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TOPICAL INDEX

ARBITRATION REQUEST

Arbitration request - Mater falls under jurisdiction of TDSAT - Held - Special Law i.e., the Telecom Regulatory Authority of India Act, 1997 will prevail over general law i.e., the Arbitration and Conciliation Act, 1996 - TDSAT has the exclusive jurisdiction to adjudicate upon all disputes that arise between the parties and those specified under the Act - The Telecom Regulatory Authority of India Act, 1997 being a later statute and having been specially enacted for the Telecom Sector, will certainly prevail over the Arbitration and Conciliation Act, 1996 - Arbitration request dismissed.

આર્બિટ્રેશન વિનંતી - મેટર ટીડીએસએટીના અધિકારક્ષેત્રમાં આવે છે - ઠેરવ્યું - ખાસ કાયદો ,ટેલિકોમ રેગ્યુલેટરી ઓથોરિટી ઓફ ઇન્ડિયા એક્ટ, 1997 સામાન્ય કાયદા પર પ્રભુત્વ ધરાવશે i.e., આર્બિટ્રેશન એન્ડ સમાધાન ધારો, 1996 - ટીડીએસએટી પાસે પક્ષકારો અને કાયદા હેઠળ નિર્દિષ્ટ કરાયેલા વિવાદો વચ્ચે ઉદ્ભવતા તમામ વિવાદો પર નિર્ણય લેવાનો વિશિષ્ટ અધિકારક્ષેત્ર છે. - ટેલિકોમ રેગ્યુલેટરી ઓથોરિટી ઓફ ઇન્ડિયા એક્ટ, 1997 એ પછીનો કાયદો છે અને ટેલિકોમ ક્ષેત્ર માટે ખાસ ઘડવામાં આવ્યો છે, તે ચોક્કસપણે આર્બિટ્રેશન એન્ડ કન્સિલિએશન એક્ટ, 1996 પર પ્રભુત્વ ધરાવશે - લવાદની વિનંતી રદ્દ કરી દેવામાં આવી. [*A Salim Managing Director, M/s Mobile Star Satellite Communication India Ltd vs. Asianet Satellite Communication Ltd 2023(1)GDCJ1*]

CERTIFIED COPIES OF ORDER

Petition - Failure of JMFC in supplying certified copies of order of conviction even after direction of this Court - Held - The best course of action to be followed would be to quash and set aside the orders convicting and sentencing the respondents and remanding the matter to the learned JMFC, Quepem, B Court (and not A Court) for hearing final arguments based on the evidence already led by the parties and passing judgments and orders within a prescribed timeline.

અરજી – અત્રેની અદાલતના નિર્દેશ આપવા છતાંપણ JMFC **નાં એ દોષિત કરેલનું પ્રમાણપત્ર આપવામાં નિષ્ફળ – ઠરાવ્યું કે – આ કેસમાં તેને અનુસરવા માટેનો ઉત્તમ માર્ગ એ છે કે, સામાવાળાઓ ખાતરી આપી અને સજા ફટકારતા આદેશોને રદ્દબાતલ કરવામાં આવે અને અગાઉ આપેલાં પુરાવાને આધારે છેવટની દલીલની સુનાવણી માટે વિધ્વાન** JMFC **ક્વીપેમની** B **અદાલત (અદાલત** A **નહીં) અદાલતને મેટર પરત**

કરવામાં આવે તથા સમયરેખાની અંદર ચુકાદાઓ અને હુકમો પસાર કરવા તેવો હુકમ પસાર કરવામાં આવે છે. [*Shaikh Mohammed Tauseef vs. Gogo Constructions; Prakash S Gogi; Subhash S Gogi; Ganesh S Gogi 2023(1)GDCJ85*]

COMPOUNDING OF OFFENCE

Compounding of offence - Petitioner was convicted by Magistrate - Conviction was challenged - In the meantime, settlement was arrived between parties - Compounding of offence under Section 147 was sought - Held - Compounding of offence is permitted - Petition allowed.

ગુના ની માંડવાળ - અરજદારને મેજિસ્ટ્રેટ દ્વારા દોષી ઠેરવવામાં આવ્યા હતા - દોષી ઠેરવવામાં આવ્યા હતાતેને પડકારેલ - આ દરમિયાન, પક્ષકારો વચ્ચે સમાધાન થયું હતું - કલમ 147 હેઠળ ગુનાને માંડવાળ કરવાની માંગ કરવામાં આવી હતી - ઠેરવ્યું – ગુનાની માંડવાળ ને મંજૂરી આપવામાં આવી છે – અરજી મંજૂર [*Babuji Halaji Thakor vs. State of Gujarat 2023(1)GDCJ55*]

COMPOUNDING OF OFFENCE

Compounding of offence - Permissibility of - It would be permissible for High Court in exercise of its inherent powers under Section 482 of Code, to record settlement arrived at between parties and acquit accused of charges - Taking into account fact of settlement, compounding of offence permitted- Petition allowed - Impugned judgment quashed and set aside.

ગુનાની માંડવાળ કરવા માટેની પરવાનગી – વડી અદાલત માટે તેને ફોજદારી કાર્યરિતી સંહિતા (સીઆરપીસી) ની કલમ 482 હેઠળ અપાયેલ અંતર્ગત સત્તાની રુએ અને તેનો ઉપયોગકર્તા પક્ષકારોને તેમની વચ્ચે સમાધાન થવાને નોંધવા અને આરોપીઓને નિર્દોષ છોડી મૂકવાનું જાહેર કરી શકે છે – સમાધાન થયાની હકીકતને ધ્યાને લેતાં, ગુનામાં માંડવાળ કરવાની મંજૂરી આપેલ છે – અરજી મંજૂર કરવામાં આવી – વાંધાજનક ચુકાદાને રદ્દ કરી બાજુએ મૂકવામાં આવ્યો. [*Nitin Mahendrabhai Patel vs. State of Gujarat 2023(1)GDCJ18*]

FUTILE EXERCISE

Dishonour of cheque - Quashing of FIR - Settlement of dispute and powers of this Court to quash proceedings even after filing of chargesheet and when matter has been resolved amongst parties in connection with commercial transaction and as such exercise of undergoing full-fledged trial would be futile exercise.

ચેક વણ ચૂકવાચેલ પરત ફરેલ - એફઆઈઆર રદ કરવી - ચાર્જશીટ દાખલ કર્યા પછી પણ આ કોર્ટની વિવાદ અને કાર્યવાહીને રદ કરવાની સત્તાની પતાવટ અને જ્યારે વાણિજ્યિક વ્યવહારના સંબંધમાં પક્ષકારો વચ્ચે મામલો હલ કરવામાં આવ્યો હોય અને આવી રીતે સંપૂર્ણ સુનાવણી હાથ ધરવાની કવાયત નિરર્થક રહેશે. [*Ajju C S Sindolli vs. State of Goa; Police Inspector, Economic Offences Cell, Goa; Paul Saldanha 2023(1)GDCJ7*]

FUTILE EXERCISE

Criminal Proceedings - Inherent Powers - Exercise of - While exercising inherent powers, High Court would be entirely dependent on facts and circumstances of each case and it is neither permissible nor proper for Court to provide a straitjacket formula regulating exercise of inherent powers under Section 482 of CrPC.

ફોજદારી કાર્યવાહી - અંતર્ગત સત્તાઓ - તેનો ઉપયોગ - અંતર્ગત સત્તાઓનો ઉપયોગ કરતી વખતે, હાઈકોર્ટ દરેક કેસની હકીકતો અને સંજોગો પર સંપૂર્ણપણે નિર્ભર રહેશે અને સીઆરપીસીની કલમ 482 હેઠળ અંતર્ગત સત્તાઓના ઉપયોગને નિયંત્રિત કરતી સ્ટ્રેટજેકેટ ફોર્મ્યુલા પ્રદાન કરવી કોર્ટ માટે ન તો માન્ય છે અને ન તો યોગ્ય છે. [*Ajju C S Sindolli vs. State of Goa; Police Inspector, Economic Offences Cell, Goa; Paul Saldanha 2023(1)GDCJ7*]

FUTILE EXERCISE

Complaint - Whether amount allegedly misappropriated is received by him under compromise, he submitted that no amount was exchanged between parties at time of arriving at so called settlement and his civil suit is pending adjudication before Civil Court for recovery of said amount - On ground that he is not entitled to pay any amount - Thus, from all angles affidavit of respondent is filed only in camouflaged manner so as to obtain an order of quashing of proceedings from this Court and to get rid of criminal proceedings even though parties are litigating before the Civil Court for same cause- Cannot be considered as an affidavit with regard to arriving at a settlement between parties since chargesheet is already filed - Deemed fit and proper to reject present petition - Petition dismissed.

ફરિયાદ - કથિત રીતે ગેરરીતિ કરવામાં આવેલી રકમ તેમને સમાધાન હેઠળ પ્રાપ્ત થાય છે કે કેમ, તેમણે એવી રજૂઆત કરી હતી કે કહેવાતા સમાધાન સમયે પક્ષકારો વચ્ચે કોઈ રકમની આપ-લે કરવામાં આવી ન હતી અને તેમનો સિવિલ દાવો ઉપરોક્ત રકમની વસૂલાત માટે સિવિલ કોર્ટ સમક્ષ ચુકાદો બાકી છે - તે આધારેતે કોઈ પણ રકમ

ચૂકવવા માટે હકદાર નથી - આમ, તમામ એંગલથી પ્રતિવાદીનું સોગંદનામું માત્ર છેતરપિંડી ના સાધન ની રીતે જ દાખલ કરવામાં આવે છે, જેથી આ કોર્ટમાંથી કાર્યવાહી રદ કરવાનો હુકમ મેળવી શકાય અને ફોજદારી કાર્યવાહીથી છૂટકારો મેળવી શકાય, તેમ છતાં પક્ષકારો સમાન હેતુ માટે સિવિલ કોર્ટ સમક્ષ કેસ ચલાવી રહ્યા છે- પક્ષકારો વચ્ચે સમાધાન પર પહોંચવાના સંબંધમાં એફિડેવિટ તરીકે ગણી શકાય નહીં, કારણ કે ચાર્જશીટ પહેલેથી જ દાખલ કરવામાં આવી છે - હાલની અરજી નકારવા માટે યોગ્ય અને લાયક માનવામાં આવે છે - અરજી નામંજૂર કરવામાં આવી [*Ajju C S Sindolli vs. State of Goa; Police Inspector, Economic Offences Cell, Goa; Paul Saldanha 2023(1)GDCJ7*]

IMPROBABLE DEFENCE

Revision - Accused was convicted for offence punishable under Section 138 - It was case of accused that he was businessman and complainant was commercial tax inspector - He gave blank cheques for purpose of tax - Held - If really the accused has issued 15 signed blank cheques to the complainant, the accused ought to have explained as to why the complainant has insisted him to issue 15 signed blank cheques - Accused has not explained on what date and time the complainant has insisted and on what date the accused has issued those cheques to the complainant - Accused chose not to reply to the legal notice demanding payment of the loan by the complainant - Even the accused has not taken any legal steps against the complainant for misuse of the alleged signed blank cheques - Such an improbable defence set up by the accused cannot be accepted - Petition dismissed.

રીવિજન - આરોપીને કલમ 138 હેઠળ સજાપાત્ર ગુનામાં દોષિત ઠેરવવામાં આવ્યો હતો - તે આરોપીનો કેસ હતો કે તે ઉદ્યોગપતિ હતો અને ફરિયાદી કોમર્શિયલ ટેક્સ ઇન્સ્પેક્ટર હતો - તેમણે કરના હેતુસર કોરા ચેક આપ્યા હતા - ઠેરવ્યું - જો ખરેખર આરોપીએ ફરિયાદીને 15 સહી કરેલા કોરા ચેક આપ્યા હોય, તો આરોપીએ ખુલાસો કરવો જોઈતો હતો કે ફરિયાદીએ તેને શા માટે 15 સહી કરેલા કોરા ચેક આપવાનો આગ્રહ કર્યો છે - આરોપીએ એ સ્પષ્ટ કર્યું નથી કે ફરિયાદીએ કઈ તારીખ અને સમયે આગ્રહ કર્યો છે અને આરોપીએ ફરિયાદીને તે ચેક કઈ તારીખે આપ્યા છે - આરોપીએ ફરિયાદી દ્વારા લોનની ચુકવણીની માંગ કરતી કાનૂની નોટિસનો જવાબ ન આપવાનું પસંદ કર્યું હતું - આરોપીએ પણ કથિત સહી કરેલા કોરા ચેકના દુરૂપયોગ બદલ

ફરિયાદી સામે કોઈ કાનૂની પગલા લીધા નથી - આરોપીઓ દ્વારા ગોઠવવામાં આવેલા આવા અસંભવ બચાવને સ્વીકારી શકાય નહીં - અરજી નામંજૂર. [*Gajanan S/o Kallappa Kadolkar vs. Appasaheb Siddamallappa Kaveri 2023(1)GDCJ20*]

INHERENT POWERS OF COURT

Application - Conviction - Held - The inherent powers under Section 482 of the Code of Criminal Procedure or the extraordinary jurisdiction under Article 226 of the Constitution of India include the powers to quash the FIR, investigation or any criminal proceedings pending before the High Court or any Court subordinate to it and are of wide magnitude and ramification - The settlement has brought peace in the society and the parties who were once aggrieved, are now contended and are willing to lead harmonious life - In such circumstances, continuance of criminal proceedings will not serve any purpose - Application allowed.

અરજી – ગુનેગાર ઠરાવવું - ઠેરવ્યું - ફોજદારી કાર્યરીતિ સંહિતાની કલમ 482 હેઠળની અંતર્ગત સત્તાઓ અથવા ભારતના બંધારણના અનુચ્છેદ 226 હેઠળના અસાધારણ અધિકારક્ષેત્રમાં એફઆઈઆર, તપાસ અથવા કોઈ પણ ફોજદારી કાર્યવાહી હાઈકોર્ટ અથવા તેના હેઠળની કોઈપણ કોર્ટ સમક્ષ પેન્ડિંગ અને વ્યાપક છે - સમાજમાં શાંતિ સમાધાનમાં છે અને જે પક્ષકારો એક સમયે નારાજ હતા, તેઓ હવે દલીલ કરે છે અને સુમેળભર્યું જીવન જીવવા તૈયાર છે - આવા સંજોગોમાં, ફોજદારી કાર્યવાહી ચાલુ રાખવાથી કોઈ હેતુ સરશે નહીં - અરજીને મંજૂરી આપવામાં આવી છે. [*Pratikbhai Pravinbhai Parmar vs. Mayurbhai K Parikh (Proprietor of Omkar Firm) 2023(1)GDCJ80*]

INTEREFERENCE FOR ACQUITTAL

Acquittal - Intereference for - Appellate Court in appeal cannot interfere with order of acquittal - Unless reasons given by trial Court are found to be not based on record or improbable, appellate Court in appeal against acquittal can show indulgence and reverse order of acquittal - Court while adjudicating appeal against appeal cannot reverse said order of acquittal only for reason of there being another view which can be taken to convict accused - Cannot be interfered with to set aside order of acquittal - Appeal dismissed.

નિર્દોષ છોડી મૂક્યાંમાં દખલ કરવા બાબતે – અપીલ અદાલત નિર્દોષ છોડી મૂકવાનાં હુકમમાં દખલ કરી શકશે નહીં – જ્યાં સુધી ટ્રાયલ કોર્ટ દ્વારા નિર્દોષ છોડ્યાં સામેની અપીલમાં કારણ આધારિત અથવા અસંભવિત હોવાનું એપેલેટ કોર્ટને જણાયું ન હોય તો,

તે તેને માણવા લાયક બનાવી શકે છે અને દોષમુક્ત થવાના હુકમને ઊલટાવી શકે છે – જ્યાં સુધી ટ્રાયલ કોર્ટ દ્વારા અપાયેલ કારણો આધારભૂત ન હોય, ત્યાં સુધી અથવા દોષમુક્ત કરવા સામેની અપીલમાં દોષમુક્ત કરવાનાં કારણો માટે કોઈ અન્ય દ્રષ્ટિકોણ મુજબ દોષિત ઠરતાં હોય, ત્યાં સુધી હુકમને ઊલટાવી શકતી નથી – અપીલ નામંજૂર. [*T Narayana Rao vs. S Sujatha 2023(1)GDCJ107*]

INTEREFERENCE FOR ACQUITTAL

Criminal Jurisprudence - Indian criminal jurisprudence, accused has two fundamental protections available to him in a criminal trial or investigation - Firstly, he is presumed to be innocent till proved guilty and secondly that he is entitled to a fair trial and investigation - Both se facets attain even greater significance where accused has a judgment of acquittal in his favour - Judgment of acquittal enhances presumption of innocence of accused and in some cases, it may even indicate a false implication, has to be established on record of Court.

ફોજદારી ન્યાયશાસ્ત્ર – ભારતીય ફોજદારી ન્યાયશાસ્ત્ર – આરોપીને ખટલો ચલાવવામાં અથવા તપાસમાં તેના માટે બે પ્રકારના મૂળભૂત રક્ષણો મળી રહે છે – પ્રથમ તો જ્યાં સુધી તે દોષિત સાબિત ન થાય ત્યાં સુધી, તે નિર્દોષ છે એમ માનવામાં આવે છે અને બીજું એ કે, તે સુનાવણી અને તપાસ માટે હકદાર છે – બંને પાસાંઓ વધુ મહત્વતા ધરાવે છે, જેમાં આરોપમાં નિર્દોષ હોવાના ચુકાદા તેની તરફેણમાં આવી શકે છે – નિર્દોષ જાહેર કરવાનો ચુકાદો દોષિતની નિર્દોષતાની ધારણાંને વધારે છે – અને કેટલાંક કિસ્સામાં તે ખોટી રીતે તેને સંડોવવામાં આવ્યો હોવાનું પણ સૂચવી શકે છે, જે તેણે આ બાબત કોર્ટના રેકર્ડ પર સ્થાપિત કરવી પડે છે. [*T Narayana Rao vs. S Sujatha 2023(1)GDCJ107*]

MITAKSHARA COPARCENARY

Mitakshara coparcenary - Hindu law, as administered which is recognised in section 6(1), it is not necessary that there should be a living, coparcener or father as on date of amendment to whom daughter would succeed - Daughter would step into the coparcenary as that of a son by taking birth before or after Act - However, daughter born before can claim these rights only with effect from the date of the amendment, i.e., 9.9.2005 with saving of past transactions as provided in the proviso to section 6(1) read with section 6(5).

મિતાક્ષરા મજિયારું - હિંદુ કાયદો, જેનો વહીવટ કલમ 6(1)માં માન્યતા પ્રાપ્ત છે, તે

જરૂરી નથી કે સુધારાની તારીખે કોઈ જીવંત, સહકાર્યકર અથવા પિતા હોવા જોઈએ, જેને પુત્રી સફળ થશે - અધિનિયમ પહેલાં અથવા પછી જન્મ લઈને પુત્રી પુત્રની જેમ મજિયારામાં પગ મૂકશે - જો કે, અગાઉ જન્મેલી પુત્રી માત્ર સુધારાની તારીખથી જ આ અધિકારોનો દાવો કરી શકે છે, એટલે કે, 9.9.2005, કલમ 6 (5) સાથે વાંચવામાં આવતી કલમ 6 (1) ના પરંતુકમાં જોગવાઈ કર્યા મુજબ ભૂતકાળના વ્યવહારોની સાથે. [*Krishna Chand Gupta (Since Died); Ritesh Kumar Gupta, S/o Late Krishnachand Gupta; Kalpana Gupta D/o Late Krishnachand Gupta; Nisha Gupta, D/o Late Krishnachand Gupta; Rajkumari Devi W/o Late Krishnac vs. Shashikala Gupta D/o Late Laxmi Prasad Gupta; Somvati Gupta D/o Late Laxmi Chand Gupta; Sudha Gupta D/o Late Laxmi Chand Gupta; Saroj Gupta D/o Late Laxmi Chand Gupta; Sweta Gupta D/o Late Laxmi Chand 2023(1)GDCJ39*]

MITAKSHARA COPARCENARY

Hindu law - Effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary - Section 6(1) recognises a joint Hindu family governed by Mitakshara law - Coparcenary must exist on 9.9.2005 to enable the daughter of a coparcener to enjoy rights conferred on her - As right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with rights is alive or not - Conferral is not based on the death of a father or other coparcener - In case living coparcener dies after 9.9.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted section 6(3).

હિંદુ કાયદો - આ સુધારાની અસર એ છે કે પુત્રીને સંશોધનની તારીખથી અમલમાં આવે તે રીતે કોપેર્સનર બનાવવામાં આવે છે અને તે વિભાજનનો દાવો પણ કરી શકે છે, જે સહપાર્સનરીની આવશ્યક સંમિશ્રણ છે - કલમ 6(1) મિતાક્ષરા કાયદા દ્વારા સંચાલિત સંયુક્ત હિન્દુ પરિવારને માન્યતા આપે છે–મઝીયરી 9.9.2005ના રોજ અસ્તિત્વમાં હોવી જોઈએ, જેથી એક કોપેર્સનરની પુત્રી તેને મળેલા અધિકારોનો આનંદ માણી શકે. - જેમ કે અધિકાર જન્મથી છે અને વારસા દ્વારા નહીં, તે અપ્રસ્તુત છે કે જે સહહિસ્સેદાર ની પુત્રીને અધિકાર આપવામાં આવે છે તે જીવંત છે કે નહીં પ્રદાન કરનાર એ પિતા અથવા અન્ય સહ હિસ્સેદાર ના મૃત્યુ પર આધારિત નથી - જો જીવંત સહહિસ્સેદાર 9.9.2005 પછી મૃત્યુ પામે તો, વારસો સર્વાઇવરશીપ દ્વારા નહીં પરંતુ અવેજી કલમ 6 (3)માં પૂરી પાડવામાં

આવેલી માહિતી અથવા વસિયતનામા ઉત્તરાધિકાર દ્વારા કરવામાં આવે છે. [*Krishna Chand Gupta (Since Died); Ritesh Kumar Gupta, S/o Late Krishnachand Gupta; Kalpana Gupta D/o Late Krishnachand Gupta; Nisha Gupta, D/o Late Krishnachand Gupta; Rajkumari Devi W/o Late Krishnac vs. Shashikala Gupta D/o Late Laxmi Prasad Gupta; Somvati Gupta D/o Late Laxmi Chand Gupta; Sudha Gupta D/o Late Laxmi Chand Gupta; Saroj Gupta D/o Late Laxmi Chand Gupta; Sweta Gupta D/o Late Laxmi Chand 2023(1)GDCJ39*]

MITAKSHARA COPARCENARY

Declaration, injunction and partition of the suit property - Rights under substituted section 6 accrue to living daughters of living coparceners as on irrespective of when such daughters are born - Court was not drawn to aspect as to how a coparcenary is created - It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive; relevant is birth within degrees of coparcenary to which it extends - Survivorship is the mode of succession, not that of the formation of a coparcenary - Concept of "living coparcener", as laid down in Prakash v. Phulavati - Daughters should be living on 9.9.2005 - In substituted section 6, expression 'daughter of a living coparcener' has not been used. Right is given under section 6(1) (a) to daughter by birth - Declaration of right based on the past event was made on 9.9.2005 and as provided in section 6 (1) (b), daughters by their birth, have the same rights in the coparcenary, and they are subject to the same liabilities as provided in section 6(1) (c) - Any reference to the coparcener shall include a reference to the daughter of a coparcener - Provisions of section 6(1) leave no room to entertain the proposition that coparcener should be living on 9.9.2005 through whom the daughter is claiming - Trial court does not suffer from perversity or illegality warranting any interference by this court - Appeal dismissed.

