2025:BHC-AUG:28939

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 882 OF 2023

Hitendra S/o. Vinayakrao Upadhyay,
Age : 62 years, Occu. : Agriculture,
R/o. Sahakar Nagar, Anukrupa Building,
Parbhani, Tq. & Dist. Parbhani. …. Appellant
(Orig. Complainant)

Versus

Shankar S/o. Rajaram Gaud,
Age : 58 years, Occu. : Business,
R/o. Om Niwara Complex, "Niwara",
Nivara Housing Society, Takli Naka,
Near Cement House, Kopargaon,
Tq. Kopargaon, Dist. Ahmednagar. … Respondent
(Orig. Accused)

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Mr. V. D. Hon, Senior Counsel i/b. Mr. Mayur Subhedar, Advocate for Appellant.

Mr. P. R. Katneshwarkar, Senior Counsel i/b. Mr. V. S. Undre, Advocate for Respondent.

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CORAM : ABHAY S. WAGHWASE, J.
RESERVED ON : 12 SEPTEMBER 2025
PRONOUNCED ON : 14 OCTOBER 2025

JUDGMENT :

1. Original complainant, who instituted proceedings under section 138 of Negotiable Instruments Act, against present respondent, is hereby assailing judgment and order of acquittal dated 03.03.2022 passed by learned Judicial Magistrate First Class, Parbhani acquitting the accused from above offence.

FACTS GIVING RISE TO PRESENT APPEAL ARE AS UNDER

2. A CL-III Country Liquor Shop licence, stood in the name of one Vinayakrao Narmadashankar Upadhyay and his sons, who were partners. As they were unwilling to conduct the business, there was offer by the present respondent, who worked as Manager, to get liquor licence transferred in his name and conduct the business. Agreement was reached at between the parties. Deal was finalized for payment of Rs.25,00,000/- towards the goodwill and both parties had agreed to apply for transfer of licence to the Collector i.e. in the name of original accused. Procedure was completed and licence was also transferred in the name of accused. Towards the agreed amount accused allegedly issued cheques. On its presentation, the same were returned dishonoured, which was followed by issuance of demand notice by complainant and on failure to pay the cheque amounts, proceedings under section 138 of N.I. Act were initiated. Parties led respective evidence. After appreciating the same, learned trial court was pleased to acquit the accused holding that there was no case made out for legally enforceable debt. Such acquittal is now challenged by filing appeal, pursuant to this court granting leave to file appeal by order dated 11.09.2023.

3. Here, as submitted and as is emerging from record, this court

had heard the appeal and vide judgment and order dated 08.01.2025 was also pleased to allow the same, thereby overturning the order of acquittal. The same was questioned before the Hon'ble Supreme Court by filing Petition for Special Leave to Appeal (Cri.) No.2649 of 2025 and by order dated 07.03.2025, following order is passed :

> *"Leave granted.*
>
> *In terms of the signed order, the impugned judgment dated 08.01.2025 is set aside without commenting on the merits of the case. Criminal Appeal No. 882 of 2023 shall stand revived on the file of the High Court of Judicature at Bombay, Bench at Aurangabad, and shall be heard afresh, without being influenced by the impugned judgment and the present order.*
>
> *The appeal is disposed of, in terms of signed order.*
> *Pending application(s), if any, shall stand disposed of."*

It is in the above backdrop, appeal is heard afresh.

SUBMISSIONS

Apart from making oral submissions, written notes of arguments are placed on record by each of the side.

On behalf of Appellant Sr. Counsel Mr. V. D. Hon. :

4. Learned Senior Counsel would point out that, there is no dispute that CL-III licence stood in the name of appellant and on account of their reluctance to conduct Country Liquor Shop business and due to their acquaintance with respondent accused, who was also their

Manager, licence was sought to be transferred. Learned Senior Counsel pointed out that there was written agreement, which is at Exh.28. He would point out that, it was agreed between the parties that towards the "Goodwill" an amount of Rs.25,00,000/- would be paid by accused. That, complainant had performed their part of contract i.e. applying for transfer of CL-III licence with the Collector, Parbhani. That, licence was also accordingly got transferred and hence he submitted that, it was expected of accused also to perform his part for contract i.e. parting with the amount as agreed. That, however, accused had failed on two occasions to meet the timeline as sought by him. That, on hot persuasion accused issued cheques towards above agreement, however, the same were dishonoured. Learned Senior Counsel pointed out that, therefore, complainant was constrained to dispatch legal notice demanding Rs.25,00,000/-. In spite of accused failed and therefore finally legal recourse was taken by instituting proceedings under section 138 of N.I. Act vide S.C.C. No.930 of 2017.

