

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL REVISION APPLICATION NO.163 OF 2022

Dilip Keshav Narule,

Aged : 47 Yrs., Occ.: Service,
R/o. Revenue Colony, Hanuman
Nagar, Behind Hotel Paradise King,
Chandrapur Road, Gadchiroli,
Tah. & Distt. Gadchiroli.

.... **APPLICANT**

// VERSUS //

**1. Smt. Kavita Madhukar Arjunker
(dead) legal heirs of respondent No.1**

1-a) Ku Prajakta Madhukar Arjunker,
Aged : 22 Yrs., Occ. : Education,

1-b) Nayan Madhukar Arjunker,
Aged : 18 Yrs, Occ.: Education.
Both R/o. Near Sai Mandir, Camp
Area, Rampuri Ward, Gadchiroli
Tah. & Dist. Gadchiroli.

.... **RESPONDENT**

Shri A. A. Dhawas, Advocate for the applicant
Ms Sanchita Sontakke, Advocate for the respondent

CORAM : G. A. SANAP, J.
DATED : 7th DECEMBER, 2022

ORAL JUDGMENT :

1. Heard.

2. RULE. Rule made returnable forthwith. Heard finally by consent of learned advocates for the parties.

3. In this revision application, challenge is to the judgment and order dated 19.05.2022, passed by the learned Sessions Judge, Gadchiroli, whereby the learned Sessions Judge dismissed the appeal filed by the applicant challenging his conviction and sentence awarded by the learned Judicial Magistrate First Class, Gadchiroli for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (For short 'N.I. Act'). Learned Judicial Magistrate First Class, Gadchiroli, vide order dated 16.02.2017/17.02.2017, had convicted the applicant for the offence punishable under Section 138 of the N.I. Act and sentenced him to suffer rigorous imprisonment for three months and to pay fine of Rs.35,00,000/- (Rs. Thirty Five Lacs Only) and in default of payment of fine to further undergo rigorous imprisonment for 20 days.

4. In this order, for the purpose of convenience, the parties would be referred by their nomenclature in the complaint. The applicant was accused and the respondent- late Smt Kavita Madhukar Arjunker was the complainant. According to the complainant, the accused had agreed

to sell plot No. 5, from Survey No. 851/2, situated at Mouza Gadchiroli, together with the construction, to the complainant and one Prashant Mukhruji Malode for a consideration of Rs.40,00,000/- (Rs. Forty Lacs Only). This transaction was given finality by executing an agreement on 15.02.2015. The complainant and Prashant Malode paid a sum of Rs.33,00,000/- (Rs .Thirty Three Lacs Only) to the accused. The remaining amount of Rs.7,00,000/- (Rs. Seven Lacs only) was agreed to be paid at the time of execution of sale deed. It is stated that for some reason or the other the accused canceled the transaction and as such, the agreement. In token of the refund of consideration he issued a Cheque bearing No. 003551, dated 28.02.2015, for Rs.25,00,000/- (Rs. Twenty Five Lacs only), drawn on his saving account maintained with Bank of Maharashtra, Branch Armori, in favour of late Smt Kavita Arjunker and issued two cheques, bearing Nos. 899853 and 899854, of Rs.4,00,000/- (Rs. Four Lacs only) each dated 23.03.2015, in favour of Prashant Malode, drawn on his account maintained with Chatgaon Branch of State Bank of India. The complainant deposited the cheque for encashment with the Bank. The cheque was dishonored and returned on the ground of insufficiency of funds in the account of accused. The complainant issued statutory notice on 04.07.2015 and made a demand of amount. The accused, despite receipt of the notice neither paid the amount nor

replied the notice. The complainant, therefore, approached the learned Judicial Magistrate First Class, Gadchiroli by filing criminal complaint under Section 138 of the N. I. Act.

5. Pursuant to the process issued by the learned Magistrate, the accused appeared before the Magistrate. The complainant examined herself and one witness by name Sandip Prabhakar Muttelwar, an attesting witness to the agreement to sell dated 15.02.2015. Learned Magistrate found the evidence sufficient to prove the offence under Section 138 of the N. I. Act against the accused. Learned Magistrate, therefore, convicted and sentenced the applicant, as above. The accused preferred the appeal in the Sessions Court. Learned Sessions Judge dismissed the appeal and maintained and confirmed the conviction and sentence. The correctness and legality of the said order has been questioned in this revision application.