દાવાની મિલકતનું ડેકલરએસએન, મનાઈહુકમ અને વિભાજન - અવેજીમાં લેવાયેલી કલમ 6 હેઠળનો અધિકાર જીવંત સહહિસ્સેદારો ની જીવંત પુત્રીઓને મળે છે, પછી ભલેને આવી પુત્રીઓનો જન્મ ક્યારેય થયો હોય - મઝીયરું કેવી રીતે બનાવવામાં આવે છે તે અંગે કોર્ટ પાસા તરફ દોરવામાં આવી ન હતી - સહહિસ્સેદાર ની રચના કરવી કે પુરોગામી સહહિસ્સેદાર જીવિત હોવો જોઈએ તે માટે સહ હિસ્સેદાર બનવું જરૂરી નથી; સંબંધિત માઝીયરું ની ડિગ્રીમાં જન્મ છે જેમાં તે વિસ્તૃત છે- સર્વાઇવરશીપ એ ઉત્તરાધિકારની રીત છે, માઝીય રીની રચનાની નહીં - "લિવિંગ કોપર્સનર"ની વિભાવના, પ્રકાશ વિ. કુલાવતી - 9.9.2005ના રોજ દીકરીઓ જીવતી હોવી જોઈએ - અવેજીમાં વિભાગ 6 માં, 'જીવંત સહ હિસ્સેદાર ની પુત્રી' ની અભિવ્યક્તિનો ઉપયોગ કરવામાં

આવ્યો નથી. કલમ 6(1) (એ) હેઠળ પુત્રીને જન્મથી જ અધિકાર આપવામાં આવ્યો છે - ભૂતકાળની ઘટનાને આધારે અધિકારની જાહેરાત 9.9.2005ના રોજ કરવામાં આવી હતી અને કલમ 6 (1) (બી)માં જોગવાઈ કરવામાં આવી છે તે મુજબ, પુત્રીઓને તેમના જન્મ દ્વારા, મજિયારી માં સમાન અધિકારો છે, અને તેઓ કલમ 6 (1) (સી) માં પૂરી પાડવામાં આવેલી સમાન જવાબદારીઓને આધિન છે. - સહહિસ્સેદાર ના કોઈપણ સંદર્ભમાં સહહિસ્સેદાર ની પુત્રીના સંદર્ભનો સમાવેશ થવો જોઈએ - કલમ 6(1)ની જોગવાઈઓમાં એ દરખાસ્તને ધ્યાનમાં લેવા માટે કોઈ અવકાશ રહેતો નથી કે સહહિસ્સેદાર 9.9.2005ના રોજ રહેતો હોવો જોઈએ, જેના દ્વારા પુત્રી દાવો કરી રહી છે - ટ્રાયલ કોર્ટ વિકૃતતા અથવા ગેરકાયદેસરતાથી પીડાતી નથી, જે આ કોર્ટ દ્વારા કોઈ હસ્તક્ષેપની બાંહેધરી આપે છે - અપીલ નામંજૂર. [*Krishna Chand Gupta (Since Died); Ritesh Kumar Gupta, S/o Late Krishnachand Gupta; Kalpana Gupta D/o Late Krishnachand Gupta; Nisha Gupta, D/o Late Krishnachand Gupta; Rajkumari Devi W/o Late Krishnac vs. Shashikala Gupta D/o Late Laxmi Prasad Gupta; Somvati Gupta D/o Late Laxmi Chand Gupta; Sudha Gupta D/o Late Laxmi Chand Gupta; Saroj Gupta D/o Late Laxmi Chand Gupta; Sweta Gupta D/o Late Laxmi Chand 2023(1)GDCJ39*]

ORDER OF ACQUITTAL

Appeal - Order of acquittal - Held - Upon a bare reading of the examination-in-chief and cross examination of the complainant, it is crystal clear that there are material contradictions in the statements - She clearly admitted during her cross-examination that she never got her statement recorded before any authorities or any person regarding commission of rape upon her by the respondent till the time she filed the application upon which present FIR was registered - As per the complainant, the reason for not disclosing the incidence of rape for complete one year was because the accused was in possession of her obscene photographs, which were taken by him when she was unconscious - However, neither the prosecution agency recovered those photographs specifically when three different disclosure statements of respondent were recorded nor the complainant produced on record those photographs in order to substantiate the reason for delay in lodging the FIR - Appeal dismissed.

અપીલ - નિર્દોષ છૂટકારોનો આદેશ - ઠેરવ્યું - ફરિયાદીની સર તપાસ અને ઊલટતપાસના ખુલ્લા વાંચન પર, તે સ્પષ્ટ છે કે નિવેદનોમાં ભૌતિક વિરોધાભાસ છે - તેણીએ તેની ઊલટતપાસ દરમિયાન સ્પષ્ટપણે કબૂલ્યું હતું કે જ્યાં સુધી તેણીએ અરજી દાખલ કરી ન હતી, જેના પર હાલની એફઆઈઆર નોંધવામાં આવી હતી ત્યાં સુધી

તેણીએ પ્રતિવાદી દ્વારા તેના પર બળાત્કારના ગુના અંગે કોઈ પણ અધિકારીઓ અથવા કોઈ પણ વ્યક્તિ સમક્ષ પોતાનું નિવેદન નોંધ્યું ન હતું - ફરિયાદીના જણાવ્યા અનુસાર, બળાત્કારની ઘટનાને એક વર્ષ સુધી જાહેર ન કરવાનું કારણ એ હતું કે આરોપી પાસે તેના અશ્લીલ ફોટોગ્રાફ્સ હતા, જે તે બેભાન હતી ત્યારે તેના દ્વારા લેવામાં આવ્યા હતા - જો કે, ફરિયાદી એજન્સીએ ખાસ કરીને જ્યારે પ્રતિવાદીના ત્રણ જુદા જુદા ડિસ્ક્લોઝર સ્ટેટમેન્ટ રેકોર્ડ કરવામાં આવ્યા હતા ત્યારે તે ફોટોગ્રાફ્સ પ્રાપ્ત કર્યા ન હતા અથવા ફરિયાદીએ એફઆઈઆર નોંધવામાં વિલંબનું કારણ સાબિત કરવા માટે તે ફોટોગ્રાફ્સ રેકોર્ડ પર રજૂ કર્યા ન હતા – અપીલ ના મંજૂર. [*State of Haryana vs. Shyam Sunder 2023(1)GDCJ100*]

PREPONDERANCE OF PROBABILITIES

Presumption - Preponderance of probabilities - Respondents were permitted by Single Judge to engage a hand-writing expert to seek an opinion on whether "the authorship on the questioned writings" (the disputed cheque) can be attributed to the respondents - Held, when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities" - Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail - Details in the cheque have been filled up not by the drawer, but by some other person would be immaterial - Presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert - Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was issued towards payment of a debt or in discharge of a liability - Impugned order is set aside - Appeal is allowed.

સંભાવનાઓની પ્રબળતાઓનો અનુમાન – એકવડી ખંડપીઠનાં ન્યાયાધીશે સામાવાળાઓને એક હસ્તાક્ષર નિષ્ણાંત રોકવાની પરવાનગી આપેલ કે, તે નિષ્ણાંત "સવાલવાળા લખાણનો લેખકત્વ" પર અભિપ્રાય આપી શકે કે, વાદગ્રસ્ત ચેક સામાવાળાઓને આભારી હોય શકે કે કેમ – ઠરાવ્યું કે – આરોપીએ ખંડન કરવું પડશે કે, કલમ 139 હેઠળ તેમ કરવા માટેના પુરાવાનાં ધોરણમાં "સંભાવનાઓને પ્રાધાન્ય" આપ્યું છે કે કેમ – તેથી જો આરોપી સંભવિત બચાવ રજૂ કરવામાં સક્ષમ હોય, કે જે કાયદેસર રીતે લાગુ કરી શકાય તેવાં કરજ અથવા જવાબદારીનાં અસ્તિત્વ વિશે શંકા પેદા કરે છે – તો કાર્યવાહી નિષ્ફળ થઈ શકે છે – ચેકમાં વિગતો, ચેક ઘડનાર દ્વારા નહીં પણ અન્ય

વ્યક્તિ દ્વારા લખવામાં આવી હતી, તો તે મહત્વની નથી હોઈ શકતી – ચેક પર હસ્તાક્ષર કરતી વખતે ઉદ્ભવતા અનુમાનને ફક્ત હસ્તલેખન નિષ્ણાંતના અહેવાલ પરથી ખંડન કરી શકાતું નથી, ભલે તેમાં વિગતો ચેક ઘડનાર દ્વારા લખવામાં આવી ન હોય કે અન્ય કોઈ દ્વારા લખાઈ હોય – આ બચાવ માટેનાં સંબધમાં નથી આવતું, કે ચેક દેવુ (કરજ) ચૂકવવા અથવા જવાબદારીઓના નિકાલ કરવા માટે આપવામાં આવેલ હતો – અસ્પષ્ટ હુકમને રદ્દ કરવામાં આવી – અપીલ મંજૂર કરવામાં આવી. [*Oriental Bank of Commerce vs. Prabodh Kumar Tewari 2023(1)GDCJ57*]

SUMMONING ORDER

Summoning order - Appellant filed four criminal complaints on the allegations that the account payee cheque issued by the respondent no. 2 towards the outstanding bills when presented for clearance was dishonored on the ground that the cheque amount exceeds arrangement - Summoning order and proceedings issued by Trial court quashed by High Court - Necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process - Held, a liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself - So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141 - No error has been committed by the High Court in allowing the Writ Petition filed by the respondent no. 2 and quashing the impugned order and the proceedings - Appeals stand dismissed.

સમન્સ મંગાવવાનો હુકમ - અપીલકર્તાએ આ આરોપો પર ચાર ફોજદારી ફરિયાદો નોંધાવી હતી કે પ્રતિવાદી નંબર 2 દ્વારા બાકી બિલો માટે જારી કરવામાં આવેલા એકાઉન્ટ પેયી ચેકને ક્લિયરન્સ માટે રજૂ કરવામાં આવેલ ત્યારે તે વણ ચૂકવાયેલ પરત આવેલ હતા કારણ કે ચેકની રકમ ખાતા માં રકમ જમા હતી તેના કરતા વધી ગઈ છે - ટ્રાયલ કોર્ટ દ્વારા જારી કરાયેલા આદેશ અને કાર્યવાહીને હાઈકોર્ટે રદ કરી - કોઈ વ્યક્તિને ફોજદારી પ્રક્રિયાને આધિન કરવામાં આવે તે પહેલાં ફરિયાદમાં જરૂરી કથનો શામેલ હોવા જોઈએ - ઠેરવ્યું , અધિનિયમની કલમ 141 હેઠળની જવાબદારી કંપની સાથે સંકળાયેલી વ્યક્તિ પર અવેજી ની રીતે બાંધવાની માંગ કરવામાં આવી છે, મુખ્ય આરોપી કંપની જ્યાં સુધી ચેક પર હસ્તાક્ષર કરનારનો સવાલ છે, ત્યાં સુધી તે ગુનાહિત કૃત્ય માટે સ્પષ્ટપણે જવાબદાર છે અને કલમ 141 ની પેટા કલમ (2) હેઠળ

આવરી લેવામાં આવશે - પ્રતિવાદી નંબર 2 દ્વારા દાખલ રિટ પિટિશનને મંજૂરી આપવામાં અને વાદગ્રસ્ત હુકમ અને કાર્યવાહીને રદ કરવામાં હાઈકોર્ટ દ્વારા કોઈ ભૂલ કરવામાં આવી નથી - અપીલો ના મંજૂર. [*Pawan Kumar Goel vs. State of U P & Another 2023(1)GDCJ63*]

TIME BARRED COMPLAINT

Complaint filed under Section 138 - dismissed- Appeal against rejected- complaint is found to be time barred- no application for condonation of delay -failed to prove case beyond all reasonable doubts- rebutting presumption under Section 139- Cognizance of offences- after the prescribed period - Appeal allowed.

કલમ 138 હેઠળ નોંધાયેલી ફરિયાદ - નામંજૂર - ફરિયાદ સામે અપીલ સમય નો બાધ હોવાનું જણાયું છે - વિલંબના પાલન માટેની કોઈ અરજીનથી - તમામ વાજબી શંકાઓથી આગળ કેસ સાબિત કરવામાં નિષ્ફળ - કલમ 139- કલમ 139હેઠળની ધારણાને દૂર કરવી - નિર્ધારિત સમયગાળા પછી – અપીલ મંજૂર. [*Tanveer Khatib; Oscar Vaz vs. State 2023(1)GDCJ110*]

UNCONDITIONAL LEAVE

Commercial Division Summary Suits- grant of unconditional leave to the defendant to defend suit in respect of interest component only- Court would be justified in passing decree for indisputable principal amounts- summons for judgment- plaintiff is entitled at any time to abandon or give-up a part of claim- defence of existence of a verbal agreement-not fair-without making any record thereof -It would be legitimate to examine as to whether the defendant had the opportunity- mere fact that money was advanced by the plaintiff to the defendant in tranches, by itself, is not sufficient to draw an inference of a "running account' - Leave granted, Summons disposed.

કોમર્શિયલ ડિવિઝન સમરી શુટ - માત્ર હિતના ઘટકના સંદર્ભમાં જ દાવોનો બચાવ કરવા માટે પ્રતિવાદીને બિનશરતી રજા આપવી - નિર્વિવાદ મુખ્ય રકમ માટે હુકમનામું પસાર કરવામાં કોર્ટને ન્યાયી ઠેરવવામાં આવશે- ચુકાદા માટેના સમન્સ- વાદી કોઈ પણ સમયે મૌખિક કરારના અસ્તિત્વના દાવા-બચાવના એક ભાગને છોડી દેવા અથવા છોડી દેવા માટે હકદાર છે - ન્યાયી નહીં - તેની કોઈ નોંધ કર્યા વિના -પ્રતિવાદીને તક મળી હતી કે કેમ તે અંગે તપાસ કરવી કાયદેસર રહેશે - માત્ર હકીકત એ છે કે વાદી દ્વારા પ્રતિવાદીને હપ્તાઓમાં પૈસા એડવાન્સ કરવામાં આવ્યા હતા, તે જાતે જ, "ચાલતા ખાતા" નો અંદાજ કાઢવા માટે પૂરતા નથી – રજા મંજૂર કરેલ , સમન્સનો નિકાલ

કરવામાં આવ્યો છે. [*Kavita G Rajani; Gautam G Rajani vs. Samir N Bhojwani 2023(1)GDCJ31*]

DISHONOUR OF CHEQUE JUDGEMENTS

2023(1)GDCJ1

IN THE HIGH COURT OF KERALA AT ERNAKULAM

[Before N Nagaresh]

A R (Arbitration Request) No 23 of 2016 **dated 18/11/2022**

A Salim Managing Director, M/s Mobile Star Satellite Communication India Ltd

Versus

Asianet Satellite Communication Ltd

ARBITRATION REQUEST

Arbitration and Conciliation Act, 1996 - Section 11 - Negotiable Instruments Act, 1881 - Section 138 - Telecom Regulatory Authority of India Act, 1997 - Sections 14 and 15 - Arbitration request - Mater falls under jurisdiction of TDSAT - Held - Special Law i.e., the Telecom Regulatory Authority of India Act, 1997 will prevail over general law i.e., the Arbitration and Conciliation Act, 1996 - TDSAT has the exclusive jurisdiction to adjudicate upon all disputes that arise between the parties and those specified under the Act - The Telecom Regulatory Authority of India Act, 1997 being a later statute and having been specially enacted for the Telecom Sector, will certainly prevail over the Arbitration and Conciliation Act, 1996 - Arbitration request dismissed.

[Paras 14 to 19]

Law Point - Special Law i.e., the Telecom Regulatory Authority of India Act, 1997 will prevail over general law i.e., the Arbitration and Conciliation Act, 1996.

લવાદ અને સમાધાન અધિનિયમ, 1996 - કલમ 11 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટ, 1881 - કલમ 138 - ટેલિકોમ રેગ્યુલેટરી ઓથોરિટી ઓફ ઇન્ડિયા એક્ટ, 1997 - કલમ 14 અને 15- આર્બિટ્રેશન વિનંતી - મેટર ટીડીએસએટીના અધિકારક્ષેત્રમાં આવે છે - ઠેરવ્યું - ખાસ કાયદો ,ટેલિકોમ રેગ્યુલેટરી ઓથોરિટી ઓફ ઇન્ડિયા એક્ટ, 1997 સામાન્ય કાયદા પર પ્રભુત્વ ધરાવશે i.e., આર્બિટ્રેશન એન્ડ સમાધાન ધારો, 1996 - ટીડીએસએટી પાસે પક્ષકારો અને કાયદા હેઠળ નિર્દિષ્ટ કરાયેલા વિવાદો વચ્ચે ઉદ્ભવતા તમામ વિવાદો પર નિર્ણય લેવાનો વિશિષ્ટ અધિકારક્ષેત્ર છે. - ટેલિકોમ રેગ્યુલેટરી ઓથોરિટી ઓફ ઇન્ડિયા એક્ટ, 1997 એ પછીનો કાયદો છે અને ટેલિકોમ ક્ષેત્ર માટે ખાસ ઘડવામાં આવ્યો છે, તે

ચોક્કસપણે આર્બિટ્રેશન એન્ડ કન્સિલિએશન એક્ટ, 1996 પર પ્રભુત્વ ધરાવશે - લવાદની વિનંતી રદ્દ કરી દેવામાં આવી.

[Paras 14 to 19]

કાયદાનો મુદ્દો- ખાસ કાયદો ,ટેલિકોમ રેગ્યુલેટરી ઓથોરિટી ઓફ ઇન્ડિયા એક્ટ, 1997 સામાન્ય કાયદા પર પ્રભુત્વ ધરાવશે i.e., આર્બિટ્રેશન એન્ડ સમાધાન ધારો, 1996

Acts Referred:

Arbitration and Conciliation Act, 1996 Sec. 11
Negotiable Instruments Act, 1881 Sec. 138
Telecom Regulatory Authority of India Act, 1997 Sec. 14, Sec. 15

Counsel:

M Ramesh Chander, Aneesh Joseph, Dennis Varghese, Saji Varghese T G

JUDGEMENT

N. Nagaresh, J.

[1] The petitioner, who is Managing Director of M/s. Mobile Star Satellite Communication India Limited, has filed this Arbitration Request invoking Section 11 of the Arbitration and Conciliation Act, 1996 seeking to appoint an Arbitrator pursuant to the request made by the petitioner.

[2] The petitioner states that the petitioner entered into an agreement with the respondent-M/s. Asianet Satellite Communications Limited on 19.12.2013. The respondent violated the terms of agreement and therefore he sent Annexure-A4 letter to the respondent requiring to refer the matter for arbitration. The petitioner suggested the name of Advocate Francis Gomez. The respondent did not respond to the notice. Therefore, the petitioner approached this Court seeking to appoint an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996.

[3] The respondent entered appearance and resisted the writ petition. The respondent stated that the petitioner is a Broadcaster and the respondent is a Multi System Operator. The parties are governed by the Telecom Regulatory Authority of India Act, 1997. If the petitioner has any grievance against the respondent in connection with the agreement executed between the parties, the petitioner has to invoke the provisions of the Telecom Regulatory Authority of India Act, 1997.

[4] Counsel for the respondent argued that Section 14 of the Act, 1997 provides for establishment of an Appellate Tribunal. The Tribunal is competent to adjudicate any dispute between a licensor and a licensee, between two or more service providers and between a service provider and a group of consumers. Dominant public policy demands that all disputes in Telecom Sector which includes broadcasting and cable TV, should be within the exclusive jurisdiction of the Telecom Disputes Settlement

and Appellate Tribunal (TDSAT) and arbitration agreement will not have any applicability. Arbitration is barred in respect of the matters which are within the exclusive jurisdiction of TDSAT.

[5] The counsel for the respondent argued that the Telecom Regulatory Authority of India Act, 1997 being a special statute, it would prevail over the Arbitration and Conciliation Act, 1996. The counsel for the respondent relied on the judgement of the Hon'ble High Court of Delhi in Gaur Distributors v. Hathway Cable and Datacom Limited (ARB. P. 129/2016).

[6] The counsel for the petitioner, on the other hand, argued that the respondent has admittedly entered into an agreement with the petitioner, under which all disputes, controversies, or differences arising out of or in connection with the agreement or for the breach thereof, shall be settled by arbitration in Trivandrum and the arbitration shall be governed by the Arbitration and Conciliation Act, 1996 and the Arbitration and Conciliation Rules, 1996 or any statutory amendment or re-enactment thereof. After entering into an agreement agreeing to settle all disputes through the process of arbitration, the respondent cannot now turn around and question the arbitrability of the dispute, contended the counsel for the petitioner. The counsel for the petitioner further argued that the dispute between the petitioner and the respondent will not fall within the ambit of the Telecom Regulatory Authority of India Act, 1997.

[7] The counsel for the petitioner further pointed out that the respondent has filed complaints under Section 138 of the Negotiable Instruments Act, 1881 against the petitioner. That itself would show that the parties are at liberty to approach competent courts / forums, other than the TDSAT.

[8] I have heard the learned counsel for the petitioner and the learned counsel for the respondent.

[9] Annexure-A1 is the agreement entered into between the petitioner and the respondent. The arbitration clause is contained in Clause 8 of the agreement governing law and dispute resolution. Clause 8 of Annexure-A1 agreement reads as follows:

> 8. GOVERNING LAW AND DISPUTE RESOLUTION:
>
> The terms of this Agreement shall be construed and enforced in accordance with the laws of India.
>
> All disputes, controversies, or differences arising out of or in connection with this Agreement, or for the breach thereof, shall be settled by arbitration in Trivandrum and the arbitration shall be governed by the Arbitration and Conciliation Act, 1996 and the Arbitration and Conciliation Rules, 1996 or any statutory amendment or re-enactment thereof. The arbitration proceedings shall be conducted in the English language.
>
> The arbitration award will be final and binding on the Parties.

Therefore, it is evident that the parties have agreed for resolution of any disputes through arbitration.

[10] The petitioner has issued Annexure-A4 notice of arbitration. The respondent has not responded to Annexure-A4. Therefore, ordinarily, an Arbitrator has to be appointed by this Court invoking Section 11 of the Arbitration and Conciliation Act, 1996. But, the respondent would urge that the provisions of the Arbitration and Conciliation Act, 1996 would not apply to the disputes in question, in view of the provisions contained in the Telecom Regulatory Authority of India Act, 1997.

[11] Section 14 of the Telecom Regulatory Authority of India Act, 1997 reads as follows:

14. Establishment of Appellate Tribunal The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to

(a) adjudicate any dispute

(i) between a licensor and a licensee;

(ii) between two or more service providers;

(iii) between a service provider and a group of consumers:

Provided that nothing in this clause shall apply in respect of matters relating to-

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act;

(c) excercise jurisdiction, powers and authority conferred on -

(i) the Appellate Tribunal under the Information Technology Act, 2000 (21 of 2000); and

(ii) the Appellate Tribunal under the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008).

Section 14, in its proviso, states that nothing in Section 14 shall apply to matters relating to the Monopolies and Restrictive Trade Practices Act, 1969,

> the Consumer Protection Act, 1986 and Section 7B of the Indian Telegraph Act, 1885. The proviso does not speak of the Arbitration and Conciliation Act, 1996.

[12] The counsel for the respondent relied on the judgment of the Hon'ble High Court of Delhi in Gaur Distributors v. Hathway Cable and Datacom Limited (Arb.P.129/2016) to argue that in view of the Telecom Regulatory Authority of India Act, 1997, resolution of the dispute through proceedings under the Arbitration and Conciliation Act, 1996, is not permissible.

[13] The High Court of Delhi in Gaur Distributors (supra) has held that Sections 14 and 15 of the Telecom Regulatory Authority of India Act, 1997 makes it abundantly clear that TDSAT is empowered to adjudicate any dispute between two or more service providers and therefore arbitration proceedings in such disputes is not permissible. The Hon'ble High Court of Delhi held that the Telecom Regulatory Authority of India Act, 1997 being a special statute, it would prevail over the Arbitration and Conciliation Act, 1996. Consequently, arbitral proceedings under the Act, 1996 is not permissible under law.

[14] In **Maddada Chayanna v. Karnam Narayana and another**, 1979 3 SCC 42], the Hon'ble Apex Court quoted with approval the following observations of the Andhra Pradesh High Court in **Appanna v. Sriramamurty**, 1958 1 AndhWR 420].

> Where a Special Tribunal, out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as is otherwise expressly provided or necessarily implied, that Tribunal's jurisdiction to determine those questions is exclusive.
>
> In the matter of disputes in Telecom Sector, the Telecom Regulatory Authority of India Act has designated TDSAT as the Special Tribunal.

[15] The Indian Arbitration Act being a general provision relating to settlement of disputes by arbitration and the Act having carved out certain matters only as available for determination by arbitration, on the principle of generalia specialibus non derogant, what has been provided in the Act would override the general provisions contained in the Indian Arbitration Act. So, the matters relating to which there is direction in the Act, 1997 cannot be the subject matter of arbitration. This is for the reason that the Telecom Regulatory Authority of India Act is a Special Act on the subject of which disputes covered by the Act could be decided by TDSAT. The Telecom Regulatory Authority of India Act, 1997 is a later Act than the Arbitration and Conciliation Act, 1996.

[16] The Hon'ble Apex Court considered the question of special law vis a vis general law and special law vis-a-vis special law, in the judgment in **Allahabad Bank v. Canara Bank and another**, 2000 4 SCC 406]. The issue before the Apex Court was whether permission of the Company Court where winding up proceedings were pending, was required for filing a petition for recovery of money before the Debt

Recovery Tribunal constituted under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. The Hon'ble Apex Court held that there can be a situation in law where the same statute is treated as a special statute vis a vis one legislation and again as a general statute vis a vis yet another legislation. The general law is that when there are two special laws, the principle that the latter will normally prevail over the former if there is provision in the latter Special Act giving it overriding effect.

[17] The object of the Telecom Regulatory Authority of India Act, 1997 as stated in the preamble is to provide for the establishment of the Telecom Regulatory Authority and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services and adjudicate disputes. Section 15 of the Act, 1997 states that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under the Act to determine. Section 14 of the Act which provides for establishment of Tribunal, excludes certain disputes / complaints from the purview of TDSAT. Arbitral proceedings under the Arbitration and Conciliation Act, 1996 have not been so excluded.

[18] It is therefore clear that the Special Law i.e., the Telecom Regulatory Authority of India Act, 1997 will prevail over general law i.e., the Arbitration and Conciliation Act, 1996. Therefore, TDSAT has the exclusive jurisdiction to adjudicate upon all disputes that arise between the parties and those specified under the Act. The Telecom Regulatory Authority of India Act, 1997 being a later statute and having been specially enacted for the Telecom Sector, will certainly prevail over the Arbitration and Conciliation Act, 1996. The Telecom Regulatory Authority of India Act, 1997 was enacted in the year 1997 and the Arbitration and Conciliation Act was enacted in the year 1996. When the Telecom Regulatory Authority of India Act, 1997 was enacted, the Parliament was aware of the remedy of arbitration available under the Arbitration and Conciliation Act, 1996. Even then, the Parliament chose not to exclude the Arbitration and Conciliation Act, 1996 from the ambit of the Act, 1997.

[19] The Telecom Regulatory Authority of India Act, 1997 is not only a later legislation, but is also a special legislation aiming to protect the interests of the service providers and consumers of the Telecom Sector and to promote and ensure the orderly group of Telecom Sector. Speedier adjudication of disputes by a specialised Tribunal having requisite knowledge and expertise of the Sector is necessary for the growth of the Telecom Sector in the long run. The Telecom Regulatory Authority of India Act, 1997 is a complete Code. TDSAT has exclusive jurisdiction to adjudicate any dispute between the parties.

