IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 12 OF 2019

Arun Popatlal Chavada ...Applicant
Versus
Shabbir Sharafali Golawala And Anr. ...Respondents

WITH
CRIMINAL WRIT PETITION NO. 4126 OF 2019

Shabbir Sharafali Golawala ...Petitioner
Versus
The State Of Maharashtra And Anr. ...Respondents

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Mr. Mayur Sapkale i/by Mr. Anand D. Gugale, Advocate for the Applicant in Revision Application and for Respondent in Writ Petition.

Mr. Murtaza Najmi with Mr. Mustafa Shabbir Shamim i/by Shamim and Co, Advocate for Respondent No.1 in Revision Application and for Petitioner in Writ Petition.

Mr. S. R. Agarkar, APP for the Respondent – State.

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CORAM	**:**	**PRAKASH D. NAIK, J.**
RESERVED ON	**:**	**29th SEPTEMBER, 2022**
DATE OF LISTING FOR CLARIFICATION/HEARING	**:**	**25th JULY 2023**
PRONOUNCED ON	**:**	**27th JULY 2023**

JUDGMENT :

1. The Revision Applicant has challenged the judgment and order dated 18th March 2017 passed by learned Metropolitan Magistrate, 6th Court, Mazgaon at Sewri, Mumbai in C.C. No. 1091/SS/2015 and judgment and order dated 6th December 2018 passed by learned

Additional Sessions Judge, Greater Bombay in Criminal Appeal No. 249 of 2017.

2. The Revision Applicant is convicted for the offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as N.I. Act.). He was sentenced to pay fine of Rs. 2,83,32,500/- along with 9% simple interest from the date of complaint till its realization for the offence under Section 138 of the N.I. Act and in default to suffer simple imprisonment for three months. The amount of fine of Rs.2,83,32,500/- along with 9% simple interest from the date of complaint till its realization, if recovered the same be paid to the complainant as compensation vide Section 357(3) of the Cr.P.C.

3. The revision applicant/accused challenged the judgment of conviction dated 18th March 2017 before the Court of Sessions by preferring Criminal Appeal No.249 of 2017. Whereas, the complainant preferred Criminal Revision No.382 of 2017 for enhancement of sentence. The learned Additional Sessions Judge vide order dated 6th December 2018 dismissed Criminal Appeal No.249 of 2017 filed by accused. The judgment and order dated 18th March 2017 passed in C.C. No. 1091/SS/2015 by learned Metropolitan Magistrate, 6th Court Mazgaon, Mumbai was modified to the extent of amount of fine. The accused was ordered to pay fine of Rs.25,000/- in addition to the amount of fine imposed by the trial

Court. Order of compensation was maintained. Amount of Rs.50,00,000/- deposited in the Sessions Court was directed to be paid to the complainant after the period of revision is over.

4. The original complainant has preferred Criminal Writ Petition No. 4126 of of 2019 for setting aside the orders of the Courts below with regard to the compensation and imprisonment on the ground that it is inadequate.

5. The relevant facts for adjudicating the grievance of both the sides are as under:-

(i) The revision applicant was prosecuted for offence under Section 138 of the Negotiable Instruments Act in C.C. No. 1091/SS/2015. The Respondent No.1 in the Revision Application and Petitioner in Criminal Writ Petition is the complainant.

(ii) The accused approached the complainant and represented as builders and developers of the property at CTS No. 506/A/1, CTS No. 506-A and CTS No. 186-A (part) situated at Chembur, Mumbai. The accused represented that, they intend to carry the development on the said property and looking for investors in the project. The complainant entered into the MOU dated 3rd July 2010 with the accused. Agreement dated 9th July 2010 was executed. The complainant paid the amount of Rs.2 crores to the accused.

(iii) The accused failed to complete the construction. In order to discharge liability, the accused issued three cheques viz. Cheque bearing No.910456 dated 3rd November 2014 for the sum of Rs.1,00,00,000/-, Cheque No.910457 dated 3rd November 2014 for sum of Rs. 1,00,00,000/- and cheque No. 910458 dated 3rd November 2014 for sum of Rs. 83,32,500/-.

