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

CRIMINAL APPEAL NO.773/2008

Shri Atish S/o Bhagwan Patekar,
age 33 yrs., Occ. Business,
R/o. Shivkrupa Colony, Dastur Nagar
Chowk, Amravati, Tq. & Dist. Amravati.

...**APPELLANT**

VERSUS

Smt. Varsha w/o Dinanath Sonar,
age 40 yrs., Occ. Service,
R/o. Plot No.13, Kaushik Colony,
behind Jawhar Nagar, V.M.V Road,
Amravati, Tq. & Dist. Amravati.

...**RESPONDENT**

Ms. Nisha S. Khope, Advocate (appointed) for appellant.
Mr. S.R. Sayre, Advocate h/f Mrs. S.W. Deshpande, Advocate for respondent.

CORAM : M. M. NERLIKAR, J.
DATE : 18.12.2025

ORAL JUDGMENT :

Heard the learned counsel for the appellant as well as the learned counsel for respondent.

2. The present appeal is directed against the judgment and order dated 27.08.2008 passed by the learned 6th Judicial Magistrate First Class in Summary Criminal Complaint No.3329/2007, wherein the present respondent/original accused was acquitted for the offence punishable under Section 138 of the Negotiable Instruments Act ("NI Act").

3. The learned counsel for the appellant submits that the complaint came to be filed by the appellant alleging that cheque No.212956 was issued by the respondent for Rs.62,500/-. When it was presented to the Bank, it was returned with the memo that the respondent has stopped the payment. Therefore, the complainant has sent notice dated 22/06/2007 and accordingly, the notice was replied, however as the amount was not paid, he has filed the complaint. She submits that admittedly, there was agreement between the parties for construction of the house of respondent, wherein it was agreed that the respondent will pay Rs. 4,95,000/-to the complainant after completion of construction of the house.

4. According to her, endorsement of the Bank which shows that the respondent has stopped the payment, this by itself is sufficient to invoke the provision of Section 138 of the NI Act. The amount is due and payable against the construction work, therefore it is a legally enforceable debt.

5. So far as the facts are concerned, those are not disputed as the complainant has constructed the house of the respondent. It is further not in dispute that the cheque was issued by the respondent and the signature appearing on the cheque is also not disputed. Under such circumstances, presumption under Section 139 of the NI Act can be invoked. She further submits that respondent has failed to rebut the presumption and therefore, the Court ought to have considered the case of the complainant and ought to have convicted the respondent. However, the Trial Court has miserably failed to appreciate the evidence on record in its true perspective, therefore wrongly acquitted the respondent.

6. On the other hand, the learned counsel for the respondent submits that the complaint filed under Section 138 of the NI Act is vague, as material facts are suppressed by the complainant. He submits that the agreement was entered between the parties for the construction of house on 20.10.2005. On the same date, the respondent has given seven cheques and it was agreed between the parties that as per the progress of the construction, the cheque would be presented to the Bank for encashment. The complainant has encashed four cheques, however three cheques were with him. As the construction work was not completed by the complainant, therefore the respondent has given the intimation to the Bank to stop the payment. He further submits that there is no legally enforceable debt as could be gathered from the facts and circumstances of the case and therefore, the offence under Section 138 of the NI Act cannot be said to be made out. Not only that, in cross-examination, it was specifically admitted by the complainant that on 20.10.2005, the agreement was executed and the entire contents of the agreement were

admitted, therefore this is sufficient to gather that there is no legally enforceable debt and the cheques were issued as security and they were to be presented as per the progress of the construction of the house. In the cross-examination, the complainant further admitted that it was agreed between the parties that construction work of house would be for a consideration of Rs.4,95,000/-. He has invited my attention to the cross-examination, where the complainant has admitted that the amount is to be paid in installments. However, he further admitted that he has not taken cheques from the respondent. He further deposed that, if the cost of the construction increased, for that purpose cheques would be given. It was admitted by the complainant that he has received the amount of Rs.4,10,000/- as per the cheques mentioned in the agreement even the cheque numbers are mentioned by the complainant. It was further admitted by the complainant that he received an earnest amount of Rs.11,000/-. He admitted that the respondent has demanded remaining three cheques from the accused in reply to the legal notice issued by the complainant to the respondent. He further submits that in support of version of the respondent, the respondent has examined two witnesses wherein one of the witness Gorkshanath Vishwanath Puri who was the witness to the agreement specifically deposed that when the agreement was executed, at that time, seven blank cheques Nos. 212952 to 212957 were given as a security. As per the progress of the work, those cheques were to be deposited in the Bank. He further deposed that the construction work of the house of the respondent was of inferior and sub-standard quality and it was not completed. Another witness was also examined on behalf of respondent i.e. Vinod Fattuji Dabhade who has deposed that he went to take the photographs of the house, where he noticed inferior and sub-standard quality of work. Lastly the learned counsel for respondent submits that the case would not fall under Section 138 of the NI Act as there is no legally enforceable debt against the respondent. Therefore, learned counsel for respondent submitted that the Trial Court after scanning the entire evidence on record and appreciating the documentary as well as oral evidence has come to the conclusion that the complainant has failed to prove the case beyond reasonable doubt, that the accused has issued cheques in question for discharge of legally enforceable debt or that there was pre-existing debt on the date when the cheque in question was issued.

