

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

CRIMINAL REVISION APPLICATION NO. 162 OF 2022

Manoj S/o Ghansham Birla,
Age : 52 Years, Occ. Proprietor Ram Agro Sale,
R/o. Marwadi Lane, Near State Bank, Erandol
Tq. Erandol, District Jalgaon. .. Applicant
(Ori. Accused)

V E R S U S

1. Rajkumar Ganpati Manudhane,
(Since Deceased through his legal heirs)

1a) Smt. Meena Rajkumar Manudhane,
Age : 52 Years, Occ. Household,

1b) Kum. Shruti Rajkumar Manudhane,
Age : 27 Years, Occ. Household,

Both are R/o. Marwadi Lane,
Near State Bank, Erandol
Tq. Earndol, Dist. Jalgaon
2. The State of Maharashtra. .. Respondents
(Ori. Complainant)

....
Advocate for the applicant : Ms. Rashmi S. Kulkarni,
Mr. Uday S. Malte, Advocate for Respondent Nos.1-A to 1-B
....

CORAM : S. G. MEHARE, J.

Reserved on : 13.02.2023

Pronounced on : 25.04.2023

JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.

2. The revision arises from Judgments and orders of learned Judicial Magistrate, First Class, Erandol, District Jalgaon in Summary Criminal Case No. 74 of 2014 dated 17.07.2018 and learned Sessions Judge, Jalgaon in Criminal Appeal No. 117 of 2018 dated 02.05.2022.

3. The petitioner was an accused before the trial Court and respondent No.1 was the complainant. They would be referred to as the 'accused' and the 'complainant'.

FACTS IN BRIEF

4. There was no dispute that the complainant and the accused knew each other. The complainant paid the accused a hand loan of Rs. 4,00,000/- on November 23, 2010. After the demand at various times, the accused issued a cheque in dispute of Rs. 4,00,000/- to the complainant on 7.1.2014 towards the legally enforceable debt. The complainant presented the above cheque to the Bank on 11.01.2014; however, it was dishonoured for want of sufficient funds in the bank account of the accused. The accused was served with a statutory notice dated 06.01.2014.

5. On 01.02.2014, the accused replied to the statutory notice. He came with a defence that the cheque in dispute was issued as a security towards the hand loan. He repaid the hand loan by

cheque of Rs. 80,000/- and the remaining by cash. Hence, nothing remained to be paid. In the circumstances, there was no legally enforceable debt. The complainant conspicuously did not state the date of the hand loan and the date of issuing the cheque. The alleged demand for a hand loan was time-barred. Hence, no offence is made out under Section 138 of the Negotiable Instrument Act. There was no express acknowledgment of the time-barred loan. However, both the courts erroneously declined the defence and held the accused guilty and convicted for the offence punishable under Section 138 of the Negotiable Instrument Act.

6. The learned counsel for the accused has raised various legal grounds. She vehemently argued that the learned trial Judge erroneously held that since the accused had issued a cheque in favour of the complainant, has made a promise to pay the time-barred debt. The learned trial Court failed to consider that the complainant was conspicuously silent on the date of the alleged cheque issued to the complainant. The complainant did not rebut the probable defence of time-barred debt. After issuing the cheque in dispute, the accused paid Rs. 80,000 by cheque. Therefore, without any endorsement on the negotiable instrument about the repayment of Rs. 80,000/- the cheque was not negotiable and no offence under section 138 of the N.I. Act is

made out. This material aspect has also been ignored. She has also argued that the learned Sessions Judge erroneously held that the defence taken in the reply and one taken in the written notes of arguments are contrary to each other and thus are not the probable defence. The learned subordinate appellate Judge also erroneously held that once the presumption is raised against the accused, he should enter the witness box and depose. Having failed to do so, he failed to rebut the presumption.

