

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

CRIMINAL REVISION APPLICATION NO.334 OF 2022
WITH
CRIMINAL APPLICATION NO.3845 OF 2022
IN CRIMINAL REVISION APPLICATION NO.334 OF 2022

Shaikh Suleman Shaikh Rustam,
Age 45 years, Occu. Agriculture,
R/o Shajapur, Post. Ghanegaon,
District Aurangabad.

... Applicant.

Versus

Lata Anil Gangwal,
Age 56 years, Occu. Household,
R/o 32, Jawahar Housing Society,
Jawahar Colony, Aurangabad.
Through her Power of Attorney Holder
Dr. Anil Hansraj Gangwal,
Age 58 years, Occu. Medical Practitioner,
R/o 32, Jawahar Housing Society,
Jawahar Colony, Aurangabad.

... Respondent.

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Advocate for Applicant : Mr. V. D. Sapkal (Senior Counsel) i/b
Mr. Gore Ravindra Vitthal.
Advocate for Respondent : Mr. Patni Pramod Fulchand.

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CORAM : S. G. MEHARE, J.

RESERVED ON : 28.02.2023
PRONOUNCED ON : 19.04.2023

JUDGMENT :-

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

2. The applicant takes exception to the judgments and orders of conviction of the learned Judicial Magistrate First Class (Court No.16), Aurangabad, in SCC.No.3149 of 2019, dated 06.05.2022 and confirmed in Appeal No.69 of 2022, dated 16.11.2022 by the learned Additional Sessions Judge, Aurangabad.

3. The "applicant" would be referred to as an "accused" and the "respondent" as the "complainant" for convenience.

FACTS :

The complainant had a case that the accused approached her through estate broker Shri. Bhimchand Govindrao Desai to purchase her landed property situated at Dhanegaon, Taluka Gangapur. After negotiation, the consideration was agreed upon and settled at Rs.56,50,000/-. An agreement to sale was also executed, and the mode of payment was by cheque. Hence, cheque numbers were written in the agreement. However, the accused did not sign the agreement. She, the broker and another witness signed it. The original agreement was handed over to the accused, and its copy was retained. The sale was to be executed within two months. Before executing the sale deed, the accused requested the

complainant to show consideration for Rs.36,50,000/-. He promised to pay the balance consideration of Rs.20,00,000/- in cash within a short period after selling some of the plots out of her land sold to him. He agreed if he would not pay the balance consideration in cash within fifteen days, the cheque bearing No.125856 drawn on the Cosmos Bank (disputed cheque) be presented for encashment. Surprisingly, the accused issued a notice to the complainant stating that the agreed consideration was Rs.36,50,000/- and the cheque in dispute was delivered as a security to the complainant, as it was their first transaction. His notice was replied. The cheque in dispute was presented to her bank for encashment on 21.12.2018. However, the accused had instructed the bank to 'stop payment'. Hence, on 15.01.2019, a statutory notice was served upon the accused. The accused did not reply to the said notice.

4. It was a defence that the cheque in dispute was delivered to the complainant as a security and never intended to be encashed. Therefore, there was no legally enforceable debt.

5. The learned senior counsel appearing for the accused has vehemently argued that both courts erred in law in believing the complainant's case that the cheque in dispute was given

towards the balance consideration. The agreement of sale dated 06.03.2018 was unregistered and signed by the complainant only. Since the accused did not sign, it was an incomplete agreement that did not bind him. These circumstances prove that the cheque in dispute was given as a security. The complainant nowhere mentioned whether the cheque in dispute was post-dated or otherwise. He raised a question. How the sale agreement can be executed after the execution of the sale deed. The cheque in dispute also became ineffective. The complainant wrote the false contents and date on the cheque with ill intent. The power of attorney of the complainant has admitted that on the date of the execution of the sale deed, there was no separate agreement about the balance consideration of Rs.20,00,000/- to be paid in cash.

6. He has referred to Illustration(b) of Section 63 of the Indian Evidence Act and vehemently argued that the Xerox copy of the agreement to sell was secondary evidence, and unless the original was produced before the Court, secondary evidence was inadmissible in evidence. However, both Courts erroneously received it in the evidence.

7. The learned senior counsel relied on the case of *Joseph Vilangadan Vs. Phenomenal Health Care Services Ltd. and another ; 2010 (5) AIR Bom. R 554*, and vehemently argued that the limitation starts from the date of the delivery of the cheque. Therefore, the claim of the applicant is barred by limitation. The arguments of the learned senior counsel for the accused mainly revolve around the agreement to sell, which was not signed by the accused, and the cheque in dispute was ineffective. Learned senior counsel for the accused prays to allow the revision application and set aside the impugned judgments and orders.