Therefore, I hold that arbitration is barred in respect of the matters which are within the exclusive jurisdiction of TDSAT under the provisions of the Telecom

Regulatory Authority of India Act, 1997. Therefore, the Arbitration Request is not maintainable. The Arbitration Request is therefore dismissed

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2023(1)GDCJ7

IN THE HIGH COURT OF BOMBAY AT GOA

[Before Prasanna B Varale; Bharat P Deshpande]

Criminal Writ Petition No 99 of 2022 **dated 14/09/2022**

Ajju C S Sindolli

Versus

State of Goa; Police Inspector, Economic Offences Cell, Goa; Paul Saldanha

FUTILE EXERCISE

A) Constitution of India Art. 226 - Indian Penal Code, 1860 Sec. 420, Sec. 406 - Negotiable Instruments Act, 1881 Sec. 138 - Dishonour of cheque - Quashing of FIR - Settlement of dispute and powers of this Court to quash proceedings even after filing of chargesheet and when matter has been resolved amongst parties in connection with commercial transaction and as such exercise of undergoing full-fledged trial would be futile exercise.

B) Code of Criminal Procedure, 1973 Sec. 482 - Criminal Proceedings - Inherent Powers - Exercise of - While exercising inherent powers, High Court would be entirely dependent on facts and circumstances of each case and it is neither permissible nor proper for Court to provide a straitjacket formula regulating exercise of inherent powers under Section 482 of CrPC.

C) Constitution of India Art. 226 - Indian Penal Code, 1860 Sec. 420, Sec. 406 - Negotiable Instruments Act, 1881 Sec. 138 - Complaint - Whether amount allegedly misappropriated is received by him under compromise, he submitted that no amount was exchanged between parties at time of arriving at so called settlement and his civil suit is pending adjudication before Civil Court for recovery of said amount - On ground that he is not entitled to pay any amount - Thus, from all angles affidavit of respondent is filed only in camouflaged manner so as to obtain an order of quashing of proceedings from this Court and to get rid of criminal proceedings even though parties are litigating before the Civil Court for same cause- Cannot be considered as an affidavit with regard to arriving at a settlement between parties since chargesheet is already filed - Deemed fit and proper to reject present petition - Petition dismissed

Law Point - It needs no emphasis that exercise of inherent power by High Court would entirely depend on facts and circumstances of each case

A) ભારતીય બંધારણ અનુચ્છેદ 226 - ભારતીય દંડ સંહિતા, 1860 કલમ 420, કલમ 406 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટ, 1881 કલમ 138 –ચેક વણ ચૂકવાયેલ પરત ફરેલ - એફઆઈઆર રદ કરવી - ચાર્જશીટ દાખલ કર્યા પછી પણ આ કોર્ટની વિવાદ અને કાર્યવાહીને રદ કરવાની સત્તાની પતાવટ અને જ્યારે વાણિજ્યિક વ્યવહારના સંબંધમાં પક્ષકારો વચ્ચે મામલો હલ કરવામાં આવ્યો હોય અને આવી રીતે સંપૂર્ણ સુનાવણી હાથ ધરવાની કવાયત નિરર્થક રહેશે.

B) ફોજદારી કાર્યરીતિ સંહિતા, 1973ની કલમ 482 - ફોજદારી કાર્યવાહી - અંતર્ગત સત્તાઓ - તેનો ઉપયોગ - અંતર્ગત સત્તાઓનો ઉપયોગ કરતી વખતે, હાઈકોર્ટ દરેક કેસની હકીકતો અને સંજોગો પર સંપૂર્ણપણે નિર્ભર રહેશે અને સીઆરપીસીની કલમ 482 હેઠળ અંતર્ગત સત્તાઓના ઉપયોગને નિયંત્રિત કરતી સ્ટ્રેટજેકેટ ફોર્મ્યુલા પ્રદાન કરવી કોર્ટ માટે ન તો માન્ય છે અને ન તો યોગ્ય છે.

C) કોન્સ્ટિટ્યુશન ઓફ ઇન્ડિયા આર્ટિકલ 226 - ઇન્ડિયન પીનલ કોડ, 1860 કલમ 420, કલમ406 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 કલમ138 - ફરિયાદ - કથિત રીતે ગેરરીતિ કરવામાં આવેલી રકમ તેમને સમાધાન હેઠળ પ્રાપ્ત થાય છે કે કેમ, તેમણે એવી રજૂઆત કરી હતી કે કહેવાતા સમાધાન સમયે પક્ષકારો વચ્ચે કોઈ રકમની આપ-લે કરવામાં આવી ન હતી અને તેમનો સિવિલ દાવો ઉપરોક્ત રકમની વસૂલાત માટે સિવિલ કોર્ટ સમક્ષ ચુકાદો બાકી છે - તે આધારેતે કોઈ પણ રકમ ચૂકવવા માટે હકદાર નથી - આમ, તમામ એંગલથી પ્રતિવાદીનું સોગંદનામું માત્ર છેતરપિંડી ના સાધન ની રીતે જ દાખલ કરવામાં આવે છે, જેથી આ કોર્ટમાંથી કાર્યવાહી રદ કરવાનો હુકમ મેળવી શકાય અને ફોજદારી કાર્યવાહીથી છૂટકારો મેળવી શકાય, તેમ છતાં પક્ષકારો સમાન હેતુ માટે સિવિલ કોર્ટ સમક્ષ કેસ ચલાવી રહ્યા છે- પક્ષકારો વચ્ચે સમાધાન પર પહોંચવાના સંબંધમાં એફિડેવિટ તરીકે ગણી શકાય નહીં, કારણ કે ચાર્જશીટ પહેલેથી જ દાખલ કરવામાં આવી છે - હાલની અરજી નકારવા માટે યોગ્ય અને લાયક માનવામાં આવે છે - અરજી નામંજૂર કરવામાં આવી

કાયદાનો મુદ્દો - એ વાત પર કોઈ ભાર મૂકવાની જરૂર નથી કે હાઈકોર્ટ દ્વારા અંતર્ગત સત્તાનો ઉપયોગ સંપૂર્ણપણે દરેક કેસના તથ્યો અને સંજોગો પર આધારિત રહેશે.

Acts Referred:
Constitution of India Art. 226
Indian Penal Code, 1860 Sec. 420, Sec. 406
Code of Criminal Procedure, 1973 Sec. 482
Negotiable Instruments Act, 1881 Sec. 138

Counsel:
Vibhav R Amonkar, S G Bhobe, Nuno Noronha

JUDGEMENT

Bharat P. Deshpande, J.

[1] Rule. Rule made returnable forthwith.

[2] Heard the parties with consent.

[3] The petitioner approached this Court under Section 482 of CrPC and Article 226 of the Constitution of India praying for a writ, order or directions thereby quashing FIR No.192/2015 dated 02.12.2015 registered with respondent no.2 and consequently criminal proceedings initiated pursuant thereto, on the ground that the petitioner and respondent no3/informant settled their dispute.

[4] Heard learned counsel Shri Vibhav Amonkar appearing for the petitioner and Mr. S. G. Bhobe, learned Public Prosecutor for respondents no.1 and 2 and Shri Nuno Noronha, learned counsel appearing for respondent no.3.

[5] With the assistance of learned counsel appearing for the parties we have gone through a copy of the chargesheet and relevant documents as well as the affidavit filed by respondent no.3.

[6] Learned counsel Shri Amonkar appearing for the petitioner strenuously urged that though FIR was lodged against the applicant which culminated into filing of a chargesheet, subsequently the petitioner and the informant/respondent no.3 settled their dispute out of the court and therefore the petitioner has approached this Court since the offence alleged against him in the chargesheet is non-compoundable offence. He invited our attention to a specific pleading in the petition wherein it has been claimed that FIR was lodged purely on misunderstanding and misapprehension and the petitioner alongwith respondent no.3 discussed about it. The petitioner represented to respondent no.3 about true and factual position and accordingly both of them amicably resoled to withdraw/compound all criminal pending cases including the present FIR. Such averments are found in paragraphs 6, 8 and 9 of the petition.

[7] Learned counsel Shri Amonkar then placed reliance in the case of Gian Singh vs. State of Punjab & Another,2012 10 SSC 203 and **Narender Singh and Others vs.**

State of Punjab And Another, 2014 6 SCC 466 to buttress his submissions regarding settlement of the dispute and powers of this Court to quash proceedings even after filing of the chargesheet and when the matter has been resolved amongst the parties in connection with commercial transaction and as such the exercise of undergoing full-fledged trial would be futile exercise.

[8] Mr. Bhobe, the learned Public Prosecutor appearing for the State opposed the said application on the ground that the FIR was lodged in the year 2015 and after full-fledged investigation, chargesheet is already filed in the year 2017 before the learned Chief Judicial Magistrate's Court at Panaji. Therefore, it is not proper to quash the entire proceedings including FIR at this stage when the police machinery was used by the informant for investigations and filing of the chargesheet.

[9] Learned counsel for respondent no.3 submitted that though she is ready and willing to compound the matter by quashing FIR, the contentions raised by her in a Civil Suit bearing Civil Suit no.57/2016 filed against the petitioner for recovery of the same amounts would not be affected by the outcome of the present compounding. In paragraph 9 of the affidavit, respondent no.3 submitted that she is giving conditional consent for compounding the offence.

[10] We have considered all the relevant contentions raised by the respective parties and after perusal of pleadings in the petition and more particularly, affidavit filed by respondent no.3, we consider it appropriate not to exercise our inherent jurisdiction under Section 482 of CrPC and/or under Article 226 of the Constitution of India in granting the prayer in the petition for the reasons disclosed below.

[11] The Hon'ble Apex Court in the case of **Gian Singh** (supra) was dealing with the reference and this aspect is found in paragraph 52 as under:-

> "The question is with regard to the inherent power of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 of the Code."

[12] While answering the above aspect, the Apex Court discussed earlier decisions having different views and then arrived at the conclusion which is found from paragraphs no.53 onwards. However, relevant observations are in paragraphs 54, 55, 56, 57 and 61 which read thus:

> '55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will

be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.'

'56. **It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case.** It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided.'

'57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.'

...

...

...

'61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim

> or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.'

[13] In the case of **Narender Singh** (supra), the Apex Court was considering powers of High Court under Section 482 of CrPC vis-a-vis the offences punishable under Section 307 of IPC. After considering the decision in the case of **Gian Singh** (supra), the Apex Court observed from paragraph 13 onwards that the question is as to whether the offence under Section 307 of IPC falls within the aforesaid parameters. After the discussion, the Apex Court while summing up laid down the principles by which a High Court would be guided in giving adequate treatment to the settlement within the parties and exercising its powers under Section 482 of the Code while accepting a settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Such directions are found from paragraph 29, 29.1 to 29.7 which read thus:

> '29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and

quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court. While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For

this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime.'

[14] The learned Additional Public Prosecutor placed reliance in the recent decision in the case of **M/s. Niharika Infrastructure Pvt. Ltd v. State of Maharashtra**, 2021 AIR(SC) 1918 . The Apex Court after discussing all earlier decisions including the above referred decisions in the case of **Gian Singh** (supra) and **Narender Singh** (supra), reiterated its earlier considerations including the one found in the case of **Bhajan Lal**. Keeping in mind about settled propositions and more

particularly the observations in paragraph no.56 and paragraph no.61 in the case of **Gian Singh** (supra) wherein the Apex Court has observed that while exercising inherent powers, the High Court would be entirely dependent on the facts and circumstances of each case and it is neither permissible nor proper for the Court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482 of CrPC. No precise and inflexible guidelines can also be provided. Thus, each case has to be decided on its own facts and material and more particularly the aspect of settlement between the parties as tried to be claimed in the present petition.

[15] Briefly, facts of the matter on the basis of which FIR was lodged against the petition needs to be disclosed. On the basis of a complaint lodged by the respondent no.3, FIR no.192 of 2015 was registered by the police and later on it was taken over by Economic Offences Cell, North Goa, Panaji, for the offence punishable under Section 406 and 420 of IPC.

[16] The main allegations of respondent no.3/informant in the FIR are that the petitioner induced the informant to invest in different schemes on promise of 8% returns every month. Accordingly, the informant invested an amount of Rs. 42,00,000/- somewhere in the year 2014. Subsequently, the petitioner promised to sell a property to the informant and collected an amount of Rs. 28,20,000/- and misappropriated the said amount for his personal use. Thereafter, the petitioner again took an amount of Rs. 67,000/- from respondent no.3/informant with a promise to buy auctioned iron ore from Directorate of Mines & Geology and misappropriated the said amount for his personal use. Therefore, the petitioner by making false promise and inducing the informant, misappropriated an amount of Rs. 75,98,566/- and thereby committed offence punishable under Section 406 and 420 of IPC.

[17] It is matter of record that complaint/FIR was lodged on 02.12.2015 and thereafter chargesheet was filed in the Court of CJM at Panaji which is registered as Criminal Case No.22/2017. Thus, the basic contentions in the complaint is regarding inducement, misappropriation of funds and cheating. No doubt it is a commercial transaction and purely between two persons, the question of quashing of such proceedings needs to be considered on the basis of contentions raised in the petition so also affidavit filed by respondent no.3/informant, so as to find out whether there is actual settlement of the dispute between the parties.

[18] Petitioner in his petition and more particularly in paragraph no.6 onwards claimed that the complaint was lodged purely on misunderstanding and misapprehension in the mind of the informant and that the dispute is now amicably settled between the parties.

[19] Therefore, it is necessary to look into the affidavit filed by respondent no.3 so as to find out whether the contentions raised in the petition regarding misunderstanding and misapprehension in the mind of the complainant while filing the complaint is made out in the affidavit.

[20] Bare perusal of the affidavit filed by respondent no.3 today clearly goes to show that he is giving conditional consent for compounding of the said offence thereby keeping open his contentions raised in the Special Civil Suit No.57/206 filed by him against the petitioner for the recovery of the same amount which he has alleged as misappropriated by the petitioner.

[21] In the entire affidavit filed by respondent no.3, there is no whisper to the contentions raised in the petition and more specifically found in paragraph 6 of the petition that such complaint was filed by respondent no.3 purely out of misunderstanding and misapprehension.

[22] We clearly observe on perusal of the affidavit of respondent no.3 that in fact there is no compromise arrived at between the parties as far as the present FIR and chargesheet is concerned. Respondent no.3 nowhere states on oath that she filed the said complaint purely on misunderstanding and misapprehension of the facts. Contrary to the above facts, affidavit in fact reiterates the contention of the respondent no.3 that amount of Rs. 75,98,566/- was misappropriated by the petitioner by cheating and inducing. It is necessary to quote few paragraphs of the affidavit of respondent no.3 for the purpose of better understanding of the matter.

> '6. I say that during the course of the proceedings of the afore - referred Case No. OA/85/2016/D, the Petitioner and me have now resolved our dispute amicably with respect to the police complaint dated 02/12/2015 which has been filed by me against the Petitioner before the Respondent No. 2, Police Inspector and also in connetion to the proceedings under Section 138 of the Negotiable Instruments Act, 1881 being Case No. OA/85/2016/D pertaining to a false / fake Cheque bounce case instituted by the Petitioner against me, subject, to me keeping all my rights, contentions, issues, disputes etc. open for me to litigate with respect to recovering from the abovenamed Petitioner my money amounting to the aforesaid sum of Rs. 75,98,566/- (Rupees Seventy Five Lakhs Ninety Eight Thousand Five Hundred and Sixty Six)Only which the Petitioner has misappropriated and cheated me of, with respect to which I have filed the afore-referred Special Civil Suit No. 57/2016/A before the Hon'ble Court of the Civil Judge, Senior Division 'A' Court at Panaji-Goa.'
>
> 7. I say that I give my consent to this Hon'ble Court compounding the offences charged against the Petitioner which are punishable under Section 406 and 420 of the Indian Penal Code, 1860 and also for quashing the FIR No. 192/2015 which has been registered against the Petitioner by the Respondent No. 2, Police Inspector in pursuance of my police complaint dated 02/12/2015.'
>
> '8. I say that the consent given by me so that this the Hon'ble Court may proceed to compound the offences committed by the Petitioner under Section

406 and 420 of the Indian Penal Code 1860 with connection to which the afore - referred F.I.R. No. 192/2015 has been registered against the Petitioner abovenamed by the Respondent No. 2, Police Inspector shall have no bearing, connection and / or implication with the outcome of the Special Civil Suit No. 57/2016/A which has been filed by me against the abovenamed Petitioner for recovering the aforesaid sum of Rs. 75,98,566/- (Rupees Seventy Five Lakhs Ninety Eight Thousand Five Hundred and Sixty Six)Only from the abovenamed Petitioner, which aforesaid sum of money I have been wilfully and intentionally mis-appropriated and cheated of by the Petitioner and against the recovery of the aforesaid sum of Rs. 75,98,566/- (Rupees Seventy Lakhs Ninety Eight Thousand Five Hundred and Sixty Six)Only, the afore - referred Special Civil Suit No. 57/2016/A has been filed by me, which is pending before the Hon'ble Court of the Civil Judge, Senior Division 'A' Court at Panaji - Goa.'

'9. I say that keeping all my rights, contentions, issues, disputes etc., open for me to litigate in the afore - referred Civil Suit 57/2016/A I hereby give my conditional consent to this Hon'ble Court compounding the offences under Section 406 and 420 of the Indian Penal Code, 1860 charged by the Respondent No. 2, Police Inspector against the abovenamed Petitioner in pursuance of my police complaint dated 02/12/2015 and also for quashing the F.I.R. No. 192/2015 registered by the Respondent No. 2, Police Inspector against the Petitioner on 02/12/2015.'

[23] Respondent no.3 in the above affidavit clearly submitted that the petitioner cheated her and induced to part money on false promises. Respondent no.3 further claimed that the proceedings filed by the petitioner against her under Section 138 of Negotiable Instrument Act were pertaining to false/fake cheque bounce case. However, one thing is clear that that the tenor of the affidavit is not found in consonance with the pleadings in the petition and more particularly paragraph 6 of the petition claiming thereby that so called complaint filed by respondent no.3 was purely out of misunderstanding and misapprehension.

[24] When we asked the counsel for respondent no.3 as to whether the amount allegedly misappropriated is received by him under compromise, he submitted that no amount was exchanged between the parties at the time of arriving at so called settlement and his civil suit is pending adjudication before the Civil Court for recovery of said amount. Learned counsel for the petitioner also submitted that the petitioner is contesting the said suit on the ground that he is not entitled to pay any amount to the respondent no.3. Thus, from all angles we clearly observe that affidavit of respondent no.3 is filed only in camouflaged manner so as to obtain an order of quashing of proceedings from this Court and to get rid of the criminal proceedings even though the parties are litigating before the Civil Court for the same cause. The affidavit of respondent no.3, therefore, cannot be considered as an affidavit with regard to arriving

at a settlement between the parties. Since the chargesheet is already filed and the matter is pending before learned CJM, we deem it fit and proper to reject the present petition for the said reasons.

[25] The petition is dismissed.

[26] Rule stands discharged

2023(1)GDCJ18

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Ilesh J Vora]

Special Criminal Application No. 12582 of 2022 **dated 01/12/2022**

Babuji Halaji Thakor

Versus

State of Gujarat

COMPOUNDING OF OFFENCE

Code of Criminal Procedure, 1973 - Section 482 - Negotiable Instruments Act, 1881 - Section 147 - Compounding of offence - Petitioner was convicted by Magistrate - Conviction was challenged - In the meantime, settlement was arrived between parties - Compounding of offence under Section 147 was sought - Held - Compounding of offence is permitted - Petition allowed.

[Paras 5 and 6]

ફોજદારી કાર્યરીતિ સંહિતા, 1973 - કલમ 482 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટ, 1881 - કલમ 147 –ગુના ની માંડવાળ - અરજદારને મેજિસ્ટ્રેટ દ્વારા દોષી ઠેરવવામાં આવ્યા હતા - દોષી ઠેરવવામાં આવ્યા હતાતેને પડકારેલ - આ દરમિયાન, પક્ષકારો વચ્ચે સમાધાન થયું હતું - કલમ 147 હેઠળ ગુનાને માંડવાળ કરવાની માંગ કરવામાં આવી હતી - ઠેરવ્યું – ગુનાની માંડવાળ ને મંજૂરી આપવામાં આવી છે – અરજી મંજૂર

[Paras 5 and 6]

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482

Negotiable Instruments Act, 1881 Sec. 147

Counsel:

Jigneshkumar M Nayak, Krina Calla, Divya P Bhatt

JUDGEMENT

Ilesh J Vora, J.

[1] Rule returnable forthwith. Ms.Krina Calla, learned APP and Ms. Divya Bhatt, learned advocate waive service of notice of Rule for and on behalf of respondent Nos. 1 and 2 respectively.

[2] By this application under Articles 226 and 227 of the Constitution of India, read with Section 482 of the Code of Criminal Procedure, the petitioner has sought quashing of the judgment and order dated 22.08.2022 passed by Additional Metropolitan Magistrate, Ahmedabad in Criminal Case No.57605/2019, whereby, the Petitioner has been convicted for 1 year SI and also directed to pay an amount of Rs.20,00,000/- as a compensation to the complainant within a period of two months, failing which, to undergo 6 months SI.

[3] It appears that the settlement has been arrived at between the complainant and present petitioner and the entire cheque amount has been paid to the respondent no. 2, which has been confirmed by the complainant by detailed affidavit, which has been placed on record. The complainant do not wish to proceed further and is willing to compound the offence. Accordingly, the petitioner by filing this petition, seeks compounding of the offence under Section 147 of the Negotiable Instruments Act.

[4] The petitioner also submits that the Company is willing to deposit cost as directed by the Supreme Court in cased of Damodar S. Prabhu Vs. Sayed Babalal H.,2010 5 SCC 633, with the Legal Service Authority.

[5] In case of **Kripalsingh Pratapsingh Vs. Salvinder Kaur Hardisingh Lohana**, 2004 2 GLH 544, the coordinate Bench of this Court after considering various decisions of the Apex Court, took a view that it would be permissible for the High Court in exercise of its inherent powers under Section 482 of the Code, to record the settlement arrived at between the parties and acquit the accused of the charges.

[6] Thus, taking into account the fact of settlement, the compounding of the offence is hereby permitted. As a result, the petition is allowed. Rule is made absolute. The judgment and order dated 22.08.2022 passed by Additional Metropolitan Magistrate, Ahmedabad in Criminal Case No.57605/2019 is hereby quashed and set aside. The petitioner is acquitted from the offences under the provisions of the Negotiable Instruments Act. The petitioner is directed to deposit Rs.1,25,000/- with the Gujarat State Legal Service Authority within a period of 3(Three) months from the date of receipt of this order. Direct service permitted

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2023(1)GDCJ20

IN THE HIGH COURT OF KARNATAKA

[From DHARWAD HIGH COURT]

[Before G Basavaraja]

Criminal Revision Petition No 2011 of 2013 **dated 18/11/2022**

Gajanan S/o Kallappa Kadolkar

Versus

Appasaheb Siddamallappa Kaveri

IMPROBABLE DEFENCE

Code of Criminal Procedure, 1973 - Sections 397, 200, 251, 313 and 401 - Income Tax Act, 1961 - Section 269-SS - Negotiable Instruments Act, 1881 - Sections 139 and 138 - Revision - Accused was convicted for offence punishable under Section 138 - It was case of accused that he was businessman and complainant was commercial tax inspector - He gave blank cheques for purpose of tax - Held - If really the accused has issued 15 signed blank cheques to the complainant, the accused ought to have explained as to why the complainant has insisted him to issue 15 signed blank cheques - Accused has not explained on what date and time the complainant has insisted and on what date the accused has issued those cheques to the complainant - Accused chose not to reply to the legal notice demanding payment of the loan by the complainant - Even the accused has not taken any legal steps against the complainant for misuse of the alleged signed blank cheques - Such an improbable defence set up by the accused cannot be accepted - Petition dismissed.

[Paras 20 to 24]

ફોજદારી કાર્યરીતિ સંહિતા, 1973 - કલમ 397, 200, 251, 313 અને 401 - આવકવેરા અધિનિયમ, 1961 - કલમ 269-એસએસ - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 - કલમ 139 અને 138 – રીવિજન - આરોપીને કલમ 138 હેઠળ સજાપાત્ર ગુનામાં દોષિત ઠેરવવામાં આવ્યો હતો - તે આરોપીનો કેસ હતો કે તે ઉદ્યોગપતિ હતો અને ફરિયાદી કોમર્શિયલ ટેક્સ ઇન્સ્પેક્ટર હતો - તેમણે કરના હેતુસર કોરા ચેક આપ્યા હતા - ઠેરવ્યું - જો ખરેખર આરોપીએ ફરિયાદીને 15 સહી કરેલા કોરા ચેક આપ્યા હોય, તો આરોપીએ ખુલાસો કરવો જોઈતો હતો કે ફરિયાદીએ તેને શા માટે 15 સહી કરેલા કોરા ચેક આપવાનો આગ્રહ કર્યો છે - આરોપીએ એ સ્પષ્ટ કર્યું નથી કે ફરિયાદીએ કઈ તારીખ અને સમયે આગ્રહ કર્યો છે અને આરોપીએ ફરિયાદીને તે ચેક કઈ તારીખે આપ્યા છે -

આરોપીએ ફરિયાદી દ્વારા લોનની ચુકવણીની માંગ કરતી કાનૂની નોટિસનો જવાબ ન આપવાનું પસંદ કર્યું હતું - આરોપીએ પણ કથિત સહી કરેલા કોરા ચેકના દુરૂપયોગ બદલ ફરિયાદી સામે કોઈ કાનૂની પગલા લીધા નથી - આરોપીઓ દ્વારા ગોઠવવામાં આવેલા આવા અસંભવ બચાવને સ્વીકારી શકાય નહીં - અરજી નામંજૂર

[Paras 20 to 24]

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 397, Sec. 200, Sec. 251, Sec. 313, Sec. 401
Income Tax Act, 1961 Sec. 269SS
Negotiable Instruments Act, 1881 Sec. 139, Sec. 138

Counsel:

Deepak S Kulkarni, B V Somapur

JUDGEMENT

G Basavaraja, J.