(iv) The cheques were deposited by complainant with his bank. All the cheques were dishonoured with remarks “fund insufficient”. Statutory notice dated 24th November 2014 was sent to the accused. It was received by the accused. Payment was not made. The complaint was filed on 6th January 2015.

(v) Affidavit of examination-in-chief of complainant was filed on 10th November 2015. The complainant was cross-examined by the Advocate for accused. Evidence of other witnesses was recorded. Complainant examined CW-2 Ragini Modi, CW-3 Balkrishna Ingle, CW-4 Bhushan Sonavane, CW-5 Ashok Arulekar and CW-6 Manoj Sharma. Statement of accused was recorded under Section 313 of Cr.P.C.

6. Learned Advocate for the Revision Applicant/accused submitted as under:-

(i) Judgment of trial Court and Appellate Court are contrary to law.

(ii) The blank cheques were issued as security in 2010 and not against any existing debt of liability.

(iii) The cheques were deposited by the complainant without cancelling the MOU and agreement duly executed between the parties.

(iv) The complainant has admitted in cross-examination that, blank cheques were issued in 2010 and the impugned cheques were deposited after three years.

(v) The statutory notice was not served on the accused. It was not issued on correct address. If the correct address could have been given on the notice, presumption can be drawn about execution of notice.

(vi) The Courts have committed error in holding that the revision applicant is liable to pay sum of Rs.2,83,32,500/- with 9% interest thereon to the complainant. The liability to pay the amount as per the agreement would arise only on cancellation of agreement.

(vii) There was never any termination of MOU and agreement and there was no liability to make payment.

(viii) The complainant had not maintained books of account and had not paid the income tax. There are reasonable grounds to presume that, no transaction regarding payment of any amount by complainant to Dinesh Chavda ever took place.

(ix) The dishonoured cheques were received by complainant as security. The complainant has admitted in cross-examination that, the cheques were undated on the date of execution of MOU. The complainant admitted that, on that date he has not paid any amount to Dinesh Chavda or accused. On 3rd July 2010, there was no legal liability to return any amount to complainant. Clause 11 of the agreement is not complied. Hence, there was no liability on 3rd July 2010 and the cheques are nothing but in the nature of guarantee or security. Mr. Dinesh Chavda could not be prosecuted in view of order passed by the Court on 27th February 2015. The Court did not find material to prosecute him. Process was not issued against him. The said order was not challenged by complainant. The applicant cannot be prosecuted in the said offence without accused Dinesh Chavda.

7. Learned Advocate for the revision Applicant has relied upon the following decisions:-

(i) C.C. Alavi Haji Vs. Palapetty Muhammed and Anr. decided by supreme court on 18th May 2007 in Criminal Appeal No. 767 of 2007.

(ii) Engineering Control Vs. Banday Infratech Pvt. Ltd. decided by Jammu and Kashmir and Ladakh at Srinagar High Court on 8th July 2022 in CRMC No.381 of 2018.

(iii) Dr. Kiran Laxminarayan Maheshwari Vs. Shri Wilson Matthws D'Souza decided by this Court on 24th March 2011 in Criminal Writ Petition No. 2671 of 2009.

(iv) Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Ors. decided by Hon'ble Supreme Court on 14th July 2020 in Civil Appeal Nos. 20825-20826 of 2017.

8. Learned Advocate for Respondent No.1/complainant and petitioner submitted as under:-

(i) There is no infirmity in the order convicting the accused.

(ii) Liability has been proved. Cheques were issued in discharge of liability. Cheques were dishonoured. Notice was executed on the accused. Cheques were dishonoured on account of insufficient fund.

(iii) Trial Court has assigned reasons for conviction. The Sessions Court ought to have imposed fine double the amount of cheque.

(iv) The complainant had adduced the evidence to support the liability of the accused. It is established that, the cheques were issued in discharge of liability. No objection was raised by the accused for exhibiting the documents.

(v) The cheques were issued for legally enforceable liability. The complainant was cross-examined in detail but the evidence of complainant in respect to liability of the accused could not be rebutted.

