

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

CRIMINAL REVISION APPLICATION (REVN) NO.8 OF 2011

Smt. Prema W/o. Dalbahadur Mall,
Aged Major, Occ.: Housewife,
R/o. C/o. Shri Dalbahadur Mall,
B/50/4, Type-B, Block No. 4,
Western Coal Estate, Civil Lines,
Nagpur.

.... **APPLICANT**

// VERSUS //

1. State of Maharashtra,
Through Government Pleader,
Nagpur

2. Smt. Nalini Agrawal,
Aged about 55 Yrs., Occ.: Business,
R/o. Ravi Nagar, Nagpur

.... **NON-APPLICANTS**

Shri C. B. Dharmadhikari, Advocate for the applicant
Shri A. R. Chutke, APP for the State/non-applicant No.1
Shri P. A. Gode, Advocate for the non-applicant No.2

CORAM : G. A. SANAP, J.
DATED : 28th FEBRUARY, 2023

JUDGMENT :

1. Heard.

2. In this revision application, the applicant/accused has challenged the order dated 14.12.2010 passed by the learned Additional

Sessions Judge, Nagpur, whereby the learned Additional Sessions Judge confirmed the order of conviction of the applicant/accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'N. I. Act'), but set aside the substantive sentence of six months' simple imprisonment. Learned Additional Sessions Judge sentenced the applicant to pay a fine of Rs.5,000/- and in default of payment of fine to suffer simple imprisonment for one month. The applicant was further directed to pay a compensation of Rs.1,00,000/- to the complainant and in default of payment of compensation to further undergo simple imprisonment for one year. The learned Judicial Magistrate, Nagpur, vide order dated 10.04.2007, had sentenced the applicant to suffer simple imprisonment for six months and to pay a fine of Rs.1,25,000/- and in default of payment of fine to suffer simple imprisonment for one month.

3. The facts relevant for the purpose of deciding this application are as follows:

In this judgment, the parties would be referred by their nomenclature in the complaint. The applicant is the accused. The non-applicant No.2 is the complainant. It is the case of the complainant that she is engaged in the business of beauty parlour. The accused, according

to the complainant, was engaged in the business of chit fund scheme. The accused needed sum of Rs.1,00,000/- for her business purpose. The accused approached the complainant and demanded hand loan of Rs.1,00,000/-. The complainant considering the request of accused paid Rs.1,00,000/- to her. The accused assured to repay this amount as and when demanded by the complainant. When the complainant made demand of the said amount, the accused issued two account payee cheques dated 22.12.1998 for Rs.50,000/- each, drawn on her account maintained with State Bank of India, Coal Estate Branch, Nagpur.

4. The complainant presented the cheques for encashment in the bank. The cheques were dishonored for the reason 'Funds Insufficient'. On receipt of the necessary intimation to that effect from her bank, the complainant issued a notice dated 08.03.1999 to the accused and called upon the accused to pay the cheque amount within 15 days. The accused on receipt of the notice replied the same vide reply dated 23.03.1999 and raised false defence. The accused did not pay the cheque amount. The complainant, therefore, filed the complaint before the Court of Magistrate.

5. On the basis of the evidence adduced by the complainant and the accused, the learned Magistrate held the accused guilty of the offence punishable under Section 138 of the N. I. Act and sentenced her, as above. The accused filed the appeal in Sessions Court. The Sessions Court dismissed the appeal, however, set aside the substantive sentence, as above. The accused is, therefore, before this Court in the revision.

6. I have heard Mr C. B. Dharmadhikari, learned Advocate for the accused and Mr P. A. Gode, learned Advocate for the complainant. Perused the record and proceedings.

7. Learned Advocate for the accused submitted that the complainant has failed to discharge the initial burden and prove that she was financially well-off to advance the hand loan to the accused. Learned Advocate took me through the cross examination of the complainant and pointed out that she has been completely exposed in her cross examination with regard to the real nature of the transaction. Learned Advocate submitted that the mode and manner of payment of the amount stated by the complainant is self contradictory. In the complaint, she has stated that it was personally handed over to the accused, but in her cross examination she has stated that the amount was paid to the

accused by cheques. Learned Advocate further submitted that there is evidence of the accused and her independent witness to fortify the defence of the accused that in order to secure the chit fund transaction the blank cheques with the signature were handed over to the complainant. Learned Advocate, therefore, submitted that the accused has probalilized her defence and thereby, rebutted the presumption sought to be invoked against her. In order to substantiate his submission, the learned Advocate has placed reliance on the decision in the case of ***Basalingappa .v/s. Mudibasappa***¹. Learned Advocate submitted that the Courts below have erred in convicting and sentencing the accused.

