

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

CRIMINAL REVISION APPLICATION NO.13 OF 2018

Shri Abhaykumar Bansilal Mutha
Age: 62 years, Occu.: Business,
R/o. Shivaji Raod, Taluka : Shrirampur,
Dist.Ahmednagar. ..Applicant
(Orig. Complainant)

VERSUS

1. Aris @ Arish Mohammad Shaikh
Age: 55 years, Occu.: Business,
R/o. : C/o.Superb Battery Plates,
Sangamner Road, In front of Gajanan
Vasahat, At. Post. Taluka – Shrirampur,
District – Ahmednagar. ..Respondent No.1
(Orig. Accused)
2. State of Maharashtra ..Respondent No.2
(Respondent No.2 is deleted as per
the order of Hon'ble Court
dated 27th June 2018)

...
Advocate for Applicant/Complainant :Smt. Rashmi S. Kulkarni
Advocate for Respondent/Accused : Shri Avinash N.Barhate Patil
(absent)

...
**WITH
CRIMINAL REVISION APPLICATION NO.177 OF 2021**

Aris @ Arish Mohammad Shaikh
Age: 55 years, Occu.: Business,
R/o. : C/o.Suparb Battery Plates,
Sangamner Road, In front of Gajanan
Vasahat, Shrirampur, Tq. Shrirampur,
District – Ahmednagar. ..Applicant
(Orig. Accused)

VERSUS

1. Shri Abhaykumar Bansilal Mutha
Age: 62 years, Occu.: Business,
R/o. Shivaji Raod, Shrirampur,

Taluka : Shrirampur,
Dist.Ahmednagar.

..Respondent No.1
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2. The State of Maharashtra ..Respondent No.2
(Respondent No.2 is deleted as per
the order of Hon'ble High Court
dated 27th June 2018)

...
Advocate for Applicant/Accused : Shri Avinash N.Barhate Patil
(absent)

Advocate for Respondent/Complainant : Smt. Rashmi S. Kulkarni

...

CORAM : M.G.SEWLIKAR, J.

...

RESERVED ON : 10th December, 2021

PRONOUNCED ON : 16th March, 2022

JUDGMENT :-

1. Criminal Revision Application No.13 of 2018 is preferred by the original complainant and Criminal Revision Application No.177 of 2021 is preferred by the original accused. Both these revisions are preferred against the order of the learned Additional Sessions Judge, Shrirampur, District Ahmednagar, whereby conviction of the accused recorded by the learned Judicial Magistrate First Class (JMFC) has been maintained but substantive sentence is modified.

2. In this order parties are referred to as per their original status in the trial Court.

3. Facts in brief are that on the request of the accused - Aris @ Arish Mohammad Shaikh, complainant - Abhaykumar Bansilal Mutha paid Rs.2,50,000/- to accused as a hand-loan on 28th December 2004. Accused assured that he would repay the amount within two days. Accused gave post-dated cheque dated 31st December 2004 to the complainant. On 31st December 2004, complainant deposited the cheque in the Bank which was dishonoured on account of insufficient funds. On 1st January 2005, notice for demanding the amount was sent by the complainant to the accused. On 3rd January 2005, accused received the notice. However, accused did not pay the amount of Rs.2,50,000/- and therefore, on 16th February 2005 complainant filed a private complaint under Section 138 of the Negotiable Instruments Act (N.I.Act) bearing STC No.127 of 2005.

4. Particulars of offence were read over and explained to the accused. He pleaded not guilty to it and came to be tried. Accused admitted to have issued the cheque but he contended that it was issued on 1st February 2004 and the complainant altered it to 31st December 2004. The cheque was, therefore, barred by limitation as it was issued on 1st February 2004.

5. The learned JMFC, Shrirampur, after recording evidence

and after recording statement of the accused under Section 313 of the Code of Criminal Procedure, by his order dated 13th August 2012, recorded conviction under Section 138 of the N.I.Act and sentenced the accused to suffer rigorous imprisonment for three months with fine of Rs.2,60,000/-, in default to suffer rigorous imprisonment for two months. It further directed that Rs.2,50,000/- be paid as compensation to the complainant.

6. Accused preferred Criminal Appeal bearing No.22 of 2012 against this order of the learned JMFC, Shrirampur. The learned Additional Sessions Judge, Shrirampur, maintained conviction and the amount of fine. However, the learned Additional Sessions Judge set aside the substantive sentence on the ground that sentence awarded was simple imprisonment. This order was passed by the learned Additional Sessions Judge on 13 December, 2017. This order is impugned in this revision.