5. Learned Senior Counsel pointed out that, before trial court, complainant adduced their own oral evidence as well as documentary evidence as contemplated under law. Witness to the agreement, which was notarized, was also examined. That, full-proof case comprising of all essential ingredients under section 138 of N.I. Act were made available

with the complainant's evidence. It is also his submission that, initial burden was thereby discharged by complainant, and therefore, presumption under sections 118 and 139 of N.I. Act got automatically attracted. Accused failed to rebut the case of complainant. There is no denial of either issuance of cheque or signature over it. Under such circumstances, it is his submissions that conviction ought to have been recorded. However, according to him, learned trial court failed to appreciate availability of legally acceptable evidence, admissions of accused regarding transfer of licence in his name being completed on due inquiry.

6. Learned Senior Counsel took this court through the evidence of complainant i.e. both, oral and documentary and would point out that, there was legally enforceable debt at the end of accused. That, learned trial court failed to consider and appreciate the same and also failed to consider settled legal position. That, other ancillary proceedings instituted by complainant like Revision on account of issuance of process were rejected by this court. Similarly, Writ Petition filed by accused bearing No.3765 of 2018 and Second Appeal No. 917 of 2022 were already dismissed by this court. For all above reasons, learned Senior Counsel seeks indulgence at the hands of this court. He has placed on record relevant citations as well as list of documents.

On behalf of Respondent Sr. Counsel Mr. P. R. Katneshwarkar :-

7. Supporting the judgment of acquittal passed by learned trial court, learned Senior Counsel Shri Katneshwarkar would submit that, here, claimant had miserably failed to prove existence of legally enforceable debt. He pointed out that, there is denial of any oral or written agreement to pay amount of Rs.25,00,000/- towards goodwill as asserted by complainant. It is pointed out that, no doubt, as appellant was unwilling to conduct the business, there was offer by the present respondent, who worked as Manager, to get liquor licence transferred and conduct the business. Accordingly, after both parties jointly participated in the proceedings of transfer of licence and the same has been transferred by the authorities i.e. on payment of necessary fees. It is emphasized that, even essential ingredients for attracting the charges under section 138 of N.I. Act are not available and as fundamental burden of making out the case for offence punishable under section 138 of N.I. Act itself is not discharged by complainant, learned Senior Counsel questions the contention regarding accused failing to discharge his burden on owners. He submitted that, the provisions under which the licence was got transferred do not acknowledge or require payment of any amounts towards goodwill. According to him, at the outset,

complainant had no ownership or brand name of which liquor was sold so as to seek goodwill. That, the State of Maharashtra is the real owner of the business and that complainant was merely permitted to conduct of sale of liquor in the capacity of licence. Learned Senior Counsel has pointed out that so called transaction of transfer of licence of 2013 and cheques in question are of 2017. Contentions raised by the complainant that accused twice borrowed time to repay amount towards goodwill, has no foundation either in the form of oral or the documentary evidence.

8. Learned Senior Counsel would strenuously submit that, though cheques are issued, the same are not towards transaction alleged by complainant, rather there are cheques pertaining to other land transaction between brother of complainant and wife of accused. Said cheques are misused and false case has been set up. That, complainant failed to make out the case under section 138 of N.I. Act and on the contrary, accused succeeded in substantiating his defence. Thus, according to him, learned trial court committed no error whatsoever in acquitting the accused and ultimately he urges for dismissal of appeal. Learned Senior counsel seeks reliance on the following judgments :

(i) Rajco Steel Enterprises v. Kavita Saraff & Anr., (2024) 9 SCC 390

(ii) Anss Rajashekar v. Augustus Jeba Ananth, (2020) 15 SCC 348

(iii) Vikas Gopi Bhagat v. Shivdas Pednekar & Anr., 2019 SCC OnLine Bom 1367

(iv) *Anugrah Stock & Stock & Broking Pvt. Ltd. v. Parind Sushil Parekh and Anr., 2015 SCC OnLine Bom 2644*

(v) *Shaikh Jalal (D) Through LRs v. State of Goa, 2018(1) Mh.L.J. 225*

9. At the threshold, it is to be mentioned that this court had decided the appeal vide judgment and order dated 08.01.2025 in Criminal Appeal No. 882 of 2023. The matter was taken up before the Hon'ble Apex Court vide Petition for Special Leave to Appeal (Crl.) No. 2649 of 2025 by Shankar and the Hon'ble Apex Court by its order dated 07.03.2025, without commenting on merits of the case, directed that Criminal Appeal No. 882 of 2023 be revived and restored on the file of this court with further directions to hear the appeal afresh.

10. As stated above, in such backdrop, appeal is heard afresh and taken up for decision. As stated above, apart from making oral submissions, both learned Senior Counsel, representing each of the party, had placed on record written notes of arguments and some rulings relied by them and the gist of the same is already dealt in aforesaid paras.

