# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CRIMINAL APPELLATE JURISDICTION

## CRIMINAL REVISION APPLICATION NO. 31 OF 2021

Harishchandra Kushaba Dhole ...Applicant

Versus

Nivruti Laxman Bonwate and Anr. ...Respondents

Mr. Limbraj Manikrao Pawar, Advocate for Applicant.

Mr. Vilas B. Tapkir, Advocate for Respondent No.1.

Mr. Arfan Sait, APP for the Respondent–State.

**CORAM : PRAKASH D. NAIK, J.**

**DATE : 30th SEPTEMBER, 2022.**

**JUDGMENT. :-**

1. The Applicant has preferred this application under Section 401 of Code of Criminal Procedure invoking revisional jurisdiction of this Court and challenged the Judgment and order dated 10th August, 2017 passed by learned J.M.F.C., Vashi in SCC No.10318 of 2013 by which the Applicant has been convicted for offence punishable under Section 138 of Negotiable Instruments Act, 1881 (for short 'N.I. Act') and sentenced to suffer imprisonment for two months and directed to pay compensation of Rs.5,00,000/-. In default of payment of compensation to suffer simple imprisonment for one month. The Applicant has also challenged the Judgment and order dated 3rd March, 2020 passed by Additional Sessions Judge, Thane dismissing Criminal Appeal No.111 of 2017.

2. The facts of the case in nutshell are as under :

The complainant is a Fruit Merchant at APMC market, Vashi. The Accused is the owner of Gala No.N-1023, Fruit Market, Plot Nos. 3 and 7, Gut No.796, Sector- 19, Turbhe, Vashi, Navi Mumbai. The complainant was in search of Shop/gala at APMC fruit market, Vashi. The Accused approached the complainant in April-2007 and offered to sell the aforesaid gala to the complainant. They executed an agreement on 3rd May, 2007. The total consideration amount was fixed towards sale of shop was Rs.10,00,000/-. The complainant paid sum of Rs.3,00,000/- to the Accused and it was decided that, the balance amount shall be paid within two years from the date of agreement. The complainant was ready to pay the balance amount but the Accused requested to cancel the deal and promise that, he would refund the amount with interest. Considering the relation with the Accused, the complainant agreed to the request made by the Accused and it was decided that, the Accused would return the amount of Rs.8,00,000/- to the complainant. However, the Accused did not comply his promise. After repeated demand made by complainant, the Accused issued cheque dated 1st July, 2013 bearing no. 059133 for an amount of Rs.4,00,000/-. The cheque was drawn of Deccan

Merchants Co-operative Bank Ltd., APMC Brachn, Navi Mumbai as a part payment. The complainant presented the said cheque with the banker Warana Sahakari Bank Ltd., Sector 14, Vashi. The cheque was dishonored on 2nd July, 2013 and returned with remark "Funds Insufficient". The complainant issued demand notice dated 23rd July, 2013 through Advocate and the same was received by the Accused on 29th July, 2013. Though the Accused received demand notice, he neither complied the demand notice nor gave reply to the same. Complaint was filed.

2. Vide order dated 21st October, 2013, learned 5th J.M.F.C., Vashi issued process against the Accused under Section 138 of N.I. Act.

3. Affidavit of evidence of complainant was tendered on 20th June, 2014. Vide order dated 20th August, 2014, the trial Court directed that, the list of documents Exhibit-12 are proved as those have received formal proof as per the provisions of Indian Evidence Act. The documents proved along with Exhibit-12 were exhibited as Exhibit Nos. 13 to 18. It was further observed that, though the documents are exhibited the evidential value of the contents of documents is a matter of law and it is open for argument. In order to avoid possibility of *de novo* trial, instead of recording evidence

in the manner of notes of evidence, full fledged evidence is recorded as per the procedure of recording evidence in summons trial.

4. The complainant (CW-1) was cross-examined by the Advocate of Accused. The evidence of CW-2 Balkrushna Shingare was recorded on 23rd February, 2016 at the instance of complainant. CW-3 Murlidhar Dherange was also examined by the complainant. The Accused examined Dattatray Avati as defence witness on 16th September, 2016. The Accused filed written statement. The statement of the Accused was recorded under Section 313 of Cr.P.C.

