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# IN THE COURT OF METROPOLITAN MAGISTRATE, 43rd COURT, BORIVALI, MUMBAI

## (BEFORE SHRI. S. A. KHALANE)

## C. C. No. : 4300652/SS/2017
(CNR NO.MHMM17-002173-2017)

**Exh.25.**

Mrs.Ekta Nitin Kurade,
adult, aged 44 Yr.,
Profession : Service, residing at :
251/D-2, Sahawas CHS Ltd.,
Gorai-2, Borivali(W.),
Mumbai- 400 091. **...COMPLAINANT.**

**V/s.**

1.Mr.Prasad Anant Mondkar,
adult, aged 55 Yrs.
Profession : Travel Agent.
**(Complaint dismissed at the time of issuance of process)**

2. Mrs.Shilpa Prasad Mondkar,
adult, aged 52 Yrs.
Profession : Travel Agent.

(1) & (2) both residing at :
Flat No.B27, Rajyog Society,
Paranjpe Nagar, Vazira Naka,
Borivali(W.), Mumbai-400092. **...ACCUSED.**

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## OFFENCE PUNISHABLE U/SEC. 138 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881.

**Advocates appeared** :-
For the Complainant :- Smt.Akshata Dave.
For Accused :- Shri.D.M.Mandhare.

## JUDGMENT
**(Delivered on 21.05.2026)**

The present complaint came to be filed alledging that accused have committed an offence punishable under section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as "N.I. Act" for brevity).

2. As the Ld. Predecessor of this court, noticed that the accused no.1 is not signatory of the disputed cheque, the complaint against accused no.1 came to be dismissed u/s.203 of the Code of Criminal Procedure. The process came to be issued against accused no.2 only, she being the signatory of the cheque. So, the case has proceeded against accused no.2 only.

### Complainant's case in nutshell is as follows-

3. That, accused No.2 Mrs. Shilpa Prasad Mondkar became friend of the complainant. She was introduced to the complainant by the brother the complainant namely Mr. Dilip Yadav. The accused were in need of money, they approached the complainant and demanded friendly loan. Having considered the request of the accused, the complainant provided friendly loan of Rs.2,50,000/- for a brief period of one year. Both the accused executed an affidavit on 22.06.2016 to the complainant stating therein that they would repay the said loan on or before 25.07.2016 and for that matter accused

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no.2 issued the cheque of Rs.2,50,000/- bearing cheque No.100005, dated 25.07.2016 drawn on Abdhudaya Co-Op. Bank Ltd., Borivali (East), Branch.

4. The said cheque issued by the accused no.2 was presented by the complainant for its encashment in her bank namely District Central Co-Op. Bank Ltd., Gorai Branch. However, the said cheque returned unpaid with remark 'Funds Insufficient" on 27.07.2016. The complainant issued demand notice to the accused on 10.08.2016. The notice is duly received by the accused on 12.08.2016. As this court has mentioned herein before that the issue process order is passed against accused no.2 only, the case has proceeded against accused no.2 only. The accused no.2 as has failed to pay the amount of dishonoured cheque, the present case has proceeded against her. The complainant has requested the conviction of the accused no.2 and compensation under section 357 of the Cr.P.C.

## PLEA

5. Ld. Predecessor of this Court has recorded the Plea (Exh.P-4) of accused No.2, to which she pleaded not guilty and claimed to be tried.

## ORAL AND DOCUMENTARY EVIDENCE ADDUCED ON BEHALF OF THE COMPLAINANT

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6. To prove her contentions in the complaint, the complainant has examined herself and examined Sandeep Hari Bhilare, as CW-2.

7. Besides, the above oral evidence, the complainant has

relied upon the following documentary evidence-

| SR.No. | Name of document | Exh.No. |
|---|---|---|
| 1. | Affidavit of accused admitting liability | 6 |
| 2. | Cheque | 7 |
| 3. | Memo | 8 |
| 4. | Demand Notice | 9 |
| 5. | Acknowledgment Card | 10 (Colly.) |
| 6. | Postal receipts | 11 (Colly.) |

**STATEMENT OF ACCUSED NO.2 AND HER DEFENCE**

8. After evidence of the complainant came to be closed, the statement of accused under section 313 of the Code of Criminal Procedure came to be recorded. In that statement the accused has taken her defence of total denied. She has taken a stand that the chque was forcefully obtained from her.