7. In short, she argued that a debt claimed to be a legally enforceable debt was barred by limitation. The alleged cheque was delivered as security. Hence, the complainant could not encash it. It was a blank cheque. Since the part payment of Rs. 80,000/- was made, and without any endorsement about the part payment on the negotiable instrument, it was not a legally enforceable debt and no offence is made out. To bolster her argument, she would rely upon the following cases laws:-

- (i) *Dashrathbhai Trimbakbhai Patel Vs. Hitesh Mahendrabahi Patel and another reported in 2022 SCC Online SC 1376*
- (ii) *Vijay Vs. Laxman and Others reported in (2013) 3 SCC 86*
(Criminal Appeal No. 261 of 2013)
- (iii) *Kamala S Vs Vidyadharan M.J. and Others reported in (2007) 5 SCC 264*

- (iv) *Kamalaksha Laxman Prabhu Vs. S.G. Mayekar reported in 2008 DGLS (Cri) Soft 560*
- (v) *Ashwini Satish Bhat Vs. Jeevan Divakar reported in 2000 Bom CR (Cri) 9*
- (vi) *Shivjiram Dhannalal Marwari and another Vs. Gulabchand Kaluram Marwari reported in AIR 1941 NAG 100*
- (vii) *Balkrishna Mansukhram Vs. Jayshankar Narayan reported in AIR 1938 Bom 460*
- (viii) *Pioneer Drip System Pvt. Ltd Vs. Jain Irrigations system reported in (2010) 2 Mhlj 458.*
- (ix) *Ramkrishan Urban Co-op Credit Society Vs. Rajendra Bhagchnna Warma reported in MANU/MH/0211/2010 Criminal Appeal No. 989 of 2009 decided on 16.02.2010*

8. Per contra, the learned counsel Mr. U. S. Malte, for the complainant, has vehemently argued that the debt was legally enforceable. The accused did not deny the hand loan and the amount of the hand loan. The accused did not enter the witness box to have an opportunity for the complainant to rebut his defence. The cheque of Rs. 80,000/- allegedly issued towards the hand loan of Rs. 4,00,000/- as alleged, had no relevance, as it was issued against the separate and independent transaction of another hand loan. There is no evidence of paying the remaining balance, as alleged. To prove this contention, he referred to the

cross-examination of the complainant. Referring to the admission, he has argued that the cheque in dispute for Rs. 4,00,000/- was correctly presented for legally enforceable debt. He also argued that though the debt was time-barred when the cheque in dispute was issued, such a promise or agreement is valid and, therefore, enforceable. To bolster his argument, he relied on the following cases:-

- (I) Criminal Application Nos. 2933 of 2007, 2934 of 2007, 2935 of 2007 and 2936 of 2007 Mr. Dinesh B. Chokshi Vs. Rahul Vasudeo Bhatt and others, decided by The Division bench at the principal seat of this High Court.
- (ii) A.V. Murthy Vs. B. S. Nagabasavanna, 2002 A.I.R. SCW 694 referred to in the case of Dinesh Chokshi.
- (iii) National Insurance Co. Ltd Vs. Seema Malhotra 2001 AIR (SC) 1197
- (iv) Oriental Bank of Commerce Vs. Prabodh Kumar Twari(SC) Criminal Appeal No. 1260 of 2022 (Arising out SLP (Cri) No. 9836 of 2019) decided on August 16, 2022.

9. The rival claims and arguments of the respective parties emerge the following points for determination:-

- (I) Whether the accused has to enter into the witness box to rebut the presumption under the Negotiable Instruments Act?

- (ii) Whether the cheque issued for time-barred debt is legally enforceable?
- (iii) Whether the cheque without endorsement about the part payment of the debt is not negotiable and dishonour of such cheque does not constitute an offence under the N.I. Act.?
- (iv) Whether the cheque in dispute was issued for legally enforceable debt?

As to point No.1 :-

10. Admittedly, the accused did not enter the witness box to rebut the presumption under Sections 118 and 139 of the Negotiable Instruments Act. Whether the accused has to enter into the witness box is essential to rebut the presumption *is no more res intergra*.

