

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

CRIMINAL REVISION APPLICATION NO. 95 OF 2015

APPLICANT : Rajesh Bhuleshwarnath Dubey, Age 41 years, Occ. Private Service, R/o. Gurushrichand Park, Gita Nagar, Akola, Tq. & District Akola.

//VERSUS//

NON-APPLICANTS : 1. Sushil Rajaramsing Thakur, Age 34 years, Occ. Business, R/o. Kailash Tekdi, Akola, Tq. & District Akola.

2. State of Maharashtra, through Government Pleader, Nagpur.

Mr. M. Badar, Advocate for the Applicant.
Mr. A.R. Chutke, APP for Non-applicant No.2/State.

CORAM : G. A. SANAP, J.
DATED : 22nd JUNE, 2023.

ORAL JUDGMENT

In this revision application, challenge is to the judgment and order dated 5th May, 2015, passed by learned Sessions Judge, Akola, whereby learned Sessions Judge allowed the appeal filed by the 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) and acquitted him. Learned Judicial Magistrate First Class, Akola, by judgment and order dated 7th May, 2014, on conviction, had sentenced the accused to suffer rigorous imprisonment for three months and to pay fine of Rs.2,80,000/- (two lakhs eighty thousand only) and in default, to undergo simple imprisonment for one month.

02] The facts are as follows:

In this judgment, the parties would be referred by their nomenclature in the complaint. The applicant is the original complainant. Non-applicant No.1 is the accused. It is the case of the complainant that he intended to invest his money in real estate. The accused wanted to sell his two shops. The complainant agreed to purchase the two shops of the accused for a total consideration of Rs.5,01,000/-. On 3rd December, 2010, an agreement to sell was executed. The complainant paid Rs.3,80,000/- to the accused as an earnest money in cash. The accused handed over possession of the shops to the complainant. The sale-deed was agreed to be executed on 3rd June, 2011. The accused on one pretext or the other, avoided to execute the sale-deed. At the request of the accused, time was

granted by the complainant. However, in the meantime, the complainant came to know that the accused had mortgaged the shops with the bank. In view of this development, the accused requested for some time to release the shops from the bank. Again, an agreement was executed between the accused and the complainant.

03] It is the case of the complainant that in view of the above development, the complainant on the request of the accused given some time to the accused to clear the loan and release the property from mortgage till 26th September, 2011. The accused agreed to execute the sale-deed on or before 26th September, 2011. Similarly, he issued a cheque bearing No.242741 dated 26th September, 2011 in favour of the complainant for Rs.3,80,000/-, drawn on his account maintained with Jijau Commercial Co-operative Bank Limited towards repayment of the earnest money in case, he was unable to clear the title of the shops and execute the sale-deed in favour of the complainant. It is the case of the complainant that the accused neither cleared the loan amount nor released the property from mortgage. He did not execute the sale-deed as agreed. Therefore, the complainant presented the cheque through his banker for encashment. The cheque was dishonoured on the

ground of insufficiency of funds in the account of the accused. The complainant issued a notice to the accused and demanded the amount of cheque. The accused despite receipt of notice did not pay the cheque amount. The notice was also not replied by the accused. The complainant, therefore, filed a complaint. Learned Judicial Magistrate First Class, Akola took cognizance of the offence and issued process against the accused.

04] The complainant examined himself as sole witness. The accused examined himself in his defence. He has also examined one independent witness, to substantiate his defence. Learned Magistrate, on consideration of the material on record, held the accused guilty of the offence punishable under Section 138 of the N.I. Act and sentenced him as above. The accused filed an appeal against his conviction and sentence. Learned Sessions Judge, Akola set aside the judgment and order passed by learned Magistrate and acquitted the accused. The complainant is, therefore, before this Court in revision.

05] I have heard Mr. M. Badar, learned advocate for the complainant and Mr. A.R. Chutke, learned Additional Public Prosecutor for the State. Perused the record and proceedings.

06] The record reveals that the advocate appearing for the accused, by order dated 14th February, 2020, was allowed to take discharge from the case. This Court, by order dated 14th February, 2020, had issued a bailable warrant against the accused. The bailable warrant was executed. Despite execution of bailable warrant, the accused did not appear before this Court. The record further reveals that a non-bailable warrant was issued against the accused. When police went to execute the non-bailable warrant, the accused was not found at his home. Police came to know that he had gone to Allahabad for marriage. The accused has, therefore, chosen to remain absent in this proceeding. Learned Additional Public Prosecutor representing the State has extended able assistance to this Court.

