

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL REVISION APPLICATION NO. 78 OF 2023

APPLICANT : Bhikam Bajrangsingh Thakur,
(Ori. Accused) Age – 42 years, Occu. - Business,
R/o. C/o. Highway Iron Depot,
Murtizapur Road, Akola.

//VERSUS//

NON-APPLICANT : Kamalkishor S/o. Fulchand Baheti,
(Ori. Complainant) Age – 70 years, Occu. - Private
Service, C/o. Near Shivaji Park,
Akola.

Mr. A.J. Mirza, Advocate for the Applicant.
Mr. N.J. Patil, Advocate for the Non-applicant.

CORAM : G. A. SANAP, J.
DATED : 31st JULY, 2023.

ORAL JUDGMENT

Rule. Rule made returnable forthwith. The application is heard finally by consent of learned advocates for the parties.

02] In this revision application, challenge is to the judgment and order dated 31st January, 2023, passed by learned Additional Sessions Judge, Akola, whereby learned Additional Sessions Judge

dismissed the appeal filed by the applicant/accused against his conviction and sentence awarded by learned Judicial Magistrate First Class, Akola for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the “N.I. Act” for short). Learned Magistrate, on conviction, had sentenced the applicant/accused to undergo rigorous imprisonment for two months and to pay compensation of Rs.60,000/- (rupees sixty thousand) and in default, to undergo simple imprisonment for two months.

03] The facts are as follows:

In this judgment, the parties would be referred by their nomenclature in the complaint. Applicant is the accused. Non-applicant is the original complainant. It is the case of the complainant that he had cordial relations with the accused. The accused was serving in High Iron Depot. The accused is contractor and is doing the business of sale of cements. The accused approached the complainant and requested him for hand loan of Rs.54,000/- (rupees fifty four thousand) for a period of four months. Considering their relationship, the complainant agreed to pay him Rs.54,000/- (rupees fifty four thousand) in cash and accordingly paid it on 13th April, 2012. The accused on the same

day issued a cheque bearing No.0407638 for Rs.54,000/- (rupees fifty four thousand) drawn on his account maintained with The Agresen Nagari Co-operative Bank Ltd., Akola, Branch Gandhi Road, Akola. The accused had instructed the complainant to present the cheque for encashment after 2-3 months. On 22nd December, 2012, the complainant presented the cheque through his banker for encashment. The cheque was dishonoured for want of sufficient funds in the account of the accused. On receipt of intimation, the complainant through his advocate by notice dated 7th January, 2013, made demand of the amount of cheque. The notice was duly served. The accused despite receipt of notice neither paid the amount nor replied the notice. The complainant, therefore, filed a complaint. Learned Judicial Magistrate First Class, Akola took the cognizance of the offence and issued process against the accused.

04] The complainant examined himself as a sole witness. He relied upon the documentary evidence. Learned Magistrate, on consideration of the evidence, held the accused guilty of the offence punishable under Section 138 of the N.I. Act and sentenced him as above. The appeal filed by the accused against his conviction and sentence came to be dismissed. The accused is, therefore, before this Court in revision.

05] I have heard Mr. A.J. Mirza, learned advocate for the accused and Mr. N.J. Patil, learned advocate for the complainant. Perused the record and proceedings.

06] Learned advocate for the accused submitted that two cheques were issued to the complainant. Learned advocate submitted that the notice produced on record in this case is pertaining to the different cheque. Learned advocate submitted that the basic ingredients of Section 138 of the N.I. Act have not been made out. Learned advocate submitted that the Courts below have committed error, while appreciating the evidence. It is submitted that, therefore, the findings are required to be reversed.

07] Learned advocate for the complainant submitted that on the basis of the evidence adduced by the complainant, he has established the foundational facts to invoke the presumption provided under Section 139 of the N.I. Act against the accused. Learned advocate pointed out that the accused has admitted his signature on the cheque and therefore, the presumption under Section 118 of the N.I. Act would also get attracted. Learned advocate pointed out that the accused has not adduced evidence to rebut the presumption. Learned advocate, in short, supported the

judgment and order passed by learned Additional Sessions Judge.

