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

CRIMINAL REVISION APPLICATION NO. 115 OF 2020

APPLICANT : Shri Suresh S/o. Bajirao Chirkute, Aged 61 years, Occupation- Nil, R/o. Ramnagar Ward, Hinganghat, Tah. Hinganghat, District- Wardha.

//VERSUS//

RESPONDENTS : **1.** Hinganghat Nagari Sahakari Pat Sanstha Mar. Hinganghat Regd. No.831, Through its Manager,

i] Mr. Keshav Narayan Kumbhare, Aged 56 years, Occupation- Service,

ii] Mr. Pramod Madhukarrao Pohekar, Aged 48 years, Occupation-Service,

iii] Mr. Dinkar Vasudeorao Kale, Aged 38 years, Occupation-Service,
All R/o. Hinganghat, Tah.- Hinganghat, District-Wardha.

2. The State of Maharashtra, Through Police Station Officer, Police Station Hinganghat, Tah.-Hinganghat, District- Wardha.

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Mr. M.P. Kariya, Advocate for the Applicant.
Mr. Apurv De, Advocate for Respondent Nos.1 (i) to 1 (iii).
Mr. A.R. Chutke, APP for Respondent No.2/State.

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CORAM : G. A. SANAP, J.
DATED : 21st APRIL, 2023.

ORAL JUDGMENT

Heard.

02] **Admit.** The application is heard finally with the consent of the learned advocates for the parties at the admission stage.

03] In this criminal revision application, challenge is to the judgment and order dated 21st September, 2020 passed by the learned Additional Sessions Judge, Hinganghat, whereby the learned Additional Sessions Judge dismissed the appeal filed by the applicant/accused against his conviction and sentence for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act" for short). The applicant/accused, on conviction, was sentenced by Magistrate to suffer simple imprisonment for eight months and to pay compensation of Rs.2,00,000/- to the complainant/society and in default of compensation to further suffer simple imprisonment for four months.

04] The relevant facts are as follows:

In this judgment, the parties would be referred by their nomenclature in the complaint. Complainant is a Credit Co-operative Society, registered under the Maharashtra Co-operative Societies Act, 1961. The complainant/society deals in sanction and disbursement of loan and credit facilities to the needy people. The accused was a nominal member of the complainant/ society. The accused in the year 2012 made a request to the complainant/society to advance him the loan of Rs.1,40,000/- for his business purpose. The complainant/society sanctioned the loan of Rs.1,40,000/-. The interest payable was at the rate of 16% per annum. The complainant/society on several occasions made demand of the outstanding loan amount. The accused did not pay the same. The accused on 5th May, 2012 issued a cheque bearing No.044936, drawn on his account maintained with Wana Nagrik Sahakari Bank Ltd, Branch Hinganghat for Rs.1,83,414/- to the complainant/society. On presentation of the cheque for encashment, it was dishonoured on account of insufficient funds in his account to honour the cheque. The complainant/society, therefore, issued a notice dated 23rd May, 2012 to the accused and called upon him to pay the amount of cheque. The accused despite receipt of the notice, did not pay the amount. The complainant/society, therefore, through its authorised representative, filed a complaint. The learned Judicial Magistrate First Class, Hinganghat took the cognizance and issued process against the accused.

05] The complainant/society examined one witness, the authorised representative, to substantiate the claim. The number of documents were placed on record to support the case. The learned Magistrate, on consideration of the evidence, held the accused guilty of the offence under Section 138 of the N.I. Act and convicted him as above. The appeal filed by the accused against this conviction and sentence came to be dismissed by the learned Additional Sessions Judge, Hinganghat. The accused is, therefore, before this Court.

06] I have heard Mr. M.P. Kariya, learned advocate for the accused and Mr. Apurv De, learned advocate for the complainant. Perused the record and proceedings.

07] Learned advocate for the accused submitted that the outstanding loan in respect of which the cheque was issued, was time barred. Learned advocate, therefore, submitted that the complaint filed on the basis of the cheque in question for recovery of time barred debt, was not maintainable. Learned advocate further submitted that the evidence adduced by the complainant/society is not sufficient to prove the basic ingredients of Section 138 of the N.I. Act. Learned advocate further submitted that the accused had paid Rs.56,000/- to the complainant/society before issuance of the cheque. Learned advocate submitted that, therefore, the outstanding amount, on the given date, was not substantiated by the documentary evidence. Learned advocate, therefore, submitted that on the basis of the material available on record, the accused has fully rebutted the presumption, invoked against him under the law. Learned advocate further submitted that the accused has paid the amount of compensation. Learned advocate submitted that the accused has undergone two months' imprisonment. Learned advocate submitted that, therefore, the order with regard to the substantive sentence deserves to be modified, in case this Court is not inclined to accept the submissions advanced on merits.

08] Learned advocate for the complainant submitted that the witness No.1 was authorised, as per the resolution passed by the complainant/society to act and depose on behalf of the society. Learned advocate submitted that the defence of the accused that a blank cheque issued as a security, cannot be accepted to rebut the presumption, attracted against the accused in terms of Section 139 of the N.I. Act. Learned advocate submitted that on the basis of the oral and documentary evidence, the complainant/society has established the foundational facts to satisfy the basic requirements of Section 138 of the N.I. Act. Learned advocate submitted that, therefore, the presumption provided under Sections 118 and 139 of the N.I. Act was rightly attracted against the accused. Learned advocate submitted that there is no iota of material to rebut this presumption. Learned advocate further submitted that the substantive sentence awarded by the learned Magistrate and confirmed in appeal by the learned Additional Sessions Judge, Hinganghat, is proportionate to the gravity of the crime. Learned advocate submitted that merely because of payment of compensation, the accused cannot be allowed to get away with a sentence undergone by him. Learned advocate submitted that there is no substance in the revision application.