07] Learned advocate for the complainant submitted that in this case, on the basis of the evidence adduced by the complainant as well as on the basis of the undisputed facts, the complainant has established the basic ingredients of Section 138 of the N.I. Act. Learned advocate pointed out that the accused has admitted the issuance of cheque. Learned advocate pointed out that the accused has admitted execution of two agreements of sale of his two shops. Learned advocate submitted that the agreement at Exh.29 dated

26th September, 2011 was executed and the period for execution of sale-deed was extended for specific reasons recorded in the said agreement. Learned advocate submitted that this agreement has been duly proved. It is pointed out that there is specific mention of issuance of cheque with other details by the accused in the agreement. Learned advocate further submitted that the accused, on receipt of demand notice, neither paid the amount of cheque nor replied the said notice. Learned advocate further submitted that after filing of the complaint, the accused and complainant had filed a settlement pursis in the Court of learned Magistrate on 11th September, 2012. It is submitted that the accused by the said pursis admitted his liability and paid Rs.1,60,000/- in cash to the complainant. Learned advocate submitted that on the basis of cogent and concrete evidence, the complainant has established the foundational facts to invoke the presumption under Sections 118 and 139 of the N.I. Act against the accused. Learned advocate submitted that the evidence adduced by the accused is not sufficient to rebut the presumption invoked against the accused. Learned advocate submitted that learned Sessions Judge by drawing unnecessary and unwarranted inference, accepted defence of accused. Learned advocate submitted that the judgment and order passed by learned Sessions Judge is not in accordance with

law. Learned advocate submitted that learned Sessions Judge has failed to consider the settled position of law with regard to the presumption under the N.I. Act. Learned advocate, therefore, submitted that the judgment and order passed by learned Sessions Judge is required to be quashed and set aside and the judgment and order passed by learned Magistrate is required to be restored.

08] Learned Additional Public Prosecutor for the State submitted that the analysis of the evidence made by learned Sessions Judge is in accordance with law. Learned Additional Public Prosecutor submitted that on the basis of number of agreements executed between the parties, a serious doubt was created in the mind of learned Sessions Judge about the real nature of the transaction. Learned Additional Public Prosecutor submitted that on the basis of multiple agreements executed between the parties, the inference drawn by learned Sessions Judge about the transaction being a money lending transaction, is sustainable. Learned Additional Public Prosecutor submitted that on the basis of the evidence adduced by the accused, the presumption has been fully rebutted.

09] At the outset, it would be necessary to make a mention of some of the undisputed facts. The accused has admitted that he

had agreed to sell the shops to the complainant. He has admitted that he had issued the cheque. The agreement of the year 2008 has been proved. It is at Exh.41. The agreement at Exh.29 is the third agreement executed on 26th September, 2011. The demand notice issued by the complainant was duly served upon the accused. The accused did not reply the said notice. The defence of the accused was disclosed for the first time at the time of cross-examination of the complainant.

10] The basic question that is required to be considered is whether the evidence adduced by the complainant is sufficient to establish the foundational facts as postulated under Section 138 of the N.I. Act, to invoke the presumption provided under Sections 118 and 139 of the N.I. Act against the accused. Perusal of two agreements, namely agreements at Exh.29 and 41, would show that the first agreement at Exh.41 was executed in the year 2008. In the said agreement, the real nature of transaction between the accused and the complainant was depicted. The complainant had agreed to purchase two shops for Rs.5,01,000/-. It is seen on perusal of the said agreement that the sale-deed was to be executed by the accused on or before 11th June, 2009. The agreement of 2011 is at Exh.29. Perusal of this agreement would show that after the

agreement of 2008, one more agreement was executed on 3rd December, 2010, whereby time for execution of sale-deed was extended upto 3rd June, 2011. However, the sale-deed was not executed on or before 3rd June, 2011. In this agreement at Exh.29, there is specific mention of execution of agreement dated 3rd December, 2010 as well as the extension of time from time to time. It is further seen on perusal of this agreement that the sale-deed could not be executed because, in the meantime, the complainant came to know that the property was mortgaged with the bank by the accused. The agreement would further show that the accused had agreed to clear the loan and release the property from mortgage and then execute the sale-deed on or before 26th September, 2011. A cheque was also issued in favour of the complainant with an understanding that if there was failure to execute the sale-deed on or before the stipulated date, the complainant would be free to recover the amount mentioned in the cheque. It is to be noted that learned Sessions Judge, on the basis of the agreement at Exh.41, came to the conclusion that the repetitive extension of time by the complainant for execution of sale-deed, was indicative of the fact that it was a money lending transaction. There was no agreement of sale, as sought to be made out by the complainant, of the two shops by the accused. Learned Sessions Judge also held that since

the possession was delivered to the complainant pursuant to the agreement to sell, there was no whisper about handing over of the possession back to the accused in the complaint and therefore, the very basis of the agreement to sell, was doubtful.

11] In my view, this finding of fact recorded by learned Sessions Judge cannot be sustained for more than one reason. First and foremost, learned Sessions Judge has not addressed the principal issue with regard to proof of the foundational facts to invoke the presumption against the accused as provided under Sections 118 and 139 of the N.I. Act. Similarly, learned Sessions Judge has not recorded a finding that the evidence of the accused is sufficient to establish his case of money lending transaction and as such rebut the presumption. In this context, it is necessary to mention that in cheque bounce case, the Court has to give a primacy to the fact of issuance of cheque and admission of the accused with regard to the issuance of cheque. The complainant is duty bound to lead evidence of the actual nature of transaction. However, the actual nature of transaction, once the issuance of cheque is either admitted or proved, becomes a secondary aspect.