(vi) The accused had not denied the payment receipt at exhibit-47 and letter exhibit-51. It was brought on record that, the accused would complete the project within 24 months. The dishonoured cheques were proved by complainant. The accused failed to rebut the presumption under Section 139 of N.I. Act.

(vii) The accused should have been punished with imprisonment of two years. The fine could have been twice the amount of cheque. The Sessions Court having held that, even after receiving the amount of two crores from complainant failed to honour the cheques, ought to have granted imprisonment of two years.

9. The complainant filed Affidavit in examination-in-chief stating that, the accused represented to be owner and developer of the property and looking for investors in the development project. MOU was executed on 3rd July 2010. It was singed by Revision Applicant. The contents of MOU were confirmed vide agreement dated 9th July 2010. As per terms and conditions of MOU and the agreement, the complainant paid sum of Rs.2 crores to the accused. In the agreement, the revision applicant and Dinesh Chavda were referred

to as owners. The accused accepted acknowledged and issued payment receipt of sum of Rs.2 crores. The accused failed to complete the construction. The accused kept on assuring about completion of project. As per the agreement dated 9th July 2010, the construction of the building was to be completed within stipulated time. Newspaper advertisement was published on 16th November 2013 calling for any claim from third party in respect of the suit property. The complainant issued letter dated 26th November 2013 to the party, who had put up the public notice. The complainant put forward their claim in respect to property. The accused failed to make payment. Notice dated 1st September 2014 was issued to the Corporation. The accused were likely to create third party interest in the property. The accused assured that, they will complete payment and since there is delay in project, they are returning the amount of Rs.2,83,32,500/-. Three cheques were issued. Cheques were dishonoured as the fund was insufficient to clear the cheque. Statutory notice was sent to the accused. Complaint was filed. MOU and agreement were adduced in evidence. The complainant was cross-examined. The evidence of complainant could not be demolished in any manner. The complainant admitted that, he has not executed deed of cancellation to cancel Exh.45 and Exh.47. He personally deposited the cheque with the bank. He did not disclose the name of the bank and branch to his Advocate while drafting notice. He never received back the A.D. card of Exh.55. He never maintained books of account. He never gave any notice to the accused for cancelling the transaction of purchase of three flats and parking space. He has mentioned the date on disputed cheques in November 2014. He had personally not received the acknowledgment card of demand notice.

10. C.W.-2 Ragini V. Modi is working in Town Hall Post Office as Sub-Post Master. In her statement she has stated that, one article was booked on 25th November 2014 for RPAD. She showed postal receipt Exh-56. She showed online track report at Exh.58 and Exh-59. In the cross-examination, she stated that for the first time, she had seen postal receipts and online track report Exh-56 to Exh-59. Article can be said to be delivered only when the addressee signs on the acknowledgment card and the daily delivery sheet for RPAD. She had not seen record personally about online track reports Exh-58 and Exh-59. She cannot say to which address articles were sent. As online tracking reports are formats of Indian Postal Department, she is saying that, articles were delivered.

11. CW-3 Balkrishna Ingle has stated that, he brought related documents including Authority Letter, Account Statement, Certificate under Bankers Book Evidence Act. The documents were marked as

Exh-72, 73 and 75. In cross-examination he stated that, he joined Bank of India on 23rd June 2014. He was asked to bring account statement from 1st July 2010 to 31st July 2010. Exh-74 is not having entries after 8th July 2010. Entries Exh-74 can be made only on the basis of relevant paying slip, withdrawal vouchers, cheques etc. Entries in Exh-74 can be verified from supporting documents only. He has not seen supporting documents of entries in Exh-74. Since his Superior Officer has signed Exh-74, he has said that the entries in it are true and correct.