8. Learned Advocate for the complainant submitted that in this case the issuance of cheques with the signature of the accused has been admitted. Learned Advocate further submitted that on receipt of the demand notice the amount of cheque was not paid by the accused. Learned Advocate further submitted that in the cross examination of the complainant she has reiterated that she is running beauty parlour. There is no admission in the cross examination to point out that she has given any admission contrary to her case and evidence on this point. Learned Advocate submitted that, once issuance of cheque was admitted, the

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presumption under Section 139 as well as Section 118 of the N. I. Act on both the counts would get attracted. Learned Advocate submitted that the evidence adduced by the accused is silent about the actual nature of the chit fund business managed by the complainant, the members in the said chit fund business and the monthly contribution by each members. Learned Advocate submitted that the evidence adduced by the accused is not at all sufficient to probabalize her defence. It is submitted that on the contrary her evidence would show that just to avoid her liability to pay the amount the concocted defence has been put forth. Learned Advocate relied upon para No. 20 of the judgment in the case of ***Basalingappa (supra)*** and submitted that once the signature on the cheque is acknowledged the presumption has to be raised that the cheque pertains to legally enforceable debt or liability.

9. In order to appreciate the rival submissions, I have gone through the record and proceedings. The Courts below have recorded the concurrent finding of fact against the accused. On appreciation of the evidence adduced by the parties, it is to be noted that except modification of substantive sentence, the learned Additional Sessions Judge in the appeal did not disturb the finding of fact recorded by the Magistrate. The accused has come before this Court in revision. At the outset, it is

necessary to state that the scope of revisional jurisdiction is not as wide as the scope of appellate jurisdiction. In the revisional jurisdiction, unlike the appellate jurisdiction, the evidence cannot be re-appreciated as matter of course. In order to undertake the exercise of re-appreciation of evidence, in revisional jurisdiction, the revisional Court at the threshold must be satisfied that the approach of the Court below is perverse, unreasonable and arbitrary. It must be established that by adopting such an approach a grave error and illegality has been committed by the Courts below. It must also be established that the evidence on record has not been taken into consideration or the appreciation of evidence is not in terms of the settled canons of law, thereby resulting in a prejudice to the accused and making the defence of perversity available to the concerned party. In this revision application, the above principle is required to be borne in mind.

10. I have minutely perused the judgment and orders passed by the learned Magistrate as well as by the learned Additional Sessions Judge. Perusal of the judgment and orders passed by the Courts below would show that evidence adduced by the parties has been properly appreciated and on doing so concurrent finding of fact with regard to the proof of offence under Section 138 of the N. I. Act has been recorded.

On minute perusal of the order passed by the learned Additional Sessions Judge, it is seen that the learned Additional Sessions Judge has in the exercise of appellate jurisdiction re-appreciated the entire oral and documentary evidence adduced by the parties and on doing so concurred with the finding of fact recorded by the learned Magistrate.

11. It is to be noted that on proof of certain facts the presumption provided under Section 139 of the N. I. Act in favour of holder gets attracted. The law provides that unless and until it is contrary proved it shall be presumed that the holder of the cheque received the cheque for the discharge in whole or in part of any debt or other liability. Similarly, Section 118 provides that until the contrary is proved it must be presumed that every negotiable instrument is made or drawn for consideration. In this case, undisputedly, the two cheques bear the signature of the accused. It is the defence of the accused that when the cheques were issued the same were blank. In my view, this defence is not legally tenable as long as the drawer admits his or her signature on the cheque. The cheques were drawn on the account of the accused maintained with State Bank of India, Coal Estate Branch, Nagpur. The complainant by adducing evidence has proved that the cheques were dishonored on the ground 'Funds Insufficient'. It is therefore, seen that

the cheques were not honored. The complainant issued a notice to accused. The notice was replied by the accused. However, the amount of cheque was not paid. It is the defence of the accused that the cheques were issued as a security to a chit fund transaction conducted by the complainant. The Courts below have found this defence without substance. The reasons have been recorded. Minute perusal of the judgment and order passed by the learned Additional Sessions Judge would show that in support of this conclusion, on appreciation of evidence, cogent reasons have been recorded. In the fact situation, the complainant has proved basic ingredients of Section 138 of the N. I. Act to invoke the presumption against the accused, as provided under Sections 139 and 118 of the N. I. Act. As far as this aspect is concerned, I do not see any substance in the submission.

