

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

CRIMINAL REVISION APPLICATION NO. 146 OF 2018

Rajabhau s/o Subrao Londe,
Age : 51 years, Occu.: Service,
Flat No. B-2, Jyoti Nagar, Near Indian Oil,
Bhavan, Aurangabad.

.... Applicant
(Orig. Complainant)

VERSUS

1. The State of Maharashtra
(Deleted as per court order
dated 11.06.2018)

2. Pareshkumar s/o Rajeshkumar Khandelwal,
Age : 36 years, Occu.: Business,
R/o.: Lord Datta Temple Lane,
Police Station Road, Phulambri,
Tq. Phulambri, District : Aurangabad.

... Respondents
(Org. Accused)

.....
Mr. S. B. Bhapkar, Advocate for the applicant.
Mr. S. V. Suryawanshi, Advocate for respondent No.2.
.....

CORAM : MANGESH S. PATIL, J.
RESERVED ON : 01/02/19
PRONOUNCED ON : 05/03/19

JUDGMENT :

I have heard the learned advocate Mr. S. B. Bhapkar for
the revision-applicant and the learned advocate Mr. S. V.

Suryawanshi for the respondent No.2. At their request, the matter is heard finally at the stage of admission.

2. The applicant is the original complainant, who filed a complaint under Section 138 of the Negotiable Instruments Act against respondent No.2 inter alia alleging that the latter needed hand loan of Rs.1,00,000/- for the medical treatment of his wife. The applicant obliged him by issuing a bearer cheque No. 126414 dated 12.07.2013. The respondent no.2 promised to pay back the money within a month. Again respondent No.2 needed an additional amount of Rs.1,50,000/- for the medical treatment of the wife. The applicant, therefore, paid the money to him by another bearer cheque No. 126415 dated 12.08.2013. The respondent promised to repay the aggregate sum of Rs.2,50,000/- within two months. After completion of the period as was promised, the applicant approached respondent No.2 and respondent No.2 gave him cheque No. 002657 for an amount of Rs.2,50,000/- dated 24.06.2014 drawn on his banker the Chikali Urban Cooperative Bank, Branch : Phulambri. However, when the applicant

presented the cheque for encashment through his banker, it was dishonoured for insufficient funds on 27.06.2014. A statutory notice dated 30.06.2014 was served on respondent No.2 on 04.07.2014. However, he failed to pay the money and the complaint was filed on 28.07.2014.

3. After conducting the trial, by the judgment and order dated 13.04.2016 the learned Magistrate convicted the respondent No.2 and sentenced him to suffer simple imprisonment for three months and also directed him to pay a compensation of Rs.3,00,000/- to the applicant as contemplated under Section 357(3) of Cr.P.C. within a month and also directed in default of payment of compensation to suffer simple imprisonment for three months.

4. Being aggrieved, respondent No.2 preferred Criminal Appeal No. 102 of 2016 in the Court of Sessions at Aurangabad. The learned Ad hoc Additional Sessions Judge by the judgment and order dated 15.05.2018 inter alia allowed the appeal, quashed and set aside the judgment and order of

conviction but remanded the matter to the Trial Court for rehearing and reconsideration of the entire evidence giving opportunity to both the sides to lead evidence. Being aggrieved and dissatisfied by such judgment and order, the original complainant has preferred this revision.

5. The learned advocate for the applicant vehemently submitted that there was absolutely no reason or ground for the learned Additional Sessions Judge to remand the matter much less for a fresh trial when the evidence was already available before her which would have enabled her to decide the appeal finally. The grounds mentioned in the impugned judgment and order are perverse and arbitrary. The trial had concluded after extending sufficient opportunity to both the sides to lead evidence. It was not a case where the respondent No.2 was unable to avail of the opportunity to substantiate his defence. Therefore, there was no legal and cogent reason for directing the remand that too for a fresh trial, extending opportunity to both the sides to lead additional evidence. It was not a case of want of evidence which could not have

enabled the learned Additional Sessions Judge to decide the appeal finally. In fact the learned Additional Sessions Judge instead of deciding the appeal finally with the evidence available on record has shirked the his responsibility to decide it on merits, which has resulted in gross miscarriage of justice.

6. The learned advocate for the applicant in support of his submission placed reliance on the decision of this Court in case of **Bapurao s/o Narayan Chavan Vs. State of Maharashtra and another 2003 (3) B CR C 612** and submitted that the powers exercised by the learned Additional Sessions Judge of remanding the matter are *de hors* the provision of Section 386 of the Cr.P.C.

7. Per contra, the learned advocate for the respondent No.2 supported the impugned judgment and order. He submitted that in the memo of appeal, a specific request was made for remanding the matter and pursuant thereto the impugned judgment and order has been passed. It was specifically pointed out that the respondent No.2 while leading

the evidence had requested for enabling him to lead evidence but was deprived of sufficient opportunity to substantiate his defence. Thus, he prayed to dismiss the revision.

8. I have carefully gone through the judgment and order of conviction passed by the learned Judicial Magistrate First Class as well as the impugned judgment and order as also the appeal memo of respondent No.2 filed before the Sessions Court.

