



Judgment

470 revn81.24

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

CRIMINAL REVISION APPLICATION NO.81 OF 2024

Kisan R.Gate,
age 49 years, occupation service,
r/o c/o Madhukar Potdukhe,
Siraspeth, Telipurs, Aamaa Hospital,
Nagpur, Maharashtra. **Applicant.**

:: V E R S U S ::

Prakash Tukaram Kakuhas,
age 64 years, occupation business,
r/o house No.455, near Chitra
Talkies, Gawli Pura Road,
Nagpur, Maharashtra. **Non-applicant.**

**Mrs.Suhasini Deshpande, Counsel for the Applicant.
Shri A.R.Rishi, Counsel for the Non-applicant.**

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 06/08/2025
PRONOUNCED ON : 12/09/2025

JUDGMENT

1. By this revision, the applicant has challenged
judgment and order dated 22.12.2023 passed by learned
Additional Sessions Judge, Nagpur in Criminal Appeal

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No.47/2018 whereby judgment and order dated 9.1.2018 passed by learned 25th Judicial Magistrate First Class (Special Court for 138 N.I.Act), Nagpur in Summary Complaint Case No.1171/2010 convicting the non-applicant was set aside and the non-applicant is acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 (the NIA).

2. Brief facts of the case are as under:

The applicant is Power of Attorney Holder of Mrs.Vaishali Sanjay Jaiswal who entered into an Agreement of Sale with Shri Prabhakar Ramchandra Bansod, Ramesh Bansod, and Mrs.Prabha Hunnergirikar, residents of Nagpur. They entered into an agreement to sale plot No.106-B at mouza Ambazari, admeasuring 6000 square feet jointly owned by above said Prabhakar Bansod and ors for consideration of Rs.2,70,00,000/-.

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Said Vaishali Jaiswal has paid Rs.20.00 lacs towards consideration amount to the vendors through the non-applicant, who is accused. The said amount was received by vendors in presence of the accused. As per the agreement, balance amount shall be paid by purchaser on completion of legal documents and on execution of sale deed on or before 31.12.2009. However, the above agreement has been cancelled by the said parties and the vendors returned amount Rs.5,50,000/- through the accused in the name of the applicant, since he is the Power of Attorney Holder to receive the amount on behalf of Vaishali Jaiswal, by cheque bearing No.no.231307 dated 8.12.2009 drawn on "Shamrao Vitthal Cooperative Bank Limited". On depositing the said cheque, it was dishonoured and returned with endorsement "Funds Insufficient". Therefore, the applicant issued notice dated 23.12.2009

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by RPAD. On receipt of the notice also, the accused has not paid the amount and, therefore, the applicant was constrained to file complaint against the accused.

3. In response to the summons, the accused appeared before learned JMFC at Nagpur and denied the contentions and came with a defence that there was no legal and enforceable debt due from him and, therefore, he is not responsible for the payment of the money. He has only handed over the cheque on behalf of the vendors. It is further contended that the applicant has not established that he is aware about the entire transaction and well acquainted with the facts. At the relevant time, no Power of Attorney was executed in his favour and, therefore, the complaint is liable to be dismissed.

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4. After recording the evidence and after hearing both the sides, learned JMFC held the accused guilty and sentenced him to suffer till rising the court and to pay compensation of Rs.6,10,000/-, in default, simple imprisonment for 5 months.

5. Being aggrieved and dissatisfied with the same, the accused preferred an appeal bearing Criminal Appeal No.47/2018. After appreciating the evidence, learned Additional Sessions Judge, Nagpur allowed the appeal and set aside the judgment and order of conviction.

6. Being aggrieved and dissatisfied with the same, the present revision is preferred by the applicant who is Power of Attorney Holder on the ground that the Appellate Court has not considered that the cheque was issued against discharge of legal and enforceable debt.

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The applicant has adduced the evidence, who is Power of Attorney Holder of Vaishali Jaiswal, which establishes that the cheque was issued against discharge of legal and enforceable debt. The presumption is not rebutted by the accused. The applicant has also established all ingredients of the offence. In view of that, reversing the judgment of the trial court by the Appellate Court is erroneous and, therefore, the judgment of the Appellate Court deserves to be quashed and set aside.