8. Per contra, learned counsel Mr. Patni for the complainant has vehemently argued that Section 20 of the N.I. Act gives a right to the holder in due course to complete the transaction. Even if it is assumed that the cheque was blank, the accused did not deny his signature. He referred to the said cheque at Exh.9 and argued that the accused had counter-signed the alterations in the said cheque. Therefore, it cannot be said that the accused had a voice to say that its contents were written falsely. He knew the issuance of the cheque in dispute. The amount filled in the cheque in dispute was also not disputed. Once the delivery of the cheque is proven no question to claim

that the cheque was time-barred. The presumption under Sections 118 and 139 of the N.I. Act, are in favour of the complainant. The accused was to prove his defence that the cheque in dispute was delivered as security at least under the doctrine of a preponderance of the probability. The accused had to get the sale deed from the complainant, then what reason he had to give the cheque as security? The defence was apparently false and an afterthought. The terms of the agreement bind the accused for the reason that it was the document agreeing the terms of the purchase of the land. The accused admitted in cross-examination the contents of the cheque in dispute. The accused had no defence of novation of contract before either of the Courts. It was a new ground raised for the first time. It is a mixed question of facts and law, hence, cannot be raised for the first time before a revisional Court. He supported the impugned judgments and orders.

9. To bolster his argument, he relied on *Nav Bharat Press (Bhopal) Pvt. Ltd. and another Vs. Nootan Agencies Nagpur and another ; (2019) 6 Mh.L.J. (Cri.) 64*. In this case, the ratio has been laid down that the scope of revision under Section 401 is limited and the revision could be allowed unless the findings rendered by the Courts below were found perverse or

any jurisdictional error was found in the orders of the Courts below.

10. In the case of ***Ripudaman Singh Vs. Balkrishna ; (2019) 4 SCC 767***, it has been held that though the agreement to sell does not create interest in immovable property, it constitutes an enforceable contract between the parties. The cheques issued in pursuance of the agreement to sell qualify as being towards legally enforceable debt or liability and amenable for prosecution under Section 138 in case of dishonour.

11. In the case of ***T. Nagappa Vs. Y. R. Muralidhar ; 2008 (6) Mh.L.J. 515***, it has been held that by reason of Section 20 of the N.I. Act only a right has been created in the holders of the cheque subject to the conditions mentioned therein. Thereby, only a *prima facie* authority is granted, *inter alia*, to complete an incomplete negotiable instrument. The provision as a rider, namely no person other than a holder in due course shall recover from the person delivering instrumentation anything in excess of the amount intended by him to be paid therein.

12. In the case of ***Purushottam S/o Maniklal Gandhi Vs. Manohar K. Deshmukh ; 2007(1) Mh.L.J. 210***, it has been held that it is open to a person to sign and deliver a blank and

incomplete cheque and is equally open for the holder to fill up blanks and specify the amount therein.

13. In the case of *Bhawish Chand Sharma Vs. Bawa Singh 2018 ; DGLS (Delhi) 413*, it has been held that the agreement, namely the sale of the property, is not prohibited by law. The mutual agreement between the parties to disclose only a part of the consideration under the sale deed may attract other consequences for the parties. However, that itself does not render the underlined transaction unlawful. Pertinently, it is not claimed that at the relevant time, there was a bar to the payment of consideration in cash and the said bar and the effect of invalidating the transaction.

14. *In case of M/s Shakti Tubes Ltd. Vs. State of Bihar and others ; 2010 AIR SCW 2842*, it has been held that the novation and alteration of contract is a mixed question of law and facts. Therefore, it cannot be allowed to be raised for the first time at the final hearing of the appeal before the Supreme Court.

15. In the case of *Yogendra Bhagatram Sachdeo Vs. State of Maharashtra and another, 2003 STPL 3392 Bombay*, it has been held that where the demand notice has not been replied it

can raise a presumption against the accused that he had no defence.

16. The sale transaction and issuing of the cheque in dispute is not disputed. The accused has the defence that he did not sign the alleged agreement hence did not bind him, and the cheque in dispute was given as security as it was their first transaction. Since the sale deed was executed, the agreement to sale is inexecutable.

17. The following points emerge from the arguments of the respective counsels.

- (i) Whether agreement of sale not signed by the buyer is inexecutable against him?
- (ii) Can the agreement to sale become inexecutable after the execution of the sale deed, and consequently, the cheque delivered at the time of agreement cannot be cashed ?

18. The Hon'ble Supreme Court in *Aloka Bose Vs. Parmatma Devi & others ; AIR 2009 Supreme Court 1527*, in Paragraph No.7 has specifically observed that the agreement to sell can be oral or it can be signed by the vendor executing the document

and delivering it to the purchaser who accepts it. A written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid. In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract.

19. It is admitted that the accused did not sign the said agreement to sale. But the original was handed over to the accused, and he had received it. PW.2 Desai, the broker, proved the agreement to sale. The accused admitted in his cross-examination that all four cheques arising out of the sale transaction were delivered simultaneously. He did not deny the contents of the cheque in dispute. The original agreement to sell was in the custody and possession of the accused. Therefore, before leading the evidence to prove the said agreement to sell, a notice to produce original agreement was served upon the accused. He has opposed it and denied that he did not possess any such agreement. However, the Trial Court permitted to lead the secondary evidence of the agreement to sell.

