

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

CRIMINAL REVISION APPLICATION NO. 117 OF 2021

Mr. Rajnish s/o Ayodhyaprasad Singh
Age 48 years, Proprietor of Alyrans Enterprises,
R/o 32, Jalvihar Colony, Takli Sim, Hingna
Road, T-Point, Nagpur

...APPLICANT

---VERSUS---

Anq Enterprises,
Through its Partner, Mr. Harish Niyaz Ali,
Having its Work At A-45, Hingna MIDC,
Nagpur-440016.

...NON-APPLICANT

Shri R.R. Vyas, Advocate for applicant.
Shri N.R. Bhishikar, Advocate for non-applicant/State.

CORAM : G.A. SANAP, J.
DATE : JANUARY 10, 2023.

ORAL JUDGMENT :

. Heard learned advocate for the applicant and learned advocate for the non-applicant. Perused the record and proceedings.

2. In this revision, the challenge is to the judgment and order dated 04.12.2021 passed in Criminal Appeal No.256 of 2018 by the learned Additional Sessions Judge-4, Nagpur, whereby the appeal filed by the applicant against his conviction and sentence for the offence under Section 138 of the Negotiable Instruments

Act, 1881 (for short, “**NI Act**”) came to be dismissed. The learned Judicial Magistrate First Class, Nagpur vide judgment and order dated 20.08.2018, has convicted the applicant for the offence punishable under Section 138 of the NI Act and awarded him substantive sentence till rising of the Court and to pay compensation of ₹5,50,000/- and in default of the payment of compensation to undergo simple imprisonment for five months. In this order, the parties would be referred by the nomenclature in the complaint.

3. The complainant was doing the business in the name and styled as ‘Anq Enterprises’ and dealing in the manufacturing of packaged drinking water and pet bottles. It is stated that the accused was introduced by one Sanjay Pathak to him in connection with the starting of the business of pet bottles. The accused wanted to buy a moulding machine for starting the business. The complainant had one spare blow moulding machine. He agreed to sell the said machine for ₹5 lakhs to the accused on a condition that the machine would be installed in the premises of the accused at the cost of the complainant and period of one month would be the trial period the machine. The accused issued post-dated cheque dated 01.12.2014

bearing Cheque No.022052 for ₹2 lakhs and another cheque bearing No.022051 dated 03.12.2014 for ₹3 lakhs. Both cheques were drawn on the accounts of the accused maintained with Union Bank of India, Wadi Branch, Nagpur. The complainant presented the cheques for encashment. The cheques dishonoured on account of insufficiency of funds to honour the cheques vide cheque return memo dated 21.01.2015. The complainant, thereafter, issued a statutory notice on 05.02.2015 and called upon the accused to make the payment of the cheque amount within 15 days. The accused received the notice on 07.02.2015 but he failed to make the payment. He, therefore, filed the complaint.

4. The complainant examined himself and adduced the evidence of three more witnesses. The accused has examined two witnesses. On consideration of the evidence, the learned Magistrate found that the offence punishable under Section 138 of the NI Act is proved. As such, the learned Magistrate convicted and sentenced the accused as above. The appeal filed against the judgment of the learned Magistrate came to be dismissed. The accused is before this Court in revision.

5. I have heard the learned advocate for the accused and learned advocate for the complainant. Perused the record and proceedings.

6. The gist of the submissions advanced by learned advocate for the accused is as follows:

There is no evidence to prove that, as per the agreement, the machine was delivered and installed at the premises of the accused. There was no cause of action for the initiation of the proceedings. The complainant was not entitled to present the cheques for encashment during the trial period of one month, after the installation of the machine. The basic ingredients of Section 138 of the NI Act have not been established. In Section 313 of the Code of Criminal Procedure (Cr.P.C.) statement of the accused, no specific question was asked to the accused so as to enable him to offer his explanation with regard to the installation of the machine in terms of the agreement. This has resulted in a grave prejudice. The condition precedent namely the one-month trial period after installation of the machine has not been established and therefore the complaint, which was filed without cause of action is liable to be dismissed.

7. The gist of the submissions advanced by the learned advocate for the complainant is as follows:

The machine was installed and therefore the cheques were issued. The accused would not have issued the cheques unless and until the transaction was fructified as agreed. The demand notice was issued to the accused, which was served to him. He failed to reply to the said notice. The adverse inference is therefore required to be drawn. In his Section 313 statement, he has not stated that the machine was not installed at his premises. The answer to the question No.14 makes it clear that the dispute raised was with regard to the presentation of the cheque prior to the expiry of the trial period. The basic requirements to invoke the presumption provided under Section 139 of the NI Act has been satisfied. No evidence has been adduced by the accused to rebut this presumption invoked against him on proof of the basic requirements.