6. I have heard Shri A. A. Dhawas, learned Advocate for the accused and Ms Sanchita Sontakke, learned Advocate for the complainant. Perused the record and proceedings.

7. Learned Advocate for the accused submitted that the accused had engaged inexperienced Advocate to defend himself and therefore, his case was not properly defended. Learned Advocate submitted that it has resulted into miscarriage of justice and therefore, on this ground the judgment and order passed by the Courts below are required to be set aside and the matter is required to be remanded back for fresh trial. Learned Advocate further submitted that oral and documentary evidence adduced by the complainant is not sufficient to prove the basic ingredients of Section 138 of the N. I. Act. Learned Advocate submitted that, therefore, the presumption, as postulated under Section 139 of the N. I. Act, would not get automatically invoked. Learned Advocate further submitted that the complainant has failed to establish that she was financially well off and capable to pay such a huge amount on the date of the alleged agreement. In the submission of the learned Advocate, therefore, the presumption, if any, attracted in this case would get automatically rebutted. Learned Advocate further submitted that the case of the complainant and Prashant Malode that they paid Rs.33,00,000/- (Rs. Thirty Three Lacs Only) on the date of agreement and therefore, the agreement was executed, is totally unbelievable. Learned Advocate in order to fortify this submission contended that there is no iota of evidence with regard to the cancellation of the agreement. In

the submission of the learned Advocate, therefore, the admitted and undisputed facts and circumstances would be sufficient to rebut the presumption invoked against him. Learned Advocate further submitted that the learned Sessions Judge has not properly considered the oral, documentary and circumstantial evidence and thereby committed a patent illegality. In the submission of the learned Advocate, for the above reasons judgment and order passed by the learned Sessions Judge has become perverse.

8. In order to seek support to his submission, the learned Advocate Shri A. A. Dhawas has relied upon the decision in the case of ***Krishna Janardhan Bhat .v/s. Dattatraya G. Hegde***, reported in, **(2208) 4 SCC 54**. In this case it is held that Section 139 merely raised presumption in favour of holder of cheque that the cheque has been issued for discharge of any debt or other liability. It is held that existence of legally recoverable debt is not a matter of presumption under Section 139. Relying upon decision in the case of ***Vinay Parulekar .v/s. Pramod Meshram***, reported in, **(2008) 2 Mh.L.J.115** and ***M. Ibrahim .v/s. Gurudas H. Borkar and Anr.***, reported in, **(2010) 5 Mh. L. J. 137**, it is submitted that the accused is not required to lead evidence in rebuttal. The accused can rely on the undisputed and admitted material and

circumstances on record and on the basis of the same he can rebut the presumption. In this case, it is held that in order to rebut the presumption it is not necessary for the accused to lead the evidence and disprove the fact. It is further held that weakness of the defence evidence certainly cannot be considered by the prosecution and the prosecution must stand on its own legs.

9. Learned Advocate for the complainant submitted that learned Sessions Judge has made threadbare analysis and appreciation of evidence and on doing so found the evidence reliable and worth credible to prove the basic ingredients of Section 138 of the N. I. Act. Learned Advocate relied upon the decision in the case of ***Rohitbhai Jivanlal Patel .v/s. State of Gujrat and Ant.***, reported in, ***(2019) 18 SCC 106*** and submitted that when the material on record is sufficient to draw the presumption against the accused, the factors relating to source of funds would not become relevant consideration. In this case, the Hon'ble Apex Court has held that when the presumption under Section 139 is drawn, the factors relating to want of documentary evidence in the form of receipts or accounts or want of evidence as regards source of funds are not of relevant consideration while examining if the accused has been able to rebut the presumption or not. Relying upon the decision in the case of ***P.***