12. CW-4 Bhushan Suresh Sonawane deposed that, he has brought the related documents including Authority Letter, Account Statement and Account Opening Form. Documents were marked as Exh-78 to Exh-80. The Authority bear the signature of Branch Manager while the account statement and account opening form bears his signature. The complainant is having account with their ICICI Bank, Branch at Mazgaon. In cross-examination, he stated that, he has joined Mazgaon Branch of ICICI Bank in April 2016. He has not brought original account opening form. It is not with Mazgaon Branch. He did not see pay in sleep of cheques Exh-48 to Exh-50. At the time of giving cheque return memo and for unpaid cheque, the customer has to put his signature in register. The customer has to approach for said memo where he has deposited the cheque for signing on

register. He is not able to say whether ICICI Bank has given original Exh-79 to Shabbir Golwala. He had not seen supporting documents for the entries.

13. CW-5 Mr. Ashok Dharmaji Arulekar stated that, he brought related documents including statement of Arun Chavda. Documents were marked as Exh-82 and 83. He identified cheques of bank.

14. CW-6 Mr. Manoj Ramji Sharma stated that, he brought ID card and bank statement. Documents were marked as Exh-88 and 89. Bank used to return cheques with memo which were dishonoured. Statement of accused was recorded under Section 313 of Cr.P.C.

15. The defence of accused in statement under Section 313 (1)(b) of Cr.P.C. is that, he has not received the notice. There is no question of payment. It is false case. The accused has not examined himself and any other witness in his defense. The trial Court had noted that, on demand notice, the address mentioned is “Opposite Shalimar Petrol Pump, Dr. Choitram Gidwani Road, Ganesh Wadi, Chembur, Mumbai-74”. The same address was mentioned by the accused after his appearance on bail bonds Exh.-12 and Exh.13 with one more word “Chavda Compound”. Same address was there in title clause of the complaint. From said facts it can be concluded that, though there are certain admissions given by the complainant and CW-2 but the

accused admitted his address by mentioning it on bail bonds. Hence, the said address is last known address of the accused to the complainant. The trial Court relied upon decision of Supreme Court in the case of C.C. Alavi Haji Vs. Palapetty Muhammed [2007 AIR Mr. (Cri.) 2044 (SC)], the case of complainant is that, he paid Rs.2 crores to Dinesh Chavda and the accused. MOU was executed between him and Arun Chavda for himself and on behalf of Dinesh Chavda on 3rd July 2010. Original allotment-cum-guarantee for investment was also executed on 3rd July 2010 as a collateral security. It was signed by accused. It was part of MOU. The MOU was confirmed by agreement dated 9th July 2010 which was executed between complainant and the accused alongwith Dinesh Chavda. He paid two crores. Receipt was signed by Dinesh Chavda. The accused and Dinesh Chavda failed to complete the construction. The accused and Dinesh Chavda had agreed to complete construction within 24 months from 9th July 2010. They failed to complete it. It was agreed that, in such case the actual rate prevailing the market will be paid at the rate of Rs.8,500/- per sq.ft. for Rs.3,333/- which comes to Rs.2,83,32,500/-. Thereafter, the amount will be deducted from prevailing market value and the difference will be divided by two and half of difference to be paid by accused and Dinesh Chavda which comes to Rs.4,74,95,250/-. They also agreed to pay

Rs.60,000/- per month from 9th July 2010 towards default charges if they fail to complete the project within 24 months. The receipt of two crores by cheque bearing No.51079749 dated 6th July 2010. It is signed by accused. The receipt was not disputed by accused. Signature on receipt was not disputed. Evidence of CW-3 and bank statement shows that, amount of two crores was cleared in the name of accused. The accused has not denied the payment by receipt or that he has not received payment of Rs.2 crores in his account by cheque. He has not adduced any evidence or document to prove that the entries in Exh.-74 are false. The cheques issued in favour of complainant were dishonoured with remark “funds insufficient”. The accused had disputed memo’s of bank at Exh.-52 to Exh.-54. The complainant has given all the details in respect of memo’s in complaint and affidavit. The defense of accused is devoid of merits. In the cross-examination, the accused has not disputed his signature on cheques. The covering letter Exh.-51 shows that, accused and Dinesh Chavda admitted that, they have issued three cheques of Rs.2,83,32,500/-. They have agreed to complete the construction within 24 months from date of agreement. The accused have contended that, complainant has not opted for cancellation of MOU and Agreement. The accused have not denied the payment receipt at Exh.-47 and letter at Exh.-51. Accused was to complete project within 24 months. The complainant cannot be blamed for that dishonour cheque is proved. The defense of accused that, cheques were received as security by the complainant cannot be accepted. When there is no relevance of liability on 3rd July 2010 as per MOU Exh.-45. It cannot be accepted that the cheques were for security. In the cross-examination, no such defense of security cheque was taken by the accused.