[1] This criminal revision petition is filed under Section 397(1) r/w Section 401 of Cr.P.C. seeking to set aside the judgment dated 31.10.2012 passed by the II Addl. District and Sessions Judge, Belgaum, in Crl.A.No.13/2012 confirming the judgment of conviction and order of sentence passed by the JMFC II Court, Belgaum, in C.C.No.1592/2009 dated 09.09.2011 wherein the revision petitioner has been convicted for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 (for short 'NI Act') and sentenced to pay a fine of Rs.1,28,000/- in default to undergo a simple imprisonment for 6 months.

1.1 [Note: The revision petitioner/accused has preferred 15 separate revision petitions against the judgments of the Court below including the above case in Crl.R.P.Nos.2011-2025/2013 in respect of dishonor of 15 cheques amounting to Rs.1 lakh each, separate judgment is passed in each case.].

[2] The parties are referred to as per their ranks in the trial court.

[3] The relevant facts of the case leading to this revision petition are as under:

3.1 The Complainant is the permanent resident of Anjaneya Nagar, Belgaum and the accused is his neighbour and close friend. The accused was running a business of Glass and plywood under the name and style “M/s. Gajanan Glass and Plywoods.” In the month of January 2007, the accused approached the complainant seeking financial assistance of Rs.15 lakhs to meet his personal commitments and for business purpose. As the complainant was on good terms with the accused, who was also a neighbour, he agreed to advance a hand loan of Rs.15 lakhs to the accused. Between January 2007 and June 2007, he advanced a hand loan of Rs.15 lakhs to the accused and that accused

agreed to repay the hand loan within six months from the date of last advancement. However, after repeated requests, the accused issued 15 cheques for Rs.1 lakh each towards repayment of the hand loan availed of by him. The cheque was issued for Rs.1 lakh bearing No.580497 dated 09.10.2009 drawn on State Bank of Mysore, M.M. Extension, Belgaum, towards discharge of said hand loan. The complainant has presented the said cheque for encashment through his banker i.e., HDFC Bank, Belgaum, on 10.10.2009 and the said cheque was dishonored with an endorsement of "**exceeds arrangements**" on 10.10.2009. Thereafter, the complainant issued a legal notice to the accused on 23.10.2009 calling upon him to make payment of the entire cheque amount within 15 days from the date of receipt of notice; the said notice was duly served to the accused on 26.10.2009, but he failed to make good of the cheque amount. Hence, the complainant has filed a complaint under Section 200 of the Cr.P.C. against the accused for the commission of an offence punishable under Section 138 of the NI Act.

[4] The learned Magistrate after taking cognizance has recorded the sworn statement of the complainant and registered the case against the accused and summons was issued to the accused. In response to the summons, the accused appeared before the court; a plea was recorded under Section 251 of Cr.P.C and the accused pleaded not guilty and claimed to be tried.

[5] To prove the guilt of the accused, the complainant has examined himself as P.W.1 and placed reliance on six documents, which were marked as Exs.P-1 to P-6. On closure of the complainant's side evidence, a statement under Section 313 of Cr.P.C. is recorded to explain the incriminating evidence that appeared against the accused. The accused has denied the same and has not chosen to lead any defence evidence. On hearing the arguments, the learned Magistrate convicted the accused for the commission of an offence punishable under Section 138 of the NI Act and sentenced him to pay a fine of Rs.1,28,000/-. Further, learned Magistrate has directed that out of fine amount, Rs.1,25,000/- is ordered to be paid to the complainant by way of compensation.

[6] Being aggrieved by this judgment of conviction dated 09.09.2011 in C.C.No.1592/2009 on the file of JMFC II-Belgaum, the accused has preferred an appeal before the II Addl. District and Sessions Judge, Belgaum, in Crl.A.No.13/2012, which came to be dismissed on 31.10.2012. Being aggrieved by the judgment of conviction, the accused has preferred this revision petition.

[7] As per the order dated 25.06.2013, the sentence passed by the JMFC II, Belgaum, in C.C.No.1592/2009 dated 09.09.2011, which was confirmed in Crl.A.No.13/2012 on 31.10.2012 by the II Addl. District and Sessions Judge, Belgaum, was suspended and the petitioner was ordered to be released on bail on execution of a personal bond of Rs.25,000/- with one solvent surety for the likesum to the satisfaction of the trial court.

[8] On 02.09.2013, this Court passed an order stating that the petition is admitted subject to deposit of 50% of the cheque amount within 4 weeks. Further, it is ordered that the respondent be permitted to withdraw the same on such deposit upon furnishing security to the satisfaction of the registry. But the revision petitioner/accused has not complied with the order of this Court. Hence, on 02.06.2014, this Court has passed an order as under:

> "Office objections in all these cases not complied in spite of granting four opportunities. The order sheet discloses that the order was passed by this Court on 02.09.2013. Since that day, the petitioner never made any attempt to comply the office objections. No reasons also have been properly assigned.
>
> Therefore, I am of the opinion that granting of further time would definitely send a message to the petitioner that he can take the order of the Court for a ride. Therefore, I am of the opinion, the noncompliance of the order should be treated seriously for vacating the interim order granted by this Court.
>
> Accordingly, in all the above said cases the interim order granted suspending the sentence passed by the Trial Court is hereby vacated."

[9] Even after passing the above order, the accused has not complied with the order of this Court. However, the learned counsel appearing on behalf of revision petitioner has submitted his arguments. The respondent has appeared before the Court through learned Advocate - Sri.B.V.Somapur. The said learned Advocate has filed a memo for retirement with a copy of notice, postal receipt and acknowledgement. On perusal of the memo for retirement, this Court passed an order permitting the counsel for the respondent to retire from the case and even then, the respondent has not appeared before the Court. Hence, arguments on behalf of the respondent is taken as "NIL".

[10] Sri.Deepak S. Kulkarni, learned counsel for the revision petitioner has submitted his arguments that the courts below have not appreciated the evidence on record in a proper perspective manner. The complainant has failed to prove the payment of amount of Rs.15 lakhs. There is no exact date of the payment of amount of Rs.15 lakhs in the notice or in the complaint. It is stated that the transaction between the complainant and the accused effected between January 2007 and June 2007. During the course of cross examination of P.W.1, he has stated that he has paid an amount of Rs.5 lakhs for 3 times for a total of Rs.15 lakhs. Further, it is stated that the accused has executed a bond for having received an amount of Rs.15 lakhs; however, the said bond was not produced before the Court. Further it is submitted that the complainant is a Commercial Tax Officer and the accused is a proprietor of M/s.Gajanan Glass and Plywoods. The complainant, being the Commercial Tax Officer had insisted the accused to issue 15 signed blank cheques of Rs.1 lakh each for the purpose of paying tax in respect of the business of M/s.Gajanan Glass and Plywoods. Accordingly, the accused had issued 15 signed blank cheques in favour of

the complainant without receiving the amount from the complainant and all the 15 cheque leaves did not have one serial number sequence and had different numbers in the cheque leaves. The complainant has not shown the transaction of Rs.15 lakhs in his income tax returns. In view of Section 269SS of the Income Tax Act, if the transaction amount is more than Rs.20,000/-, such transaction shall be made through cheque or demand draft, but the complainant has stated that he has paid the amount of Rs.15 lakhs in cash. Further, he has submitted that the accused need not enter the witness box to substantiate his defence. It is the duty of the complainant to discharge his burden as to the payment of the amount, but the complainant has failed to discharge his burden. Hence, he sought for allowing this revision petition. To substantiate his arguments he has relied on the following decisions rendered in the cases of GURUMALLESH v. G. RAMESH,2019 CrR 481 (KANT.) and LAHU v. DHANAJIIRAO RAMCHANDRA HAIBATI,2019 CrR 461 (KANT.).

[11] The nature of power of this Court in revision is the same as that of the Court below; however, such revision power is given to prevent the gross and palatable failure of justice and it should not be exercised in such a way as to give a right of appeal where such a right is excluded by the Code. Further, in order to substantiate the correctness, legality and proprietary of the finding, I have examined the evidence of the complainant and documentary evidence.

[12] After the receipt of legal notice issued by the complainant, the accused has not sent any reply notice to the complainant. The accused has not explained anything in the statement under Section 313 of the Cr.P.C. as to why he has not replied to the legal notice issued by the complainant and has also not adduced any defence evidence in this regard. If the accused has sent a reply notice as to the alleged money transaction between the complainant and accused, the complainant would have narrated the exact date of the alleged transaction in the complaint. For the first time in the cross examination of P.W.1, when a question was raised to the complainant regarding the same, he has then answered as to the date of the alleged transaction of Rs.15 lakhs. The appellate court has observed the decision of the Full Bench of the Hon'ble Apex Court relied on by the learned counsel for the revision petitioner in the case of **KRISHNA JANARDHAN BHAT v. DATTATRAYA G. HEGDE**, 2008 4 SCC 54 and also observed the decision of the Hon'ble Apex Court rendered in the case of **RANGAPPA v. SRI MOHAN**, 2010 AIR(SC) 1898.

[13] A perusal of the evidence placed by the complainant makes it clear that accused issued the cheques in favour of complainant for Rs.1 lakh each dated 09.10.2009, same was presented by the complainant for encashment and it was returned with the shara that "**exceeds arrangement**" as per Ex.P-2 on 10.10.2009. The complainant has issued a legal notice as per Ex.P-3 on 23.10.2009 by registered post receipt as per Ex.P-4 calling upon the accused to make payment within 15 days from the date of receipt of said notice. The said notice has been issued by the Registered Post and was duly served on 26.10.2009; however, the accused has not paid the cheque

amount. As a result, on 08.12.2009, the complainant filed a complaint under Section 200 of Cr.P.C. for the commission of an offence punishable under Section 138 of the NI Act.

[14] The appellate court has also observed that the complainant has financial capacity to advance the hand loan to the tune of Rs.15 lakhs to the accused and this version of the complainant is supported by Ex.P-6. Considering the facts and circumstances of the case and relying on the decision of the Hon'ble Apex Court in the case of **RANGAPPA vs SRI MOHAN**, 2010 AIR(SC) 1898, the courts below have come to the conclusion that the complainant proved the guilt of the accused.

[15] It is the contention of the accused that the complainant has not pleaded as to the transactions of the debt and has prayed for the dismissal of this complaint. In this regard, I have gone through the latest decision of Hon'ble Apex Court in the case of **P.RASIYA v. ABDUL NAZER AND ANOTHER [Crl.A.Nos:1233-1235/2022]** wherein their Lordships have observed as under:

> "By the impugned common judgment and order, the High Court has reversed the concurrent findings recorded by both the courts below and has acquitted the accused on the ground that, in the complaint, the Complainant has not specifically stated the nature of transactions and the source of fund. However, the High Court has failed to note the presumption under Section 139 of the N.I. Act. As per Section 139 of the N.I. Act, it shall be presumed, 3 unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability. Therefore, once the initial burden is discharged by the Complainant that the cheque was issued by the accused and the signature and the issuance of the cheque is not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. The presumption under Section 139 of the N.I. Act is a statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the Complainant/holder of the cheque, in that case, it is for the accused to prove the contrary. The aforesaid has not been dealt with and considered by the High Court. The High Court has also failed to appreciate that the High Court was exercising the revisional jurisdiction and there were concurrent findings of fact recorded by the courts below.
>
> 8. In view of the above and for the reasons stated above, the impugned common judgment and order passed by the High Court is not sustainable and the same deserves to be quashed and set aside."

15.1 On the aforesaid plinth, the defence theory urged by the accused cannot be considered as it is observed that the presumption under Section 139 of the NI Act is a statutory presumption and once the signature and cheque are not in dispute, it will be

presumed that the cheque was issued for discharge of any debt or other liability in favour of the complainant/holder of the cheque. The complainant is not required to spell out in the complaint the nature of transaction or source of fund, since the onus is on the accused to prove that the cheque was not issued towards discharge of any debt or other liability.

[16] I have gone through the judgment relied by the learned counsel for the revision petitioner in the case of GURUMALLESH v. G. RAMESH,2019 CrR 481 (KANT.). The pleadings of the complainant and the defence taken by the accused are not consistent with the facts of the case on hand. The accused has taken the defence of lost cheque and he was able to show that there was no legally enforceable debt and simultaneously, as complainant has failed to prove the existence of legally enforceable debt, the alleged act would not attract Section 138 of the NI Act, as it won't constitute an offence. Hence, the lower appellate court reversed the judgment of conviction.

16.1 Another judgment relied upon by the learned counsel for the revision petitioner in the case of LAHU v. DHANAJIRAO RAMCHANDRA HAIBATI,2019 CrR 461 (Kant.), the theory of defence pleaded is "lost cheques" and the accused was acquitted on the ground that there was a basic defect in the complaint itself for not pleading the transactions for lending amount. Therefore, on the basis of these decisions, this Court cannot interfere with the impugned judgment passed by the Courts below.

[17] As regard to the non-production of bond said to have been executed by the accused, as admitted by P.W.1 in the cross examination, it is not fatal to the case of the complainant. When the complainant has discharged his burden that the cheques have been issued in discharge of legally enforceable debt, the burden lies on the accused to rebut the presumption under Section 139 of the NI Act. However, the accused has failed to rebut the said presumption by placing the probable defence.

[18] Another defence taken and vehemently argued by the learned counsel for the petitioner is that, in view of Section 269SS of the Income Tax Act if the transaction amount is more than Rs.20,000/-, such transaction shall be made by cheque or demand draft. Since the complainant has not paid the amount through the cheque or the demand draft, the alleged transaction cannot be called as legally recoverable debt. On this ground, he has sought for acquittal of the accused.

18.1 Section 269SS was inserted in the Income Tax Act by Finance Act 1984 with effect from 01.04.1984, but the same came into effect from 01.07.1984. The Income Tax Department, in the course of searches carried out by them from time to time, recovered large amounts of unaccounted cash from certain tax payers and often the tax payers gave explanations for their unaccounted cash to the effect that they had borrowed loans or received deposits made by other persons. Sometimes, it was noticed, that the unaccounted income was also brought into the books of accounts in the form of loans and deposits, and later they would obtain confirmatory letters from

other persons in support of their explanation. The Department was not able to unearth the source of such unaccounted cash. Therefore, in order to plug the loopholes and to put an end to the practice of giving false and spurious explanations by tax payers, a new provision was inserted in the Income Tax Act debarring persons from taking or accepting from any other person any loan or deposit otherwise than by account-payee cheque or account-payee bank draft, if the amount of such loan or deposit, or the aggregate amount of such loan or deposit, is Rs.10,000/- or more. The amount of Rs.10,000/- was later revised as Rs.20,000/- with effect from 01.04.1989.

18.2 Section 269SS of the Act 1981 reads as follows:

"S. 269SS. Mode of taking or accepting certain loans and deposits No person shall, after the 30th day of June, 1984, take or accept from any other person (hereafter in this section referred to as the depositor) any loan or deposit otherwise than by an account payee cheque or account payee bank draft, if

(a) the amount of such loan or deposit or the aggregate amount of such loan and deposit; or

(b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or

(c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is twenty thousand rupees or more:

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by-

--

(a) Government;

(b) Any banking company, post office savings bank or cooperative bank;

(c) Any corporation established by a Central, State or Provincial Act;

(d) Any Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956)

(e) Such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:

Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.

Explanation----For the purposes of this section ---

(i) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act;

(ii) "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949);

(iii) "loan or deposit" means loan or deposit of money."

18.3 Section 276DD was inserted in the Act by the Finance Act, 1984 which came into effect from 01.04.1984 and which reads as under:

"S. 276DD. Failure to comply with the provisions of section 269SS --- If a person takes or accepts any loan or deposit in contravention of the provisions of section 269SS, he shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine equal to the amount of such loan or deposit.".

18.4 Subsequently, Section 271D, which is the penal clause in the Act which provides for imposition of penalty for failure to comply with the provisions of Section 269SS was introduced with effect from 01.04.1989 omitting Section 276DD with effect from the same date. In the original Section 276DD, in case of imposition of punishment, the term of imprisonment was also prescribed which could extend to two years. But, subsequently, by the introduction of Section 271D, the punishment of imprisonment was taken away and the failure to comply with the provisions of Section 269SS could only be visited with a penalty of fine equal to the amount of loan or deposit to be taken or accepted. Section 271D as incorporated with effect from 01.04.1989 reads as follows:

"271D. Penalty for failure to comply with the provisions of section 269SS ---

(1) If a person repays any deposit referred to in section 269T otherwise than in accordance with the provisions of that section, he shall be liable to pay, by way of penalty, a sum equal to the amount of the deposit so repaid.

(2) Any penalty imposable under subsection (1) shall be imposed by the Deputy Commissioner."

[19] The constitutional validity of Sec. 269 SS was challenged in the case of the **ASST. DIRECTOR OF INSPECTION INVESTIGATION v. KUM. A.B.SHANTH**, 2002 6 SCC 259, the Apex Court upheld the constitutional validity of Sec. 269 SS and observed thus: the object of introducing Section 269SS is to ensure that a tax payer is not allowed to give a false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving a false explanation for the same. During search and seizures, unaccounted money is unearthed, and the tax payer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for the so-called lender also to manipulate his records later to suit the plea of the tax-payer. The main object of Section 269SS was to curb this menace. As regards the tax legislations, it is a policy

matter, and it is for the Parliament to decide in which manner the legislation should be made. Of course, it should stand the test of constitutional validity.

[20] The High court of Karnataka in **MR. MOHAMMED IQBAL vs MR. MOHAMMED ZAHOOR**, 2007 ILR(KAR) 3614 decided on 12th July, 2007 and reported in 2008 (1) Kar.L.J. 338, has observed in para 11 that the contravention of Section 269SS of the Act though visited with a stiff penalty on the person taking the loan or deposit, nevertheless, the rigor of Section 271D is whittled down by Section 273B, on proof of bonafides. It cannot therefore be said that the nature of the transaction brought before this court could be declared illegal, void, and unenforceable.

[21] The Madras High Court in the case of K.T.S.SARMA, SESHASAYEE BROTHERS (P) LTD. v. SUBRAMANIAN, PROP. KUMAR VIDEOS,2001 SCCOnlineMad 520. This was a suit for recovery of money, which was decreed by the Trial Court. In appeal, the defendant raised the issue of whether the amount advanced by the plaintiff by way of cash is legal and recoverable in view of Section 269SS of the Income Tax Act. The submission of the defendant/appellant was that the contract between the parties was unlawful, and the same was also hit by Section 23 of the Contract Act. It was contended that the agreement was void and could not be enforced. While rejecting the said plea of the defendant/appellant, the Madras High Court, inter alia, observed:

> "24. From the decisions relied upon by either side and the discussions made above, it is made clear that maxim "in pari delicto" cannot be made applicable in the following circumstances:
>
> (i) Section 269 SS of the Income Tax, which falls under Chapter XX-B, opens with the caption "Requirement as to Mode of acceptance, payment or repayment in certain cases to counteract evasion of Tax." As such, this chapter and the Section are introduced with main object to prevent the evasion of tax. In the absence of any evasion of tax, the borrower (the defendant) in the case cannot take shelter under the Section and he is liable to repay the amount.
>
> (ii) As Section .269 (SS) is vested with penalty under Section. 271(D) of the Income Tax Act, the object of imposing penalty is merely to the protection to the Revenue, and then the contract will not be regarded as prohibited by implication.
>
> (iii) If it was not the object of the parties at the time when the transaction was entered into to circumvent or to defeat the provisions of the Income Tax, the contract is not void".

21.1 The High Court of Delhi at New Delhi in Crl.L.P.No.559/2015 between **SHEELA SHARMA vs MAHENDRA PAL, decided on 2nd August, 2016**, has observed in para.28 of the judgment that ,"In the present case, the object of

the parties when the transaction was entered into cannot be said to be to circumvent or defeat the purpose of the Income Tax Act. The defendant would not have issued the cheque in question had the object of the loan transaction been to defeat the provisions of the Income Tax Act".

21.2 Hence, the said contravention of Section 269SS of the Income Tax Act does not make the alleged transaction void. The concerned authorities can take necessary action against the complainant for non compliance of Section 269 of the Income Tax Act. Only on that ground, this Court cannot interfere with the impugned judgment passed by the Courts below.

[22] Another contention of the accused is that the complainant was a Commercial Tax Officer at the time of alleged transaction and that the accused was the proprietor of M/s.Gajanan Glass and Plywoods. The complainant being the Commercial Tax Officer, has insisted the accused to issue 15 signed blank cheques of Rs.1 lakh each for the purpose of paying tax in respect of the business of M/s.Gajanan Glass and Plywoods. Accordingly, the accused has issued 15 signed blank cheques and filed a false complaint against the accused. This is the most absurd defence taken by the accused without the application of mind and accused being an entrepreneur has better knowledge as to the procedure for payment of income tax.

[23] If really the accused has issued 15 signed blank cheques to the complainant, the accused ought to have explained as to why the complainant has insisted him to issue 15 signed blank cheques. The accused has not explained on what date and time the complainant has insisted and on what date the accused has issued those cheques to the complainant. The accused chose not to reply to the legal notice demanding payment of the loan by the complainant. Even the accused has not taken any legal steps against the complainant for misuse of the alleged signed blank cheques. It is the contention of the accused that the complainant being a Commercial Tax Officer, cannot insist the accused or anybody to issue signed blank cheques in any legal transactions. The accused need not issue signed blank cheques to the complainant in any circumstances. However, it is the defence of the accused that he has issued 15 signed blank cheques to the complainant; such an improbable defence set up by the accused cannot be accepted.

[24] The Courts below have properly appreciated the evidence on record in a proper perspective with the provisions of law regarding presumption in detail. Both the Courts below have observed the decision of the Hon'ble Apex Court and passed the impugned judgment in accordance with law. On re-evaluation of the entire evidence placed on record, I do not find any illegality in the impugned judgments. In my opinion, the judgments and orders impugned in these revision petitions are not suffering from any legal infirmity occasioning grave injustice to the petitioner, calling for interference.

24.1 Revision petition is without merit and is liable to be dismissed. Resultantly, the respondent is held guilty of the commission of offence under Section 138 of the NI Act. Accordingly, the impugned judgments do not call for any interference by this Court. Hence, I proceed to pass the following:-

ORDER

1) The criminal revision petition is **dismissed.**

2) The registry is directed to transmit the records to the trial court along with a copy of this order

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2023(1)GDCJ31

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before N J Jamadar]

Summons For Judgment; Commercial Summary Suit; Interim Application No 12 of 2021, 14 of 2021; 205 of 2020, 211 of 2020; 251 of 2022, 261 of 2022 **dated 09/11/2022**

Kavita G Rajani; Gautam G Rajani

Versus

Samir N Bhojwani

UNCONDITIONAL LEAVE

Negotiable Instruments Act, 1881 Sec. 80-Commercial Division Summary Suits-grant of unconditional leave to the defendant to defend suit in respect of interest component only- Court would be justified in passing decree for indisputable principal amounts- summons for judgment- plaintiff is entitled at any time to abandon or give-up a part of claim- defence of existence of a verbal agreement-not fair-without making any record thereof -It would be legitimate to examine as to whether the defendant had the opportunity- mere fact that money was advanced by the plaintiff to the defendant in tranches, by itself, is not sufficient to draw an inference of a "running account' - Leave granted, Summons disposed

[Para 21,29,31,32]

નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 સેકશન 80-કોમર્શિયલ ડિવિઝન સમરી શુટ - માત્ર હિતના ઘટકના સંદર્ભમાં જ દાવોનો બચાવ કરવા માટે પ્રતિવાદીને બિનશરતી રજા આપવી - નિર્વિવાદ મુખ્ય રકમ માટે હુકમનામું પસાર કરવામાં કોર્ટને ન્યાયી ઠેરવવામાં આવશે- ચુકાદા માટેના સમન્સ- વાદી કોઈ પણ સમયે મૌખિક કરારના અસ્તિત્વના દાવા-બચાવના એક ભાગને છોડી દેવા અથવા છોડી દેવા માટે હકદાર છે - ન્યાયી નહીં

- તેની કોઈ નોંધ કર્યા વિના -પ્રતિવાદીને તક મળી હતી કે કેમ તે અંગે તપાસ કરવી કાયદેસર રહેશે - માત્ર હકીકત એ છે કે વાદી દ્વારા પ્રતિવાદીને હપ્તાઓમાં પૈસા એડવાન્સ કરવામાં આવ્યા હતા, તે જાતે જ, "ચાલતા ખાતા" નો અંદાજ કાઢવા માટે પૂરતા નથી – રજા મંજૂર કરેલ , સમન્સનો નિકાલ કરવામાં આવ્યો છે

[Para 21, 29, 31, 32]

Acts Referred:

Negotiable Instruments Act, 1881 Sec. 80

Counsel:

Karl Tamboly, Shaheda Madraswala, Zahra Padamsee, Vashi And Vashi, Cherag Balsara D U Deokar, D Parikh, Parimal K Shroff & Co

JUDGEMENT

N J Jamadar, J.

[1] These Commercial Division Summary Suits are instituted by a mother-son duo against a common defendant. Since identical factual and legal issues arise for consideration in both the suits, the Summons for Judgments and Interim Applications in both the suits are decided by this common order.