Rasiya .v/s. Abdul Nazer and Anr., reported in, **2022 SCC OnLine SC 1131**, the learned Advocate submitted that on proof of facts postulated under Sections 138 and 139 the Court shall draw the presumption unless the contrary is proved. In this case, it is held that as per mandate of Section 139 of the N. I. Act 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 discharge, in whole or in part, of any debt or other liability. On the same point learned Advocate relied upon the decision in the case of *Kalamani Tex and Anr. .v/s. P. Balasubramanian*, reported in, **(2021) 5 SCC 283**. Learned Advocate for the complainant on the specific issue of financial capacity of complainant on the date of issuance of cheques heavily relied upon the decision in the case of *APS Forex Services Private Limited .v/s. Shakti International Fashion Linkers and ors.*, reported in, **(2020) 12 SCC 724**, wherein it is held that whenever the accused has questioned the financial capacity of complainant in support of his probable defence, despite the presumption under Section 139 of the N. I. Act with regard to the legally enforceable debt and such presumption being rebuttable, the onus shifts again on complainant to prove his financial capacity and at that stage, the complainant is required to lead the evidence to prove his financial capacity. Learned Advocate submitted that the evidence adduced on

record is sufficient to invoke the presumption against the accused, as provided under Section 139 of the N. I. Act. There is no material on record to rebut the presumption. Learned Advocate further submitted that while exercising the revisional jurisdiction the scope of inquiry is very limited. The appreciation of evidence cannot be done as a matter of right and in a routine manner. Besides, the learned Advocate submitted that the evidence has been properly appreciated by both the Courts below and therefore, the concurrent finding of facts arrived at by the Courts below does not warrant interference.

10. In order to appreciate rival submissions, I have gone through the record and proceedings and particularly the judgment and order passed by the learned Sessions Judge. It is undisputed that the accused has undergone the substantive sentence as well as sentence in default of payment of fine. Learned Sessions Judge has taken this fact into consideration while dealing with the prayer made for remand of the matter. In the opinion of the learned Sessions Judge, the retrial on remand can result into prejudice to the accused. It is observed that since the accused has undergone the substantive sentence then the further sentence on retrial would be hit by the principle of double jeopardy. I am in fully agreement with the conclusion arrived at by the learned

Sessions Judge. Even otherwise on this ground, the well reasoned judgment and order cannot be set aside and the matter cannot be remanded back. If the Courts start interfering with the well reasoned judgment and order on such ground, then this ground will be routinely raised before the Higher Court for setting aside the judgment and order. On both the counts, I am not convinced with the submission, on this point. Therefore, the submission deserves to be rejected.

11. Before proceeding to deal with the submissions touching the merits of the matter, it would be apposite to state that the scope of the revisional jurisdiction is very limited. The appreciation of the evidence, while exercising revisional jurisdiction, cannot be made as a matter of right and routinely. In order to undertake the exercise of threadbare re-appreciation of evidence the party concerned shall make out a case that the evidence adduced by the party has not at all been considered or the evidence has not been properly considered. It is to be noted that the exercise of re-appreciation of evidence cannot be undertaken on the ground that based on the same evidence two views are possible, one being supporting the contention of the aggrieved party. It is a settled legal position that in the exercise of revisional jurisdiction the evidence cannot be re-appreciated as a matter of course and for asking and to dislodge the

concurrent findings of the fact by undertaking such exercise. In my view, while appreciating submissions advanced by the learned Advocate for the accused the above legal position would be required to be borne in mind.

12. The Courts below on the basis of the evidence have held that the complainant has proved the execution of agreement by the accused. The Courts below have relied upon the evidence of the complainant and independent witness, who was an attesting witness to the agreement to record a finding that the contents of the agreement to sell have been proved. The submission that there is no separate document of cancellation of the agreement does not hold any water because the issuance of cheques within a period of one month from the execution of agreement in favour of the complainant and one Prashant Malode would be sufficient material to negative this submission. It is further pertinent to note that out of Rs.40,00,000/- (Rs. Forty Lacs only), the amount of Rs.33,00,000/- (Rs. Thirty Three Lacs only) were paid under the agreement, as an earnest money. The complainant and Prashant Malode, in the absence of cancellation of any agreement and the issuance of cheques, would have definitely sued the accused for specific performance of the agreement. In my view, issuance of cheques within a month from the date of execution of agreement is the important piece of