Appeal pertains to judgment and order of acquittal passed by learned trial court i.e. J.M.F.C., Court No.5, Parbhani, dated 03.03.2022 acquitting the accused (present respondent) from offence punishable under section 138 of N.I. Act.

11. Original complainant has taken exception to the order of acquittal by filing instant appeal. On hearing learned Senior Counsel for the appellant and on studying the written notes, the gist of appellant's case seems that, appellants were initially conducting business of sale of liquor on the strength of licence issued by concerned authority. To this extent there is no dispute by the other side. Appellant's case is that, the accused showed interest to take over the business on getting licence transferred in his name and in return, it was allegedly agreed by accused to pay a sum of Rs.25,00,000/- towards the goodwill. After formalities of transfer were completed, on participation of complainant and accused, licence was transferred in the name of accused, who started conducting business. Appellant's case is that, as agreed by accused, he was called upon to pay price of the goodwill and accused though delayed compliance, issued five cheques with assurance that it would be honoured. However, on presentation of the same, the same were dishonoured and when accused replied to legal notice under section 138 of N.I. Act issued by complainant, taking stand of no agreement on the point of payment of Rs.25,00,000/- towards goodwill, complaint under section 138 of N.I. Act has been instituted.

12. In support of commission of above offence, there is evidence of complainant Hitendra (CW1), who is said to be one of the partner of

the firm, who were originally conducting liquor sell business of the licence. Complainant has also adduced the evidence of CW2, who notarized the alleged notarized agreement i.e. Exh.28, which is said to be an agreement between the parties regarding payment of Rs.25,00,000/- towards goodwill.

13. Defence though did not adduce evidence, took a stand that there was another transaction between his wife and Manish pertaining to land and in that transaction cheques which were issued, were misused in the instant 138 N.I. Act complaint and complainant is cross examined on such line.

14. It is settled law that, in cases of 138 N.I. Act, there is burden on complainant to prove essential ingredients of 138 N.I. Act, i.e. it is to be demonstrated and rather substantiated that there was legally enforceable debt which was dishonoured. Once the foundational facts are proved by the complainant, presumption available under section 139 of N.I. Act steps in and then onus shifts on accused to rebut the said presumption. This is the fairly settled legal position in cases of such nature.

15. On re-appreciating the complainant's evidence, his case could be summarized in brief as under :-

That, in April 2013, accused Shankar was appointed as a Manager to look after the day to day complainant's shop. It is specific case of complainant that, accused wanted to test business potential and initially executed 'naukarnama' i.e. for ascertaining the profits returns from the said business. Further case put up is that, both parties agreed to transfer liquor licence in favour of accused and accordingly participated in the procedure for transfer of licence with the Collector Office. On 22.06.2015, the Collector Parbhani granted the application for transfer of shop licence in the name of accused. That, as agreed accused was expected to pay Rs.25,00,000/- towards goodwill, but he failed. It however seems to be the case of complainant that after gap of two months thereafter i.e. on 22.08.2015, an agreement (Exh.28) was notarized, wherein accused undertook to pay Rs.25,00,000/- with 24% rate of interest from 22.06.2015 till realization of the amount and five cheques were duly issued payable by Central Bank of India, Kopergaon Branch, Ahmednagar. Said cheques are of 05.04.2017; 10.04.2017; 15.04.2017; 20.04.2017 and 25.04.2017. It is further case of complainant that, initially above cheques were in Marathi and by way of mischief, issued cheque of the year 2017 which should have been of the year 2016 and accused twice urged for extensions of time to make payments i.e. first extension was sought on 31.03.2016 and second one was on 05.04.2016. Above referred cheques were tendered for realization, but each cheque was distinctly dishonoured with remark as “funds insufficient”. Hence, demand notice was issued and also received by accused.

16. What can be discerned from above discussed chronology of events is that, according to complainant accused had agreed to purchase the licence in the year 2013. Further it is also his clear case that, there was oral agreement between them regarding payment of Rs.25,00,000/- towards goodwill. Thus, there is nothing in black and white regarding alleged purchase of licence for Rs.25,00,000/ towards goodwill. Parties seem to have participated in making application before the Collector, Parbhani seeking transfer of licence on 08.01.2014 itself. Complainant’s own case suggests that said application was granted by the Collector and licence was transferred in the name of accused on 22.06.2015, but alleged agreement Exh.28 is of 22.08.2015 i.e. after two months of actual transfer. Mere pleadings are made that accused sought extension of time to make payments twice i.e. on the count of amount to be huge and secondly on the ground of marriage of his son and expenses required for education. No timely steps seem to be taken by the complainant for long gap since even date of transfer of application in favour of accused dated 08.01.2014. Allegations are levelled that notice served upon complainant by Excise authorities, was received by accused and behind their back

licence was got transferred. With such case of complainant, it was expected of him to demonstrate that behind his back accused obtained notice served on complainant and without giving knowledge to them got the licence transferred. It was possible for complainant to demonstrate by way of acknowledgment over the alleged notice served on complainant by the Collector Parbhani. The same does not seems to be happened here, and moreover complainant has admitted in cross that even in statement before Excise authorities there is no reference of Rs.25,00,000/- agreed by accused to be paid towards goodwill.