20. The party claiming to lead the secondary evidence has to prove, as per Section 65 of the Indian Evidence Act, that the original is in the possession or power of the person against whom the document is sought to be proved or any person legally bound to produce it and when after the notice to produce documents mentioned in Section 66, such person does not produce it. The secondary evidence may be permitted to lead.

21. C.W.2 was cross-examined thoroughly. He deposed that the original of the said document was given to the accused. His evidence that he was the commission agent for the transaction has gone unchallenged. The complainant had proved that the said agreement was in possession and power of the accused. In cross-examination, the accused admitted that the negotiation were done in the hospital of the power of attorney at Waluj. Therefore, the Court has validly received the said document Exh.32 in the evidence.

22. In the agreement Exh.32, the cheque numbers were mentioned. The agreement was to be completed within two months, but it appears that it was completed after around seven months. Before fifteen days were over, the accused

issued a notice alleging that the cheque in dispute was given as security, and he had an apprehension of its presentation in the bank. In the notice, he did not mention the agreement to sale. The complainant replied to the said notice and took a stand that the agreement to sale was executed. The accused neither gave a reply to the said reply nor denied that there was no agreement as such. Considering these facts with the ratio laid down in the case of Aloka Bose (*supra*), it cannot be said that the agreement to sale became infructuous and inexecutable.

23. Let us now test the defence of issuing the undated cheque in dispute as 'security'. The admission of the accused that he put his small signature below the alterations in the said cheque speaks lot. He explained that as it was his first transaction with the complainant. Hence, he had issued the cheque in dispute as 'security'. It has been correctly falsified by the arguments of the learned counsel for the complainant that when the accused had to get the sale deed, then what reason he had to give a cheque as security? His explanation does not inspire confidence or appear probable.

24. Section 20 of the N.I Act deals with an Inchoate stamped instrument. It has been provided in the said section that where

a person delivers a signed negotiable instrument, either wholly blank or having written incomplete, he thereby gives *prima facie* authority to the holder thereof to make or complete by writing the contents, including the amount, provided such amount shall not exceed the amount agreed by the person issued such cheque. In other words, issuing a blank signed cheque give authority to its holder to fill in the blanks but should not exceed the amount agreed to be paid.

25. To believe the case of issuing cheques as security, the nature of transactions assumes importance. The cheque may be given as security where the drawer has to perform his part of the contract in terms of the agreement in the agreed time against borrowing something. In such case, the drawee cannot present the cheque issued in advance till the time of performing the contract is over. Security is furnished against the money or other thing borrowed from the lender. It may be by pledging or mortgaging movable or immovable property, including a negotiable instrument. In the case of furnishing the security, the borrower has to return or repay the thing he has borrowed or taken from the lender as per the agreement. In agreement to sale of the immovable property, both parties have to perform their part of the contract. It is an agreement of

transfer of immovable property for consideration. The purchaser has to pay the agreed consideration, and the seller has to transfer his property or thing, whatever it may be. It's an enforceable agreement. It is governed under the Specific Relief Act. Considering the nature of the agreement and transaction between the complainant and the accused it is hard to believe that the accused had any reason to issue the cheque in dispute as security. In these facts, the defence appears not probable. The ratio laid down in the case of *Purshottam (supra)* and *T. Nagappa (supra)* is squarely applicable to the case at hand.

26. The conduct of the accused reveals that he knew that the cheque was likely to be presented for encashment. Hence, he tactfully issued a notice through the lawyer demanding the cheque in dispute back. If the cheque in dispute was issued as a security, the accused had no reason to keep it with the complainant after the sale deed. He ought to have taken it back before or after the execution of the sale deed. But he did not do so. It is also not the case that the cheque amount was in excess of the agreed amount of the sale transaction to prove the defence that the blank signed cheque was issued as security and the complainant used it falsely. It is believed that the cheque in dispute was issued towards the balance

consideration, and the accused failed to pay the said consideration in cash. Hence, it was correctly presented for encashment. Non-replying to the statutory notice is also one of the circumstances against the accused.

27. Both courts have considered the entire circumstances and the conduct of the accused and rightly concluded that the offence under Section 138 of the N.I.Act, is made out.

28. Considering the arguments advanced by the respective counsels thoroughly and going through the impugned judgments and orders, the Court did not find errors on the face of the record. Both judgments and orders are legal, proper, and correct and do not warrant interference. Hence, the following order:

ORDER

- (i) Criminal Revision Application stands dismissed.
- (ii) The accused to surrender his bail bonds and appear before the learned Judicial Magistrate First Class, Court No.16, Aurangabad, on or before 06.05.2023 till then he shall not be arrested.

- (iii) The bail bonds stand cancelled and surety stands discharged.
- (iv) Rule stands discharged. No order as to costs.
- (v) Criminal Application No.3845 of 2022 stands disposed of.
- (vi) Record and Proceedings be returned to the learned Judicial Magistrate First Class, Court No.16, Aurangabad.

(S. G. MEHARE, J.)

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