11. The Hon'ble Supreme Court in **Bharat Barrel and Drum Manufacturing Co. Vs. Amin Chand Pyarelal** **MANU/SC/01223/1999** observed in paragraph No.11, which reads thus:-

"11. Though the evidential burden is initially placed on the defendant by virtue of Section 118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so

rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence on or presumptions of law and fact. One such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant who has also the legally burden."

12. The Hon'ble Supreme Court in the case of **Krishna Janardhan Bhat Vs. Dattatraya G. Hegde MANU/SC/0503/2008 L (2008) 4 SCC 54** held that the accused is not required to step into the witness box.

13. In view of the settled law, the accused need not enter into the witness box to rebut the presumption under Sections 118 and 139 of the Negotiable Instrument Act. The Court agreed with the arguments of the learned counsel for the accused that the subordinate Appellate Court erred in holding that the accused did not enter into the witness box and did not offer himself for cross-examination to his adversary.

As to point No.2 :-

14. The learned counsel for the accused has vehemently argued that the complainant conspicuously did not state the date of hand

loan as well as the date of issuing the cheque in dispute. She tried to convince the Court that it was a blank cheque delivered to the complainant as a security. The hand loan of Rs. 4,00,000/- was repaid partly by a cheque of Rs. 80,000/- and the remaining by cash, from time to time. Admittedly, the parties had no written document or agreement about a hand loan and its repayment. As against the defence, the complainant has explained that the cheque issued for Rs. 80000/- was an independent transaction, and there is no concern with the amount of debt mentioned in the disputed cheque. The complainant pleaded that he paid Rs. 4,00,000/- as a hand loan to the accused on 23.11.2010. It is also pleaded that the cheque in dispute was given to him on 7.1.2014. It is not in dispute that any amount due is to be recovered within three years from the date of payment of the money. The defence is that the cheque in dispute *prima facie* appears to have been issued after three years from the date of the payment of Rs. 4,00,000/-. Therefore, it was not an acknowledgment nor the admission of debt. To prove such a defence, the learned counsel for the accused has taken shelter of section 25(3) of the Indian Contract Act and relied on the case of **Shivjiram Dhannalal Marwari and Another Vs. Gulabchand Kalooram Marwari AIR 1941 Nagpur** cited (supra), wherein the Division Bench at Nagpur Bench held that *promise to pay under Section 25(3) must be in writing. It was also observed that an acknowledgment signed*

after the expiration of the period prescribed by Section 19 of the Limitation Act cannot be brought within time by application of Section 4.

15. She further relied on the case of **Balkrishna Mansukhram Vs. Jayshankar Narayan reported in AIR 1938 Bom 460** in which it has been observed that *for the purpose of Section 25(3) of the Contract Act, there must be an express promise as opposed to an unconditional acknowledgment involving an implied promise to pay.*

16. In reply, the learned counsel for the complainant relied on the case of **Dinesh B. Chokshi Vs. Rahul Vasudo Bhatt**, which was referred to by a Single bench to the Division bench on the issue raised about the acknowledgment of the time-barred debt by issuing the cheque, wherein the case of **A.V. Murthy vs. B. S. Nagabasavanna** of the Supreme Court was referred to, and High Court in paragraph no.15 observed thus;

“Though on the date of making such promise by issuing cheque, the debt which is promised to be paid may be already time barred, in view of sub-section (3) of Section 25 of the Contract Act, promise/agreement is valid and, therefore, the same is enforceable. The promise to pay a time barred debt becomes a valid contract as held by the Apex Court in the case of A.V. Moorthy (supra) Therefore the first question will have to be answered in affirmative..

15. The Hon'ble Division Bench had framed the first question as follows;

(i) Does the issuance of a cheque in repayment of a time barred debt amounts to a written promise to pay the said debt within the meaning of section 25(3) of the Indian Contract Act?

16. The above question was answered in the affirmative.

17. In view of the ratio laid down in the case of Dinesh (supra) the Court does not find force and substance in the argument of learned counsel for the accused that the debt was time-barred and the cheque in question did not amount to a written agreement to pay the debt.