Suit No. 205 of 2020:-

[2] The material averments in the plaint can be summarized as under:-

The defendant is a developer and builder. In the month of January, 2017 the defendant had approached the plaintiff for a loan of Rs. 62 lakhs. Pursuant to the representation of the defendant, the plaintiff had advanced an amount of Rs. 62 lakhs vide cheque 18th January 2017 drawn on HDFC Bank, Worli Branch against a bill of exchange dated 18th January, 2017 drawn for the said amount by the defendant. Initially the defendant paid interest on the said amount at varied rate ranging from 14.40% p.a. to 12 % p.a. for the varying periods commencing from 18th January, 2017 to 7th May, 2018. Eventually, the defendant repaid a sum of Rs. 60 lakhs and only an amount of Rs. 2 lakhs remained outstanding towards the principal amount.

[3] In the month of October, 2017 the defendant had again availed a second tranche of loan of Rs. 4,09,000/- against a bill of exchange. Interest was paid on the second tranche of loan @ 12% p.a.

[4] As the defendant failed and neglected to pay the outstanding principal amount of Rs. 2 lakhs of the first tranche of loan and the entire principal amount of Rs. 1,09,00,000/- of the second tranche and interest thereon, the plaintiff addressed legal notice on 13th December, 2019 calling upon the defendant to pay the due amount along with accrued interest thereon. Despite service of the notice, the defendant failed and neglected to pay the outstanding amount. Hence, the suit for recovery of the

principal amount of Rs. 1,11,00,000/- along with interest thereon @ 12% p.a. till the date of the suit and future interest at the said rate.

Suit No. 211 of 2020:-

[5] Gautam, who is the son of Kavita (the plaintiff in Suit No. 205 of 2011) claimed to have advanced money to the defendant in three tranches. First, a sum of Rs. 50 lakhs was advanced in the month of November, 2015 against a bill of exchange drawn by the defendant. Second, a sum of Rs. 60 lakhs in the month of February, 2017 again against a bill of exchange dated 9th February, 2017 drawn by the defendant. And the third, a sum of Rs. 70 lakhs in the month of February, 2017 itself against a bill of exchange dated 10th February, 2017 drawn by the defendant. The plaintiff claims that against each of the aforesaid tranches of loan, the defendant paid interest for various periods in the range of 14% p.a. to 12% p.a. Eventually, when the defendant committed default in repayment of the principal amount and interest accrued thereon, the plaintiff claimed to have addressed a legal notice on 13th December, 2019 calling upon the defendant to repay the principal loan amount of all three tranches along with interest accrued thereon @ 12% p.a. The defendant paid no heed despite service of the legal notices. Hence, the suit for recovery of principal loan amount of Rs. 1,80,00,000/- along with interest @ 12% p.a.

[6] It would be contextually relevant to note that the suits were decreed by an order dated 15th January, 2021. On 3rd February, 2021 the defendant took out Interim Applications (Interim Application (L) Nos. 3301 of 2021 and 3302 of 2021) seeking setting aside of the decrees. By orders dated 18th February, 2021 the decrees were set aside subject to the defendant depositing of Rs. 1.11 Crore and Rs. 1.80 Crore, respectively, with the Prothonotary and Senior Master of this Court. The defendant has made the said deposit.

[7] The plaintiffs have thereupon taken out the Summons for Judgment.

[8] An affidavit in reply is filed by the defendant seeking an unconditional leave to defend each of the suits by raising defences which are, in a sense, integral to both the claims.

[9] The defendant calls in question the tenability of the suit under Order XXXVII of the Code primarily on the ground that the plaintiffs are guilty of suggestio falsi and suppressio veri. The defendant contends plaintiffs have been the investors in the projects developed by the defendant and there have been multiple transactions between the parties. Therefore, the summary suits would not be tenable.

[10] The defendant further contends that on 18th February, 2018 the plaintiff entered into an agreement with the defendant that the amount of Rs. 1,80,00,000/- due and payable to Gautam and the amount of Rs. 1,11,00,000/- due and payable to Kavita would be adjusted against the mutually agreed consideration of Rs. 3 Crores for purchase of Flat No. 801, 8th Floor, Rachana-A, Rachana Cooperative Housing Society Limited situated at Hill Road, Bandra, Mumbai (Flat No. 801). It was further

agreed that the defendant would not be liable to pay interest on the said amount of Rs. 2,91,00,000/- from 18th April, 2018. The defendant contends suppressing the said understanding and by taking undue advantage of the situation which arose out of the dispute between the defendant and Rachana Cooperative Housing Society and Covid 19 pandemic, the plaintiffs instituted the instant suit. In fact, the defendant is still willing to convey the flat in favour of the plaintiffs and the plaintiffs are, in turn, bound to complete the transaction in accordance with the agreement between the parties. Therefore, the defendant is entitled to an unconditional leave to defend the suit.

[11] In any event, since the defendant has already made the deposit of the principal amount, in both the suits, no further condition is required to be imposed in the event the Court is inclined to grant conditional leave to defend the suit.

[12] Affidavits in rejoinder are also filed by the plaintiffs controverting the contentions especially the alleged agreement to adjust the amount advanced by the plaintiffs towards consideration for Flat No. 801.

[13] The plaintiffs have also taken out Interim Application Nos. 251 of 2022 and 261 of 2022 seeking a decree to the extent of the principal amount of Rs. 1,11,00,000/- and 1,80,00,000/- respectively.

[14] In the wake of aforesaid pleadings, I have heard Mr. Karl Tamboly, learned counsel for the plaintiffs, and Mr. Cherag Balsara, learned counsel for the defendant at some length. With the assistance of the learned counsel for the parties, I have perused the material on record.

[15] Before adverting to note the submissions on behalf of the parties, it may be appropriate to note uncontroverted facts.

[16] In both the suits, the primary issue of advance of sums of Rs. 1,11,00,000/- by Kavita and Rs. 1,80,00,000/- by Gautam to the defendant is incontestible. It is not in dispute that the defendant did pay interest on the said amount to the respective plaintiff for various periods of time and at varying rates as well. Indisputably, the said advances were against the bills of exchange drawn by the defendant. The fact that in December, 2019 the plaintiffs called upon the defendant to pay the principal amount along with interest @ 12% p.a. is by and large indisputable. In the light o the aforesaid un-controverted facts, the suits based on the bill of exchange for recovery of the liquidated debt clearly fall within the ambit of Order XXXVII of the Code of Civil Procedure, 1908.

[17] Mr. Balsara, learned counsel for the defendant, would however assail the tenability of the suit on the ground that the suits are based on a running account and therefore beyond the purview of Order XXXVII of the Code. Mr. Balsara took the Court through the pleadings to bolster up the case that series of transactions between the plaintiff and the defendant lead to an irresistible inference of a running account.

[18] In contrast, Mr. Tamboly, learned counsel for the plaintiff would urge that the defence of running account now sought to be raised has not at all been pleaded in the affidavit in reply seeking leave to defend the suit. Such a submission without any foundation in facts does not deserve any countenance, urged Mr. Tamboly.

[19] Indeed the affidavit in reply does not contain a categorical assertion that the suits are based on running accounts. In the affidavit in reply, the defendant contends that the plaintiffs have been the investors in the projects developed by the defendant for past several years and there have been transactions between the parties since the year 2005. The affidavit in reply stops at that. It is not the case that the parties maintained ledger accounts and there were series of transactions between the parties reflecting reciprocal demands and the balance was settled and carried forward at periodical intervals.

[20] In Black's Law Dictionary, Eighth Edition a "Running account" is defined as

> 'An open, unsettled account that exhibits the reciprocal demands between the parties'.
>
> In P Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition a "Running Account" is defined as
>
> 'An account with a bank for money loaned, checks paid, etc., which during the time makes monthly statements, striking the balance due each month, which is carried forwarded and charged, constitutes a "running account" and is in effect but one transaction'.

[21] In the case at hand, neither there is pleading nor material to show that the transactions in question, have any of the aforesaid features of a "running account". At best, there are series of transactions. The mere fact that money was advanced by the plaintiff to the defendant in tranches, by itself, is not sufficient to draw an inference of a "running account".

[22] Reliance placed by Mr. Balsara on an order of the Division Bench dated 11th August, 1986 in Appeal No. 712 of 1986 in Summons for Judgment No. 274 of 1986 in Summary Suit No. 2506 of 1985 does not seem to advance the cause of the defence. In the said order, the Division Bench had, inter alia, observed as under:-

> "Mr. Tulzapurkar, on behalf of the appellants, has urged that, apart from several contentions on merits, the suit on the item of a Bill Discounting facility in respect of which there was an account maintained by the Bank, could not be filed as a Summary Suit. This is a substantial defence and not one which can be stated to be rejected or brushed aside as lacking in bona fides. Prima facie the defence seems to be one which would be required to be accepted at least at this stage.
>
> It is to be made clear that the observations which we are making pertains to the frame of suit as a summary suit and we are not required to go into other contentions on the merits. We are satisfied that it is difficult to accept the suit

as Summary Suit. The order for conditional deposit is, therefore, required to be set aside."

[23] Evidently, the aforesaid observations were made in the context of peculiar facts of the said case. The transaction arose out of a bill discounting facility in respect of which there was an account maintained by the bank. In that context, the Division Bench observed that the suit to enforce liability incurred thereunder could not have been filed as a summary suit. I am afraid, the aforesaid observations govern the facts of the case even remotely.

[24] Mr. Balsara would urge that the claim of the defendant that the parties had entered into an agreement for purchase of Flat No. 801 for a consideration of Rs. 3 Crores and that the sum of Rs. 2,91,00,000/-, which the defendant owed to the plaintiffs, was to be adjusted towards the said consideration, constitutes a substantial defence. An endevour was made by Mr. Balsara to demonstrate that post the said agreement in the month of April, 2018, the defendant stopped paying interest and that is a pointer to the said agreement.

[25] Mr. Tamboly, learned counsel for the plaintiff, on the other hand, would urge that the said defence is totally moonshine and sham. There is not a shred of material which would lend a semblance of credence to such a gratuitous defence, urged Mr. Tamboly.

[26] Evidently, it is not the case of the defendant that there is a document to evidence the alleged agreement between the parties. The defendant wants the Court to believe that it was an oral agreement. It is imperative to note that no contemporaneous conduct and/or circumstances are pressed into service to substantiate such arrangement. It does not appeal to human credulity that in a Metropolis like Mumbai, where property commands premium, the parties would be comfortable arriving at an oral agreement to convey the property without making any record thereof. It would be legitimate to examine as to whether the defendant had the opportunity to assert that there was such an understanding between the parties, before the institution of the suit. Service of the legal notice upon the defendant, indeed provided such an opportunity to the defendant. The existence of such an oral agreement did not see the light of the day till the defendant filed affidavit in these suits. Time lag of almost two years in between the said alleged arrangement and the institution of the suit cannot be said to be immaterial and inconsequential. In the interevening period, had there been such an arrangement, either party must have taken initiative to either enforce such agreement or resile therefrom.

[27] Another factor which runs counter to the defendant's claim is that in the financial year 2018-19, in Form No. 26 AS, the defendant had booked payment of TDS qua the plaintiffs towards the interest from 1st April, 2018 to 31st March, 2019. This militates against the claim of the defendant that based on the alleged agreement

for purchase of the flat, the defendant was not liable to pay interest on the loan amount.

[28] Mr. Balsara attempted to salvage the position by canvassing a submission that TDS does not constitute an admission of liability. This submission is required to be appreciated in the light of the fact that admittedly the defendant paid interest on the outstanding amount since the day of advance till April, 2018 and the TDS, in the least, reflects that the said state of affairs continued even after April, 2018.

[29] In the totality of the circumstances, the defence of existence of a verbal agreement between the parties to adjust the loan amount towards consideration for purchase of the flat does not appear to be either reasonable or fair defence.

[30] Mr. Balsara would submit that in the absence of any agreement to pay interest, coupled with the fact that interest has been paid at varying rates, the entitlement to claim interest becomes a triable issue. It is true that the plaintiffs have not approached the Court with a case that interest was agreed to be paid at a definite rate. It is also true that the material on record indicates that interest has indeed been paid till the year 2018 at varying rates. However, the submission on behalf of the defendant that the plaintiff would not be entitled to claim interest at all, does not deserve acceptance unreservedly. We have noted that the amounts were advanced against bills of exchange. In the absence of any stipulation as to rate of interest in the Negotiable Instruments, section 80 of the Negotiable Instruments Act, 1881, may govern the aspect of entitlement to interest. However, the question as to at what rate the plaintiff would be entitled to interest and whether, in fact, the parties had agreed that interest shall not be chargeable from 12th April, 2018 are the questions which would warrant adjudication. To this extent, a triable issue qua the liability to pay interest can be said to have risen.

[31] The conspectus of aforesaid consideration is that to the extent of the principal amount of loan, in both the suits, the liability is rather indubitable. The twin defence of the transactions being in the nature of a "running account" and there being an agreement between the parties to adjust the principal amount of Rs. 2,91,00,000/- towards the consideration for Flat No. 801, are not of such quality as to warrant the leave to defend the suit. However, to the extent of liability to pay interest on the said principal amount, triable issues may rise.

[32] It is trite that at the hearing of the Summons for Judgment, the Court would be justified in passing a decree for the part of the claim and also grant conditional or unconditional leave to defend the suit in respect of rest of the claim. A profitable reference can be made to a Full Bench judgment of this Court in the case of **SICOM Limited vs. Prashant S. Tanna and Others**, 2004 2 MhLJ 292 wherein the full Bench enunciated the principles as under:-

> 28} In the circumstances, we summarize the answer to the reference as follows:

(1) .....

(2) In a summary suit filed under Order XXXVII of the Civil Procedure Code, the plaintiff is entitled at any time to abandon or give-up a part of the claim unilaterally. This, the plaintiff may do by making a statement to be recorded by the Court and without the necessity of the plaintiff making a formal application for the same by withdrawing the summons for judgment, amending the plaint and thereafter taking out a fresh summons for judgment or otherwise.

(3) At the hearing of the summons for judgment, it will be open to the Court to pass a decree for a part of the claim and grant unconditional leave to defend the suit in respect of rest of the claim.

(4) At the hearing of the summons for judgment, it is open to the Court to grant conditional leave to defend in respect of a part of the claim and unconditional leave to defend for the remaining part of the claim. In such an order it would follow that in the event of the defendant failing to comply with the condition, he would suffer the consequences mentioned in Order XXXVII qua only that part of the claim for which conditional leave to defend has been granted and not in respect of that part of the claim for which unconditional leave has been granted.

(5) There may be further options available to the Court while passing an order on the summons for judgment. Our judgment does not exhaustively set out the options. Obviously, judicial discretion has to be exercised in consonance with the settled legal principles governing grant of leave to defend in summary suits.

[33] In my view, in the present case, the Court would be justified in passing a decree for the indisputable principal amounts in both suits and grant unconditional leave to the defendant to defend the suit in respect of interest component only.

Hence, the following order.

ORDER

Commercial Summary Suit No. 205 OF 2020:-

a] The Summons for Judgment stands partly allowed.

b] The suit stands decreed to the extent of the principal amount of Rs. 1,11,00,000/-.

c] The defendant do pay the sum of Rs. 1,11,00,000/- to the plaintiff. The sum of Rs. 1,11,00,000/- deposited by the defendant be paid to the plaintiff and the interest accrued thereon be refunded to the defendant.

e] The defendant is granted unconditional leave to defend the suit in respect of interest component.

f] The defendant shall file written statement within a period of thirty days from today.

g] The defendant do pay the proportionate costs of the suit to the plaintiff.

h] Decree be drawn accordingly.

i] In view of disposal of the Summons for Judgment in the aforesaid terms, the Interim Application No. 251 of 2022 also stands disposed.

Commercial Summary Suit No. 211 OF 2020:-

a] The Summons for Judgment stands partly allowed.

b] The suit stands decreed to the extent of the principal amount of Rs. 1,80,00,000/-.

c] The defendant do pay Rs. 1,80,00,000/- to the plaintiff.

d] The sum of Rs. 1,80,00,000/- deposited by the defendant be paid to the plaintiff and the interest accrued thereon be refunded to the defendant.

e] The defendant is granted unconditional leave to defend the suit in respect of interest component.

f] The defendant shall file written statement within a period of thirty days from today.

g] The defendant do pay the proportionate costs of the suit to the plaintiff.

h] Decree be drawn accordingly.

i] In view of disposal of the Summons for Judgment in the aforesaid terms, the Interim Application No. 261 of 2022 also stands disposed

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2023(1)GDCJ39

CHHATTISGARH HIGH COURT

[Before Narendra Kumar Vyas]

F A (First Appeal) No 100 of 2005 **dated 12/10/2022**

Krishna Chand Gupta (Since Died); Ritesh Kumar Gupta, S/o Late Krishnachand Gupta; Kalpana Gupta D/o Late Krishnachand Gupta; Nisha Gupta, D/o Late Krishnachand Gupta; Rajkumari Devi W/o Late Krishnac

Versus

Shashikala Gupta D/o Late Laxmi Prasad Gupta; Somvati Gupta D/o Late Laxmi Chand Gupta; Sudha Gupta D/o Late Laxmi Chand Gupta; Saroj Gupta D/o Late Laxmi Chand Gupta; Sweta Gupta D/o Late Laxmi Chand

MITAKSHARA COPARCENARY

A) Hindu Succession Act, 1956 Sec. 6, Sec. 23- Mitakshara coparcenary - Hindu law, as administered which is recognised in section 6(1), it is not necessary that

there should be a living, coparcener or father as on date of amendment to whom daughter would succeed - Daughter would step into the coparcenary as that of a son by taking birth before or after Act - However, daughter born before can claim these rights only with effect from the date of the amendment, i.e., 9.9.2005 with saving of past transactions as provided in the proviso to section 6(1) read with section 6(5).

[Para 68]

B) Hindu Succession Act, 1956 Sec. 6, Sec. 23 - Hindu law - Effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary - Section 6(1) recognises a joint Hindu family governed by Mitakshara law - Coparcenary must exist on 9.9.2005 to enable the daughter of a coparcener to enjoy rights conferred on her - As right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with rights is alive or not - Conferral is not based on the death of a father or other coparcener - In case living coparcener dies after 9.9.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted section 6(3).

[Para 69]

C) Code of Civil Procedure, 1908 Sec. 96 - Evidence Act, 1872 Sec. 102, Sec. 101 - Hindu Succession Act, 1956 Sec. 6, Sec. 23- Declaration, injunction and partition of the suit property - Rights under substituted section 6 accrue to living daughters of living coparceners as on irrespective of when such daughters are born - Court was not drawn to aspect as to how a coparcenary is created - It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive; relevant is birth within degrees of coparcenary to which it extends - Survivorship is the mode of succession, not that of the formation of a coparcenary - Concept of "living coparcener", as laid down in Prakash v. Phulavati - Daughters should be living on 9.9.2005 - In substituted section 6, expression 'daughter of a living coparcener' has not been used. Right is given under section 6(1) (a) to daughter by birth - Declaration of right based on the past event was made on 9.9.2005 and as provided in section 6 (1) (b), daughters by their birth, have the same rights in the coparcenary, and they are subject to the same liabilities as provided in section 6(1) (c) - Any reference to the coparcener shall include a reference to the daughter of a coparcener - Provisions of section 6(1) leave no room to entertain the proposition that coparcener should be living on 9.9.2005 through whom the daughter is claiming - Trial court does not suffer from perversity or illegality warranting any interference by this court - Appeal dismissed

[Para 80]

A) હિન્દુ ઉત્તરાધિકાર અધિનિયમ, 1956ની કલમ 6, કલમ 23- મિતાક્ષરા મજિયારું - હિંદુ કાયદો, જેનો વહીવટ કલમ 6(1)માં માન્યતા પ્રાપ્ત છે, તે જરૂરી નથી કે સુધારાની તારીખે કોઈ જીવંત, સહકાર્યકર અથવા પિતા હોવા જોઈએ, જેને પુત્રી સફળ થશે - અધિનિયમ પહેલાં અથવા પછી જન્મ લઈને પુત્રી પુત્રની જેમ મજિયારામાં પગ મૂકશે - જો કે, અગાઉ જન્મેલી પુત્રી માત્ર સુધારાની તારીખથી જ આ અધિકારોનો દાવો કરી શકે છે, એટલે કે, 9.9.2005, કલમ 6 (5) સાથે વાંચવામાં આવતી કલમ 6 (1) ના પરંતુકમાં જોગવાઈ કર્યા મુજબ ભૂતકાળના વ્યવહારોની સાથે.

[Para 68]

B) હિન્દુ ઉત્તરાધિકાર ધારો, 1956ની કલમ 6, કલમ 23 - હિંદુ કાયદો - આ સુધારાની અસર એ છે કે પુત્રીને સંશોધનની તારીખથી અમલમાં આવે તે રીતે કોપેર્સનર બનાવવામાં આવે છે અને તે વિભાજનનો દાવો પણ કરી શકે છે, જે સહપાર્સનરીની આવશ્યક સંમિશ્રણ છે - કલમ 6(1) મિતાક્ષરા કાયદા દ્વારા સંચાલિત સંયુક્ત હિન્દુ પરિવારને માન્યતા આપે છે–મઝીયરી 9.9.2005ના રોજ અસ્તિત્વમાં હોવી જોઈએ, જેથી એક કોપેર્સનરની પુત્રી તેને મળેલા અધિકારોનો આનંદ માણી શકે. - જેમ કે અધિકાર જન્મથી છે અને વારસા દ્વારા નહીં, તે અપ્રસ્તુત છે કે જે સહહિસ્સેદાર ની પુત્રીને અધિકાર આપવામાં આવે છે તે જીવંત છે કે નહીં પ્રદાન કરનાર એ પિતા અથવા અન્ય સહ હિસ્સેદાર ના મૃત્યુ પર આધારિત નથી - જો જીવંત સહહિસ્સેદાર 9.9.2005 પછી મૃત્યુ પામે તો, વારસો સર્વાઇવરશીપ દ્વારા નહીં પરંતુ અવેજી કલમ 6 (3)માં પૂરી પાડવામાં આવેલી માહિતી અથવા વસિયતનામા ઉત્તરાધિકાર દ્વારા કરવામાં આવે છે.

[Para 69]

C) દિવાની કાર્યરિતી ની સંહિતા, 1908 કલમ 96 - એવિડન્સ એક્ટ, 1872 કલમ 102, કલમ 101 - હિન્દુ ઉત્તરાધિકાર અધિનિયમ, 1956 કલમ 6, કલમ 23- દાવાની મિલકતનું ડેકલરએસએન, મનાઈહુકમ અને વિભાજન - અવેજીમાં લેવાયેલી કલમ 6 હેઠળનો અધિકાર જીવંત સહહિસ્સેદારો ની જીવંત પુત્રીઓને મળે છે, પછી ભલેને આવી પુત્રીઓનો જન્મ ક્યારેય થયો હોય - મઝીયરું કેવી રીતે બનાવવામાં આવે છે તે અંગે કોર્ટ પાસા તરફ દોરવામાં આવી ન હતી - સહહિસ્સેદાર ની રચના કરવી કે પુરોગામી સહહિસ્સેદાર

જીવિત હોવો જોઈએ તે માટે સહ હિસ્સેદાર બનવું જરૂરી નથી; સંબંધિત માઝીયરૂં ની ડિગ્રીમાં જન્મ છે જેમાં તે વિસ્તૃત છે- સર્વાઇવરશીપ એ ઉત્તરાધિકારની રીત છે, માઝીય રીની રચનાની નહીં - "લિવિંગ કોપર્સનર"ની વિભાવના, પ્રકાશ વિ. ફુલાવતી - 9.9.2005ના રોજ દીકરીઓ જીવતી હોવી જોઈએ - અવેજીમાં વિભાગ 6 માં, 'જીવંત સહ હિસ્સેદાર ની પુત્રી' ની અભિવ્યક્તિનો ઉપયોગ કરવામાં આવ્યો નથી. કલમ 6(1) (એ) હેઠળ પુત્રીને જન્મથી જ અધિકાર આપવામાં આવ્યો છે - ભૂતકાળની ઘટનાને આધારે અધિકારની જાહેરાત 9.9.2005ના રોજ કરવામાં આવી હતી અને કલમ 6 (1) (બી)માં જોગવાઈ કરવામાં આવી છે તે મુજબ, પુત્રીઓને તેમના જન્મ દ્વારા, મજિયારી માં સમાન અધિકારો છે, અને તેઓ કલમ 6 (1) (સી) માં પૂરી પાડવામાં આવેલી સમાન જવાબદારીઓને આધિન છે. - સહહિસ્સેદાર ના કોઈપણ સંદર્ભમાં સહહિસ્સેદાર ની પુત્રીના સંદર્ભનો સમાવેશ થવો જોઈએ - કલમ 6(1)ની જોગવાઈઓમાં એ દરખાસ્તને ધ્યાનમાં લેવા માટે કોઈ અવકાશ રહેતો નથી કે સહહિસ્સેદાર 9.9.2005ના રોજ રહેતો હોવો જોઈએ, જેના દ્વારા પુત્રી દાવો કરી રહી છે - ટ્રાયલ કોર્ટ વિકૃતતા અથવા ગેરકાયદેસરતાથી પીડાતી નથી, જે આ કોર્ટ દ્વારા કોઈ હસ્તક્ષેપની બાંહેધરી આપે છે - અપીલ નામંજૂર

[Para 80]

Acts Referred:
Code of Civil Procedure, 1908 Sec. 96
Evidence Act, 1872 Sec. 102, Sec. 101
Hindu Succession Act, 1956 Sec. 6, Sec. 23

Counsel:
Manoj Paranjpe, Shubhank Tiwari, Vaibhav Singh

JUDGEMENT

Narendra Kumar Vyas, J.