7. In support of her contentions, learned counsel for the applicant placed reliance on following decisions:

1. Criminal Appeal No..... of 2025 (Arising out of SLP (Cri.) NO.8659/2023 (Naresh Potteries vs. M/s.Aarti Industries and anr) decided by the Hon'ble Apex Court on 2.1.2025;

2. Bicholim Urban Cooperative Bank Ltd. vs. Anil Madhusudan Sawant and ors, reported in 2014 LawSuit (Bom) 2029, and

3. New Win Export and anr vs. A.Subramaniam, reported in 2024 SCC OnLine SC 1741.

8. *Per contra*, learned counsel for the non-applicant submitted that the burden on accused is to rebut the presumption on the basis of preponderance of probability. The complainant entered into transaction has not entered into the witness box. As far as Power of Attorney is concerned, the evidence must reflect that the Power of Attorney Holder is aware and conversant with the facts that there is no whisper either in the complaint or in the evidence that the Power of Attorney Holder is conversant with the facts and, therefore, the evidence of the complainant is not sufficient to prove the guilt of the accused.

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9. After hearing both the sides and perusing the evidence on record, it reveals that in support of the contentions, the applicant, who is Power of Attorney Holder, entered into the witness box and reiterated as to the transaction between complainant Vaishali Sanjay Jaiswal and vendors Prabhakar Ramchandra Bansod and ors. Admittedly, it is the case of the complainant that as the Agreement to Sell was cancelled by the parties, the vendors returned amount of Rs.5,50,000/- through the accused by cheque bearing No.no.231307 dated 8.12.2009 which was deposited and returned with endorsement "Funds Insufficient". Therefore, legal notice was issued on 23.12.2009. On receipt of the notice also the amount was not paid.

10. The affidavit evidence is at Exh.19, Power of Attorney is at Exh.21, legal notice at Exh.22, cheque is at

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Exh.23, and cheque return memos dated 11.12.2009 ad 10.12.2009 are at Exh.24, and postal receipt is at Exh.25.

11. During the cross examination, it is admitted that when notice was issued to the accused, no Power of Attorney was executed in favour of the applicant. He further stated that as he was working with Vaishali Jaiswal and orally she had directed and authorized him to depose before the court and later on the same was put into writing vide Exh.22. On showing the legal notice Exh.22, wherein 2 dates are mentioned, he stated that date 24.12.2009 to be considered as issuance of notice. He further admitted that the present transaction did not take place between him and the accused, but he has issued cheque. He also admitted that there is no document on record showing that the agreement has

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taken place or it is cancelled between Vaishali Jaiswal and the vendors. He has not filed any documents showing monetary transaction between the same parties. He further admitted that Exh.21 i.e. Power of Attorney neither is numbered nor there is photograph of executants or attesting witnesses. He further admitted that complete address of the executants is also not mentioned at Exh.21. He further admitted that there is no document on record which can reflect the liability of the accused of cheque amount Exh.23. On the basis of this evidence, the the applicant claimed that the issuance of the cheque towards discharge of legal and enforceable debt is established and, therefore, the trial court rightly convicted the accused, but the Appellate Court erroneously acquitted the accused.

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12. Before entering into the merits of the case, it is necessary to see the settled law as far as evidence of the Power of Attorney Holder on behalf of the executant is concerned.

13. The Hon'ble Apex Court in the cases of **M/s.MMTC Ltd. and anr vs. M/s.Medchl Chemicals and Pharma P Ltd. and anr**, reported in (2002)1 SCC 234 and **Janki Vashdeo Bhojwani and anr vs. Indusind Bank Ltd. and ors**, reported in (2005)2 SCC 217, while answering the reference, which was for consideration before the Hon'ble Apex Court, was the maintainability of the complaint under Section 138 of the NIA filed by the Power of Attorney Holder on behalf of the original complainant and necessity of specific averments as to the knowledge of the Power of Attorney Holder with respect to the facts and circumstances leading to dishonour of

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cheques and preference of criminal proceedings, held as under:

“21. In terms of the reference order, the following questions have to be decided by this Bench:

21.1. Whether a power-of-attorney holder can sign and file a complaint petition on behalf of the complainant?/Whether the eligibility criteria prescribed by Section 142(a) of the NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque?

21.2. Whether a power-of-attorney holder can be verified on oath under Section 200 of the Code?

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21.3. Whether specific averments as to the knowledge of the power-of-attorney holder in the impugned transaction must be explicitly asserted in the complaint?

21.4. If the power-of-attorney holder fails to assert explicitly his knowledge in the complaint then can the power-of-attorney holder verify the complaint on oath on such presumption of knowledge?

21.5. Whether the proceedings contemplated under Section 200 of the Code can be dispensed with in the light of Section 145 of the NI Act which was introduced by an amendment in the year 2002?

28. The power-of-attorney holder is the agent of the grantor. When the grantor authorises

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the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the

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power-of-attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal.

29. From a conjoint reading of Sections 138, 142 and 145 of the NI Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks

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fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the NI Act. For the purpose of issuing process under Section 200 of the Code, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act. It is only if and where the Magistrate, after considering the complaint under Section 138

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of the NI Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the NI Act.

