

(Corrected as per speaking to minutes order dt.30.10.2023)

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

Criminal Writ Petition No.963 of 2016

Sanjay Subhash Kadam
Age 40 years, Occ. Agriculturist
and Business
R/at. Near Teli Samaj Dharm Shala
Telli Galli Trimbakeshwar,
Dist.Nashik

... Petitioner
(Orig.Complainant).

Versus

1. Mr Bhushan Sambh Shikhare
Age : 40 years, Occ.: Business
R/o. : 417, Grih-sanket,
Near Satya Narayan Temple
Trimbakeshwar, Dist.Nashik

... Respondent-State
(Orig.Accused)

2. State of Maharashtra
Notice to be served upon D.G.P.
Nashik

.... Respondents

Mr Sujay Palshikar a/w Gaurav Ugale i/b Mr Shriram Kulkarni
for petitioner

Ms Vrushali R Raje, Advocate for respondent No.1.

Mr HJ Dedhia, APP for the Respondent-State.

Coram : R. N. LADDHA, J.

Date : 16 October 2023.

P.C. :

The petitioner/**original complainant** has filed a petition

to challenge the judgment and order dated 14.1.2016 in **Criminal Revision Application No.550 of 2011** passed by the learned Additional Sessions Judge, Nashik whereby the order passed by the trial Court below Exhibit 36 on 13.10.2011, in RCC No.635 of 2009 was set aside and the petitioner/original complainant has been directed to produce documents before the trial Court regarding the availability of an amount of Rs.5,00,000/- on 22.11.2008 and to give an opportunity to the accused to cross-examine the witness on the issue of legally enforceable debt.

2. The petitioner claims that he had entered into an agreement to purchase a property viz Municipal House No. 325, city survey No.787-A, admeasuring about 137.70 sq.mtrs in village Tryambakeshwar from Suresh Pachorkar on 22.11.2008. As per the agreement, the petitioner had paid Rs.5,00,000/- as earnest money on the date of the agreement and agreed to pay the remaining amount of Rs. Rs.31,00,000/- within one month of executing the sale deed.

3. The petitioner claims that the respondent/accused learnt about the transaction and proposed to buy the property from the petitioner. The petitioner agreed to sale the property to

the accused for an additional Rs.5,00,000/- as they had a good relationship and had issued a cheque of Rs.4,20,000/- and promised to pay the remaining amount of Rs.80,000/- and an additional amount of Rs.5,00,000/- in the first week of June 2009. However, the cheque was dishonoured, and as a result, the petitioner constrained to file a criminal case against accused.

4. The learned Magistrate took cognizance of the complaint and issued a process against the accused. The accused appeared before the learned Magistrate and pleaded not guilty. The matter was then posted for evidence, and the complainant adduced his evidence. During cross-examination of the complainant, the advocate for the accused filed an application below Exh.36 contending that the complainant should produce evidence regarding the availability of an amount of Rs.5,00,000/- on the date of agreement to sale dated 22.11.2008 executed between him and Suresh Pachorkar. In reply to this application, the petitioner contended that he had already filed a copy of the cheque received by him from the accused, and there was no relevance in showing documents as to whether or not the petitioner had an amount of Rs.5,00,000/- on the date of the agreement

executed between him with a third party. The learned trial Court rejected the said application of the accused by its order dated 13.10.2011.

5. Being aggrieved by this order, the respondent No.1 filed a criminal revision application under Section 397 of the Code of Criminal Procedure, 1973, bearing No.550 of 2011. However, on 14.1.2016, the Additional Sessions Judge allowed the revision application filed by the accused. The Additional Sessions Judge ordered the trial Court to direct the petitioner to produce relevant documents regarding the availability of an amount of Rs. 5,00,000/- on 22.11.2008. The accused/respondent was also given an opportunity to cross-examine the witness on the issue of legally enforceable debt.

6. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 14.1.2016, passed in Criminal Revision Application No.550 of 2011, the petitioner preferred this petition.

7. Mr SS Kulkarni, learned Senior Counsel appearing for the petitioner, submitted that the order passed below Exh. 36

is an interlocutory order and no revision is maintainable against it. In support of his contentions he relied on the judgments of the Hon'ble Supreme Court in *Madhu Limaye v. State of Maharashtra* AIR 1978 SC 47, *Amar Nath & Ors. vs. State of Haryana & Anr.* (1977) 4 SCC 137 and the judgment of this Court in *Smt. Mamta w/o Ashok Vaidya v. Ashok s/o Manohar Vaidya* 1991 SCC OnLine Bom 445.

8. The learned Senior Counsel argued that the accused's application demands the production of documents that show the availability of Rs.5,00,000/- with the petitioner on the date of the agreement to sale dated 22.11.2008. However, these documents are irrelevant to the present complaint. The agreement to sale dated 22.11.2008 is already produced before the Court, wherein Suresh Pachorkar admits to receiving Rs.5,00,000/-.

9. Mr Kulkarni, learned Senior Counsel, submitted that since the cheque was issued by the accused, there is a presumption in favour of the complainant. If at all, the accused has to dispute his legal liability towards the petitioner, he has all the rights to do so with independent documents and necessary evidence.

10. On the other hand, Ms Vrushali Raje, representing the accused, submitted that the complainant had admitted during cross examination that he had documentary proof to show that he had an amount of Rs.5,00,000/- with him on the date of agreement. In such circumstance, accused filed an application Exh.36 requesting to the trial Court to direct the complainant to produce documents to show that on 22.11.2008 an amount of Rs.5,00,000/- was available with the complainant. She submitted that provisions of Section 138 of NI Act cannot be resorted to for recovery of unaccounted amount. According to her, directing the complainant to file such documents would assist the Court in finding out the truth.

11. The rival contentions now fall for the determination of this Court.

12. It is not in dispute that the applicant entered into an agreement with Suresh Pachorkar, who acknowledged receiving of Rs.5,00,000/-. This agreement was placed before the trial Court. The present complaint is filed for dishonouring a cheque of Rs.4,20,000/- issued as compensation for extending the consent to the agreement

between the accused and Suresh Pachorkar. The accused claims that the complainant did not have enough funds to enter into a transaction with Suresh Pachorkar at that time. However, Suresh Pachorkar never raised any objections in this regard. Therefore, those documents which are directed to be produced are irrelevant for the purpose of the present complaint.

13. The accused cannot blow hot and cold at the same time wherein, prima facie, he issued a cheque towards the said compensation for the mere existence of the earlier agreement to sale dated 22.11.2008 and thereafter disputes to the fact that the petitioner had not enough requisite funds to enter into a transaction with Pachorkar. Since all the ingredients of Section 138 of the NI Act are satisfied prima facie, there is a presumption in favour of the complainant and if at all the accused has to dispute his legal liability towards the petitioner he has all the rights to do so with independent documents and necessary evidence. Moreover, the impugned order is an interlocutory order. Also, in the impugned order, there are certain factually incorrect observations.

14. Accordingly, the impugned order, passed by learned

Additional Sessions Judge, Nashik, in Criminal Revision Application No.550/2011 dated 14.1.2016 is quashed and set aside.

[R.N.Laddha, J.]