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

CRIMINAL REVISION APPLICATION NO.1 OF 2022

Manoj Manoharrao Mahajan,
age: 48 years, major, occupation: business,
r/o : plot No.35, 5th Layout,
Dharampeth Society, Jaiprakash
Nagar, Nagpur. ….. **Applicant.**

:: VERSUS ::

Sandesh Sunil Shinde,
age: major, occupation: business,
r/o 48, Gawande, Layout,
Ring Road, Khamla Square,
Nagpur. ….. **Non-applicant**.

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Shri R.D.Hajare, Counsel for the Applicant.
Shri R.S.Nagpure, Counsel for the Non-applicant.
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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 20/01/2025
PRONOUNCED ON : 12/02/2025

JUDGMENT

1. By preferring this revision, the applicant (complainant) has challenged the judgment and order

of acquittal passed by learned Additional Sessions Judge-8, Nagpur dated 10.3.2021 in Criminal Appeal No.116 of 2016.

2. As per the case of the complainant, he had advanced hand loan of Rs.4,15,000/- with interest at the rate of 18% per annum in March - April 2002. The non-applicant (accused) has agreed to repay the same with interest at the rate of 18% per annum. Thereafter, the accused expressed his inability and requested the complainant to reduce the liability of interest to the tune of Rs.25000/-. The complainant has accepted his request and the accused has paid amount Rs.25000/- to the complainant on 27.7.2002. The accused has issued cheque of Rs.4,15,000/- bearing No.227077 dated 23.10.2003 drawn on the Bank of Baroda, Nagpur. The complainant presented the said cheque for realization and the said cheque was returned "unpaid" with an

endorsement “insufficient funds”. The complainant has issued a statutory notice to the accused on 24.11.2003. The accused failed to pay the cheque amount despite of service of notice. As the cheque was issued, as per the contention of the complainant, against legal and enforceable debt which was dishonoured and on issuance of notice also the accused has not repaid the amount, the complainant was constrained to file the complaint.

3. The defence of the accused was of total denial and it was contended that there was no money transaction between him and the complainant. The complainant was working with him as Supervisor and he has given blank cheque to the complainant for site work and maintenance of machine. The same was misused by the complainant. He never issued letter Exh.37 to the complainant.

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4. In support of the complainant's case, the complainant has examined himself vide Exh.32, CW2 Bank Officer Ajit Lonare vide Exh.69, and relied upon letter Exh.37, envelope Exh.38, cheque Exh.39, memo Exh.40, notice Exh.41, postal receipt Exh.42, and acknowledgment Exh.43.

5. After appreciation of the evidence, learned 16th JMFC, Nagpur held the accused guilty and convicted him for the offence under Section 138 of the Negotiable Instruments Act and sentenced to suffer simple imprisonment, till rising the court. The accused was directed to pay compensation of Rs.6.00 lacs to the complainant under Section 357 of the Code of Criminal Procedure.

6. Being aggrieved and dissatisfied with the same, the accused preferred an appeal bearing Criminal

Appeal No.116 of 2016 before learned Additional Sessions, Nagpur. Learned Additional Sessions Judge, after appreciating the evidence, held that the complainant has failed to prove the foundational facts that he has given the hand loan to the accused. The evidence of the complainant falls short to show that he was having sufficient means to give the amount of Rs.4,15,000/- as hand loan to the accused. As the complainant has not proved the foundational facts, presumption under 139 of the Negotiable Instruments Act is not attracted and, therefore, failed to prove the offence under section 138 of the said Act.

7. Heard learned counsel Shri R.D.Hajare for the complainant and learned counsel Shri R.S.Nagpure for the accused. Perused the entire evidence on record. Learned counsel appearing for respective parties have taken me through the entire evidence on record.

8. On appreciation of the evidence, it reveals that the complainant came with a case that he has handed over the loan of Rs.4,15,000/- to the accused at the rate of 18% per annum. On the request of the accused, he reduced the amount of Rs.25,000/- towards the interest. The accused has issued cheque to him against the legal and enforceable debt bearing No.227077 dated 23.10.2003 drawn on the Bank of Baroda, Nagpur of Rs.4,15,000/-. The said cheque is at Exh.39, the cheque return memo is at Exh.40, office copy of the notice is at Exh.41 and postal receipt is Exh.42 and postal acknowledgment is at Exh.43.