7. Criminal Revision Application No.13 of 2018 is preferred by the complainant. Accused has preferred Criminal Revision Application No.177 of 2021 challenging the order of learned Additional Sessions Judge maintaining conviction. Since both these revisions arise out of the same order of the learned Additional Sessions Judge, they are being disposed of by this

common order.

8. Heard Smt.Rashmi S.Kulkarni, learned counsel for the complainant and Shri Avinash Barhate Patil, learned counsel for the accused.

9. Smt.Kulkarni, learned counsel submitted that accused has not denied his signature on the cheque. He has not denied that he did not draw the cheque. His only defence is that date of cheque was 1st February 2004 and it was altered to 31st December 2004. She submitted that report of the Handwriting Expert was called but Handwriting Expert was not examined. Therefore, the report carries no value. She submitted that both the Courts have held that there was legally enforceable debt and therefore, cheque was issued in discharge of legally enforceable debt. She further submitted that learned Additional Sessions Judge committed gross error in setting aside the substantive sentence erroneously presuming that the sentence awarded was simple imprisonment. Infact, if order of the learned trial Court is perused, it would show that the sentence awarded was rigorous imprisonment. She submitted that if substantive sentence is not awarded, accused will not have any deterrence to pay the amount awarded by the learned trial Court. She submitted that

therefore, interference by this Court is necessary in the order of the learned Additional Sessions Judge.

10. Shri Barhate, learned counsel for the accused submitted that complainant changed the date from 1st February 2004 to 31st December 2004. He further submitted that if date 1st February 2004 is reckoned, the cheque would have lost its validity. Just to bring it within the validity period, complainant altered date to 31st December 2004. He further submitted that accused issued cheque of Superb Battery Plates. He further submitted that income tax returns were not produced to show that this amount was lent to the accused by the complainant as a hand-loan. He submitted that there was no legally enforceable debt. Therefore, accused has been erroneously convicted by the learned JMFC and conviction has been erroneously confirmed by the learned Additional Sessions Judge. He submitted that in the facts and circumstances of the case, the learned Additional Sessions Judge was perfectly justified in setting aside the substantive sentence.

11. I have given thoughtful consideration to the submissions of both the learned counsel.

12. Both the Courts have held that accused did not dispute

drawing of the cheque and his signature thereon. It is also not in dispute that notice was issued within the stipulated period and complaint was filed within limitation. The only point that was canvassed was that there was alteration in the date of the cheque so as to bring it within the validity period. Second defence raised was that there was no legally enforceable debt. Both, the learned JMFC and the learned Additional Sessions Judge have given cogent reasons for rejecting these arguments.

13. In terms of Section 139 of the N.I.Act, when the drawer of the cheque admit issuance of cheque, a presumption is raised that it was issued for legally enforceable debt. Section 139 of the N.I.Act reads as under :

“139. Presumption in favour of holder – It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability.”

14. Thus, Section 139 of the N.I.Act enables the Courts to raise a presumption that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. It is for the accused to prove that it was not issued for any legally enforceable debt.

15. True it is that accused need not step into witness box to prove that there was no legally enforceable debt. He can prove it from the cross-examination of the witnesses and other evidence that there was no legally enforceable debt. In the case at hand, except alleging that there was alteration in the date, nothing has been brought on record to show that there was no legally enforceable debt. Report of the Handwriting Expert was received indicating therein that there was alteration. The learned Additional Sessions Judge has observed that the Handwriting Expert was not examined. Therefore, no importance can be attached to this report of Handwriting Expert. The learned trial Court has observed that the only defence taken by the accused during the cross-examination of the complainant is that the cheque was issued on 1st February 2004 and date was altered by the complainant to 31st December 2004. Thus, in the cross-examination also, accused could not bring on record that there was no legally enforceable debt for issuance of cheque. The learned Additional Sessions Judge has also given cogent reasons for rejecting this argument of the accused.

16. Revisional Court cannot re-appreciate evidence unless it is shown that the findings of the learned trial Court and the learned Appellate Court are perverse. From the discussions made above,

it cannot be said that the findings of the learned trial Court and learned Appellate Court are perverse. Therefore, I do not find any infirmity in the appreciation of evidence made by the learned trial Court and the learned Appellate Court.