08] In order to appreciate the submissions advanced by learned advocates for the parties, I have gone through the record and proceedings. Undisputedly, the accused has admitted the issuance of cheque. It is his defence that he had issued two cheques to the son of the complainant. The son of the complainant returned one cheque and misused the one, which is the subject-matter of dispute in this case. This defence of the accused is sought to be substantiated by relying upon the answers given in the cross-examination by the complainant. The accused has admitted his signature on the cheque. Cheque is at Exh.24. Cheque return memo is at Exh.25. Debit advice is Exh.26. Office copy of demand notice is Exh.27. Postal acknowledgment is at Exh.29. The complainant has deposed that on payment of Rs.54,000/- (rupees fifty four thousand), the cheque was issued by the accused. He has stated that the cheque was dishonoured and after communication of the dishonour by a notice, the accused did not pay the amount. The documentary evidence on record corroborates the oral testimony of the complainant on all the above aspects. The evidence adduced by the complainant is, therefore, sufficient to establish the foundational facts.

09] In the backdrop of the above evidence, it is necessary to see whether a case in question is a fit case to invoke the presumption under Sections 118 and 139 of the N.I. Act. As per Section 118 of the N.I. Act, until the contrary is proved, the Court has to presume that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed negotiated or transferred for consideration. The presumption is also there with regard to its date and time of acceptance. Section 139 provide that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. The complainant has adduced sufficient evidence to prove the basic ingredients of Section 138 of the N.I. Act. He has proved the issuance of cheque by the accused. He has proved the actual nature of the transaction between him and the accused. In my view, therefore, the presumption under Sections 118 and 139 of the N.I. Act was rightly invoked against the accused on the basis of the evidence.

10] It is seen that the accused has not examined himself or adduced other evidence in rebuttal. The accused has taken a

defence that the blank cheque with signature was misused by the complainant. This defence of the accused is not consistent with the conduct of a man of ordinary prudence placed in similar situation. On receipt of demand notice sent by the complainant, the accused was expected to reply the same. If the case was, as sought to be made out by the accused of misuse of the cheque, then without wasting any time he would have replied the said notice. In my view, this conduct is not consistent with the defence of the accused put forth to the complainant for the first time in his cross-examination. The accused has not been able to point out any material on record, which could substantiate his defence.

11] In the facts and circumstances, I am of the view that there is no substance in the revision application. The Courts below have recorded the concurrent findings of fact. In the exercise of revisional jurisdiction, interference is not warranted in the concurrent findings of fact. No case is made out to warrant interference in the well reasoned judgment and order passed by learned Additional Sessions Judge.

12] In this case, it is pointed out that the amount of cheque was Rs.54,000/- (rupees fifty four thousand). The compensation awarded is Rs.60,000/- (rupees sixty thousand). Learned advocate

for the accused submitted that considering the compensation, the substantive sentence of two months' rigorous imprisonment was not warranted. Learned advocate submitted that the learned Additional Sessions Judge has not properly appreciated this aspect. It is pointed out that out of Rs.60,000/- (rupees sixty thousand), the accused has deposited Rs.40,000/- (rupees forty thousand). Learned advocate for the complainant submitted that the complainant has received the said amount.

13] Learned advocate for the accused submitted that in view of this position, the order of substantive sentence may be modified. Learned advocate submitted that the Court may exercise discretion in favour of the accused.

14] Learned advocate for the complainant submitted that considering the facts and circumstances, some more amount may be awarded by way of compensation, in case the substantive sentence is modified.

15] I have bestowed thoughtful consideration to the submissions. It is to be noted that in cheque bounce cases, the main transaction is money transaction. The transaction was out of cordial relationship between the parties. The party facing the

prosecution was helped by the complainant in his dire need. It is to be noted that the sentence awarded in such cases must be proportionate to the gravity of the offence. The cheque amount was Rs.54,000/- (rupees fifty four thousand). In the facts and circumstances, in my view, the substantive sentence of two months' rigorous imprisonment was not warranted. The same deserves to be set aside. Accordingly, the revision application is **partly allowed**.

The substantive sentence of two months' rigorous imprisonment awarded by learned Judicial Magistrate First Class, Akola in SCC No.723/2013, is set aside. The applicant/accused is granted one month's time to deposit the amount of Rs.20,000/- (rupees twenty thousand only). If he fails to deposit the said amount within one month from today, then he shall undergo simple imprisonment for one month.

16] Rule is made absolute in the above terms.

(G. A. SANAP, J.)

Vijay