[1] The instant first appeal has been filed under section 96 of the Civil Procedure Code by the appellants/defendants No. 1 to 4 against the judgment and decree dated 21-02-2005 passed by the Second Additional District Judge, Sarguja in Civil Suit No. 31-A of 2002 (in case of Indravati Gupta vs Krishnachand Gupta and others) by which the learned trial court has allowed the suit filed by the respondent No.1/plaintiff Indravati Gupta for declaration, injunction and partition of the suit property.

[2] For sake of convenience the parties shall be referred to as per their status shown in Civil Suit No.31-A of 2022.

[3] The brief facts as reflected from the plaint are that the respondent No.1/plaintiff filed a Civil Suit for partition, possession and for mesne profits arising out of the suit property described in Scheduled A & B of the plaint (which is subsequently referred to as suit property) mainly contending that the suit property is in possession and in the right of the plaintiff Indravati Gupta who was the second wife of Late Lakshmi Prasad Gupta. The marriage was solemnized between plaintiff and late Laxmi Prasad Gupta in the year 1946 after death of his first wife Smt. Maheshwari Devi who expired in the year 1944. It has been further contended that after sometime, their relation with Late Lakshmi Prasad Gupta was not cordial, therefore, he has kept Indravati Gupta in a separate house where she was living along with her husband and their children. It has been further contended that deceased Laxmi Prasad Gupta expired the year 1978. From the wedlock of Smt. Indravati Gupta (second wife) and Late Lakshmi Prasad Gupta, defendants No. 5 to 9 were born, whereas defendants No. 1 to 4 were born from the wedlock of Maheshwari Devi (first wife) and Late Lakshmi Prasad Gupta. Therefore, the defendants No. 1 to 9 are legal heirs of deceased Lakshmi Prasad Gupta, as such, they have jointly right over the suit property. It has been further contended that the defendant No.1 started misbehaving with the plaintiff, therefore, they have approached before the Panchayat for partition of the suit property but despite the request made by the plaintiff and defendants No. 5 to 9, defendants No. 1 to 4 have refused to do the partition which has necessitated the plaintiff to file a civil suit for partition, possession and for mesne profits claiming 1/8 share in the suit property. According to the plaint averments defendants No. 1 to 7 have equal share of 1/8 in the suit property as they are **Hindus** and they are being governed by **Hindu** Succession Law. The defendant No.1 being male member of the family started adopting coercive method and depriving the daughters of the plaintiff from their legitimate right for mesne profits of the agricultural land which comes to Rs. 3000/- per acre which has compelled her to file a suit for partition.

[4] The defendants No. 1 to 4 have filed their written statement denying the allegations made in the plaint contending that plaintiff Indravati Gupta is not legally wedded wife of Lakshmi Prasad Gupta, therefore, the defendants No. 5 to 9 have no right over the suit property. It has been specifically contended that the property described in Scheduled A and B are the self acquired property of their grandfather namely Bhagwat Sao and during their life time they are in possession of the property of Bhagwat Sao after death of Bhagwat Sao in 1940 Lakshm Prasad Gupta and defendant No.1 became joint owners of the suit property. It is specifically denied that plaintiffs and defendants No. 5 to 9 have right over the suit property. Defendants No. 5 to 9 have filed their written statement wherein they have admitted the case of the plaintiff.

[5] On the pleadings of the parties learned trial court has framed as many as 9 issues. Issues No. 1, 2, 4 and 5 are the relevant issues, therefore, they are extracted below:

1. Whether after death of Lakshmi Prasad Gupta both his wives Maheshwari Devi and Indravati Gupta are in possession of the property described in Scheduled A and B of the plaint and legal heirs of Indravati have inherited property in joint ownership and possession?

2. Whether the property of Lakshmi Prasad Gupta mentioned in Scheduled A and B has been received by Lakshmi Prasad Gupta from his father on being succession in which Lakshmi Prasad Gupta and his son have co-ownership of the suit property?

3. Whether the plaintiff is title holder of 1/8 share of the property described in Scheduled A and B?

4. Whether the property described in Scheduled B the defendant No.1 is getting Rs. 3000/- per acre as mesne profits and plaintiff is entitled to get share of 1/8 or not?

[6] The plaintiffs to substantiate averments have exhibited the documents namely Keshbandi Katauni as Exh. P/1, Khasra Panchshala Exh. P/2 to P/4, Rinpustika as Exh. P/5 and voters list as Exh. P/7 to P/11 and examined herself as PW1.

[7] The defendants have exhibited the documents ie., revenue records given by the Sarguja settlement as Exhibit D/1 and D/2 and examined Vishwanath Prasad Gupta as DW/1 and Krishnachand Gupta as DW/2. The plaintiff in her examination in chief has reiterated the stand which she has taken in her plaint and this witness was cross-examined by the defendants No. 1 to 4 wherein she has denied that Krishnachand Prasad Gupta (DW/2) has contributed 90% of money for solemnizing marriage of her daughter. She has also denied that in terms of expenditure received from Krishnachand Gupta (DW/2) she has left the land situated at Bhattikhurd. She has denied that the value of disputed house and land is Rs. 16 lacs. She has stated that defendant No.1 has not allowed her to enter into his house, therefore, she cannot say how much construction is being carried out in the house.

[8] The defendants to substantiate their averments before the trial court has examined DW/1 Vishwanath Prasad Gupta wherein he has admitted that Lakshmi Pprasad Gupta performed second marriage with Indravati through Sagai system after death of his first wife Smt. Maheshwari Devi. He has also admitted that Lakshmi Prasad Gupta and his second wife Indravati Gupta have five daughters. He has admitted that the marriage of Subhrata was solemnized before sale of the property. He has admitted that Bhagwat Sao has four sons and he is not aware that which share is given to whom. He has stated that elder one was Lakshmi, Ganga, Ramdeni and Keshwar and out of which Ganga is surviving. He has stated that he was not aware that how much land was given to all four brothers. The other witness namely Shri

Krishnachand Gupta was examined who has exhibited documents also Exh. D1 and D2 i.e. records relating to Sarguja Estate Settlement. This witness in the cross-examination has admitted that his grandfather Bhagwat Sao and his brother Janaki Sao have already partitioned the property during their lifetime and after death of Bhagwat Sao in the year 1966 his father Lakshmi Prasad Gupta filed a suit for partition. He has also admitted that in pursuance of that case there was partition between the four brothers and they are all in possession of their respective shares. He has admitted that his father was in Government job and after death of his father his stepmother Indravati Gupta was taking pension. He has stated that after death of his father in the Nazul land at Ambikapur along with his name, the names of stepmother Indravati Gupta and stepdaughters have been recorded. He has also stated that by fraudulently it has been recorded. He has stated that after death of his father he is paying the property tax but no document has been filed in this regard. He has further stated that he is aware of the voters list, in 1993-95 names of Indravati and Subhrata have been recorded as residents of Gurunanak Ward, in the year 1985 names of Indravati, Krishnachand, Rajkumari, Somwati, Sudha and Saroj have been recorded as residents of Gurunanak Ward, in the year 1970 names of Lakshmiprasad, Indravati, Krishnachand, Rajkumari have been shown as residents of Gurunanak Ward and in the year 1966 the names of Indravati, Krishnachand, Rajkumari have been shown as residents of Gurunanak Ward.

[9] Learned trial court after appreciating the evidence, material on record vide its judgment and decree dated 21-02-2005 has allowed the suit and directed the parties for partition of suit property described in Scheduled A and B that the defendants No. 5 to 9 are also entitled to get 1/8 share of the suit property. Learned trial court has also directed that the plaintiff is also entitled to get mesne profits from 05-11-1997 at Rs. 200 per acre after she deposits the proper court fee on that amount. The learned trial court has also directed that the property described in Scheduled A is also valued that Rs.8 lacs since the plaintiff is entitled to get 1/8 share of the suit property, therefore if she deposits Rs. 1 lakh of the cost of the suit property then only she is entitled to execute the decree.

[10] Being aggrieved by the judgment and decree dated 21-02-2005, the defendants No. 1 to 4 have filed the present first appeal under section 96 of the CPC mainly contending that the learned trial court has passed the impugned order without appreciating the evidence, without material on record and recorded perverse finding that suit property is self acquired property of Late Lakshmi Prasad Gupta in view of statement of PW1 Indravai Gupta at paragraphs 26 and 27. Learned trial court has also not considered the provisions of Section 23 of the **Hindu** Succession Act, according to which female heir is not entitled for partition of the dwelling house until the male heir choose to decide their respective shares therein and the female heir is only entitled to a right of residence therein. It has been further contended that Indravai Gupta (PW/1) in her para 40 of her evidence has specifically stated that the agricultural land situated at Bhittikhurd was self-acquired property of Bhagwat Sao and after his death, the

property was fallen in share of late Lakshmi Prasad Gupta, therefore, it cannot be said that the property in question is self-acquired property of late Laxmi Prasad Gupta and would further submit that the judgment and decree passed by the learned trial court is based on perverse finding and ignoring the provisions of Section 23 of **Hindu** Succession Act 1956, therefore, the judgment and decree deserves to be set aside by this court.

[11] No one appears on behalf of respondents No. 2 to 6 despite service of notice, therefore, they are proceeded ex parte.

[12] I have heard learned counsel for the appellant and perused the record with utmost satisfaction.

[13] Before adverting to the submissions and issues raised in the present appeal, it is necessary for this court to examine the provisions of Section 6 of the **Hindu** Succession Act 1956 which is extracted below.

"6 Devolution of interest in coparcenary property. -

(1) On and from the commencement of the **Hindu** Succession (Amendment) Act, 2005*, in a Joint **Hindu** family governed by the Mitakshara law, the daughter of a coparcener shall,-

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a **Hindu** Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female **Hindu** becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a **Hindu** dies after the commencement of the **Hindu** Succession (Amendment) Act, 2005*, his interest in the property of a Joint **Hindu** family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and-

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a predeceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the predeceased son or a pre-deceased daughter, as the case may be.

Explanation.-For the purposes of this subsection, the interest of a **Hindu** Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the **Hindu** Succession (Amendment) Act, 2005*, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the **Hindu** law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the **Hindu** Succession (Amendment) Act, 2005*, nothing contained in this sub-section shall affect-

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the **Hindu** Succession (Amendment) Act, 2005 had not been enacted.

Explanation. -For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the **Hindu** Succession (Amendment) Act, 2005*.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation. -For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.]

[14] From bare perusal of the record, it is quite vivid that Laxmi Prasad Gupta has solemnized his second marriage after death of his first wife Smt Maheswari Devi in the year 1946 whereas his first wife of Laxmi Prasad Gupta died in the year 1944 as stated by the plaintiff before the trial court. DW/1 Vshwanath Prasad Gupta in para 3 of his deposition has stated that Laxmi Prasad Gupta has performed second marriage after death of his first wife Maheswari Devi, therefore, the defence taken by the appellant that she was not legally wedded wife, cannot be said to be correct submission of fact. It is pertinent to mention that Krishnachand Gupta (DW/2) has taken this stand in his written statement but no evidence to substantiate his pleading in the written statement is adduced that plaintiff is not legally wedded wife of deceased Laxmi Prasad Gupta, as per Sections 101 & 102 of the Indian Evidence Act, 1872, it is incumbent upon the appellant to prove the stand taken by them in the written statement. Sections 101 & 102 of the Indian Evidence Act, 1872 are reproduced below:-

> **"101. Burden of proof.-**Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> **102. On whom burden of proof lies.-**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

[15] From bare perusal of the Sections 101 & 102 of the Evidence Act, it was for the defendants to adduce evidence to prove the averments made with regard to the legal status of plaintiff but they failed to discharge the same. Hon'ble the Supreme Court in **Anil Rishi Vs. Gurbaksh Singh**, 2006 5 SCC 558 , has held at paragraph 5, 11, 12, 13, 14 & 15 as under:-

> "5. The learned Trial Judge while passing its order dated 09.02.2005 held:-
>
> "Normally the initial burden of proving the execution of a document when it is denied must rest upon the person alleging its execution. Here in the present case the plaintiff has denied the execution of the sale deed. The onus to prove a issue has to be discharged affirmative. "It is always difficult to prove the same in negative". When the fact is proved in affirmative or evidence is led to prove the same. Onus shifts on the other side to negate the existence of such a fact."
>
> 11. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.
>
> 12. Strong reliance has been placed by the High Court in the decision of this Court in **Krishna Mohan Kul @ Nani Charan Kul & Anr. v. Pratima Maity & Ors.**, 2003 AIR(SC) 4351. In that case, the question of burden of proof was gone into after the parties had adduced evidence. It was brought on

record that the witnesses whose names appeared in the impugned deed and which was said to have been created to grab the property of the plaintiffs were not in existence. The question as regards oblique motive in execution of the deed of settlement was gone into by the Court. The executant was more than 100 years of age at the time of alleged registration of the deed in question. He was paralytic and furthermore his mental and physical condition was not in order. He was also completely bed-ridden and though his left thumb impression was taken, there was no witness who could substantiate that he had put his thumb impression. It was on the aforementioned facts, this Court opined:-

"12.....The onus to prove the validity of the deed of settlement was on the defendant No. 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person, in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position"

13. This Court in arriving at the aforementioned findings referred to Section 111 of the Indian Evidence Act which is in the following terms:-

"111. Proof of good faith in transactions where one party is in relation of active confidence.- Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

14. But before such a finding is arrived at, the averments as regard alleged fiduciary relationship must be established before a presumption of undue influence against a person in position of active confidence is drawn. The factum of active confidence should also be established.

15. Section 111 of the Evidence Act will apply when the bona fides of a transaction is in question but not when the real nature thereof is in question. The words 'active confidence' indicate that the relationship between the parties must be such that one is bound to protect the interests of the other."

[16] Hon'ble the Supreme Court in **Krishna Mohan Kul alias Nani Charan Kul & another Vs. Pratima Maity & others**, 2004 9 SCC 468 , at paragraph 12 to 15 has held as under:-

"12. As has been pointed out by the High Court, the first Appellate Court totally ignored the relevant materials and recorded a completely erroneous finding that there was no material regarding age of the executant when the document in question itself indicated the age. The Court was dealing with a case where an old, ailing illiterate person was stated to be the executant and no witness was examined to prove the execution of the deed or putting of the thumb impression. It has been rightly noticed by the High Court that the courts below have wrongly placed onus to prove execution of the deed by Dasu Charan Kul on the plaintiffs. There was challenge by the plaintiffs to validity of the deed. The onus to prove the validity of the deed of settlement was on defendant No. 1. When fraud, mis-representation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with zealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been engrained in Section 111 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places a confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void ipso facto,

nor is it necessary for those who inpeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed. The rule applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The Section requires that the party on whom the burden of proof is laid should have been in a position of active confidence. Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity will not set aside a voluntary deed or donation, however, improvident it may be, if it be free from the imputation of fraud, surprise, undue influence and spontaneously executed or made by the donor with his eyes open. Where an active, confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person gains a great advantage over another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that the transaction is fair and honest.

13. In judging of the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of very great importance in such cases. It is always obligatory for the donor/beneficiary under a document to prove due execution of the document in accordance with law, even de hors the reasonableness or otherwise of the transaction, to avail of the benefit or claim rights under the document irrespective of the fact whether such party is the defendant or plaintiff before Court.

14. It is now well established that a Court of Equity, when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. The proposition is very clearly started in Ashburner's Principles of Equity, 2nd Ed., p. 229, thus:

“When the relation between the donor and donee at or shortly before the execution of the gift has been such as to raise a presumption that the donee had influence over the donor, the Court sets aside the gift unless the donee can prove that the gift was the result of a free exercise of the donor's will.”

15. The corollary to that principle is contained in Clause (3) of Section 16 of the Indian Contract Act, 1872 (in short 'Contract Act').”

[17] From the law laid down by Hon'ble the Supreme Court in **Anil Rishi (Supra),** it is quite vivid that the burden is on the person who alleged that the plaintiff is not legally wedded wife of deceased Lakshmi Prasad Gupta. But no evidence to rebut the allegation made by the plaintiff was adduced before the trial court, therefore, the defendants have failed to discharge their burden which they have taken defence before the trial court, as such finding recorded by the learned trial court that the plaintiff is legally wedded wife of late Laxmi Prasad Gupta, is legal and justified and has rightly decided issue Nos.1, 2 and 7 in favour of the plaintiff.

[18] Learned trial court after appreciating the provisions of **Hindu** Succession Act, 1956 has held that the plaintiff being legally wedded wife of Laxmi Prasad Gupta, her daughter and defendants No 1 to 4 have equal shares in the property described in Scheduled -A of the plaint and also taken note of the fact that Exh.D/2 submitted by the defendants No. 1 to 4 is of the year 1946 which is 30 years old record wherein the name of Laxmi Prasad Gupta has been recorded along with defendant No. 1, but the defendant No.1 has not produced any material, evidence to prove how the property has been recorded in his name. The learned trial court while appreciating Ex.D/2 which is record of settlement of Sarguja Estate and also considering the fact that the property inherited by Bhagwat Sao, has been partitioned between four brothers and they are in possession of their respective shares. Accordingly, issues No. 1 to 7 have been decided. This is a finding of fact which is neither perverse nor contrary to the record.

[19] The defendant to substantiate his stand before the learned trial court has not adduced any cogent evidence which was incumbent upon him, therefore, the finding recorded by the trial court on issues No. 1 to 7 is neither perverse nor contrary which warrants any interference, even the defendants No. 1 to 4 have not been able to prove that the plaintiff was not legally wedded wife of late Laxmi Prasad Gupta, therefore, from the wedlock of Laxmi Prasad Gupta and Indravati Gupta five daughters were born, as such defendants No. 1 to 4 and defendants No.5 to 9 are entitled to get equal share of the suit property described in Scheduled A and B of the plaint. This is a purely finding of fact which is neither perverse nor contrary and it is in accordance with the amended provisions of Section 6 of the **Hindu** Succession Act, 1956 as amended in the year 2005 which provides that the daughters being coparcener in the property of their father have equal right to get equal share of the property and no such partition prior to amendment of the Act, 2005 has been placed on record before death of Laxmi Prasad Gupta, therefore, in view of the amended provisions of the **Hindu** Succession Act, daughters/defendants No. 5 to 9 are also entitled to get equal share of the suit property as the Hon'ble Supreme Court in the case of **Vinita Sharma v. Rakesh Sharma and others**, 2020 9 SCC 1 has held in paras 60, 68, 69, 73, 75 and 80 as under:-

> 60. The amended provisions of section 6(1) provide that on and from the commencement of the Amendment Act, the daughter is conferred the right. Section 6(1)(a) makes daughter by birth a coparcener “in her own right” and

"in the same manner as the son." Section 6(1) (a) contains the concept of the unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth. Section6(1) (b) confers the same rights in the coparcenary property "as she would have had if she had been a son". The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcenary as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. Though the rights can be claimed, w.e.f. 9.9.2005, the provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener. At the same time, the legislature has provided savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20.12.2004, the date on which the Bill was presented in the Rajya Sabha, shall not be invalidated.

68. Considering the principle of coparcenary that a person is conferred the rights in the Mitakshara coparcenary by birth, similarly, the daughter has been recognised and treated as a coparcener, with equal rights and liabilities as of that of a son. The expression used in section 6 is that she becomes coparcener in the same manner as a son. By adoption also, the status of coparcener can be conferred. The concept of uncodified **Hindu** law of unobstructed heritage has been given a concrete shape under the provisions of section 6(1)(a) and 6(1). Coparcener right is by birth. Thus, it is not at all necessary that the father of the daughter should be living as on the date of the amendment, as she has not been conferred the rights of a coparcener by obstructed heritage. According to the Mitakshara coparcenary **Hindu** law, as administered which is recognised in section 6(1), it is not necessary that there should be a living, coparcener or father as on the date of the amendment to whom the daughter would succeed. The daughter would step into the coparcenary as that of a son by taking birth before or after the Act. However, daughter born before can claim these rights only with effect from the date of the amendment, i.e., 9.9.2005 with saving of past transactions as provided in the proviso to section 6(1) read with section 6(5).

69. The effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. Section 6(1) recognises a joint **Hindu** family governed by Mitakshara law. The coparcenary must exist on 9.9.2005 to enable the daughter of a coparcener to enjoy rights conferred on her. As the right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not. Conferral is not based on the death of a father or other coparcener. In case

living coparcener dies after 9.9.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted section 6(3).

73. It is by birth that interest in the property is acquired. Devolution on the death of a coparcener before 1956 used to be only by survivorship. After 1956, women could also inherit in exigencies, mentioned in the proviso to unamended section 6. Now by legal fiction, daughters are treated as coparceners. No one is made a coparcener by devolution of interest. It is by virtue of birth or by way of adoption obviously within the permissible degrees; a person is to be treated as coparcener and not otherwise.

75. It was argued that in case Parliament intended that the incident of birth prior to 2005 would be sufficient to confer the status of a coparcener, Parliament would need not have enacted the proviso to section 6(1). When we read the provisions conjointly, when right is given to the daughter of a coparcener in the same manner as a son by birth, it became necessary to save the dispositions or alienations, including any partition or testamentary succession, which had taken place before 20.12.2004. A daughter can assert the right on and from 9.9.2005, and the proviso saves from invalidation above transactions.

80. A finding has been recorded in Prakash v. Phulavati that the rights under the substituted section 6 accrue to living daughters of living coparceners as on 9.9.2005 irrespective of when such daughters are born. We find that the attention of this Court was not drawn to the aspect as to how a coparcenary is created. It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive; relevant is birth within degrees of coparcenary to which it extends. Survivorship is the mode of succession, not that of the formation of a coparcenary. Hence, we respectfully find ourselves unable to agree with the concept of "living coparcener", as laid down in Prakash v. Phulavati. In our opinion, the daughters should be living on 9.9.2005. In substituted section 6, the expression 'daughter of a living coparcener' has not been used. Right is given under section 6(1) (a) to the daughter by birth. Declaration of right based on the past event was made on 9.9.2005 and as provided in section 6 (1) (b), daughters by their birth, have the same rights in the coparcenary, and they are subject to the same liabilities as provided in section 6(1) (c). Any reference to the coparcener shall include a reference to the daughter of a coparcener. The provisions of section 6(1) leave no room to entertain the proposition that coparcener should be living on 9.9.2005 through whom the daughter is claiming. We are unable to be in unison with the effect of deemed partition for the reasons mentioned in the latter part.

[20] Considering the material placed on record and in the light of aforesaid observation, the judgment and decree passed by the trial court does not suffer from

perversity or illegality warranting any interference by this court. The plaintiff is entitled to get partition of the property as per judgment and decree dated 21-2- 2005 passed by the trial court subject to condition mentioned in the judgment and decree passed by the trial Court.

[21] Accordingly, the instant First Appeal being devoid of merit is liable to be and is hereby dismissed. Interim order passed earlier by this court on 02.06.2005 stands vacated.

[22] Pending interlocutory applications, if any, stand disposed of

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2023(1)GDCJ55

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Niral R Mehta]

Special Criminal Application No 11330 of 2022 **dated 20/10/2022**

Nitin Mahendrabhai Patel

Versus

State of Gujarat

COMPOUNDING OF OFFENCE

Constitution Of India Art 226 - Code Of Criminal Procedure, 1973 Sec 482 - Negotiable Instruments Act, 1881 Sec 147 - Compounding of offence - Permissibility of - It would be permissible for High Court in exercise of its inherent powers under Section 482 of Code, to record settlement arrived at between parties and acquit accused of charges - Taking into account fact of settlement, compounding of offence permitted- Petition allowed - Impugned judgment quashed and set aside

[Para 6]

Law Point - It would be permissible for High Court in exercise of its inherent powers under Section 482 of Code, to record settlement arrived at between parties and acquit accused of charges

ભારતનું સંવિધાન અનુચ્છેદ 226 – ફોજદારી કાર્યરિતી સંહિતા, 1973 કલમ 482 – વટાઉ ખત (નેગો. ઈન્સ્ટ્રુ. એક્ટ) અધિનિયમ, 1881 કલમ 147 – ગુનાની માંડવાળ કરવા માટેની પરવાનગી – વડી અદાલત માટે તેને ફોજદારી કાર્યરિતી સંહિતા (સીઆરપીસી) ની કલમ 482 હેઠળ અપાયેલ અંતર્ગત સત્તાની રુએ અને તેનો ઉપયોગકર્તા પક્ષકારોને તેમની વચ્ચે સમાધાન થવાને નોંધવા અને આરોપીઓને નિર્દોષ છોડી મૂકવાનું જાહેર કરી શકે છે – સમાધાન થયાની હકીકતને ધ્યાને લેતાં,

ગુનામાં માંડવાળ કરવાની મંજૂરી આપેલ છે – અરજી મંજૂર કરવામાં આવી – વાંધાજનક ચુકાદાને રદ્દ કરી બાજુએ મૂકવામાં આવ્યો.

(પારા 6)

કાયદાનો મુદ્દોઃ- ફોજદારી કાર્યરિતી સંહિતા (સીઆરપીસી) ની કલમ 482 હેઠળ અપાયેલ અંતર્ગત સત્તાની રુએ અને તેનો ઉપયોગકર્તા પક્ષકારોને તેમની વચ્ચે સમાધાન થવાને નોંધવા અને આરોપીઓને નિર્દોષ છોડી મૂકવાનું જાહેર કરી શકે છે.

Acts Referred:
Constitution Of India Art 226
Code Of Criminal Procedure, 1973 Sec 482
Negotiable Instruments Act, 1881 Sec 147

Counsel:
Mahesh K Poojara, V D Chauhan, Moxa Thakkar

JUDGEMENT

Niral R. Mehta, J.