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33.1. Filing of complaint petition under Section 138 of the NI Act through power of attorney is perfectly legal and competent.

33.2. The power-of-attorney holder can depose and verify on oath before the court in order to

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prove the contents of the complaint. However, the power-of-attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

33.3. It is required by the complainant to make specific assertion as to the knowledge of the power-of-attorney holder in the said transaction explicitly in the complaint and the power-of-attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

33.4. In the light of Section 145 of the NI Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under

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Section 138 of the NI Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the NI Act”.

14. Thus, the Hon’ble Apex Court held that filing of the complaint under Section 138 of the NIA through the Power of Attorney Holder is perfectly and legal competent. The the Power of Attorney Holder can depose and verify on oath before the court in order to prove the contents of the complaint. However, the the Power of Attorney Holder must have witnessed the transaction as an agent of the payee holder in due course or possessed due knowledge regarding the said transaction. It is

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further held that it is required by the complainant to make specific assertion as to knowledge of the Power of Attorney Holder in the said transaction explicitly in the complaint and the Power of Attorney Holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

15. In the light of the above well settled legal position, it has to been seen whether the complaint filed by the applicant fulfills the same.

16. Perusal of the complaint filed by the complainant before learned JMFC shows that in the complaint neither it is stated that the alleged transaction has taken place in his presence nor there is an averment that he is having knowledge as to the said transaction. The applicant in his evidence also nowhere uttered that the transaction has taken place in his presence or he is

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having knowledge about the same. On the contrary, his cross examination shows that when notice came to issued, there was no Power of Attorney in his favour. His cross examination further shows that he has no document to show that the accused has issued cheque which got dishonoured. There is no document to show that any transaction has taken place between Vaishali Jaiswal and vendors. His entire evidence nowhere nowhere reflects that he was having complete knowledge as to the transaction. Even, the Power of Attorney executed in favour of the applicant nowhere reflects that as he is aware about the entire facts of the case, he is authorized by said Vaishali Jaiswal to depose before the court.

Thus, considering the nature of the evidence, admittedly, it nowhere fulfills the criteria that either he witnessed the transaction as an agent of payee/holder in

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due course or possesses due knowledge regarding the said transaction.

17. Coming to the another aspect that whether the cheque was issued against against discharge of legal and enforceable.

18. Recital of the complaint itself shows that the Agreement of Sale took place between Vaishali Jaiswal and owners of the property in question and accused was broker in that. The cheque was issued by the vendors through the accused. The cross examination of the complainant shows that he has no document to show that any transaction took place in the nature of agreement between Vaishali Jaiswal and vendors and the same was cancelled.

19. Thus, as far as discharge of legal and enforceable debt is concerned, the evidence of the

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complainant is not sufficient to establish that the cheque was issued against legal and enforceable debt. Legal and enforceable debt does not mean any illegal or immovable in nature but also that it must be supported by some evidence to show that debt was in subsistence on the date of drawal of the cheque.

20. The Explanation to Section 138 of the NIA clear indicates that, “debt or other liability means a legally enforceable debt or other liability.” Merely because the cheque is drawn for discharge in whole or in part of the debt or other liability, Section 138 of the NIA will not be attracted. The provisions will apply provided debt or other liability is legally enforceable.

21. Thus, Section 138 of the NIA will not apply to cheque drawn in discharge of the debt from liability, which is not legally enforceable. There may be several

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categories of debts or other liability, which are not legally enforceable. A debt or liability is legally enforceable if the same can be lawfully recovered by adopting due process of law.

22. The emphasis is on the fact that the debt of other liability must be legally enforceable liability.

23. In the present case, the evidence of the complainant itself is not sufficient to show that the cheque was issued against the legal and enforceable liability.

24. As far as burden on the accused is concerned, admittedly, he has to discharge the burden on the basis of preponderance of probability. It is can be discharged through the cross examination also. The standard of proof required to prove the charge against the accused

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and standard of proof required for rebuttal of the presumption admittedly is different.

25. On going through the entire evidence, as observed by the Hon'ble Apex Court in the case of **Naresh Potteries** *supra*, by referring various judgments that it is required by the complainant to make specific assertion as to the knowledge of the Power of Attorney in the said transaction explicitly in the complaint and the Power of Attorney Holder, who has no knowledge regarding the transaction, cannot be examined as witness, which is rightly appreciated by learned Additional Sessions Judge. Learned Additional Sessions Judge rightly held that there was no legal and enforceable debt between the complainant and the accused and acquitted the accused, which is legal one and no illegality is committed.

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26. In this view of the matter, the revision being devoid of merits is liable to be dismissed and the same is dismissed.

Revision stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

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