17. Learned Additional Sessions Judge, while confirming the conviction recorded by the learned JMFC, set aside the substantive sentence. The learned Additional Sessions Judge did not assign any reason for setting aside the substantive sentence of rigorous imprisonment of three months. In paragraph No.12, learned Additional Sessions Judge made the following observations :-

“12] Considering the earlier discussion, the findings recorded by the learned J.M.F.C. in the impugned Judgment are correct and proper. Therefore, there is no need of interference in it at the hands of this Court. However, in the operative part clause 2, it reveals that imprisonment of three months is awarded.

Considering the submission of learned advocate Shri J.B.Shaikh, for the appellant / accused regarding the nature and length of litigation, as well as age, responsibility of family, he is handicapped etc., some leniency is required to be shown to the extent of imprisonment and hence, to that extent only interference is necessary by way of modification in the operative part of the impugned Judgment which meets the ends of justice. The learned Advocate Shri Kothari for complainant has opposed for the same.”

18. From these observations, it cannot be said that the learned Additional Sessions Judge has given cogent reasons. No documentary proof was placed on record to show that accused is a handicapped person. His age shown to be 55 years. Thus, at the time of deciding the appeal, he was not even Senior Citizen. Therefore, the leniency shown by the learned Additional Sessions Judge was wholly unwarranted.

19. Smt.Kulkarni, learned counsel for the complainant placed reliance on the case of *Satyanarayan Motilalji Malpani Vs. Nandlal Sivnarayan Bhutada* [MANU/MH/0884/2012]. In the said decision, this Court placed reliance on the case of *Suganthi Suresh Kumar Vs. Jagdeeshan* [2002 Cri.L.J. 1003 (1)]. In paragraph Nos.5 and 6, this Court recorded following observations :-

“5. Pertinent observations made by the Honble Apex Court at para 12 of the judgment delivered in Suganthi Suresh Kumars case are re-produced herein below.

12. The total amount covered by the cheques involved in the present two case was Rs.4,50,000/-. There is no case for the respondent that the said amount had been paid either during the pendency of the cases before the trial Court or revision before the High Court or this Court. If the amounts had been paid to the complainant there perhaps would have been

justification for imposing a flee-bite sentence as had been chosen by the trial court. But in a case where the amount covered by the cheque remained unpaid it should be the look out of the trial Magistrate that the sentence for the offence under Section 138 should be of such a nature as to give proper effect to the object of the legislation." No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light heartedly. The very object of enactment of provisions like 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount at least during the pendency of the case."

20. This Court further observed in paragraph No.7 thus :-

"7. What should have been the minimum sentence is the matter which needs to be resolved with reference to objects and reasons for enacting penal provisions in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque vide Negotiable Instrument laws (Amendment Act), 1988. This has become imperative for the reason that the Courts awarding the sentence for the offence under section 138 are required to award sentences of such nature as to give proper effect to the object of the legislation as observed in Suganthi Suresh Kumars case. Adverting to the objects and reasons for incorporating the penalties in case of dishonour of cheque due to insufficiency of funds in the account of the drawer of the cheque, in the Negotiable Instruments Act, 1881, it can be seen that such provisions were incorporated with a view to encourage the culture of use of cheques and enhancing credibility of the instrument. Needless to state that the credibility of the instrument i.e. cheque issued can only be enhanced if the payment thereunder is assured. In the instant case, therefore, the complainant had a minimum expectation, and reasonably so, of

the payment due under the said cheque. This fact has been completely overlooked by the learned trial Court leading it to land itself in error."

21. In the case at hand, the learned Additional Sessions Judge awarded a flee-bite sentence. Smt.Kulkarni, learned counsel for the complainant is right in contending that accused did not pay the amount since the year 2004 and if deterrence of punishment of imprisonment is removed, there is no possibility of the accused paying the amount. Award of sentence should be to give proper effect to the object of the legislation. By awarding flee-bite sentence, object of Section 138 of the N.I.Act is frustrated. Therefore, the learned Appellate Court committed error in setting aside the substantive sentence. Therefore, the order of the learned Appellate Court needs interference to this extent. In view of this, following order is passed :-

ORDER

- (i) Criminal Revision Application No.13 of 2018 is allowed.
- (ii) The order of the learned Additional Sessions Judge, Shrirampur dated 13th December 2017 passed in Criminal Appeal No.22 of 2012, to the extent of setting aside substantive sentence, is set aside. Rest of the order is confirmed.

(iii) The order of the learned JMFC. Shrirampur dated 13th August 2012 passed in STC No.127 of 2005 of awarding three months rigorous imprisonment is restored.

(iv) Criminal Revision Application No.177 of 2021 is dismissed.

(M.G.SEWLIKAR)
JUDGE

SPT