5. Learned Advocate for the Applicant submitted that, there is no evidence to convict the Applicant for the alleged offence. The entire claim of the Respondent/complainant is false. The complainant had taken the undated cheque for a amount of Rs.4,00,000/- from Applicant and two cheques of Rs.2,00,000/- lakhs each of Applicant's wife. The complainant misused the cheques by writing date on the cheques and filed two criminal complaints for offence under Section 138 of N.I. Act on dishonored of cheques. The Applicant and his wife were convicted for offence under Section 138 of N.I. Act and directed to pay compensation of

Rs. 5,00,000/-. The Accused preferred an appeal before Sessions Court at Thane. The Sessions Court allowed Criminal Appeal No.110 of 2017 challenging impugned judgment of conviction passed by the trial Court. There were discrepancies in the agreement with regard to the date appearing therein. The agreement of sale indicate that, the sale deed was executed on 3rd May, 2007. The agreement bears the stamp date as 2nd May, 2007. Courts below has erroneously concluded that the date 3rd May, 2007 is a typing mistake. The complainant had not proved that, he had parted an amount of Rs.3,00,000/- to the Accused. Except his oral version there is no evidence on record to corroborate the said fact. The transaction of is of 2007. The cheque was issued in 2013. There is reason to believe that, the cheque was misused by the complainant. It is not established that, the cheque was issued for legally enforceable debt or liability. The cheque was given as security. The complainant has not fulfilled the conditions stipulated under Section 138 of N.I. Act and hence, the presumption under Section 139 of the said act cannot be invoked against the Applicant. The basic foundation to constitute the offence is not laid by the complainant and merely on the basis of presumption under Section 139 of N.I. Act, the Applicant cannot be convicted for the offence under Section 138 of said Act. The complainant had failed to explain the quantum of amount reflected in the cheque. According to complainant Rs.3,00,000/- were parted to Accused towards purchase of shop and that the deal was cancelled. However, there is no plausible reason as to why the cheque with an amount of Rs.4,00,000/- was issued by the Accused. Both Courts had overlooked the discrepancies in the evidence of witnesses and failed to appreciate the defence evidence. The agreement to sale is ambiguous. It is not certain on which day the agreement was executed. It is void as per Section 93 of the Evidence Act. As per notary stamp the agreement may be prepared on 2nd May, 2007. The date 3rd May, 2007 has been deliberately typed on the agreement. The agreement to sale no where mention that the Applicant is liable to pay Rs.4,00,000/- to complainant on breach of certain conditions stipulated in agreement to sale. There is no legally enforceable debt or liability of Rs.4,00,000/-. Section 139 of N.I. Act is applicable when the complainant fulfills the conditions laid down in Section 138 of N.I. Act. The object of Sections 138 and 139 of the N.I. Act is that the cheque issued for payment of admitted liability, the drawer must honour of liability. Under the N.I. Act, the initial burden of proof is on the complainant which he has to discharge in case of dishonor of cheque. The complainant has to prove that, there is debt or liability of complainant towards Accused. The complainant was required to prove that, he had transferred some money in the account of Accused. The complainant has to prove that, Accused has admitted the liability before issuing the cheque. The Applicant has not admitted debt or liability of Rs.4,00,000/-. He did not issue cheque for an amount of Rs.4,00,000/- in favour of complainant. There is no evidence to show that, the Accused owes debt or liability of Rs.4,00,000/-. As per Section 43 of the N.I. Act, the cheque taken without consideration creates no obligation of payment between the parties to the transactions. As per Section 58 of the N.I. Act, when a cheque has been obtained by complainant from the Accused by means of fraud the complainant is not entitled to receive any amount written on the cheque. The cheque was undated. The date was filled up by the complainant. The cheque is in two languages. The date on cheque is written in Marathi whereas the name of payee and the figure is written in English. This creates doubt about the claim of complainant. As per Section 9(2) of Specific Relief Act, the cause of action for suit for specific performance of contract for sale starts from last notice asking the owner to execute sale deed. In the present case the agreement to sale between the complainant and the Accused was executed and as per the said agreement, the complainant had purchased the Gala from the Applicant. There was no notice from the complainant to Applicant for execution of sale deed. The cause of action from last notice sent by the Respondent to Applicant for specific performance of contract. The consideration for cheque under reference has been shown on the basis of agreement to sale document. However, the agreement to sale bears two dates i.e. 2nd May, 2007 and 3rd May, 2007. It is not certain as to on which date the agreement was written. The payment of Rs.3,00,000/- claimed by the complainant is suspicious. The agreement is void as per Section 29 of Contract Act and Sections 93 and 94 of Indian Evidence Act. There is no consideration for the cheque under reference. There is no cause of action to file the complaint. In the other case benefit of doubt was given to the Accused. However, in the present case although the alleged liability was based on the same sale deed, the Applicant was convicted by the trial Court and the conviction was confirmed by the Appellate Court. As per the notary stamp, the agreement was written on 2nd May, 2007. The covenants of this agreement mentions that, the Respondent has to pay Rs.3,00,000/- to Applicant on 3rd May, 2007 as advance money. The complainant has taken signature of Applicant in advance on 2nd May, 2007. The Respondent has not paid advance money of Rs.3,00,000/- on 3rd May, 2007. He has not submitted any evidence except the agreement to sale showing that, he paid Rs.3,00,000/- to Applicant on 3rd May, 2007. As per the agreement the complainant was supposed to pay remaining amount of Rs.7,00,000/- after two years from the date of agreement i.e. upto 2nd May, 2009. However, the balance amount was not paid as he has not paid an amount of Rs.3,00,000/- as advance money on 3rd May, 2007. In the complaint it is stated that, the complainant was ready to pay balance consideration amount but the deal was cancelled by the Accused and he promised that, the amount would be refunded. Such information is not reflected in the agreement. The complainant has not produced any document in that regard. The complaint is time barred. The witness Murlidhar Dherange examined by complainant stated that, he do not remember on which date he was called by complainant for signing agreement to sale dated 2nd May, 2007. The witness also stated that, he do not remember at which place he has signed the agreement to sale dated 2nd May, 2007. It shows that, the witness was not present at the time of writing the agreement to sale dated 2nd May, 2007. The complainant has obtained signature of two witnesses without the knowledge of Applicant. The original document of agreement to sale was with complainant. The witnesses were called by complainant. They are relatives of complainant. The date was written on the cheque without the knowledge of Applicant. The liability for issuing cheque is not established. Hence, both the Courts below have committed error in convicting the Applicant for offence under Section 138 of N.I. Act.