evidence of the cancellation of agreement. It is further pertinent to note that in the backdrop of the proof of the contents of the agreement there was dual responsibility on the shoulder of the accused. He was required to prove as to what happened to the agreement, which specifically mentioned that the amount of Rs.33,00,000/- (Rs. Thirty Three Lacs only) was paid to him and second, he was under an obligation to establish the reasons for issuance of cheques in favour of the complainant and Prashant Malode. The total amount of the three cheques issued come to Rs.33,00,000/- (Rs. Thirty Three Lacs only). Therefore, in my view, this circumstance cannot be used to rebut the presumption. On the contrary, this would fortify the contention of the complainant on the point of execution of the agreement and the subsequent cancellation of the agreement and the refund of the consideration by issuing the cheques in favour of the complainant and Prashant Malode.

13. The accused in the cross examination has made a feeble attempt even to deny his signature on the cheque. Learned Advocate for the complainant drew my attention to the Question No. 21 put to the accused in his Statement recorded under Section 313 of the Code of Criminal Procedure and the answer given to the said question. While answering this question he has stated that his two cheques were

misplaced from his bag. He felt that the cheques were in custody of the complainant, therefore, he made demand of the cheques from the complainant. It is to be noted that in order to substantiate his half-hearted defence, the accused was required to step into the witness box and make a categorical statement that the cheque does not bear his signature. If it is the case of the accused that the cheque does not bear his signature then he would have made request to the Court to refer the cheque for examination to the handwriting expert. In my view, over all conduct of the accused is not consistent with his defence.

14. There is one more circumstance to reject this half-hearted defence of the accused. There is ample evidence on record that the cheque was presented for encashment by the complainant to the Bank from the account of the accused. The Bank returned the cheque with the return memo. In the return memo, the Bank informed the complainant that there was no sufficient amount in the account of the accused to honor the cheque. The cheque is at Exhs. 11. Exh. 13 is the statutory notice issued by the complainant to the accused. Notice was received by the accused on 06.07.2015. The accused did not reply the said notice. He did not pay the amount of cheque. It is to be noted that this is a strong circumstance against the accused. The amount of the cheque and

the relevant facts related there to mentioned in the notice would have given a wake up call to the accused. It is to be noted that if the accused had not issued cheques and the cheques had been forged, as sought to be made out by him, then by applying the standard of prudent person, he would have immediately protested this act of the complainant by lodging the police complaint and also by giving a categorical reply to the said notice. In my view, this fact if appreciated properly would show that it negatives the contention of the accused.

15. The oral evidence on record is sufficient to accept the case of the complainant with regard to the execution of the agreement at Exh. 10 by the accused. The facts stated in the agreement clearly indicate that the amount of Rs.33,00,000/- (Rs. Thirty Three Lacs only) was paid by the complainant and Prashant Malode to the accused. This fact has been fortified by issuance of the cheques of the same amount in favour of the complainant and Prashant Malode. On the basis of this evidence, the complainant has proved that she received cheque for the discharge, in whole or in part, of the liability of the accused. In the backdrop of this evidence, the presumption postulated under Section 139 of the N. I. Act would be required to be invoked against the accused. The accused has not adduced any oral or documentary evidence to rebut this

presumption. His conduct is not consistent with the case sought to be made out for the first time in the cross examination. In the facts and circumstances, on both the counts the submissions advanced by the learned Advocate for the complainant are supported by the law laid down in the decisions relied upon (supra). In the fact and circumstances, in my view, the revision application seems to be one more feeble attempt on the part of the accused. The consideration of the material on record clearly indicates that the said material has been properly considered and appreciated by the Courts below. On going through the judgment and order passed by the learned Sessions Judge, I am fully satisfied that no error or perversity has been committed while appreciating the material on record. The well reasoned judgment does not warrant interference. As such, I conclude that there is no substance in the revision.

16. The criminal revision application, therefore, stands **rejected**.
Rule stands discharged.

(G. A. SANAP, J.)

Namrata