

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 5 OF 2010

Dr. Bhagwan S/o Laxman Chavan,
Age: 58 years, Occu: Service,
R/o. At present Gangakhed,
Tq. Gangakhed, Dist. Parbhani. ... **Applicant**

Vs.

1. Dr. Suresh S/o Kishanrao Kendre,
Age: 41 years, Occu. Medical Practitioner,
R/o. Thodga, Tq. Ahmedpur,
Dist. Latur.
2. The State of Maharashtra ... **Respondents**
[Deleted as per Court Order Dated 18.07.2018]

Mr. S.K. Naikwade, Advocate for the Applicant.
Mr. Amit S. Deshpande, Advocate for the Respondent no.1.
Mr. S.D. Ghayal, Advocate for the Respondent no.2-State.

CORAM : MANGESH S. PATIL, J.

DATE OF RESERVING THE JUDGMENT : 07.03.2019
DATE OF PRONOUNCING THE JUDGMENT : 02.05.2019

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JUDGMENT :

By way of this Revision the accused in STC No. 3238 of 2006 who was sentenced to suffer simple imprisonment for six months and to pay a fine of Rupees Two Thousand in default to suffer simple imprisonment for one month for the offence punishable under Section 138 of the Negotiable Instruments Act as well as directing him to pay to

the respondent / complainant an amount of Rs.4,25,000/- under Sub-section 3 of Section 357 of the Code of Criminal Procedure and which sentence has been confirmed by the Ad-hoc Additional Sessions Judge 2, Latur by dismissing his Criminal Appeal No.75 of 2008 by the judgment and order dated 02.01.2010 has approached this Court under section 397 of the Code of Criminal Procedure. For the sake of convenience the parties are herein after referred to by their status in the original proceeding.

2. The case of the complainant is to the effect that while he was taking education in medicine at Beed the accused was a faculty member in the year 1990 and in that capacity they were acquainted with one another. During the course they had parted ways. After passage of time in the year 2001 when the accused was Deputy Director in the Health Department and was proceeding to Nanded they got to meet each other at Ahmedpur renewing their acquaintance. In the year 2003 the Anti Corruption Bureau effected a raid on the house of the accused while his daughters and son were taking education. The accused then needed money during the period 2003 to 2005. On his request the complainant from time to time paid him sums which totally amounted to Rs. 4,00,000/- as a hand loan.

3. The complainant then alleged that in the year 2005 when he came to know that financial position of the accused had gotten better

he demanded the money back. Accordingly accused issued two cheques bearing nos. 398051 and 398052 dated 05.06.2006 drawn on Marathwada Gramin Bank, Branch Ahmedpur. When the complainant presented the cheques for encashment through his banker, the cheques were dishonoured on 22.06.2006 and 16.06.2006 with an endorsement of the bank that the funds were insufficient. Accordingly, he issued a legal notice on 28.06.2006 through his advocate by a registered post A.D. as well as certificate of posting which were duly received by the accused on 30.06.2006 and 06.07.2006. However, he failed to respond to the notice and the complaint was filed under Section 138 of the Negotiable Instruments Act.

4. The learned Magistrate recorded the plea and after extending an opportunity to both the sides to lead evidence and by the impugned judgment and order sentenced the accused as mentioned herein-above and the conviction has been confirmed in appeal by the Additional Sessions Judge.

5. The learned advocate for the accused vehemently submitted that the trial Court as well as the appellate Court have failed to appreciate the evidence particularly led by the accused in the proper perspective. They have failed to note that the burden to rebut the presumption cast upon the accused could have been rebutted on the principle of preponderance of probabilities and strict proof was not

necessary.

6. He had led the evidence to substantiate the defence that in fact the cheques were handed over by him to Pandurang Sambhaji Chate pursuant to agreement of sale entered into by the accused with him for purchasing the land. Said Pandurang Sambhaji Chate being the relative of the complainant, they have misused the cheques. Such defence having been duly substantiated by the accused by leading cogent evidence, both the Courts below have failed to appreciate this fact and have readily accepted the evidence led by the complainant while convicting the accused.

7. Per contra, the learned advocate for the complainant submitted that no apparent error or illegality is committed by the two courts below in convicting the accused. They have drawn presumptions available in his favour under Sections 20, 118 and 139 of the Negotiable Instruments Act. The accused having failed to substantiate defence he has been rightly convicted and the conviction has been correctly upheld which needs no interferences in this revision.

8. I have carefully perused the evidence led by both the sides and both the impugned judgments. Being a matter under Section 138 of the Negotiable Instruments Act, there are presumptions operating in favour of the complainant under Sections 20, 118 and 139 of that Act. Obviously, these are presumptions of facts and are rebuttable. It is also

trite that the burden on the accused to lead evidence in rebuttable to displace these presumptions is not as harsh as it is on the complainant to establish the guilt. The accused can rebut the presumptions by resorting to the principle of preponderance of probabilities and is not expected to lead strict proof of the defence. I have no hesitation in observing that both the Courts below have certainly borne in mind these principles, the presumptions operating in favour of the complainant and have correctly appreciated the evidence led by the defence and have not insisted for strict proof from the accused.