6. Learned Advocate for Respondent No.1 submitted that, the Applicant has been convicted by two Courts. There is concurrent findings of the trial Court and the Appellate Court. No case is made out for interfering in the concurrent findings. The revisional Court has the powers to interfere in the concurrent findings, in the event it is found that there is patent illegality in the impugned orders. Both the Courts have assigned reasons for convicting and confirming the conviction. The agreement to sale has been proved in evidence. It is established that, the Accused intended to sell his shop premises to the complainant. Advance amount of Rs.3,00,000/- was given to the Accused. The said fact is spelt out in the agreement. The transaction was cancelled at the instance of the Accused. On cancellation of agreement the Accused was supposed to refund the amount of Rs.3,00,000/-. After a lapse of about five years the Accused agreed to pay an amount of Rs.4,00,000/- to the complainant and thereby issued the cheque for an amount of Rs.4,00,000/-. It was dishonored on account of

insufficient funds. The cheque was issued by the Accused. There is no dispute about the cheque being signed by the Accused. It was dishonored. Demand notice was sent to the Accused. No payment was made. Thus, all the procedural requirements to prosecute the Accused were complied by complainant. The Accused could not rebut the presumption under Section 139 of N.I. Act. The grounds urged by the Applicant are devoid of merits. The complainant had examined three witnesses in support of his case and proved that, the cheque was issued by the Accused in discharge of legally enforceable liability. There is no dispute that, agreement is signed by the Applicant and complainant. Merely on account of two dates appearing in the agreement, there is no reason to discard the claim by the complainant. Pursuant to cancellation of agreement the Accused was supposed to refund the amount. The complainant was required to follow up with the Accused for a long time and ultimately the Accused agreed to refund the amount and issued the cheque. The evidence of complainant and his witnesses could not be disturbed by Accused. The liability was proved. Both the Courts have rightly convicted by the Applicant.