9. As can be seen from the impugned judgment and order the learned Sessions Judge has assigned the reasons which weighed with her for directing a remand in paragraph No.30 onwards. After discussing the scope and ambit of an enquiry under Section 138 of the Negotiable Instruments Act in the light of the presumptions under Sections 139 and 118 of that Act she has proceeded to scan the judgment and order of the learned Magistrate and has observed that the observations of the Trial Judge to the effect that 'there was no dispute about complainant having issued two cheques on 12.07.2013 and

12.08.2013 for a total amount of Rs. 2,50,000/-' was perverse, since the fact was never admitted in the form of any suggestion put to the complainant during his cross-examination on behalf of the respondent-accused. However, if one examines the reasoning given by the learned Trial Judge in paragraph Nos. 16 and 17 of his judgment, he has specifically mentioned that during the cross-examination of the applicant who is the complainant the fact that respondent No.2 had obtained a hand loan in the form of two cheques was not disputed. He also observed that even it was not disputed during the cross-examination of the applicant-complainant on behalf of respondent No.2- accused that the money was obtained as his wife was suffering from illness. One need not delve much on this aspect. Suffice for the purpose to observe that there was no apparent perversity in the learned Trial Judge making an observation that the fact that the two cheques were issued by the applicant-complainant for a total amount of Rs. 2,50,000/- was not disputed on behalf of respondent No.2-accused during cross-examination of the applicant – complainant.

10. Thereafter, the learned Additional Sessions Judge has laboured to discussg the evidence to ascertain veracity or otherwise regarding the claim of the applicant-complainant about having paid the hand loan to respondent No.2 by issuing two bearer cheques. In the process she has discussed the evidence in the form of the record of the applicant's banker as well as the testimony of the witness from the bank who was examined as a Defence Witness No.1. By general, vague and omnibus observations, the learned Additional Sessions Judge took a frog's leap in the realm of conclusions in following words in paragraph Nos. 35 and 36.

“35. Looking into the above mentioned important established facts, it is not desirable to discuss the merit of the evidence of both the parties. I am of the firm view that the Id. Trial Court has not taken into consideration the all legal provisions of the N. I. Act and also not correctly appreciated the evidence of both parties. In short, he gave the judgment of conviction without considering the peculiar facts and the circumstances of this case and specially

defence of the accused. The legislative intention behind making offence under Section 138 of the N. I. Act must be understood in the light of provision in Sec. 139 of the said Act. Hence, it is the fit case to remand it back to the Trial Court for reconsideration of evidence of both parties without going much in its depth.

36. For the aforesaid reasons and as this Court has come to the conclusion that the case needs remand for fresh trial / reconsideration of the evidence of both the parties, point No.1 to 3 have technically become redundant. Hence, I answer them accordingly”.

11. The observations clearly indicate that though the evidence was available before the learned Additional Sessions Judge to be discussed and to decide the appeal finally, instead of doing that a blanket remand order was passed apparently for mere asking.

12. I am emboldened to state that the order for blanket remand was passed merely for asking by referring to the appeal memo of the respondent No.2. A bare look at the

appeal memo would indicate that except a vague, isolated and bald assertion that respondent No.2-accused was not extended opportunity to substantiate his defence, not a single ground was sought to be made out as to why the remand was necessary.

13. In this respect it is pertinent to note that only in the prayer clause a request was made for remand for a retrial and further request was made to send the cheque in question to the handwriting expert. So far as the latter prayer is concerned, the learned Additional Sessions Judge refused to oblige the respondent. However, simultaneously, she directed the matter to be remanded for a fresh decision by extending opportunity to both the sides to lead evidence. The appeal memo is devoid of any specific assertions as to when the request was made by the respondent No.2 for leading evidence to substantiate his defence and when was it refused by the Trial Judge. Ignoring all these facts and circumstances, the learned Additional Sessions Judge seems to have exceeded the parameters which empower the Appellate Court to direct a remand by invoking

the powers under Section 386 of the Cr.P.C.

14. As is laid down in **Bapurao s/o Narayan Chavan** (supra) the Appellate Court can pass an appropriate order under that provision, if the trial itself is not fair and has resulted in failure of justice or is against public policy. Looked at from this angle, the appeal memo of respondent No.2 is completely devoid of any such ground demonstrating as to how the trial was unfair and as to how there was a failure of justice. As is pointed out by the learned advocate for the applicant, in fact, respondent No.2 examined Defence Witness No.1, who is the officer of the applicant's banker and thereafter passed on a pursis closing his evidence. If that be so, one cannot comprehend as to how it can be said that the opportunity to substantiate the defence was not extended to respondent No.2 by the learned Trial Judge.

15. It is under these circumstances, in my considered view the impugned judgment and order passed by the learned Additional Sessions Judge is quite arbitrary and perverse,

capricious and is liable to be quashed and set aside directing the learned Additional Sessions Judge to decide the appeal on the basis of the available evidence, uninfluenced by the observations made herein above.

16. The Revision is allowed. The rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

vsm/