16. There is concurrent findings of trial Court and the Appellate Court convicting the revision applicant. The disputed cheques were signed by the accused. The accused has not disputed the signature in the statement under Section 313 of Cr.P.C. The accused has not denied the assurance in covering letter with the disputed cheques. The covering letter at Exh.-51 indicate that, the accused have admitted that they have issued three cheques of Rs.2,83,32,500/-. They have agreed to complete the construction within 24 months from the date of agreement. They agreed that on failure, cheques may be deposited. The letter at Exh.-51 along with signature of the accused and Dinesh Chavda is not disputed in the cross-examination. The dishonour of cheque is proved by the complainant. The complainant has admitted in cross-examination that, cheques were undated on the date of execution of MOU Exh.-45. He also admitted that on that date he has not paid any amount to Dinesh Chavda or

the accused. It is the defence of the accused that, on 3rd July 2010 there was no legally enforceable of the accused to return any amount to the complainant. There was no cancellation of MOU and agreement. Therefore, the cheqeus were issued as security. There is no liability on 3rd July 2010 as per MOU at Exh.-45. It cannot be accepted that the cheques were issued by way of security. In the cross-examination, no such defence of security cheque was taken by accused. The judgment of trial Court was confirmed to the extent of conviction and modified in respect to the sentence of fine. Both the Courts have assigned reasons for conviction of accused. The conviction has to be confirmed. No case is made out to set aside conviction.

17. The trial Court in paragraph 38 has observed that, the transaction between the complainant and accused is of 2 crores and complainant had taken cheque of Rs.83,32,500/- in advance. Hence, the judgment in the case of *R. Vijayan Vs. Baby and Anr. [2012 ALL MR (Cri.) 1325 (SC)]* will not be applicable. The accused is first offender. The punishment of simple imprisonment for three months alongwith amount of disputed cheque with 9% simple interest from date of filing complaint till its realization will suffice for the complaint. The amount of disputed cheques with interest will have to be directed to be paid as compensation to the complainant. The

Sessions Court dealt with Appeal preferred by accused as well as Revision Application preferred by complainant for enhancement. The Court confirmed the conviction. The contention of complainant is that, the Court was empowered to double the cheque amount. The Sessions Court has observed that, Section 138 of Negotiable Instruments Act provides the punishment for term which may extend to two years or with fine which may extend to twice the amount of cheque or with both. The trial Court has ordered to pay fine of Rs.2,83,32,500/- along with 9% of simple interest from the date of complaint till its realization and in default to suffer imprisonment for three months. It is further ordered that, if amount is recovered, same be paid to complainant as compensation vide Section 357(3) of Cr.P.C. The Sessions Court further observed that, Section 357(1) of Cr.P.C. referred the direction to pay compensation out of fine imposed. The Sessions Court modified the order passed by learned Magistrate by directing that, accused is ordered to pay fine of Rs.25,000/- as in addition to amount of fine imposed by trial Court. The order of compensation is maintained. There is no reason to interfere in judgment of conviction as well as modified order dated 6th December 2018 passed by Sessions Court.

18. Hence, I pass following order :-

ORDER

(i) Criminal Revision Application No. 12 of 2019 is dismissed.

(ii) Criminal Writ Petition No. 4126 of 2019 is dismissed.

(iii) The fine amount shall be deposited in trial Court within three months.

(iv) The complainant is permitted to withdraw compensation amount.

(v) In the event, the Revision Applicant commits default in complying the judgment of conviction, the trial Court shall initiate appropriate action.

(PRAKASH D. NAIK, J.)