7. After considering the rival submissions and perusal of oral as well as documentary evidence on record, it appears that admittedly an agreement was executed between the parties on 20.10.2005. The agreement is at Exh. 21, wherein it appears that the cost of the construction work was fixed as Rs.4,95,000/- and it was agreed that as per the progress of the construction of the house, the agreed amount will be paid in installments. It appears from the agreement at Exh.21 that seven cheques were given. It was decided between the parties that the respondent would obtain a loan of Rs.3,90,000/-from the HDFC Bank. It further appears that the Cheque No. 212951 of Rs.50,000/- dated 10.02.2006 was given and cheque No.212952 of Rs.44,000/- was to be encashed after completion

of the work. In the said agreement at para 5 that the Cheque Nos.212953, 212954, 212955, 212956, 212957 these five cheques were given of HDFC Bank to the complainant. However, it appears from the complaint that nothing was mentioned regarding these transactions and only it is stated that there was an agreement between the parties. As per the contention of the appellant, the disputed cheque i.e. cheque no. 212956 was issued by the respondent for construction of her house on 12.02.2007 for Rs.62,500/- which itself falsifies the case of the appellant as the said cheque number was already mentioned in the agreement dated 22.10.2005. Therefore, it cannot be said that the cheque was issued on 12.02.2007. Further, it is to be noted that so far as the evidence is concerned, the respondent has specifically come with a case that the intimation was given by her to stop the payment for the reason that the complainant has not completed the work. It is the consistent stand of the respondent throughout the evidence which has been further supported by the witnesses who have testified on behalf of respondent. Therefore, considering this fact, it is necessary to examine whether the cheque which was issued by the respondent was in discharge of a legally enforceable debt or not. As could be gathered from the evidence, it has come in the evidence of complainant that disputed cheque was issued on 12.02.2007. The said cheque was issued by the respondent as per the terms and conditions of the agreement and for construction of the house of respondent. When the cheque was presented, it was dishonoured as the payment was stopped by the respondent, therefore he has sent the notice dated 22.06.2007 which was received on 26.06.2007 as the amount was not paid, the complainant was constrained to file the complaint. In the cross-examination, he has admitted that agreement was executed. He further admitted that the consideration for construction of Rs.4,95,000/- out of which Rs.4,21,000/- (Rs.4,10,00/- through Cheque 212952, 212953, 212954 and 212957 and earnest amount of Rs.11,000) was received. He admitted in cross-examination that in reply to the legal notice, respondent has asked for remaining three cheques from the complainant. Therefore considering the evidence on record, one thing is clear that admittedly the agreement was executed between the parties for work of construction of house of respondent for consideration of Rs Rs.4,95,000/- and the respondent has paid Rs.4,21,000/-. Therefore, there was no reason for the respondent to stop the payment of Rs. 62,500/- when the fact remains that Rs.4,21,000/- was paid by the respondent. Under such circumstances, if the stand taken by respondent is considered that the appellant has not completed the work and the quality of the work was sub-standard, therefore she was compelled to give the intimation to the Bank to stop the payment seems to be probable. Admittedly, under such circumstances, it cannot be said that there is a legally enforceable debt against the respondent. Section 138 of the NI Act was brought in the statute book with an objective to curb the activities, wherein there is dishonest intention of the drawer of the cheque.

8. So far as the present case is concerned, it could be said that absolutely this is not a case where the complainant could have prosecuted the respondent under Section 138 of the NI

Act in absence of any legally enforceable debt. I am of the opinion that there is no perversity or error committed by the Trial Court. The Trial Court has appreciated the facts and circumstances in its entirety, and came to the right conclusion that the complainant has failed to prove the case beyond reasonable doubt. In this view of the matter, there is no merit in the appeal, hence the same is dismissed.

10. The Secretary, Legal Aid Services Sub-committee, High Court Bench at Nagpur is requested to pay quantified amount of Rs.10,000/- to the learned appointed counsel for the appellant.

(M. M. NERLIKAR , J.)

Gohane