[1] Rule, returnable forthwith. Learned APP and Mr.Chauhan waives service of notice of Rule for and on behalf of respondent Nos.1 and 2 respectively. Learned advocate Mr.V.D. Chauhan is permitted to file his Vakilatnama on behalf of respondent No.2

[2] By this petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, the petitioner has sought for quashing of the judgment and order dated 30th September, 2022 passed by learned 4th Additional Judicial Magistrate First Class, Gandhinagar in Criminal Case No.3640 of 2020, whereby the Court below has allowed the criminal case filed by the complainant and the petitioner herein-original respondent has been convicted for simple imprisonment for a period of eighteen months and also directed to pay cheque amount with 6% interest.

[3] It appears that the settlement has been arrived at between the complainant and present petitioner and the entire cheque amount has been paid to the respondent No.2, which has been confirmed by the complainant by detailed affidavit, which has been placed on record. The complainant do not wish to proceed further and is willing to compound the offence. Accordingly, the petitioner by filing this petition, seeks compounding of the offence under Section 147 of the Negotiable Instruments Act.

3.1 Complainant - Tarunkumar Chandrakant Thakkar confirms the factum of settlement arrived at between the parties. The complainant is personally present before the Court and is duly identified by learned advocate for the complainant.

[4] The petitioner also submits that the company is willing to deposit cost as directed by the Supreme Court in case of Damodar S. Prabhu Vs. Sayed Babalal H.,2010 5 SCC 633, with the Legal Service Authority.

[5] In case of **Kripalsingh Pratapsingh Vs. Salvinder Kaur Hardisingh Lohana**, 2004 2 GLH 544, the coordinate Bench of this Court after considering various decisions of the Apex Court, took a view that it would be permissible for the High Court in exercise of its inherent powers under Section 482 of the Code, to record the settlement arrived at between the parties and acquit the accused of the charges.

[6] Thus, taking into account the fact of settlement, the compounding of the offence is hereby permitted. As a result, the petition is allowed. Rule is made absolute. The judgment order passed by the Court below i.e. judgment and order dated 30th September, 2022 passed by learned 4th Additional Judicial Magistrate First Class, Gandhinagar in Criminal Case No.3640 of 2020 is hereby quashed and set aside. The petitioner is acquitted of the offences under the provisions of the Negotiable Instruments Act.

[7] The petitioner is directed to deposit 15% of the cheque amount with the Gujarat State Legal Service Authority within two months from the date of receipt of this order. Rule is made absolute.

Direct service permitted

2023(1)GDCJ57

IN THE SUPREME COURT OF INDIA

[From DELHI HIGH COURT]

[Before Dhananjaya Y Chandrachud; A S Bopanna]

Criminal Appeal No 1260 of 2022 **dated 16/08/2022**

Oriental Bank of Commerce

Versus

Prabodh Kumar Tewari

PREPONDERANCE OF PROBABILITIES

Code of Criminal Procedure, 1973 Sec. 251, Sec. 313 - Negotiable Instruments Act, 1881 Sec. 139, Sec. 138 - Presumption - Preponderance of probabilities - Respondents were permitted by Single Judge to engage a hand-writing expert to seek an opinion on whether "the authorship on the questioned writings" (the disputed cheque) can be attributed to the respondents - Held, when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities" - Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail - Details in the cheque have

been filled up not by the drawer, but by some other person would be immaterial - Presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert - Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was issued towards payment of a debt or in discharge of a liability - Impugned order is set aside - Appeal is allowed

[Paras 15 to 18]

Law Point: When an accused has to rebut the presumption under Section 139 of NI Act, the standard of proof for doing so is that of "preponderance of probabilities"

ફોજદારી કાર્યરિતી સંહિતા, (સીઆરપીસી) 1973 કલમ 251, કલમ 313 – વટાઉ ખત અધિનિયમ, (નેગો. ઈન્સ્ટ્રુ. એક્ટ) 1881 કલમ 138 –સંભાવનાઓની પ્રબળતાઓનો અનુમાન – એકવડી ખંડપીઠનાં ન્યાયાધીશે સામાવાળાઓને એક હસ્તાક્ષર નિષ્ણાંત રોકવાની પરવાનગી આપેલ કે, તે નિષ્ણાંત "સવાલવાળા લખાણનો લેખકત્વ" પર અભિપ્રાય આપી શકે કે, વાદગ્રસ્ત ચેક સામાવાળાઓને આભારી હોય શકે કે કેમ – ઠરાવ્યું કે – આરોપીએ ખંડન કરવું પડશે કે, કલમ 139 હેઠળ તેમ કરવા માટેના પુરાવાનાં ધોરણમાં "સંભાવનાઓને પ્રાધાન્ય" આપ્યું છે કે કેમ – તેથી જો આરોપી સંભવિત બચાવ રજૂ કરવામાં સક્ષમ હોય, કે જે કાયદેસર રીતે લાગુ કરી શકાય તેવાં કરજ અથવા જવાબદારીનાં અસ્તિત્વ વિશે શંકા પેદા કરે છે – તો કાર્યવાહી નિષ્ફળ થઈ શકે છે – ચેકમાં વિગતો, ચેક ઘડનાર દ્વારા નહીં પણ અન્ય વ્યક્તિ દ્વારા લખવામાં આવી હતી, તો તે મહત્વની નથી હોઈ શકતી – ચેક પર હસ્તાક્ષર કરતી વખતે ઉદ્ભવતા અનુમાનને ફક્ત હસ્તલેખન નિષ્ણાંતના અહેવાલ પરથી ખંડન કરી શકાતું નથી, ભલે તેમાં વિગતો ચેક ઘડનાર દ્વારા લખવામાં આવી ન હોય કે અન્ય કોઈ દ્વારા લખાઈ હોય – આ બચાવ માટેનાં સંબધમાં નથી આવતું, કે ચેક દેવુ (કરજ) ચૂકવવા અથવા જવાબદારીઓના નિકાલ કરવા માટે આપવામાં આવેલ હતો – અસ્પષ્ટ હુકમને રદ્દ કરવામાં આવી – અપીલ મંજૂર કરવામાં આવી.

(પારા 15 થી 18)

કાયદાનો મુદ્દોઃ- જ્યારે આરોપીએ નેગો. ઈન્સ્ટ્રુ. એક્ટની કલમ 139 ની ધારણાંને રદિયો આપવાનો હોય, ત્યારે તેમ કરવા માટેનાં પુરાવાનું ધોરણ "સંભાવનાઓની પ્રબળતા" છે.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 251, Sec. 313

Negotiable Instruments Act, 1881 Sec. 139, Sec. 138

Counsel:

Amar Qamaruddin, Madhav Khuran

JUDGEMENT

Dr Justice Dhananjaya Y Chandrachud, J.

[1] Leave granted.

[2] This appeal arises from a judgment dated 24 July 2019 of a Single Judge of the High Court of Delhi.

[3] The appellant is the complainant in proceedings under Section 138 of the Negotiable Instruments Act 1881 ("NI Act"). He seeks to question the order of a Single Judge by which the respondents were permitted to engage a hand-writing expert to seek an opinion on whether "the authorship on the questioned writings" (the disputed cheque) can be attributed to the respondents.

[4] The respondent admits that he signed and handed over a cheque to the appellant. According to the respondent a signed blank cheque was handed over by him. The question which arises in the appeal is whether the High Court was correct in permitting the respondent to engage a hand-writing expert to determine whether the details that were filled in the cheque were in the hand of the respondent. For the reasons set out below, we have allowed this appeal against the order of the High Court for the reason that Section 139 of the NI Act raises a presumption that a drawer handing over a cheque signed by him is liable unless it is proved by adducing evidence at the trial that the cheque was not in discharge of a debt or liability. The evidence of a hand-writing expert on whether the respondent had filled in the details in the cheque would be immaterial to determining the purpose for which the cheque was handed over. Therefore, no purpose is served by allowing the application for adducing the evidence of the hand-writing expert.

[5] The appellant is a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act 1980. According to the appellant, a consortium of five companies, namely, (i) Century Communications Ltd, (ii) Pixion Media Pvt Ltd, (iii) Pearl Studios Pvt Ltd, (iv) Pixion Vision Pvt Ltd and (v) Pearl Vision Pvt Ltd availed of credit facilities from the appellant. The total outstanding dues of the consortium are alleged to be in excess of Rs 1200 crores as on the date of the institution of these proceedings. It has been alleged that the first respondent (A-2 before the Trial Court) handed over a cheque - bearing number 387172 dated 26 December 2011 from the account of Century Communications Ltd in the amount of Rs 5.57 crores drawn on Indian Overseas Bank, Defense Colony Branch, New Delhi - towards the dues of the above five companies. According to the appellant, this was

accompanied by a letter of the same date, bearing reference number CCL/OBC/036/2011, with a request to present the cheque at the end of the second week of January. The cheque was presented for encashment, but was returned on 25 May 2012 with the remarks "insufficient funds".

[6] After issuing a legal notice on 5 June 2012, the appellant instituted a criminal complaint, being CC No 3065 of 2012, before the Court of the Additional Chief Metropolitan Magistrate, Dwarka Courts, New Delhi for an offence punishable under Section 138 of the NI Act. Notices were framed against the first and second respondent under Section 251 of the Code of Criminal Procedure 1973 ("CrPC").

[7] During the course of the trial, on 12 February 2018, the Metropolitan Magistrate recorded the statements of the first and second respondents under Section 313 CrPC. The first respondent has stated that he is a director in all the five companies; he was an authorized signatory; and a blank signed cheque was given by him towards security. Therefore, there is no dispute that the cheque bears the signature of the first respondent.

[8] The first and second respondents filed an application before the Trial Judge seeking to have the cheque in question, the specimen signature and handwriting of the first respondent examined by a government hand-writing expert. The application was dismissed by the Trial Judge on 21 February 2019.

[9] The first and second respondents appealed to the High Court. The High Court by the impugned order dated 24 July 2019 held that there was no occasion to allow the examination of a government hand-writing expert. However, the Single Judge nonetheless allowed the petition filed by the respondents to the extent that they have been permitted to engage a hand-writing expert for the purpose of examining the disputed "writings?.

[10] We have heard Mr Amar Qamaruddin, counsel for the appellant and Mr Madhav Khuran, counsel for the respondents.

[11] During the course of the hearing, it is not in dispute that the first respondent has admitted to having signed the cheque.

[12] The submission which has been urged on behalf of the appellant is that even assuming, as the first respondent submits, that the details in the cheque were not filled in by the drawer, this would not make any difference to the liability of the drawer.

[13] Section 139 of the NI Act states:

> **139. Presumption in favour of holder.** - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

[14] In **Bir Singh v. Mukesh Kumar**, 2019 4 SCC 197 after discussing the settled line of precedent of this Court on this issue, a two-Judge Bench held:

> **33.** A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is **immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer.** If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.
>
> **34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.**
>
> [...]
>
> **36.** Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.
>
> **(emphasis supplied)**
>
> The above view was recently reiterated by a three-Judge Bench of this Court in **Kalamani Tex v. P. Balasubramanian**, 2021 5 SCC 283.

[15] A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability. The presumption arises under Section 139.

[16] In **Anss Rajashekar v. Augustus Jeba Ananth**, 2020 15 SCC 348 a two Judge Bench of this Court, of which one of us (D.Y. Chandrachud J.) was a part, reiterated the decision of the three-Judge Bench of this Court in **Rangappa v. Sri Mohan**, 2010 11 SCC 441 on the presumption under Section 139 of the NI Act. The court held:

> **12.** Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a "reverse onus clause" the three-Judge Bench of this Court in Rangappa held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities. This Court held thus:

> "28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, **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 that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail**. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."
>
> **(emphasis supplied)**

[17] For such a determination, the fact that the details in the cheque have been filled up not by the drawer, but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert. Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was issued towards payment of a debt or in discharge of a liability.

[18] Undoubtedly, it would be open to the respondents to raise all other defenses which they may legitimately be entitled to otherwise raise in support of their plea that the cheque was not issued in pursuance of a pre-existing debt or outstanding liability.

[19] In the circumstances, the appeal is allowed and the impugned order of the Single Judge of the Delhi High Court dated 24 July 2019 is set aside. The report which has been received in pursuance of the impugned order dated 24 July 2019 shall not be taken into consideration during the course of trial.

[20] The application filed by the respondent for the examination of a hand-writing expert shall in the circumstances stand dismissed. The present order shall not affect the merits of the trial or the rights and contentions of the respective parties during the course of the trial.

[21] Pending applications, if any, stand disposed of

2023(1)GDCJ62

IN THE SUPREME COURT OF INDIA

[From ALLAHABAD HIGH COURT]

[Before Krishna Murari; Bela M Trivedi]

Criminal Appeal No. 1999 of 2022, 2000 of 2022, 2001 of 2022, 2002 of 2022, 2003 of 2022 **dated 17/11/2022**

Pawan Kumar Goel

Versus

State of U P & Another

SUMMONING ORDER

Code of Criminal Procedure, 1973 Sec. 200 - Negotiable Instruments Act, 1881 Sec. 141, Sec. 138, Sec. 142 - Summoning order - Appellant filed four criminal complaints on the allegations that the account payee cheque issued by the respondent no. 2 towards the outstanding bills when presented for clearance was dishonored on the ground that the cheque amount exceeds arrangement - Summoning order and proceedings issued by Trial court quashed by High Court - Necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process - Held, a liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself - So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141 - No error has been committed by the High Court in allowing the Writ Petition filed by the respondent no. 2 and quashing the impugned order and the proceedings - Appeals stand dismissed

[Paras 25 to 32]

Law Point: A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 200 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટ, 1881 કલમ 141, કલમ 138, કલમ 142 - સમન્સ મંગાવવાનો હુકમ - અપીલકર્તાએ આ આરોપો પર ચાર ફોજદારી ફરિયાદો નોંધાવી હતી કે પ્રતિવાદી નંબર 2 દ્વારા બાકી બિલો માટે જારી કરવામાં આવેલા એકાઉન્ટ પેયી ચેકને ક્લિયરન્સ માટે રજૂ કરવામાં આવેલ ત્યારે તે વણ ચૂકવાયેલ પરત આવેલ હતા કારણ કે ચેકની રકમ ખાતા માં રકમ જમા હતી તેના કરતા વધી ગઈ છે - ટ્રાયલ કોર્ટ દ્વારા જારી કરાયેલા આદેશ અને કાર્યવાહીને હાઈકોર્ટે રદ કરી - કોઈ વ્યક્તિને ફોજદારી પ્રક્રિયાને આધિન કરવામાં આવે તે પહેલાં ફરિયાદમાં જરૂરી કથનો શામેલ હોવા જોઈએ - ઠેરવ્યું , અધિનિયમની કલમ 141 હેઠળની જવાબદારી કંપની સાથે સંકળાયેલી વ્યક્તિ પર અવેજી ની રીતે બાંધવાની માંગ કરવામાં આવી છે, મુખ્ય આરોપી કંપની જ્યાં સુધી ચેક પર હસ્તાક્ષર કરનારનો સવાલ છે, ત્યાં સુધી તે ગુનાહિત કૃત્ય માટે સ્પષ્ટપણે જવાબદાર છે અને કલમ 141 ની પેટા કલમ (2) હેઠળ આવરી લેવામાં આવશે - પ્રતિવાદી નંબર 2 દ્વારા દાખલ રિટ

પિટિશનને મંજૂરી આપવામાં અને વાદગ્રસ્ત હુકમ અને કાર્યવાહીને રદ કરવામાં હાઈકોર્ટ દ્વારા કોઈ ભૂલ કરવામાં આવી નથી - અપીલો ના મંજૂર

[Paras 25 to 32]

કાયદાનો મુદ્દો: કાયદાની કલમ 141 હેઠળની જવાબદારી કંપની સાથે સંકળાયેલી વ્યક્તિ પર કાયમી ધોરણે લાદવાની માંગ કરવામાં આવી છે, મુખ્ય આરોપી કંપની પોતે જ છે

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 200

Negotiable Instruments Act, 1881 Sec. 141, Sec. 138, Sec. 142

Counsel:

Anubhav Kumar, M/S Manoj Swarup And Co, Rahul Verma, Vishwa Pal Singh, Bharpur Singh, Naman Raj Singh, Ashish Pandey, Shantanu Krishna

JUDGEMENT

Krishna Murari, J.

[1] Leave granted.

[2] The present appeals are directed against the final judgment and order dated 19.11.2019 passed by the High Court of Judicature at Allahabad (hereinafter referred to as **"High Court"**) in four Criminal Miscellaneous Writ Petitions filed by the Respondents seeking quashing of the summoning order dated 18.03.2013 passed by the Additional Chief Judicial Magistrate-II, Muzaffarnagar (hereinafter referred to as **"Magistrate"**) and order dated 02.12.2013 passed by the Additional Sessions Judge, Muzaffarnagar (hereinafter referred to as **"Sessions Court"**). The High Court allowed the Writ Petition and quashed the entire proceedings including the summoning order dated 18.03.2013 as well as order dated 02.12.2013.

[3] As the present appeals are filed by the same Appellant challenging the same impugned judgment, for the sake of brevity they are being disposed of by this common Judgment. Criminal Appeal arising out of Special Leave Petition (Crl.) No. 1697 of 2020 is taken up as a lead case and the parties arrayed thereunder are to be taken in the same manner for the other cases as well.

Factual background:

[4] The Appellant is engaged in the business of sales of machinery and spare parts under the name and style of 'M/s Pawan Hardware Store'. Respondent No. 2 herein is one of the Director of Ravi Organics Limited, a private limited company, engaged in the manufacturing and sales of various types of chemicals. Both of them were having business dealings and Ravi Organics Limited was having a running account with the appellant. Respondent No. 2 is alleged to have issued an account payee cheque for a sum of Rs. 10 Lakhs payable at Union Bank of India, Muzaffarnagar, in favor of the

Appellant towards discharge of its liability for supply of materials made by the appellant. When the appellant presented the cheque before the banker, it was dishonored on 24.12.2012. The Appellant, thereafter, sent a legal notice dated 01.01.2013 to Respondent No. 2 through registered post, which, though, was served, however, there was no response from Respondent No.2.

[5] Despite service of notice, when neither there was any response from the accused nor payment was made, appellant filed four criminal complaints against Respondent no. 2 for the offence punishable under Section 138 Negotiable Instruments Act, 1881 (hereinafter referred to as **'NI Act'**) on the allegations that the account payee cheque bearing no. 802276 of Union Bank of India, Muzaffarnagar, for a sum of Rs.10 lakhs dated 20.11.2012 issued by the respondent no. 2 towards the outstanding bills when presented for clearance was dishonored on the ground that the cheque amount exceeds arrangement.

[6] The Magistrate took cognizance of the said complaint and required the Appellant to get his statement recorded under Section 200 of the Code of Criminal Procedure (hereinafter referred to as **'Cr.P.C'**). However, on 07.02.2013, the Appellant filed an affidavit to this effect seeking that it be read as a statement under Section 200 Cr.P.C. The Magistrate passed an order dated 18.03.2013 summoning Respondent No. 2 for trial in Criminal Case No. 162 of 2013.

[7] Being aggrieved by the summoning order dated 18.03.2013, Respondent no. 2 filed Criminal Revision No. 212 of 2013 before the Sessions Court. Vide order dated 02.12.2013, the Sessions Court dismissed the criminal revision petition and held that the cheque was issued against outstanding payments arising out of commercial transactions between Respondent No. 2 and Appellant.

[8] Respondent No. 2 aggrieved by the dismissal of the Criminal Revision approached the High Court by way of Criminal Miscellaneous Writ Petition No. 24632 of 2013 seeking quashing of the summoning order dated 18.02.2013 passed by the Magistrate and also the order dated 02.12.2013 passed by the Sessions Court. The High Court vide impugned judgment and order dated 19.11.2019 allowed the Writ Petition and quashed the entire proceedings including the summoning order dated 18.3.2013 passed by the Magistrate placing reliance on the pronouncement of this Court in the case of **Aneeta Hada Vs. Godfather Travels & Tours Pvt. Ltd.**, 2012 5 SCC 661 and **S.M.S Pharmaceuticals Ltd. Vs. Neeta Bhalla & Another.**, 2005 8 SCC 89

8.1 The operative portion of the impugned judgment reads as under: -

> "Considering the facts and circumstance of the present case, according to the complaint itself, the cheque was issued for Pawan Hardware Store, Sandeep talkies, near Court Road, Civil Lines, Muzaffar Nagar by the Director, Devendra Kumar Garg- petitioner. It is not averred in the complaint that Devendra Kumar Garg was in charge of and responsible for the conduct of

the business of the company at the time of commission of the offence and hence he will not be liable for criminal action. It may be noted that the firm named as Ravi Organics Ltd., Nai Mandi, Muzaffar Nagar, who was the principal accused, has not been made party in the complaint as stated above and side by side the necessary averment required to be made in the complaint satisfying the requirements of Section 141 of the Act are also lacking to maintain prosecution as held in the decisions cited above. In this view of the matter, complaint itself is bad in law and the entire proceedings in pursuance thereof, including the summoning order dated 18.3.2013 passed by Addl. Chief Judicial Magistrate, Court No.2, Muzaffar Nagar in Criminal Case No.162 of 2013, Pawan Kumar Goel Vs. Devendra Kumar Garg, under Section 138 N.I. Act, P.S. Civil Lines, District Muzaffar Nagar as well as order dated 2.12.2013 passed by Addl. Sessions Judge, Court No.7, Muzaffarnagar in Criminal Revision No. 212 of 2013, Devendra Kumar Garg Vs. Pawan Kumar Goel, is nothing but an abuse of process of the court and is liable to be quashed."

[9] We have heard Mr. Anubhav Kumar, learned counsel appearing on behalf of the Appellant and Mr. Vishwa Pal Singh, learned counsel appearing on behalf of the Respondents.

[10] Mr. Anubhav Kumar, learned counsel for the appellant submitted that the cheque issued by Respondent No. 2 towards payment of outstanding dues of supply of material due to the Appellant was dishonoured and hence the respondent is guilty of committing offence under the Negotiable Instruments Act and was righly summoned by the Trial Court to face the trial. He further submitted that the Criminal Revision Petition challenging the summoning order was also rightly dismissed but the High Court committed a manifest error of law in causing interference and quashing the summoning order as well as the proceedings.

10.1 It was further submitted that the High Court erred in not appreciating that respondent no. 2 was arrayed by name discribing him as a director of the Ravi Organics Limited and on account of a typographical error, the company could not be arrayed as accused no. 2 in the complaint by name, though the details thereof is mentioned in the discription of accused no. 1.

10.2. He further submitted that the complaint contained all necessary factual allegations constituting each of the ingredients of offence under Section 138 of NI Act and there is no provision either under the NI Act or under the Criminal Procedure Code, which prohibits the amendment of a complaint or the impleadment of an additional accused subsequent to the filing of the complaint.

10.3 Reliance to support the aforesaid contentions has been placed by the learned counsel for the appellant on the decisions of this Court in **N.Harihara**

Krishnan Vs. J. Thomas, 2018 13 SCC 663, **Bilakchand Gyanchand Co. Vs. A. Chinnaswami**, 1999 5 SCC 693 , and **Rajneesh Aggarwal Vs. Amit. J. Bhalla**, 2001 1 SCC 631 .

[11] In reply, learned counsel appearing on behalf of the Respondent No. 2 submitted that the summoning order is erroneous as the proceedings itself is not maintainable without the company having not been arrayed as an accused in the complaint.

11.1 It was also submitted that it is well settled by a catena of decisions that if a complaint under Section 138 of NI Act is filed in respect of dishonor of cheque issued from the account of the company, it is incumbent on the part of the complainant to make necessary averments in the complaint that at the time when the offence was committed, the person accused was in charge of and responsible for the conduct and business of the company. This averment is an essential requirement of Section 141 of NI Act. He further submitted that the infirmity in the complaint under Section 138 of NI Act for not impleading the company or not making specific averments in respect of the commission of offence by the company as required under the Act, cannot be said to be curable.

11.2 Reliance in support of the contention was placed by the learned counsel for the respondent on the decisions of this Court in the case of **Aneeta Hada (Supra), SMS Pharmaceuticals Ltd. (Supra),** and **Himanshu Vs. B. Shivamurthy & Another**, 2019 3 SCC 797 .

[12] Two main issues which falls for our consideration in this appeal are:-

(1) Whether a director of a company would be liable for prosecution under Section 138 of NI Act without the company being arraigned as an accused.

(2) Whether a complaint under Section 138 of NI Act would be liable to be proceeded against the director of the company without their being any averments in the complaint that the director arrayed as an accused was in charge of and responsible for the conduct and business of the company.

[13] Before delving into the merits of the contention raised, it is important to analyze the cardinal provision which establishes the criminal liability upon the defaulter for dishonour of cheque i.e., Section 138 of NI Act. Section 138 of the NI Act reads as under: -

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. -

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by

an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for[a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque,[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

[14] Section 141 of NI Act deals with offences by companies while extending the liability to every individual; who when the offence was committed was responsible for the conduct of the business which also extends towards key managerial positions like that of the Director. Section 141 of the NI Act reads as under: -

141. Offences by companies. -

(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the

offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purposes of this section-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

[15] A bare perusal of Section 138 and Section 141 of NI Act indicates that Section 138 of the NI Act casts criminal liability punishable with imprisonment for a term that may be extended to two years or with a fine that may extend to twice the amount of the cheque, or with both on a person who issues a cheque towards discharge of a debt or liability in whole or in part and the cheque is dishonoured by the bank on presentation. While Section 141 extends such criminal liability in case of a company to every person who at the time the offence was committed, was in charge of, and was responsible for the conduct of the business of the company.