17. Learned Senior Counsel representing accused has submitted that, neither the Maharashtra Prohibition Act, 1949 nor any Rules thereunder provide for transfer of licence on payment of price for goodwill. In this regard, he took this court through the observations of learned trial court commencing from paragraph nos.28 to 42. Submission to this extent made before this court are not countered.

18. Much emphasize is laid on Exh.28 which is said to be a notarized written agreement. However, in the body of complaint, complainant has set up a case of only agreement. Witness on the point of Exh.28 is also examined to prove the same. However, as stated above, complainant came with a case that there was oral agreement for payment

of goodwill for sell of licence in the year April 2013. Specific date is not supplied. As stated above, in the body of complaint, it is not reflected whether agreement was written one. In the very Exh.28, there is reference of mere oral agreement. Said oral agreement is admitted in cross to be eight months prior to making application to the Collector for transfer. Original agreement is also not finding place in the record. Answer of complainant to this is that original copy is with accused, but no steps are taken to call upon accused to produce the same. In fact, Exh.28 carries contents regarding payment of Rs.25,00,000/- towards goodwill on the day of transfer of licence. Here, as stated above, licence is shown to be transferred on 22.06.2015 itself. Though case is tried to be set up that time was got extended by accused on one or the other count, there is no distinct evidence to that extent. When complainant was diligent enough to get Exh.28 executed, it was further expected of him to also get further extensions also to be put in black and white. However, same has not been done by complainant.

For above reasons, contention of complainant that there was agreement between complainant and accused for transfer of Rs.25,00,000/- towards goodwill, has no strong foundation. Mere, year of oral talks i.e. April 2013 is not convincing in offence of 138 of N.I. Act, which requires strict proof of evidence and adherence of technicalities.

Complainant seems to have kept silent since date of transfer of licence i.e. 22.06.2015 till issuance of legal notice under section 138 of N.I. Act and further filing of complaint.

19. In view of nature of case, it is expected of complainant to substantiate existence of legally enforceable debt. Only when burden to this extent is successfully discharged by complainant, presumption available under section 139 of N.I. Act comes to his rescue and further onus shifts on accused to rebut the presumption. But as stated above, complainant's case is not full proof, for the reason that, alleged oral agreement of payment of Rs.25,00,000/- towards goodwill are of 2013 – 2014. Initial cheques in question were apparently of 2017 and complainant claims that said mischief was realized and accused was called upon to issue fresh cheque of 2016. Coupled with this, when there is nothing to show that accused owed Rs.25,00,000/- towards goodwill, accused has not succeeded in discharging initial burden for attracting further presumption. No legally enforceable debt has been shown to be in existence when the cheques were obtained and put to its realization.

20. On the other hand, accused had come up with specific defence that cheques in question were pertaining to distinct land transaction between Manish and wife of respondent accused and the

same are misused. The relevant translated portion of cross examination of CW1 complainant, is reproduced as under :

> *"It is true that, the place where the said country liquor shop is located was in the name of my brother Manish. It is trued that, on 21.03.2013, Manish sold the said land along with the building and construction on it, to the wife of the accused Shankar Gaud."*

In the light of answer given by this witness in cross, admitting land transaction between Manish and wife of accused, defence has succeeded in probabilizing their case that cheques in question were pertaining to another land transaction and no such cheques ever issued towards any agreement towards goodwill. Therefore, defence has succeeded in probabilizing their case to the greater extent.

21. Though learned Senior Counsel for appellant has relied on citations, facts in those cases are distinct and hence, does not come to the rescue of complainant – appellant. On the contrary, the facts in the citations relied by learned Senior Counsel for respondent accused i.e. judgment of ***Vikas Gopi Bhagat (Supra)*** as well as ***Shaikh Jalal (D) Through LRs (Supra)***, are closer to the facts to the case in hand i.e. unless legally enforceable debt is proved, accused cannot be held guilty.

22. Having gone through the impugned judgment and order of acquittal, I am convinced that all legal requirements have been kept in mind while evaluating the oral and documentary evidence. No error whatsoever has been committed while appreciating the evidence. No infirmity or perversity is brought to our notice in appeal so as to interfere in the judgment and order under challenge. Hence, I proceed to pass the following order:

ORDER

The appeal is hereby dismissed.

(ABHAY S. WAGHWASE, J.)

Tandale