8. Learned advocates for the parties submitted that the applicant/accused has deposited the entire amount of compensation.

9. The learned Magistrate considering the gravity and seriousness of the offence was inclined to impose the substantive sentence till the rising of the Court. The complainant did not challenge this order on the ground of the inadequacy of the sentence. It is necessary to mention at this stage that the Courts below have concurrently held that offence under Section 138 of the NI was made out against the accused. The Courts below have also held that on the basis of the evidence, the case was made out to apply the presumption against the accused and the evidence adduced by the accused was not sufficient to rebut the said presumption. It is to be noted that the scope of the revisional jurisdiction is not as wide as the scope of the Court exercising the appellate jurisdiction. The concurrent findings of the fact cannot be interfered with while exercising the revisional jurisdiction, unless and until it is established to the satisfaction of the Court that the Courts below have committed an error apparent on the face of record while appreciating and considering the evidence. The revisional Court must be satisfied that the available evidence on record is not either properly appreciated or not taken into consideration while deciding the matter. In order to justify the arguments on the point of perversity, it must be established that a

finding has been recorded against the accused in the absence of any iota of evidence. It, therefore, goes without saying that as a matter of right and routinely in revisional jurisdiction the concurrent findings of fact by the Courts below cannot be interfered with.

10. I have perused the evidence on record to satisfy myself with the regard to any patent illegality in the finding of fact recorded by the Courts below. The Courts below have taken into consideration the entire evidence on record and recorded a finding that the basic ingredients of Section 138 of the NI Act have been made out. The Courts below have also found that on the basis of the evidence, the case was made out to apply the presumption against the accused. The Courts below have also recorded the finding that no evidence has been adduced by the accused to rebut the presumption.

11. It is proved that after giving finality to the transaction in all respect the cheques were issued by the accused in favour of the complainant. The Courts below have taken this aspect into consideration while appreciating the defence of the accused. The grievance made by the accused in this revision application cannot be accepted for the simple reason that after the completion of the

transaction in all respect the cheques were issued in favour of the complainant. A person of ordinary prudence similarly situated would not issue the cheques for ₹5 lakhs without completing the transactions in all respects. In my view, this fact would be required to be borne in mind while appreciating the submissions advanced by the learned advocate for the accused on the point of prejudice having been caused to the accused for want of putting this specific circumstance to the accused in his Section 313 statement.

12. In order to satisfy myself about this legal argument, I have minutely perused the statement of the accused recorded under Section 313 of the Cr.P.C. The circumstance with regard to the actual transaction, finality to the transaction, and issuance of the cheques was specifically put to him. Question no.5 clearly speaks about the nature of the transaction, the trial period of the machine after installation, and the issuance of cheques. The accused has admitted that the cheques were issued. He has admitted the nature of the transaction. He has categorically stated that the statement with regard to the one-month trial period is not correct. The payment was only to be made after the trial. Question No.14 is general question asked to the accused to make a statement about the

case of the complainant. The answer given by the accused to the said question no.14 needs to be reproduced, which reads as under:

“Q.No.14 : Do you want to say anything more about this case?”

Ans: Without my consent and my instruction, they presented it, even on my demand of bills they did not provide me and prior to trial period, cheques were presented. I am not liable to pay the mentioned cheque amount.”

13. A perusal of this answer would show that the grievance was made that the cheques were presented for encashment prior to the trial period. The bills were not provided on his demand and therefore he was not liable to pay the amount mentioned in the cheques. If questions no.5 and 14 are read together with the answers given by the accused, it is manifest that he was granted an opportunity to explain each and every circumstance appearing against him. It is to be noted that if the transaction was not as stated by the complainant, then immediately after filing the complaint, the accused would have taken recourse to the available remedy. The accused would have made a specific statement before the Court that he was not liable to make the payment mentioned in the cheques because the transaction was not completed in all respect. Meaning

thereby, the machine was not installed at all. In my view, therefore, this argument advanced on the point of prejudice having been caused to the accused cannot be accepted. It is further pertinent to note that this argument was advanced before the learned Additional Sessions Judge in the appeal. The same has been properly dealt with. In view of this, I do not find any substance in the revision. The revision stands dismissed. Pending application(s), if any, stand(s) disposed of.

CRIMINAL APPLICATION (APPR) NO.328 OF 2022

14. This is an application for permission for withdrawal of amount of compensation.

15. The complainant/non-applicant is allowed to withdraw the amount of ₹4,12,500/- deposited in this Court. The complainant is also allowed to withdraw amount deposited in the appellate Court, if any.

16. The application stands disposed of.

JUDGE

Wagh