7. I have perused the documents on record. The complaint for an offence under Section 138 of N.I. Act was filed on 6th

September, 2013. It is the case of the complainant that, he was doing business of fruits at APMC Fruit Market. The Accused is the owner of Gala No.N-1023, Sector- 19, Turbhe, Vashi, Navi Mumbai. The complainant was in search of Gala/Shop at APMC Fruit Market. Accused approached complainant in April-2007 and offered to sell his gala. The complainant was knowing the Accused for several years and decided to purchase said gala. They entered into an agreement on 3rd May, 2007. The complainant paid an amount of Rs.3,00,000/- to the Accused. The total consideration for sale of shop was Rs.10,00,000/-. The balance amount was to be paid within two years from the date of agreement. According to complainant he was ready to pay the balance amount. But the Accused requested the complainant to cancell the deal and the Accused promised that he would refund the amount with interest. The Accused then issued a cheque dated 1st July, 2013 for an amount of Rs.4,00,000/- which was dishonored with remarks fund insufficient. The complainant examined himself as CW-1 by tendering affidavit of evidence. The facts narrated hereinabove were deposed through the affidavit. It is pertinent to note that, the claim of the complainant is primarily based on the sale deed purportedly executed between the complainant and the Accused. The averment in the sale deed reflects that, the said document was executed on 3rd May, 2007. The first page of the document also bares the stamp dated as 2nd May, 2007. The concluding paragraph of the sale deed mentions the date as 3rd May, 2007. The said document was notarized and stamp appearing on the sale deed refers to the fact that, the said document has notarized on 2nd May, 2007. The covenant of the agreement indicate that, by way of advance an amount of Rs.3,00,000/- was given to the Accused by complainant. The question which falls for consideration is that the agreement was executed on 3rd May, 2007 as stipulated therein then how it was notarized on 2nd May, 2007 and whether the purported amount of Rs.3,00,000/- was parted on 2nd May, 2007 or 3rd May, 2007. The agreement was not registered and it was only notarized. The sale deed also mentions the fact that, it would be cancelled on refund of Rs.3,00,000/-. It is not clear as to was was the nature of this transaction. The parties has agreed to sell and purchase the shop/gala, than why it is stated that, the sale deed would be cancelled on refund of Rs.3,00,000/-. The case of the complainant before the Court is that the Accused had agreed to sell the property and an advance of Rs.3,00,000/- was parted to the Accused. Subsequently, the Accused had cancelled the transaction and agreed to refund the amount of Rs.3,00,000/-. The deposition of complainant runs counter to the contents of the sale deed. In the affidavit of evidence/examination-in-chief the complainant has stated that, he had entered into agreement to sale on 3rd May, 2007 and paid an amount of Rs.3,00,000/- to the Accused. The agreement was signed before two witnesses namely Hanuman Dhamale and Murlidhar Dherange. It was signed before the notary public. The Accused then cancelled the deal and towards refund the cheque dated 1st July, 2013 was issued. It is relevant to note that, the transaction was executed according to the complainant on 3rd May, 2007. The cheque was issued by Accused on 1st July, 2013. The amount of cheque is Rs.4,00,000/-. As per the sale deed the balance amount towards the consideration was to be made within a period of two years. All these aspects creates doubt about the transaction executed between the parties. It is not established that, the cheque was issued towards legally enforceable debt or liability. Section 139 of N.I. Act indeed relates to the presumption that, unless 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. However, the foundational facts about the liability towards which the cheque was allegedly issued are not established by the complainant, to draw the presumption under Section 138 of N.I. Act. The Supreme Court in the case of *Hiten P. Dalal V/s. Bratindranath Banerjee 2001 (6)*

*SCC 16,* it is observed that it is obligatory on the Court to raise presumption under Section 139 of N.I. Act in every case where factual basis for raising the presumption had been established. It introduces an exception to the general rule to the burden of proof in criminal cases and shifts the onus on to the Accused. Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against Accused beyond all reasonable doubt. The obligation on the prosecution may be discharged with the help of presumption of law or fact unless the Accused adduces evidence showing the reasonable possibility of the non existence of the presumed fact. In other words, provided the facts required to form the basis of presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when after considering the matter before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of prudent man.

8. The complainant was cross-examined at the instance of Advocate for the Accused. In the cross-examination, he stated that, he is not having any license of business. The Accused himself gave him cheque of Rs.4,00,000/- even though he had given him Rs.3,00,000/-. He denied that, the disputed cheque was taken to help the Accused to get the loan from the bank and that the cheque was given as a surety. He admitted that, he had not paid the amount of Rs.4,00,000/- to the Accused. He took the cheque from the Accused in the year 2013. In the year 2007, he was working as labour in APMC Market. He has no license to show that, he was working at APMC market. In the year 2007, he used to earn Rs.200/- per day from labour work in APMC market. He did not receive the possession of the property from the Accused. He did not file any suit for recovery of amount till receiving the cheque in 2013. He had given amount of Rs.3,00,000/- in cash on the day of

