ORAL JUDGMENT :-

. Heard Mr. P.R. Katneshwarkar, Advocate h/f. Mr. Nikhil Jaju, Advocate for the applicant, non-applicant No.1 in person and Mr. A.V. Deshmukh, learned A.P.P. for non-applicant No.2/State.

. The applicant/accused has challenged the judgment passed by the Sessions Court by which the appeal filed by the accused is dismissed and the judgment passed by the learned Magistrate convicting the accused for the offence punishable under section 138 of the Negotiable Instruments Act is maintained.

02. The subordinate Courts have concurrently accepted the claim of the non-applicant No.1/complainant that the accused had given cheque for Rs.5 lakhs, that the cheque was dishonoured, that inspite of notice the accused had not paid the amount and after examining that all the pre-requisites of Section 138 of the Negotiable

Instruments Act have been complied with, the subordinate Courts have concluded that the accused is liable for conviction for the offence punishable under section 138 of the Negotiable Instruments Act.

03. The learned Advocate for the accused has submitted that the findings recorded by the subordinate Courts that the accused is liable for conviction for the offence punishable under section 138 of the Negotiable Instruments Act are not sustainable as the subordinate Courts have not appreciated the evidence on record and the fact that the complainant has failed to establish that the complainant had paid the amount of Rs.5 lakhs to the accused and the cheque in question was given to satisfy the legal liability. To support the submission, the learned Advocate has referred to the cross-examination of the complainant, the cross-examination of Dashrath (P.W.3) and the cross-examination of Vasant (P.W.4) – employee of the bank. Relying on the cross-examination of the complainant and above witnesses it is argued that the complainant has failed to prove beyond doubt that the entries on the cheque are in the handwriting of the accused. It is urged that the handwriting on the pay slip along with which the cheque was deposited and the hand-writing on the cheque is same and in the cross-examination Vasant (P.W.4) has stated

that the pay-slip along with which the cheque was deposited is filled up by the complainant in his hand-writing and therefore it is clear that the hand-writing on the cheque is of the complainant. Referring to the cross-examination of Vijay (P.W.5) who was working as Tahsildar at Shevgaon, the learned Advocate has submitted that the claim of the complainant that he was having Rs.5 lakhs in July, 2005, when the amount said to have been given to the accused is falsified. It is argued that the Sessions Court has committed error by not accepting the case of the accused on the ground that the accused has not led any evidence to substantiate his defence. It is submitted that the accused is not required to lead any evidence to substantiate his defence and the accused can substantiate his defence on the basis of the material on record and the admissions brought in the cross-examination of the witnesses examined on behalf of the complainant. In support of the submissions, reliance is placed on the following judgments :-

- (i) Judgment given by the Supreme Court in the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, AIR 2008 S.C.1325.
- (ii) Judgment given by this Court in the case of Vinay Parulekar Vs. Pramod Meshram, 2008(2) Mh.L.J.115.
- (iii) Judgment given by the Supreme Court in the case of Kamlesh Prabhudas Tanna & Anr. Vs. State of Gujarat, AIR 2014 SC (Supp) 1608.

(iv) Judgment given by this Court in the case of Rajendraprasad Gangabishen Porwal Vs. Santoshkumar Parasmal Saklecha & Anr., 2008 Cri.L.J.2955.

. It is further argued that the Sessions Court has transgressed its jurisdiction by directing the accused to pay interest at the rate of 18% on the amount of Rs. 5 lakhs, the interest being chargeable from the date of the filing of the complaint. It is submitted that the Sessions Court which is the first appellate Court is under obligation to consider all the material on record and if required, re-appreciate the evidence, however, in the present case the Sessions Court has failed to discharge its legal obligation.

. It is prayed that the impugned judgment be set aside, the applicant be acquitted of the offence punishable under section 138 of the Negotiable Instruments Act and the complainant filed by the non-applicant No.1 be dismissed.

04. The non-applicant No.1 was represented by Advocate Mr. S.R. Andhale, however, when the matter started, the non-applicant No.1 expressed his desire to address the Court in person and therefore Mr. S.R. Andhale, Advocate filed pursis praying that he be discharged. Non-applicant No.1 argued the matter.

. The non-applicant No.1 has supported the impugned judgment. Relying on the provisions of Section 30 and Section 80 of the Negotiable Instruments Act, it is submitted that the Sessions Court has rightly directed the accused to pay interest at the rate of 18% p.a. It is prayed that the Revision Application be dismissed with exemplary costs.

05. After going through the impugned judgments, I find that the considerations by both the subordinate Courts are proper and cannot be faulted with. Though much is tried to be made out on the point that the complainant has failed to establish that the cheque was given by the accused to discharge legal liability, the accused relies only on certain minor discrepancies and omissions to substantiate his defence. The presumption under section 118 and section 139 of the Negotiable Instruments Act cannot be overlooked. In my view, the complainant has discharged the preliminary burden of showing that in July, 2005, he had an amount of Rs.5 lakhs (Rs.3 lakhs and odd having been received towards his retirement benefits and the balance amount of Rs. 2 lakhs having been withdrawn from the Central Bank) by leading evidence producing documents and examining the Tahsildar, Shevgaon. As the complainant has discharged

the preliminary burden, the accused was under an obligation to rebut the legal presumption under section 118 and section 139 of the Negotiable Instruments Act. I find that the accused has failed to discharge the burden.

06. As the conclusions of the subordinate Courts are proper and based on the appreciation of the material on record, I see no reason to interfere with the findings recorded by the subordinate Courts that the accused is liable for conviction for the offence punishable under section 138 of the Negotiable Instruments Act. The judgments relied upon by the learned Advocate for the applicant/accused are of no assistance to the applicant.

. However, I find that the directions given by the Sessions Court to the applicant/accused to pay interest at the rate of 18% p.a. are unsustainable. The non-applicant No.1 has not been able to point out that the Court while trying the accused for the offence punishable under section 138 of the Negotiable Instruments Act, has power and jurisdiction to direct the accused to pay interest. The directions in this regard are required to be set aside.

. Hence, the following order :-

(i) The conviction of the applicant for the offence punishable under section 138 of the Negotiable Instruments Act is maintained.

(ii) The clause (B) of the operative part of the order passed by the learned Additional Sessions Judge is set aside and is substituted by following :-

“The applicant/accused shall pay compensation of Rs.9,00,000/- (Rupees Nine Lakhs) out of which an amount of Rs.8,00,000/- (Rupees Eight Lakhs) shall be given to the non-applicant No.1-Prakash Ambadas Kulkarni and the balance amount of Rs.1,00,000/- (Rupees One Lakh) shall be deposited with the State of Maharashtra.

(iii) The Criminal Revision Application is dismissed with costs quantified at Rs.50,000/- (Rupees Fifty Thousand) to be paid by the applicant/accused to the non-applicant No.1, within two months.

(iv) If any amount is deposited in this Court by the applicant/accused as per the impugned judgment, the same shall be adjusted.

(9)

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(v) The Criminal Writ petition is
dismissed.

[Z.A. HAQ, J.]