12] In this case, the accused in his cross-examination has admitted that he had issued the cheque. He has admitted his

signature on the cheque. The agreement at Exh.29, in my view, is the most important piece of evidence in this case. In the agreement at Exh.29, apart from setting out the actual nature of transaction, the reason for issuance of cheque and the fact of issuance of cheque has been categorically stated. This agreement has been proved. It is the case of the complainant that the sale-deed was not executed as agreed and therefore, after expiry of the stipulated period, he had presented the cheque for encashment. The cheque was dishonoured. The complainant has categorically stated that the demand notice was received by the accused. The accused neither replied the said notice nor paid the amount of cheque.

13] In my view, this is a very important and relevant aspect for the purpose of addressing the controversy. The oral and documentary evidence, in my view, is sufficient to prove the basic ingredients of Section 138 of the N.I. Act. On the basis of the oral and documentary evidence, the complainant has established the foundational facts to attract the presumption provided under Section 118 and 139 of the N.I. Act against the accused.

14] 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 has been invoked against the accused on the basis of the evidence.

15] In this case, there is one more additional admitted fact in support of the complainant. Learned Sessions Judge has observed that if the possession was handed over to the complainant, then the complainant was required to make a statement in the complaint

with regard to the possession or handing over the possession back to the accused. Learned Sessions Judge has observed that this silence on the part of the complainant creates a doubt about the real nature of transaction. Learned Sessions Judge has, therefore, observed that the same is sufficient to draw an inference that the transaction was not of agreement to sell, but a money lending transaction.

16] In my view, learned Sessions Judge on this count as well has misdirected himself. It is seen that after filing of the complaint, the complainant and accused filed a pursis at Exh.9 in the Court of learned Magistrate. By the said pursis, the accused has admitted his liability to pay Rs.3,80,000/- to the complainant. Similarly, in this pursis, the accused has stated that he has paid Rs.1,60,000/- in cash to the complainant before filing this pursis and after filing of the complaint. In my view, learned Sessions Judge was required to take note of this pursis. It is to be noted that the complainant at the time of his evidence has stated that after filing of the complaint, he received Rs.1,60,000/- (one lakh sixty thousand only) from the accused and therefore, the amount due and payable by the accused was Rs.2,80,000/- (two lakhs eighty thousand only). Payment of Rs.1,60,000/- by the accused to the complainant clearly indicates

that it was nothing but a part payment of the amount of cheque. Learned Magistrate on this count has drawn reasonable inference against the accused. Learned Magistrate after taking this fact into consideration awarded compensation of Rs.2,80,000/- only.

17] In my view, the material on record is sufficient to prove beyond doubt the basic ingredients of Section 138 of the N.I. Act. The presumption was, therefore, rightly invoked against the accused. The accused in his evidence has not denied the execution of the agreement of sale at Exh.29. In his cross-examination, he has admitted his signature as well as the signatures of the panchas on Exh.29. He has also admitted in his cross-examination that in the year 2011, he had mortgaged his two shops with Akola Janta Commercial Co-operative Bank, Dabki Road, Akola. He has admitted that on 12th August, 2011, he had issued a cheque to the complainant. It is further seen that in his evidence, he has admitted that he had executed the agreement to sell in favour of the complainant. He has stated that the complainant is doing money lending business. It is to be noted that there is no other evidence to prove that the complainant is doing money lending business. It needs to be stated that despite searching cross-examination of the complainant on this point, nothing has been brought on record to

establish this fact.

18] In my view, therefore, the evidence adduced by the accused is not sufficient to rebut the presumption against him. The complainant, on the basis of cogent and concrete evidence, has established his case. In my view, learned Sessions Judge was not right in reversing the order passed learned Judicial Magistrate First Class, Akola. It is to be noted that out of outstanding dues, the accused has paid Rs.1,60,000/- (Rs. One lakh sixty thousand only). In this case, on the basis of the evidence as well as on the basis of the subsequent payment of Rs.1,60,000/- (Rs. One lakh sixty thousand only), the existence of the legally enforceable debt is evident. In the facts and circumstances, therefore, the order passed by learned Sessions Judge, Akola reversing the order of conviction passed by learned Magistrate is required to be set aside.

19] The revision application is accordingly **allowed**.

The order dated 5th May, 2015, passed by learned Sessions Judge, Akola in Criminal Appeal No.45/2014 acquitting the accused, is quashed and set aside. The order passed by learned Judicial Magistrate First Class, Akola, dated 7th May, 2014 in S.C.C. No.1046/2012, is restored.

20] Learned Judicial Magistrate First Class, Akola to take steps for execution of this order.

21] The application is disposed of accordingly.

(G. A. SANAP, J.)

Vijay