9. In order to prove her defence accused No.2 has examined Subodh Pandurang Karve, a Secretory of Rajyog Co-Op. Housing Society.

**Argument on behalf of the complainant-**

10. The Ld. Advocate for the complainant has filed on record the written notes of arguments(Exh.23). It is argued that accused nos.1 and 2 had obtained loan from the complainant. For discharge of the liability, accused no.2 has issued the disputed cheque. The cheque has returned unpaid for 'Funds Insufficient'. The demand notice is duly served upon accused no.2. However, she has failed to pay the amount. Therefore, the complaint has

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proceeded against her. The complainant has filed on record the affidavit executed by the accused and also the documents such as cheque, memo, demand notice, etc.

11. It is argued that on behalf of the complainant, the complainant has examined Dilip Yadav (CW-2) and Sandeep Bhilare (CW-3). From the evidence of the complainant and the complainant witnesses, it is proved by the complainant that accused no.2 has issued the disputed cheque for discharge of her legal debt. Therefore, it is argued that accused no.2 be convicted. Further more, it is argued that compensation along with interest be directed to be paid by accused no.2 to the complainant.

## Argument on behalf of accused No.2.

12. The Ld. Counsel for the accused has filed the written notes of arguments(Exh.24). It is argued that Dilip Yadav (CW-2) has admitted in a cross-examination that he does not remember the name of advocate notary before whom the affidavit was prepared. It is argued that Dilip Yadav (CW-02) has admitted in his cross-examination that Prasad Mondkar has taken loan from complainant. It is argued that through cross-examination it notices that the affidavit was not executed before notary and for the said reason the witness has not stated about presence of advocate M. A. Khan and advocate R. A. Alhate at the time of execution of the said affidavit.

13. It has been further submitted in the written notes of arguments that Sandeep Bhilare (CW-3) has admitted in cross-examination that the authority letter produced by him does not bear seal of the bank. He also admitted that he was not working in the said branch of Abhudaya Bank when the disputed cheque has dishonoured.

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14. It is further argued that the accused has examined the secretary of Rajyog Co-Op. Housing Society. This witness was examined to show that original share certificate of the residence of the accused was with the complainant and in cross-examination, the complainant has denied that she was having the share certificate of accused residence. It is argued that real fact that the complainant is working with some credit society and the accused no.1 Prasad Mondkar had applied for loan to said credit society and all documents were given by accused to the said society and same are being misused by the complainant.

15. It is argued that the complainant has totally failed to prove her case against accused no.2. The complainant did not produce single document to show that accused no.2 has obtained loan from her and the amount has been credited to the account of accused no.2. In such circumstances, it is argued that no offence against accused no.2 is proved. Therefore, it is prayed that the complaint be dismissed against accused no.2 and she be acquitted.

## POINTS FOR DETERMINATION-

16. After having regard to the facts and rival contentions on record, following points do arise for determination of this Court. This Court has recorded its findings on each of them for the reasons stated herein under :-

| Sr. No. | Points | Findings |
|---|---|---|
| 1) | Whether the complainant proves the mandatory compliance of section 142 of the N.I.Act ? | **Yes.** |
| 2) | Whether the complainant proves legally enforceable debt against the accused ? | **Yes.** |

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| | | |
|---|---|---|
| 3) | Whether accused raised probable defence to rebut the presumption under section 139 and 118 of the N.I.Act ? | **No.** |
| 4) | What order ? | **As per final order.** |

## R E A S O N S

**AS TO POINT NO. 1 :-**

17. The offence punishable under section 138 of N.I.Act can be proved with the concatenation of the following components-

i) Drawing of the cheque

ii) Presentation of the cheque to the bank in a stipulated period,

iii) Returning the cheque unpaid by the drawee bank,

iv) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,

v) Failure of the drawer to make payment within stipulated period of the receipt of notice.

18. The concatenation of all the five components is a sine-qua-non for the completion of the offence punishable under section 138 of the N.I.Act. In the light of these components it is to be seen whether the complainant succeeds in proving his case or not.