09] I have perused the record and proceedings. It is to be noted at the outset that in the exercise of revisional jurisdiction, which is not coextensive with the appellate jurisdiction, the evidence cannot be re-appreciated, as a matter of course. It is further a settled position that the concurrent finding of fact recorded by the Courts below cannot be unsettled merely because another view is possible on the basis of said evidence. It is to be noted that unless and until it is established that the Court below has committed an error in deciding the matter or the approach of the Court while appreciating the evidence has resulted in perversity, the evidence cannot be subjected to appreciation. Keeping this principle in mind, it is necessary to consider the material on record.

10] The learned Magistrate, on the basis of the evidence on record, rejected the defence of the accused. The learned Magistrate found that all the basic requirements of Section 138 of the N.I. Act have been proved. The learned Additional Sessions Judge in appeal on re-appreciation of evidence agreed with the view taken by the learned Magistrate and confirmed the judgment of conviction and sentence. The bone of contention in this revision application is whether the concurrent finding of fact suffers from any manifest error or illegality or perversity.

11] Witness No.1 Mr. P.M. Pohekar has deposed on the basis of the authority given to him pursuant to the resolution at Exh.27.

He has produced on record the loan application of the accused at Exh.28. The agreement and the promissory note executed by the accused are at Exh.29 and Exh.30. Membership application of the accused is at Exh.31. The cheque in question is at Exh.32. The bank slip is at Exh.33. The cheque return memos are at Exh.34 and Exh.35. Copy of notice is at Exh.36. The postal receipt is at Exh.37. The letter issued to the post office is at Exh.38. The certificate issued by the post office regarding service of notice is at Exh.39. The statement of loan account of the accused maintained by the complainant/society is at Exh.41. On the basis of the oral and documentary evidence, the genesis of the transaction has been fully established.

12] Perusal of the cross-examination of the witness No.1, conducted on behalf of the accused, would show that the accused has not disputed the issuance of cheque. The accused has denied the service of notice. The witness No.1 has produced on record sufficient postal correspondence to prove the service of notice. The signature on the cheque has been admitted by the accused. On the basis of the evidence, the date and amount of the cheque has been proved. The notice was not replied. The defence of the accused needs to be considered in the backdrop of the abovestated facts proved by the complainant/society. The evidence adduced by the complainant/society is sufficient to establish the foundational facts, to invoke the presumption under Section 139 as well as under Section 118 of the N.I. Act against the accused. The evidence is otherwise sufficient to make out the basic ingredients of Section 138 of the N.I. Act. The Courts below have accepted this evidence to record a finding of fact against the accused. On consideration of the material on record, I am satisfied that the Courts below have not committed any error.

13] The question is whether the evidence available on record is sufficient to rebut the presumption. The accused has not adduced oral and documentary evidence. He has simply relied upon the material available on record to substantiate his contention that the material on record is sufficient to rebut the presumption. The Courts below have rejected this contention of the accused. On consideration of the material on record, I am satisfied that there is no mistake or illegality in this finding. The finding has been supported by cogent and concrete material.

14] The defence of the accused that the debt was time barred and therefore, the cheque could not be said to have been issued towards the discharge of legally enforceable debt or liability. This point has been dealt with by the Courts below. The learned Additional Sessions Judge, relying upon a decision in the case of ***Ramkrishnan Vs. Gandharan Nair [Criminal Revision Petition No.2622/2006, decided on 08.08.2006],*** has held that the promise to pay the time barred debt by issuance of cheque can be enforced. It is held in this case that on the basis of such a cheque, the payee is entitled to present the cheque to the bank and seek payment and in the event of dishonour, can proceed against the drawer under Section 138 of the N.I. Act. It is to be noted that in this case Section 25(3) of the Indian Contract Act, 1872 would come into play. The issuance of the cheque was a promise to pay the outstanding amount. In the case of ***Ramkrishnan Vs. Gandharan Nair*** (supra), it is held that under Section 25(3) of the Indian Contract Act, a promise can be made even in a case where limitation for recovery of the amount has already expired. In my view, the Courts below have properly applied this principle of law to the facts. I, therefore, conclude that no interference is warranted in the well reasoned judgment and order passed by the learned Additional Sessions Judge, Hinganghat.

15] The next important issue that needs to be addressed is with regard to the modification of substantive sentence. Learned advocate for the accused submitted that the accused has already undergone two months' imprisonment. There is no dispute about it on behalf of the complainant/society. The amount of cheque was Rs.1,83,414/-. It has come on record that before issuance of cheque, the accused had paid Rs.56,000/- by installments to the complainant/society. The learned Magistrate awarded the compensation of Rs.2,00,000/- to the complainant/society. The accused has paid the entire amount of compensation. The above facts are required to be borne in mind while appreciating the submission for modification of the substantive sentence. It is to be noted that the transaction between the complainant/society and the accused was a loan transaction. It is true that there was default on the part of the accused to repay the loan amount. The principal amount was Rs.1,40,000/-. Against the principal amount of Rs.1,40,000/-, the accused has paid Rs.2,56,000/-. Therefore, in my view, the submission advanced by the learned advocate for the accused needs to be accepted. In this case, no purpose would be served by sending the accused to jail, when he has already undergone two months' imprisonment. The sentence undergone by the accused would be proportionate to the gravity of the offence in this case. Therefore, in my view, to this extent, the order is required to be modified. Accordingly, it is modified as under:

In this case, the substantive sentence would be the imprisonment already undergone by the accused.

16] In view of the above, the revision application is **dismissed**.

(G. A. SANAP, J.)

Vijay