execution of agreement. The amount of Rs.3,00,000/- was given before notary Mrs. D'mello. The other witnesses Hanuman Dhamale and Murlidhar Dherange were present at the time of agreement. He denied that the cheque was given by way of security. CW-2 Balkrushna Shingare has stated that, the memo Exh.15 was issued by his bank Deccan Merchants Co-operative Bank Ltd., APMC branch, Navi Mumbai. It was dishonoured on account of fund insufficient. CW-3 Murlidhar Dherange was one of the witness whose presence allegedly the sale deed was signed. The said document purportedly beares his signature. He stated that, he knows the Applicant/Accused. He was present at the time of execution of sale deed. It is signed by the Accused in his presence. It is also signed by the complainant. The document bears his signature. The complainant had parted an amount in his presence to the Accused. In the cross-examination he stated that, he was called by the complainant to sign the document. He do not remember the date on which he was called for signing the document. He do not remember the date on which the amount was parted to the Accused. The evidence of this witness does not inspire confidence. Although, he deposed that the amount was parted by the complainant to the Accused in his presence, in the sale deed it is not categorically stated that the amount of

Rs.3,00,000/- was parted to the Accused in the presence of the witnesses. The sale deed at the bottom mentions date as 3rd May, 2007. The receipt of payment bears the date as 2nd May, 2007. The document is notarized on 2nd May, 2007. It is also pertinent to note that, the amount of Rs.3,00,000/- was allegedly given to the Accused in cash. The witnesses silent about the nature of transaction between the parties.

9. The defence has examined Dattatray Avati as defence witness. He has stated that, he knows complainant and Accused. He is not aware whether there was any transaction of sale deed between them. The Accused and the complainant has not executed any transaction in his presence.

10. The defence of the Accused which is also reflected in the written statement filed before the trial Court in accordance with Section 313 of Cr.P.C. is that the agreement to sale of Gala No.N-1023 was made by complainant on 2nd May, 2007. In the said agreement it was decided that, the complainant would pay to the Accused Rs.3,00,000/- on 3rd May, 2007. But the complainant has not paid the said amount. The complainant has not given any proof showing that, he has paid Rs.3,00,000/- to the Accused on 3rd May, 2007. The signatures of two witnesses were obtained on the

agreement subsequently they were not present at the time of execution of the sale deed on 2nd May, 2007. the original sale deed was kept with complainant. He had given a photo copy of sale deed to the Accused on which there were no signatures of witnesses. Witness Murlidhar Dherange and complainant are related to each other. The complainant had told him to keep ready his cheques as well as his wife's cheque so that he can arrange Rs.20,00,000/- from Deccan Merchants Co-operative Bank Ltd., and one cheque no.059133 for Rs.4,00,000/- and two cheques of wife no.051876 for Rs.2,00,000/- and no.051877 for Rs.2,00,000/- were kept on 3rd May, 2010 without writing dates on the three cheques in his bank. The complainant took away the cheques without his knowledge in 2010. The complainant wrote dates on the said cheques.

11. The Applicant had contended that, the Applicant and his wife were prosecuted for dishonor of other cheques and due to which the complainant had initiated the proceedings under Section 138 of N.I. Act. The case resulted in conviction. The Appellate Court had set aside the said conviction and acquitted the Accused.

12. The case of the complainant is doubtful. The existence of legally enforceable debt or liability has not been established. In

view of the discrepancies in evidence, the conviction is required to be set aside.

## ORDER

**i.** Criminal Revision Application No.31 of 2021 is allowed and disposed off;

**ii.** Impugned Judgment and order dated 10th August, 2017 passed by Judicial Magistrate First Class (Court No.7), Vashi at Belapur in Summary Criminal Case No.10318 of 2013 convicting the Applicant for offence under Section 138 of Negotiable Instruments Act and sentencing him to suffer simple imprisonment for two months and directing to pay compensation of Rs.5,00,000/- as well as Judgment and order dated 3rd March, 2020 passed by Additional Sessions Judge, Thane in Criminal Appeal No.111 of 2017 dismissing Criminal Appeal No.111 of 2017 are quashed and set aside and the Applicant is acquitted for the offence under Section 138 of Negotiable Instruments Act.

**iii.** If the Applicant has deposited any amount in the Court towards fine/compensation, the same shall be refunded to the Applicant.

**iv.** Criminal Revision Application stands disposed off.

**[PRAKASH D. NAIK, J.]**