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19. In order to see that in the present complaint the complainant has made mandatory compliance, it becomes necessary to see the following dates-

| | | |
|---|---|---|
| 1) | Cheque dated | **25.07.2016** |
| 2) | Cheque presented on | **26.07.2016** |
| 3) | Cheque dishonoured on | **27.07.2016** |
| 4) | Demand notice issued on | **10.08.2016** |
| 5) | Demand notice received by accused on | **12.08.2016** |
| 6) | 15 days period of notice expired on | **27.08.2016** |
| 7) | Complaint filed on | **21.10.2016** |

20. After perusal of the above said all dates, it becomes amply clear that the present complaint was not filed within the stipulated period of limitation. However, it notices that the complainant filed the complaint along with the application for delay condonation. Upon perusal of the order on delay condonation it notices that the delay of 24 days occasioned for filing the complaint came to be condoned on 08.02.2017. Thus, the necessary compliance is found to have been made by the complainant. Hence, it is observed that the complainant has made the mandatory compliance as required for proving commission of an offence punishable under section 138 of the N.I.Act. Therefore, point No.1 is answered in the affirmative.

**AS TO POINT NOS. 2 and 3 :-**

21. These points being interlinked are discussed together to avoid repetitive discussion.

22. The important ingredient of the offence punishable under section 138 of the N.I.Act is that the cheque must have been issued for the discharge in whole or in part of any debt or other liability. If the cheque is not issued for the discharge of any debt or

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other liability, section 138 cannot be invoked.

23. Hon'ble Apex Court in ***Laxmi Dyechem*** **V/s.*****State of Gujarat,*** **2013 (1) RCR (Criminal)**, has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely upon the material submitted by the complainant. Needless to say, if the accused/drawer of cheque in question neither raises a probable defence nor is able to contest existence of a legally enforceable debt or liability, statutory presumption under S.139 of the N.I.Act regarding commission of the offence comes into play.

24. Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the N.I.Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. It is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

25. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally

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enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

26. In this context this Court find it profitable to quote Judgment in the case of ***Hiten P. Dalal*** **v.*****Bartender Nath Bannerji,*** **(2001) 6 SCC 16**, wherein it has been held as under:

“The words ‘unless the contrary is proved’ which occur in this provision make it clear that the presumption has to be rebutted by ‘proof’ and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted ……”

27. In view of the above provision, it is necessary to scrutinize evidence brought on record Mrs. Ekta Kurade (C.W.1) in her affidavit filed in lieu of examination-in-chief has reiterated the contents of the complaint.

28. Mrs. Ekta Kurade (C.W.1) is cross-examined by the Ld. Counsel for the accused. In that cross-examination it has been tried to bring on record that there exists no liability of accused no.2 to pay any amount to the complainant. In the cross-examination of this witness, this witness has clearly denied the suggestion of the Ld. Counsel for the accused no.2 that an amount of Rs.2,50,000/- was not given by her to accused. She has also denied the suggestion that accused are not liable to pay the amount of the disputed cheque.

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29. Dilip Yadav (CW-2) is a witness on the affidavit executed in favour of the complainant before the notary. He deposed that accused have executed an affidavit before the notary acknowledging that they have received an amount of Rs.2,50,000/- from the complainant.

30. Dilip Yadav (CW-2) is cross-examined by the Ld. Counsel for the accused. In that cross-examination, this witness has admitted that he was not present when the affidavit (Exh.06) was prepared. He denied that he does not know the contents of the affidavit (Exh.6).

31. Sandeep Bhilare (CW-3) has deposed that he was working in Abhudaya Co-Op. Bank, Branch Borivali. He deposed that the disputed cheque was presented for clearing in their bank. He deposed that the cheque was returned back to the holder of the cheque for the reason "Insufficient Funds". He deposed that in the account of accused no.2 there was only a balance of Rs.641/-.

32. Sandeep Bhilare (CW-03) is cross-examined by the Ld. Counsel for accused no.2. In that cross-examination this witness has admitted that on authority letter there is no seal of the bank. Furthermore, he admitted that he was not working in the branch of the bank, when the cheque was dishonoured.

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33. On behalf of the accused Subodh Karve (DW-1), a Secretary of Rajyog Co-Op. Housing Society is examined. Through evidence of this witness, it has been tried to bring on record that accused no.1 had applied for loan to the credit society and for that purpose documents and cheque were given the complainant and the complainant has misused the cheque.

34. After appreciation of the evidence adduced on behalf of the complainant, it notices that it is a clear case of the complainant that accused no.1 and 2 had approached her for loan purpose. She lent an amount of Rs.2,50,000/- to accused. Both accused have executed an affidavit thereby acknowledging to have received an amount of Rs.2,50,000/- and giving an undertaking for payment of the said amount.