12. The next important question is whether the evidence adduced by the accused is sufficient to rebut the presumption. In order to point out that there is ample material to rebut the presumption, the learned Advocate for the accused first and foremost took me through the cross examination of the complainant and then through the evidence of the accused and her independent witness. It is submitted that on the basis of the cross examination of the complainant it has been established

that she was not doing beauty parlour business and as such, had no money at her disposal to pay to the accused as hand loan. It is submitted that the financial position of the holder of cheque is one of the important factor while appreciating the evidence adduced to rebut the presumption. In order to appreciate this submission, I have minutely perused the cross examination. Perusal of the cross examination of the complainant would show that in the cross examination to a pointed question the complainant has reiterated that she was doing the beauty parlour business. A suggestion was put to her stating that she was not doing the beauty parlour business. She has denied the said suggestion. It is to be noted that the suggestion cannot take place of proof. Suggestion to the witness can be made use of to probabalize the defence of the accused. The evidence adduced by the accused is not sufficient to rebut the contention of the complainant that she was running a beauty parlour.

13. The next line of defence is that the blank cheques with the signature of the accused were handed over to the complainant as a security in a chit fund business. It is the case of the accused that the chit fund business was run by the complainant. Perusal of the cross examination of the complainant and the evidence of the accused and her witness would show that this defence has not at all been substantiated

and probabilized. According to the accused, she alongwith other women were participants in the said chit fund business. Witness No.2 was one of the participants. Perusal of their evidence does not clarify as to how many women were members of the chit fund transaction ? What was the nature of the transaction ? What was the total contribution by each member of the chit fund transaction ? There is no explanation how they were acting under the thumb of the complainant. It is common knowledge that in a chit fund transaction the amount is collected by the members of the said transaction and in every month's draw the lump sum amount is given to one member. If the case of the accused that to secure the interest of the complainant in the chit fund transaction the cheques were issued to the complainant is believed, then it would follow that the complainant would have followed same practice in respect of the other members of the chit fund transaction. In that event, every successful member in the monthly draw ought to have been asked by the complainant to issue the cheque to secure the interest of the remaining members. If this was the position then the remaining members of the Bhisu would have issued cheques in favour of the complainant. Such evidence has not come on record. Therefore, in my view, this defence has no legs to stand. The evidence has not passed the test of credibility and as such, not sufficient to rebut the presumption.

14. All these facts have been taken into consideration by the Courts below. Learned Advocate relying upon the decision in the case of *Basalingappa (supra)* submitted that the accused is not required to prove his defence beyond reasonable doubt. The accused has to prove the defence, which must meet standard of preponderance of probability. It is further held that if the accused is able to make his defence probable, the burden would be on the complainant to establish his financial capacity. In my view, this proposition will not be applicable to the case on hand. In this case, on the basis of sufficient evidence the presumption provided under Sections 139 and 118 of the N.I. Act has been invoked against the accused. The evidence adduced by the accused is found lacking to substantiate the defence and as such, sufficient to rebut the said presumption. In the facts and circumstances, I am of the view that there is no substance in the revision.

15. It is further seen that the substantive sentence of six months' simple imprisonment was set aside by the learned Additional Sessions Judge. The compensation and fine amount has been deposited. The compensation amount has been withdrawn by the complainant. Learned Additional Sessions Judge, as can be seen from the order, has taken liberal view in the matter of substantive sentence. Learned Additional Sessions

Judge for the reasons stated in the order took a liberal view and set aside the substantive sentence. In my view, in the facts and circumstances, it cannot be said that the approach of the Courts below is unreasonable, arbitrary and capricious. On the touch stone of law and on the basis of the material on record it cannot be said that any error or illegality was committed by the Courts below. No prejudice, as such, has been caused to the accused. The revision application, therefore, fails.

16. The revision application accordingly stands **dismissed**.

(G. A. SANAP, J.)

Namrata