9. The cross examination of the complainant shows that the amount of Rs.4,15,000/- was paid by him in March - April 2002. He has bifurcated the amount by stating that once he has given Rs.1,65,000/- and on second occasion he has given Rs.2,10,000/- and rest of

the amount has been given in 2 or 3 installment. He admitted that he was working as pigmy agent and his monthly income was Rs.15000/-. The amount of his income was used to remain balance in his bank account. He has paid the amount of Rs.1,65,000/- by withdrawing from the said bank. Amount Rs.2,10,000/- is also paid by him by withdrawing the same. He has not obtained any receipts or documents from the accused that he paid the amount to him. His further cross examination shows that the accused has sent him cheque Exh.39 by post. He is unable to identify the handwriting of the accused. He denied the contention that the accused used to give him blank cheques and blank letter head to use it at the site. He also denied that he has misused the cheque. The cheque was referred to the handwriting expert. The opinion of the handwriting expert is at Exh.111, which shows that handwriting expert has shown his inability to express definite opinion as to the red encircled writing and figures marked at Exhs.Q-1 to Q-3 with the writings and figures marked at Exhs.S-1 to S-3.

10. CW2 Bank Officer Ajit Lonare, is examined only to prove the memorandum.

11. It is true that the complainant can rely the presumption incorporated by the Negotiable Instruments Act. However, before attracting the presumption, the complainant has to prove the foundational fact.

12. The appellate court appreciated the evidence adduced by the complainant and observed that bare perusal of the cheque reveals that signature on the cheque was in black ink, wheres rest of the contents are in blue ink and the date mentioned is by different pen

and rest of the contents i.e. name of the complainant and amount are by different ink, which are sufficient to show that the contents of the cheque Exh.39 were not scribed or written at the same time. The evidence on record further shows that during cross examination, the complainant admitted that he has withdrawn the amount from his bank and paid the same to the accused. Despite this specific defence by the accused of misusing a blank signed cheque and there was no legal and enforceable debt, the complainant did not produce extract of his bank account to substantiate the contention that he was having the amount, which is given as a hand loan to the accused, in his account and he had withdrawn the same in order to give it to the accused. The complainant has also shown his inability to tell the dates when the said amount exactly was given to the accused. As far as the fact of issuance of cheque is concerned, considering different ink on the said cheque, the same creates suspicion. Once accused admits issuance of such cheque, statutory presumption under Sections 118-A and 139 of the Negotiable Instruments Act goes in favour of the complainant and onus is shifted upon the accused to rebut the initial presumption. The accused can discharge his burden on preponderance of probability on the basis of cross examination. When the alleged cheque is given towards repayment of loan and the complainant failed to give details of transaction, the accused denied the loan taken and the complainant has to show that he has resources to give such huge amount.

13. Admittedly the complainant was working as pigmy agent and drawing salary of Rs.15000/-. The complainant has not adduced the evidence to show that

he has any other sources to have such amount in his account.

14. The law does not provide that the accused has to adduce the evidence for rebuttal of the presumption. The accused can rebut the same on the basis of preponderance of probability.

15. Thus, learned Sessions Judge has considered the specific defence of the accused, difference in ink, no explanation to issue the cheque by post, no document to show that such money was available with the complainant at the relevant time, in the light of the fact that he was working as pigmy agent, but there was no source but only his salary. There is no evidence that he has the amount and he has given the same to the accused. Considering all these facts, the appellate court held that foundational facts are not proved by the

complainant and burden of the accused is not to establish his defence beyond reasonable doubt.

16. Admittedly, when two views are possible and the appellate court has taken the possible view, merely because another view is possible, the judgment of acquittal cannot be reversed. What is to be seen is, whether the findings are perverse or not and if the findings are perverse, certainly the judgment of acquittal can be interfered with.

17. Considering the evidence on record, the issue of giving the hand loan itself is not proved by the complainant. The complainant has not proved the foundational facts and, therefore, presumption will not attract. Therefore, the view taken by the appellate court is a possible view and no interference is called for in the judgment of acquittal rendered by learned Sessions

Judge. The revision being devoid of merits deserves to be dismissed and accordingly it is **dismissed**.

Revision stands **disposed of**.

(**URMILA JOSHI-PHALKE, J.**)

!! BrWankhede !!