35. Perusal of the undertaking / affidavit (Exh.6) clearly shows that accused no.1 and 2 have signed the affidavit in presence of witnesses. The complainant is cross-examined by the Ld. Counsel for accused no.2. In that cross-examination the signatures of neither of the accused on the affidavit(Exh.6) is disputed. No single admission is found in the cross-examination of the complainant that the accused no.1 or 2 have not obtained an amount of loan from the complainant. Moreover, there is no admission that no affidavit was executed by either accused no.1 or accused no.2.

36. It is true that the witness on the affidavit(Exh.6) namely Dilip Yadav (CW-2) has given admissions in his cross-examination that he was not present before the notary before whom the affidavit was prepared. However, it is pertinent to note that that admission of the witness will not affect the genuineness of the case of the complainant. It is for the reason that Dilip Yadav (CW-2) himself in his cross-examination deposed that it is not true that he does not know the contents of the affidavit (Exh.6). He also denied that the affidavit (Exh.6) is not signed by accused no.2. For these reasons, it becomes clear that due to some admissions of Dilip Yadav (CW-2) it can not be held that the affidavit (Exh.6) was never executed. To the contrary, this court do note that the execution of the affidavit (Exh.6) is proved beyond reasonable doubt due to the cross-

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examination conducted on behalf accused no.2 itself.

37. From evidence of Sandeep Bhilare (CW-3) in clear terms it notices that the cheque has dishonoured for the reason of “Funds Insufficient”. It may have happened that there may be defect in the authority letter produced by this witnesses. However, there is no iota of doubt that the cheque issued by the accused has dishonoured due to “Funds Insufficient”. The testimony of this witness is not found to have been shaken. The evidence of the witness is found to be totally believable.

38. The defence of the accused that the documents and the cheque were given for loan purpose to the credit society and those are misused by the complainant are not found probable. It is pertinent to note that there is no justifiable reason given by accused No.2 for executing the affidavit (Exh.6) in favour of the complainant. Moreover, the defence of accused no.2 in her statement u/s.313 of the Cr.P.C. is that the cheque was obtained forcefully by the complainant. However, it is peculiar to observe that even though there is a defence of accused no.2 that the cheque was obtained forcefully, there is no complaint filed by accused no.2 against the complainant. This aspect speaks louder against the accused.

39. It is also observed that the accused no.2 has failed to give proper explanation as to why and in which condition the cheque went in to the custody of the complainant. It is also found necessary to observe that in the affidavit (Exh.6), it is mentioned that accused no.1 has taken the amount from the complainant. From that sentence in the affidavit (Exh.6), it is tried to argue on behalf of the accused no.2 that accused No.2 is not the debtor of the complainant and therefore accused no.2 can not be said to be held legally liable

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for the payment of the dishonoured cheque, as she is not liable for the payment of the loan amount itself. However, it is made crystal clear that the disputed cheque from the circumstances of the case is seen have been issued by accused no.2 as surety of accused no.1. In default of payment by accused no.1 or as a joint and several liability, accused no.2 is seen to have issued the disputed cheque. Therefore, in view of section 128 of the Indian Contract Act, the liability of surety as is co-extensive. Accused no.2 is equally found liable as that of accused no.1. Therefore, accused no.2 is found to have committed an offence punishable under section 138 of the N. I. Act.

40. Thus, the evidence on record of the complainant is found clinching and believable. Except suggestion in cross-examination of the complainant that the cheque was issued to the complainant as a security and it is misused, no cogent evidence is adduced by accused. In conclusion, it is observed that, in order to rebut the presumption under section 139 of the N.I.Act, accused have miserably failed. Per contra, the complainant has successfully proved his contentions that accused have issued cheque in his favour for discharge of legally enforceable liability. For these reasons, point No.2 is answered in the affirmative and point No.3 is answered in the negative.

**AS TO POINT NO. 4 :-**

41. As mentioned earlier, the complainant has proved that accused drawn disputed cheque(Exh.7) in her favour for the discharge of her legal liability and the same has been dishonoured. On the contrary, accused No.2 has failed to rebut the presumptions under section 118, 139 and 146 of the N.I.Act. The complainant has proved that accused No.2 has committed an offence punishable

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under section 138 of the N.I.Act. Therefore, accused No.2 is found guilty and liable to be convicted.