9. Both the Courts have correctly appreciated the fact that the story tried to be built up by the accused in defence is too shaky to believe and has not at all been substantiated even by resorting to the principle of preponderance of probabilities.

10. As is mentioned earlier, the accused is coming with a defence that he was not at all acquainted with the complainant. He had entered into an agreement to purchase a property from Pandurang Abaji Chate who is related to the complainant. He had issued the cheques to Pandurang Chate pursuant to such agreement of sale but the latter in collusion with the complainant has misused the cheques. It is interesting rather highly objectionable to note that in order to substantiate such a defence the accused has examined Pandit Sambhaji Chate (DW-6). Unfortunately for him the witness has not at all

supported but astonishingly he was sought to be declared hostile and even the learned Magistrate without any demur from the side of the complainant allowed the learned advocate for the accused to cross-examine this witness. Since there was no objection raised on behalf of the complainant for Magistrate to adopt such a procedure, the practice of declaring a witness called by the party himself as hostile is not palatable.

11. Be that as it may, the fact remains that the witness called by the accused to substantiate his defence was declared by him as hostile and has not at all supported him. For this reason alone the defence fails.

12. As has been correctly pointed out by the learned Magistrate and noticed by the learned Additional Sessions Judge, even on the touch stone of probabilities the defence is not acceptable. Firstly, if at all the accused had handed over the cheques to Pandurang Chate, it is not made clear by him as to why and how the blank and signed cheques were given. Secondly, one cannot comprehend as to how and why the cheques were in the name of the complainant if at all those were tendered to Pandurang Chate by way of consideration for the sale transaction. For these two reasons, in my considered view the accused has miserably failed to substantiate the defence.

13. Further as has been pointed out by the learned Additional Sessions Judge the agreement is shown to have been executed between

the accused and one Pandurang Abaji Chate, whereas the accused has examined Pandit Sambhaji Chate (DW-6).

14. Again the accused tried to bring another circumstance to substantiate his defence by saying that he was pressurized to open an account in Marathwada Gramin Bank, Branch Ahmedpur. He examined Chandrashekar Sangappa Dhele (DW-4) and Shashikant Narharrao Panchal (DW-5) to support this claim but even these two witnesses did not support him and following the same procedure they were declared hostile by the accused and they were cross-examined on his behalf. Consequently the concurrent findings of facts by the two Courts below about the cheques having been issued by the accused to the complainant in discharge of a legal enforceable debt is clearly borne out from the evidence and the accused has miserably failed to rebut the presumptions operating in favour of the complainant by leading cogent evidence, even on the touch stone of preponderance of probabilities.

15. The accused has also examined one Sambhaji Ramrao Mundhe (DW-2) who in his examination-in-chief has stated that on 25.12.2005 the accused had agreed to purchase land of Pandurang Chate in his presence and by accepting Rupees Ten Thousand as earnest the agreement was executed and the accused had handed over couple of blank cheques to said Pandurang Abaji Chate. He further stated that it was also agreed that the sale-deed was to be executed on 05.06.2006 on

which date the balance amount of consideration was to be paid in cash and the cheques were to be returned. However, during his cross-examination he admitted that the agreement between the accused and Pandurang Chate is false one and that he was not aware as to whose name was written in the counter foil of the cheque book from which two cheques were issued by the accused. Pertinently, during cross-examination the accused specifically admitted that the counter slip of the cheque book in respect of the two cheques in question were filled by him in his hand writing and under his signature and more importantly it bears the name of the complainant denoting that the cheques were issued in his name. No explanation is coming-forth as to why the accused instead of writing the name of the drawee of the cheque as Pandurang Chate had written the name of the accused. This is indeed a strong circumstance which gives a jolt to the defence version.

16. Couple of legal issues were raised before the learned Additional Sessions Judge as far as service of statutory notice. However the learned Additional Sessions Judge for cogent and convincing reasons has repelled the objection and in the process has examined the facts and circumstances in the light of the observations of the Bombay High Court in the case of *Shri Deelip Apte Vs. Nilesh P. Salgaonkar & Anr. 2006 ALL MR (Cri.) 2921* as well as from the decision in the case of *K. Bhaskaran Vs. Sankaran Vaidhyan Balan (1999) 7 S.C.C. 510*, as well as the principle laid down under Section 27 of the General Clauses Act,

1897.

17. Thus considering the matter in hand from all the angles, the evidence led by the complainant and the lack of evidence on behalf of the defence to rebut the presumptions have cumulatively assessed by the two Courts below in holding the charge to have been brought successfully home and convicting and sentencing the accused as mentioned herein-above. There is no ground to interfere with such concurrent findings and the revision must failed.

18. The Criminal Revision is dismissed. The Rule is discharged.

(MANGESH S. PATIL, J.)

KAKADE