18. The defence of issuing the cheque in dispute as security is two fold. Firstly, the amount mentioned in the cheque in dispute was higher than the debt, and secondly, it was a blank cheque, and the complainant misused it.

19. Sections 20, 87 and 139 of the Negotiable Instruments are relevant to the issuance of the blank cheque. The Hon'ble Supreme Court, in the case of **Bir Singh Vs. Mukesh Kumar 2019 4 SCC 197** held thus;

“33. A meaningful reading of the provisions of the Negotiable Instruments Act, including, in particular,

Sections 20,87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

34. If a signed blank cheque is voluntarily presented to a payee towards some payment, the payee may fill up the amount and other particulars. This is itself would not invalidate the cheque. The onus would still on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.”

20. The Hon’ble Supreme Court, in the case of **Dashrathbhai Trimbakbhai Patel** relied upon by the accused cited (supra) has observed thus;

33. Under Section 56, read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note appended to the

cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138. Thus, when a part-payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment. In view of the discussion above, we summaries our findings below :

- (i) For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation*
- (ii) If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque.*
- (iii) When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted.*

(iv) The first respondent has made part-payment after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds and

(v) The notice demanding the payment of the 'said amount of money' has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to section 138 need to be fulfilled in addition to the ingredients in the substantive part of Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided."

21. The accused did not deny his signature on the cheque. The burden was on the accused to prove that the cheque amount shown in the cheque in dispute was higher than what the accused had promised to pay. Similarly, he was to prove that he made the part payment after issuing the cheque in dispute. He has tried to bring material on record that Rs. 80,000/- was repaid for the debt of Rs. 4,00,000/- by issuing a separate cheque. However, he failed to prove that he made part payment of Rs. 80,000/- by cheque and the remaining by cash from time to time towards the hand loan. The Court has already declined his defence of repayment, as the complainant has proved that it was a separate transaction. The

accused did not deny that he did not receive a hand of Rs. 4,00,000/-; therefore, it is difficult to accept that the amount mentioned in the cheque in dispute was higher, and the accused did not indorse on the cheque about the part payment. Without such evidence, it is hard to believe that the cheque in dispute was not negotiable and not for legally enforceable debt.

22. The accused did not deny the hand loan. He also did not deny the issuance of the cheque in dispute after getting the hand loan. The cheque in dispute was admittedly issued against the failure to repay the hand loan. He did not prove the repayment. Hence, that gave a right to the complainant to encash the cheque. Considering these facts, it would not be accepted that the cheque in dispute was issued as security. The points for determination have been answered accordingly.

23. After going through the impugned judgments and orders of the trial and subordinate appellate Court, this Court did not find any error of law that warrants inference. The revision is without any substance. Hence, the following order:-

ORDER

- (i) The revision stands dismissed.
- (ii) No order as to costs.
- (iii) The applicant shall surrender to bail bonds and appear before the learned Judicial Magistrate First Class,

Erandol, District Jalgaon, for the execution of sentence on or before 4th May 2023.

- (iv) Bail bond and surety bond stand cancelled.
- (v) The surety stands discharged.
- (vi) Record and proceedings be returned to the learned Judicial Magistrate F.C. Erandol, District Jalgaon.
- (vii) Rule stands discharged.

**(S. G. MEHARE)
JUDGE**

24. The learned counsel for the petitioner prayed to continue the earlier order of suspension of sentence for six weeks.

25. The learned counsel for the complainant/respondent has strongly opposed the application contending that there are two concurrent judgments of conviction against the applicant. It is a financial offence. There is no provision to continue the suspension order.

26. This is a third Judgment including two concurrent Judgments of the trial as well as appellate Courts against the accused. The revision has been considered on merits. The Court is of the view that the discretion under Section 389 of the Cr.P.C cannot be

exercised for continuing the earlier suspension order. Hence the prayer of suspension of sentence stands dismissed.

(S. G. MEHARE)
JUDGE

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