42. This Court do not want to extend benefit of the provisions of the Probation of Offenders Act, 1958 to accused as the present is an economic offence. There is no question of reforming of accused, who is found guilty of the offence. This has very well been observed in the case of **M.V. Nalinakshan V/s. M.Rameshan, 2009 Cr.L.J. 1703.**

**Hearing on the point of sentence:**

43. The accused submitted on the point of sentence that this is her first conviction for the offence punishable under section 138 of the N.I.Act. She submitted that she has committed no offence. Therefore, she be given minimum sentence and be ordered to pay minimum compensation. Similar submissions are being advanced by her Ld. Counsel. Per contra, the Ld. Counsel for the complainant would submit that the accused No.2 has avoided the payment of legal debt since 2016. Therefore, the complainant has sustained a huge loss. So, she requested for maximum compensation and 18% interest upon it.

44. After hearing on the point of sentence, this Court find it profitable to quote the observations of the Hon'ble Apex Court in the case of **Hari Kishan and State of Haryana V/s. Sukhbir Singh and Ors. (AIR(1988) SC 2127)** wherein it is observed that, *"It is well to remember that this Court has emphasized the need for making liberal use of that provision".*

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45. Further, it is observed in the case of Hari Kishan(supra cited) that, *"The Court may enforce the order by imposing sentence in*

*default".*

46. In the case of **Suganthi Sureshkumar Jagdishan (AIR 2002 SUPREME COURT 681)** wherein it is observed that, *"No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light heartedly. The very object of enactment of provisions like Section 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount atleast during the pendency of the case".*

47. Question also needs to be determined whether Magistrate Court can grant interest on the amount of cheque in a case filed for the offence punishable under section 138 of the N.I.Act. A useful reference can be made in this regard through the decision of the Hon'ble Apex Court, in the case of **R.Vijayan V/s. Baby and another (AIR 2012 SUPREME COURT 528)** wherein it is observed as follows, "*As the provisions of Chapter XVII of he Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation".*

48. In Judgment reported in **Krishi Vikas Kendra V/s. Mukund Funde (2006 ALL MR (Cri) 416)** wherein it is observed that, *"Quantum of compensation shall also include interest, costs etc."*

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49. Having regard to the above legal position, now quantum of punishment and of compensation is required to be decided. Case record clearly shows that, accused gave a cheque in question to the complainant for repayment of the amount. The cheque issued in the

case is for discharging of their legal liability. Today, neither accused nor their Advocates are present.

50. Considering the nature of the offence and circumstances under which it is committed, it will be proper to convict accused No.2 and sentence her to suffer Simple Imprisonment for six months. The complainant has suffered loss due to illegal act of the accused. Therefore, it will be proper to direct accused No.2 to pay the compensation amount to the complainant i.e. an amount of Rs.4,50,000/-(Rupees Four Lakh Fifty Thousand only) with simple interest @ 9% p.a. from the date of this order till realization of the entire amount towards the compensation within a period of one month from the date of this order vide section 357(3) of the Code of Criminal Procedure, 1973 and in default sentence her to suffer Simple Imprisonment for one month. Considering all the above aspects, in answer to point No.4, the following order is passed-

**<u>O R D E R</u>**

1) The accused accused No.2)Mrs.Shilpa Prasad Mondkar is hereby convicted for the offence punishable under section 138 of the Negotiable Instrument Act, 1881 vide section 255(2) of the Code of Criminal Procedure, 1973.

2) Accused is sentenced to suffer simple imprisonment for period of six months and she shall pay compensation of Rs.4,50,000/-(Rupees Four Lakh Fifty Thousand only) with simple interest @ 9% p.a. from the date of this order till realization of the entire amount towards the compensation within a period of one month from the date of this order vide section 357(3) of the Code of Criminal Procedure, 1973 in default of payment of compensation, the accused shall suffer further simple imprisonment for the period of one month.

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3) The amount of compensation if realized from the accused, it shall be paid to the complainant, subject to expiry of the appeal period or the orders of Honourable Appellate Court (if any).

4) Accused to surrender her bail bonds.

5) The copy of this Judgment be provided to the accused free of costs, in view of section 363(1) of the Code of Criminal Procedure, 1973.

**(Dictated and pronounced in open Court)**

SHIVAJI ARJUN KHALANE

Digitally signed by SHIVAJI ARJUN KHALANE
Date: 2026.05.21 18:27:55 +0530

(**S. A. KHALANE**)
Metropolitan Magistrate,
43rd Court, Borivali, Mumbai.

Date : 21.05.2026.
ksj

Dictated on : 21.05.2026.
Typed on : 21.05.2026.
Signed on : 21.05.2026.