[16] A two-Judge Bench of this Court in the case of **K.K. Ahuja v. V.K. Vora & Anr.**, 2009 10 SCC 48 after analysing the provisions contained in Section 141 of the Act, observed as under:-

"16. Having regard to section 141, when a cheque issued by a company (incorporated under the Companies Act, 1956) is dishonoured, in addition to the company, the following persons are deemed to be guilty of the offence and shall be liable to be proceeded against and punished:

(i) every person who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company;

(ii) any Director, Manager, Secretary or other officer of the company with whose consent and connivance, the offence under section 138 has been committed; and

(iii) any Director, Manager, Secretary or other officer of the company whose negligence resulted in the offence under section 138 of the Act, being committed by the company.

While liability of persons in the first category arises under sub-section (1) of Section 141, the liability of persons mentioned in categories (ii) and (iii) arises under sub-section (2). The scheme of the Act, therefore is, that a person who is responsible to the company for the conduct of the business of the company and who is in charge of business of the company is vicariously liable by reason only of his fulfilling the requirements of sub- section (1). But if the person responsible to the company for the conduct of business of the

company, was not in charge of the conduct of the business of the company, then he can be made liable only if the offence was committed with his consent or connivance or as a result of his negligence.

17. The criminal liability for the offence by a company under section 138, is fastened vicariously on the persons referred to in sub-section (1) of section 141 by virtue of a legal fiction. Penal statutes are to be construed strictly. Penal statutes providing constructive vicarious liability should be construed much more strictly. When conditions are prescribed for extending such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of section 141 is imperative. As pointed out in **K. Srikanth Singh vs. North East Securities Ltd**, 2007 12 SCC 788, the mere fact that at some point of time, an officer of a company had played some role in the financial affairs of the company, will not be sufficient to attract the constructive liability under section 141 of the Act.

18. Sub-section (2) of section 141 provides that a Director, Manager, Secretary or other officer, though not in charge of the conduct of the business of the company will be liable if the offence had been committed with his consent or connivance or if the offence was a result of any negligence on his part. The liability of persons mentioned in sub-section (2) is not on account of any legal fiction but on account of the specific part played - consent and connivance or negligence. If a person is to be made liable under sub-section (2) of section 141, then it is necessary to aver consent and connivance, or negligence on his part."

[17] The scope of Section 141 of NI Act was again exhaustively considered by this Court in **S.M.S Pharamaceuticals (Supra):**

"10. ....What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. **Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action.** It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. **The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company.** Conversely, a person not holding any office or designation in

a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"..etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. **Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to actio...**

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. **A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable.** Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. **A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process.** We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

(emphasis supplied)

[18] Coming to the facts of the present case at hand, a perusal of the complaint filed as Annexure P-1 clearly goes to establish two facts:-

(i) The description of the respondent-accused contained in the complaint is as under:-

"Mr. Devendra Kumar Garg, S/o Lala Jagdish Prasad Garg, Director, Ravi Organics Limited, 19-A, New Mandi, Police Station-New Mandi, District-Muzaffarnagar."

From the aforesaid, it is clear that though the respondent-accused was described as a Director of Ravi Organics Limited, but the company itself was not arrayed as a party in the complaint.

(ii) A perusal of the averments made in the complaint goes to show beyond a shadow of doubt that there are no averments that respondent no. 2, at the time when the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company.

[19] This Court has been firm with the stand that if the complainant fails to make specific averments against the company in the complaint for the commission of an offence under Section 138 of NI Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. Needless to say, the provisions of Section 141 impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-Section (1) and (2) would not be liable to be convicted on the basis of the principles of vicarious liablity.

[20] Reference in this connection may also be made to another judgment of the two-Judge Bench of this Court in **Himanshu Vs. B. Shivamurthy and Another (Supra)**, the facts wherein have a stark similarity to the facts of the present case, considering the issue where the complaint was lodged only against the director without arraigning the company as an accused and whether the company could be subsequently arraigned as an accused, it was observed as under:-

"11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, 4 (2018) 13 SC 663 every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."

[21] This issue stands concluded by a decision of three-Judge Bench of this Court in the case of **Aneeta Hada Vs. Godfather Travels & Tours (P) Ltd. (Supra)**, wherein it has been held that for maintaining the prosecution under Section 141 of NI Act, arraigning of the company as an accused is imperative and non-impleadment of the company would be fatal for the complaint. It may be relevant to extract the following from the said judgment:-

> "58. Applying the doctrine of strict construction, we are of the considered opinion **that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.**
>
> 59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself."

[22] The observations made in the aforesaid judgment is also a complete answer to the arguments advanced by learned counsel for the appellant that in the absence of any prohibition under the NI Act, the amendment in the complaint is permissible and the impleadment of an additional accused subsequent to filing of the complaint, would not be barred. At this juncture, we may also refer to the following observations made in the case of **N. Harihara Krishnan Vs. J. Thomas (Supra):-**

> "26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the

amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

27. By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint.

28. The question whether the respondent had sufficient cause for not filing the complaint against Dakshin within the period prescribed under the Act is not

examined by either of the courts below. As rightly pointed out, the application, which is the subject-matter of the instant appeal purportedly filed invoking Section 319 CrPC, is only a device by which the respondent seeks to initiate prosecution against Dakshin beyond the period of limitation stipulated under the Act."

[23] In view of the above, arguments advanced by learned counsel for the appellant that an additional accused can be impleaded subsequent to the filing of the complaint merits no consideration, once the limitation prescribed for taking cognizance of the offence under Section 142 of NI Act has expired. More particularly, in view of the fact that neither any effort was made by the petitioner at any stage of the proceedings to arraign the company as an accused nor any such circumstances or reason has been pointed out to enable the Court to exercise the power conferred by proviso to Section 142, to condone the delay for not making the complaint within the prescribed period of limitation.

[24] Reliance placed by learned counsel for the appellant on the decisions of this Court in the case of **Aneeta Hada Vs. Godfather Travels & Tours Pvt. Ltd. (Supra)** is also totally mis-founded inasmuch as the ratio decidendi of the said case runs contrary to the argument advanced by learned counsel for the appellant. It may be relevant to extract the following observations made in paragraph 59 of the reports:-

"59. In view of our aforesaid analysis, we arrive at the irresistable conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh which is a three-Judge Bench decision. Thus, the view expressed in sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

[25] As already stated above, a perusal of the complaint goes to show that even though respondent no. 2 has been arrayed as a respondent, but there are no averments that respondent no.2 at the time when the offence was committed was in charge of, and was responsible to the company for the conduct of its business. The averments made in the complaint are being reproduced hereunder:-

"Complainant makes the following written submission:-

1. That the complainant has a firm which deals in all types of materials used int eh machineries of factories.

2. Defendant's firm M/s. Ravi Organics Limited is a chemical factory and the materials used in the machinery of defendant-firm are supplied by

Complainant. Both the firms have old trade relations and they do business with each other.

3. Defendant gave an account payee cheque bearing no. 802276 of Union Bank of India, Muzaffarnagar of Rs.1,00,000/- (Rupees ten lakhs) on 20.11.2012 to Complainant against outstanding bill and asked him to produce the same in his bank for encashment after receiving his signal.

4. After laying up claim many times by Complainant, defendant on 15.12.2012 asked the complainant to produce the said cheque in his bank for entrenchment after four-five days, it will be cleared, complainant believed the defendant.

5. On 21.12.2012, Complainant produced the said cheque in his bank State Bank of Patiala, Court Road, Muzaffarnagar for encashment in favour of his A/c No. 55042570994. On 24.12.2012, he was informed by his bank that the cheque amount exceeds arrangement made on 22.12.2012 by defendant's bank i.e., Union Bank of India and thus, the said cheque was dishonoured.

6. Upon dishonouring the cheque (with the remarks of Exceeds arrangement), complainant issued a registered notice through his advocate to the defendant at his above given address which was received by defendnat on 01.01.2013 but even after lapse of 15 days, defendant has not made the above payment to complainant so far.

7. Defendant-accused deliberately gave the above cheque with intent to grab complainant's money which has been dishonoured in the bank; thus, defendant-accused is guilty of committing offence under Negotiable Instruments Act.

Therefore, you are requested to summon the accused and punish him with the directions to pay the complainant the double of the above cheque amount under provisions of N.I. Act. Complainant shall remain obliged to you."

[26] The question whether it is necessary to specifically state in the complaint that the person accused was in charge of, or responsible for the conduct of the business of the company, was subject matter of reference by a two-Judge Bench of this Court along with other questions to be adjudicated by a larger Bench. The following questions were referred for consideration:-

"(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proved to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

[27] A three-Judge Bench in the case of **S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla (Supra)**, considering the aforesaid questions after analysing the provisions of Section 141 of the Act and specially the words "who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc." used in the said Section, observed as under:-

"While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

"who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc."

What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"..etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only

persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement.

12. The conclusion is inevitable that the liability arises on account of conduct , act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable."

[28] The three-Judge Bench also took note of the earlier pronouncements of this Court in the case of **State of Haryana Vs. Brij Lal Mittal & Ors.**, 1998 5 SCC 343 , wherein it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business.

[29] The Bench also considered the dictum of this Court in the case of **K.P.G. Nair Vs. Jindal Menthol India Ltd.**, 2001 10 SCC 218 , which was also a case under the Negotiable Instruments Act. In the said case, it was found that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that requirement of Section 141 was not met and the complaint against the accused was quashed.

[30] After analyzing the aforesaid and various other pronouncements, the three-Judge Bench in paragraph 18 of the reports, observed as under:-

"18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in

criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

[31] The Bench answered the questions posed in the reference as under:-

"19. (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

[32] In view of the undisputed facts of the present case in juxtaposition to the judicial pronouncements of this Court referred to above, we have no hesitation in

holding that no error has been committed by the High Court in allowing the Writ Petition filed by the respondent no. 2 and quashing the impugned order and the proceedings.

[33] Thus, the impugned orders do not warrant any interference. As a result, the appeals fail and, accordingly, stand dismissed

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2023(1)GDCJ80

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Samir J Dave]

Criminal Revision Application No. 1122 of 2022 **dated 12/10/2022**

Pratikbhai Pravinbhai Parmar

Versus

Mayurbhai K Parikh (Proprietor of Omkar Firm)

INHERENT POWERS OF COURT

Code of Criminal Procedure, 1973 - Sections 482 and 397 - Negotiable Instruments Act, 1881 **- Section 138 - Application - Conviction - Held - The inherent powers under Section 482 of the Code of Criminal Procedure or the extraordinary jurisdiction under Article 226 of the Constitution of India include the powers to quash the FIR, investigation or any criminal proceedings pending before the High Court or any Court subordinate to it and are of wide magnitude and ramification - The settlement has brought peace in the society and the parties who were once aggrieved, are now contended and are willing to lead harmonious life - In such circumstances, continuance of criminal proceedings will not serve any purpose - Application allowed.**

[Paras 9, 10 and 11]

ફોજદારી કાર્યરીતિ સંહિતા, 1973 - કલમ 482 અને 397 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 - કલમ 138 - અરજી – ગુનેગાર ઠરાવવું - ઠેરવ્યું - ફોજદારી કાર્યરીતિ સંહિતાની કલમ 482 હેઠળની અંતર્ગત સત્તાઓ અથવા ભારતના બંધારણના અનુચ્છેદ 226 હેઠળના અસાધારણ અધિકારક્ષેત્રમાં એફઆઈઆર, તપાસ અથવા કોઈ પણ ફોજદારી કાર્યવાહી હાઈકોર્ટ અથવા તેના હેઠળની કોઈપણ કોર્ટ સમક્ષ પેન્ડિંગ અને વ્યાપક છે - સમાજમાં શાંતિ સમાધાનમાં છે અને જે પક્ષકારો એક સમયે નારાજ હતા, તેઓ હવે દલીલ કરે છે અને સુમેળભર્યું જીવન જીવવા તૈયાર છે - આવા સંજોગોમાં,

ફોજદારી કાર્યવાહી ચાલુ રાખવાથી કોઈ હેતુ સરશે નહીં - અરજીને મંજૂરી આપવામાં આવી છે.

[Paras 9, 10 and 11]

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482, Sec. 397
Negotiable Instruments Act, 1881 Sec. 138

Counsel:

Vasimraja A Kureshi, M H Bhatt, A R Kadri

JUDGEMENT

Samir J Dave, J.

[1] Learned Advocate Mr. A. R. Kadri seeks permission to file his Vakalatnama during the course of the day. The permission as prayed for is granted.

[2] By this application under section 397 of the Code of Criminal Procedure, the applicant has prayed to quash and set aside judgment and order dated 30.09.2022 passed by the learned 4th Additional Sessions Judge, Vadodara in Criminal Appeal No.252 of 2019 and the judgment and order dated 04.12.2021 passed by the learned Chief Judicial Magistrate, Vadodara in Criminal Case No.19489 of 2019.

[3] In view of the fact that the parties have settled their disputes, learned advocate for respondent no.1- original complainant jointly with learned advocate for the applicant submitted that offence may be permitted to be compounded.

[4] It appears from the record that applicant was put to trial in the Court of the learned Chief Judicial Magistrate, Vadodara in Criminal Case No.19489 of 2019 for the offences punishable under section 138 of the Negotiable Instrument Act. The Trial Court vide judgment and order dated 04.12.2021 held the applicant herein guilty for the offence punishable under section 138 of the Negotiable Instrument Act.

[5] As the applicant came to be convicted by the Trial Court, they preferred Criminal Appeal No.252/2019 in the Court of the learned 4th Additional Sessions Judge, Vadodara. The appeal came to be rejected by the learned Sessions Court, Vadodara vide order dated 30.09.2022 and confirmed the order passed by the learned Trial Court. Being aggrieved with the same, the applicant has come up with this application.

[6] The complainant-respondent no.1 has produced on record an affidavit, the same is taken on record, wherein the original complainant confirms about the settlement having been arrived at. In the affidavit, the complainant stated as under:

> "3. Since the present applicant has repaid the borrowed amount of Rs.2,55,000/- with Rs.37,310/- as expenses occurred and being friendly

relationship and on grounds of humanitarian, I do not with to undergo any conviction of the applicant and at the outset, I say and submit that the disputes and grievances of both the side have been amicably settled between the present applicant and the present respondent no.1.

4. I say and submit that present applicant is very good friend of mine and he had borrowed Rs.2,55,000/- from me and for his need and now he has showing his bonafide to repay my entire amount and now with the interventions of relatives and family members collectively decided to end further litigations between the present applicant and present respondent no.1 has no objection if matter finally decided as per settlement. In the facts and circumstances as narrated above, I at my free will, wish, desire am stating on oath that I do not with that the present applicant face any hardship, inconvenience and to undergo the conviction as dispute between us have been amicably settled, and considering the amicably settlement the impugned both the orders and judgments. Hence, both the orders and judgments arising out on the complaint may be quashed and set aside considering settlement of dispute between parties in the interest of justice."

[7] In case of **Gian Singh vs. State of Punjab and Another**, 2012 10 SCC 303, the Apex court has considered the relative scope of section 482 and section 320 of the Code and has laid down the parameters as to in what kind of cases and facts and circumstances, the High Court can advert to its inherent power under section 482 of the Code to quash criminal proceedings. The Supreme Court examined previous decisions of the Apex Court in cases of **B. S. Joshi vs. State of Haryana**, 2003 4 SCC 675, **Nikhil Merchant vs. CBI**, 2008 9 SCC 677 and **Manoj Sharma vs. State**, 2008 16 SCC 1.

[8] In **Gian Singh (supra)**, it is held that,

"**57.** Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment."

"**58.** Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed."

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of

the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

[9] It is pertinent to note that the above issue is squarely covered by a Full Bench decision of the Bombay High Court rendered in case of **Abasaheb Yadav Honmane Vs. State of Maharashtra**, 2008 2 MhLJ 856, and in a decision of this Court in case of **Ashishbhai Nagindas Navsarivala Vs. State of Gujarat and Anr.,** decided on 16.11.2017 in Criminal Misc. Application No.27481 of 2017 as well as in decisions of the Coordinate Benches of this Court in case of **Rajeshbhai @ Raju Mangubhai Patel Vs. State of Gujarat and Anr.,** decided on 20.11.2017 in Special Criminal Application (Quashing) No.8878 of 2017 and in case of **Bachubhai Mangalbhai Chavda Vs. State of Gujarat and Anr.,** decided on 09.01.2013 in Criminal Revision Application No.160 of 2011, the inherent powers under section 482 of the Code of Criminal Procedure or the extraordinary jurisdiction under Article 226 of the Constitution of India include the powers to quash the FIR, investigation or any criminal proceedings pending before the High Court or any court subordinate to it and are of wide magnitude and ramification.

[10] In exercise of powers conferred under Article 226 of the Constitution of India read with section 482 of the Code of Criminal Procedure, exercise of inherent powers by the High Court would depend upon the facts and circumstances of each case. It is not permissible to have a straight jacket formula. No precise and inflexible guidelines can be provided.

[11] The settlement has brought peace in the society and the parties who were once aggrieved, are now contended and are willing to lead harmonious life. In such circumstances, continuance of criminal proceedings will not serve any purpose. On the contrary, it would harassing and also counteractive to the congenial relationship which is restored between the parties.

[12] In view of above, this application succeeds and is hereby allowed. The judgment and order dated 30.09.2022 passed by the learned 4th Additional Sessions Judge, Vadodara in Criminal Appeal No.252 of 2019 and the judgment and order dated 04.12.2021 passed by the learned Chief Judicial Magistrate, Vadodara in Criminal Case No.19489 of 2019 are hereby quashed and set aside. The applicant is ordered to be released forthwith, bail bond if any shall stand cancelled. Rule is made absolute. Direct service is permitted

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2023(1)GDCJ85

IN THE HIGH COURT OF BOMBAY AT GOA

[Before M S Sonak; Bharat P Deshpande]

Criminal Writ Petition No 578 of 2022 **dated 06/10/2022**

Shaikh Mohammed Tauseef

Versus

Gogo Constructions; Prakash S Gogi; Subhash S Gogi; Ganesh S Gogi

CERTIFIED COPIES OF ORDER

Constitution of India - Article 227 - Code of Criminal Procedure, 1973 - Sections 353, 353 and 354 - Negotiable Instruments Act, 1881 - Section 138 - Petition - Failure of JMFC in supplying certified copies of order of conviction even after direction of this Court - Held - The best course of action to be followed would be to quash and set aside the orders convicting and sentencing the respondents and remanding the matter to the learned JMFC, Quepem, B Court (and not A Court) for hearing final arguments based on the evidence already led by the parties and passing judgments and orders within a prescribed timeline.

[Paras 22, 23 and 40]

ભારતનું સંવિધાન અનુચ્છેદ 227 – ફોજદારી કાર્યરિતી સંહિતા, (સીઆરપીસી) 1973 – કલમ 353 અને 354 – વટાઉ ખત અધિનિયમ, (નેગો. ઈન્સ્ટ્રુ. એક્ટ) 1881 – કલમ

138 – અરજી – અત્રેની અદાલતના નિર્દેશ આપવા છતાંપણ JMFC નાં એ દોષિત કરેલનું પ્રમાણપત્ર આપવામાં નિષ્ફળ – ઠરાવ્યું કે – આ કેસમાં તેને અનુસરવા માટેનો ઉત્તમ માર્ગ એ છે કે, સામાવાળાઓ ખાતરી આપી અને સજા ફટકારતા આદેશોને રદ્દબાતલ કરવામાં આવે અને અગાઉ આપેલાં પુરાવાને આધારે છેવટની દલીલની સુનાવણી માટે વિધ્વાન JMFC ક્વીપેમની B અદાલત (અદાલત A નહીં) અદાલતને મેટર પરત કરવામાં આવે તથા સમયરેખાની અંદર ચુકાદાઓ અને હુકમો પસાર કરવા તેવો હુકમ પસાર કરવામાં આવે છે.

(પારા 22, 23 અને 40)

Acts Referred:

Constitution of India Art. 227

Code of Criminal Procedure, 1973 Sec. 353, Sec. 353, Sec. 354

Negotiable Instruments Act, 1881 Sec. 138

Counsel:

Ravi Gawas, Shaila Naik

JUDGEMENT

M.S. Sonak, J.

[1] Heard Mr Ravi Gawas for the Petitioner and Ms Shaila Naik, Advocate for Respondents nos.2 & 3.

[2] Rule. The rule is made returnable immediately at the request of and with the consent of the learned Counsel for the parties.

[3] The main issue involved in this matter is th failure of the learned JMFC, Quepem (A Court), in supplying certified copies of judgments and orders in Criminal Case no.161/NI/OA/2016/A and Criminal Case No.162/NI/OA/2016/A after she pronounced in the open Court on 05.03.2021, that respondent nos.2 & 3 were convicted and sentenced under Section 138 of the Negotiable Instruments Act, 1881. By Order dated 11.07.2022, made in Criminal Writ Petition No.73/2022, the learned JMFC was directed to provide the petitioner and respondent nos.2 & 3 the certified copies within a maximum period of 10 days from the receipt of an authenticated copy of the said Order. However, despite receiving this Order, the learned JMFC has neither prepared the judgment nor issued any copies to the parties. Hence, this second petition by the Petitioner, who was the original complainant in the above criminal cases.

[4] The Petitioner had instituted two criminal complaints against M/s. Gogi Construction and its Partners, i.e., respondents No.1 to 4 under Section 138 of the

Negotiable Instruments Act, 1881 (said Act), registered as Criminal Case Nos. 161/NI/OA/2016/A and 162/NI/OA/2016/A.

[5] The Petitioner has pleaded that on 05.03.2021, learned Judicial Magistrate First Class at Quepem, A Court (JMFC) convicted the accused persons for the offence under Section 138 of the said Act; directed them to pay the cheque amount, and sentenced them for one-month imprisonment, in default of payment for six months simple imprisonment. However, on the same day, the accused applied for suspension of sentence. Accordingly, the learned JMFC promptly suspended the sentence for 30 days to enable the accused persons to institute an appeal against the conviction.

[6] The Petitioner has pleaded that on 28.05.2021, the Petitioner applied for urgent certified copies of the Judgments and Orders made in both the cases against receipt Nos. 18882 and 18883 dated 28.05.2021. The Petitioner visited the Court several times to collect the certified copies. Still, the staff always informed the Petitioner that the Judgments were not ready and that the certified copies would be supplied after 15 days. Additionally, the Petitioner has pleaded that the Judgments have not even been uploaded on the website of the Court.

[7] The Petitioner, therefore, wrote to the Principal District Judge, South Goa, at Margao on 25.10.2021, but there was no response. The Petitioner, by his application dated 09.07.2021, in both cases, requested the learned JMFC to issue a non-bailable warrant against the accused persons. But such applications are not disposed of and are still pending.

[8] The Petitioner has pleaded that, to his surprise, the accused persons instituted Criminal Appeals No.52/2021 and 53/2021 before the Additional Sessions Judge (DJ-2), South Goa at Margao, without certified copies of the Judgments and Orders convicting them. Accordingly, the Office of the Sessions Judge, South Goa, at Margao, has registered these two appeals. Though the appeal Court grants no interim relief, the accused persons remain at liberty despite the orders of conviction and sentence only because the learned JMFC has, to date, not furnished the certified copies of her Judgments and Orders.

[9] Since the above situation was quite disturbing, we, by our Order dated 04.07.2022, called for a report from the Principal District Judge, South Goa latest by 08.07.2022, to ascertain the position. As a result, the Principal District Judge, South Goa, has submitted a report dated 07.07.2022, to a great extent, confirming all that the Petitioner has pleaded.

[10] The report confirms that the learned JMFC, by her Judgment and Order dated 05.03.2021, convicted and sentenced the accused persons but then suspended the sentence on the accused persons' application. Accordingly, the accused persons applied for certified copies of the Judgments and Orders dated 05.03.2021 on the same day, i.e., 05.03.2021. On this application, the learned JMFC passed an order dated 08.03.2021 for issuing certified copies by assigning the date 10.03.2021.

[11] The report states that no certified copy was issued on 10.03.2021. The accused persons preferred Criminal Appeals No.52/2021 and 53/2021 to the Sessions Court without certified copies of the impugned Judgments and Orders. They, however, filed an undertaking/ application for production of the certified copies no sooner than the same were received or uploaded on the CIS.

[12] The Appeal Court called for record and proceedings on 21.02.2022. Because the same was not transmitted, the Appeal Court sent a reminder on 08.03.2022 to the learned JMFC. Reminders on 09.03.2022 and 05.04.2022 followed this. Yet another reminder was issued on 18.04.2022. Despite all these reminders, the learned JMFC neither forwarded the records nor did she issue the certified copies of the Judgments and Orders dated 05.03.2021.

[13] On 13.06.2022, the Appeal Court issued another reminder to the learned JMFC. A further reminder followed this on 21.06.2022. However, despite these reminders, neither were the records transmitted nor were the certified copies of the Judgements and Orders dated 05.03.2021 made available.

[14] On 05.04.2021, the Principal District Judge held a surprise inspection in the Court of JMFC at Quepem. During this inspection, it was observed that Criminal Case Nos.161/NI/2016/A and 162/NI/2016/A were disposed of on 05.03.2021/08.03.2021. However, no judgments were found in the records. Only roznama showed that the matter was disposed of, and the accused persons were convicted of the offence punishable under Section 138 of the said Act.

[15] The inspection report records that upon inquiry with the Stenographer of the concerned Court and on perusal of the steno book, it was observed that the Judgments were neither dictated to the concerned steno nor found ready and duly signed as on the said date. Certified copy applications were verified, and it was found that the Advocate filed two applications for the accused persons seeking urgent certified copies. On such applications, an order “issue” dated 08.03.2021 passed and signed by the concerned Judge to issue a certified copy. There was no further order on these applications to extend the time for the issue of certified copies.

[16] The Principal District Judge, on the following day, i.e., 06.04.2021, wrote to the learned JMFC directing her to clarify the above irregularities. Directions were also issued to the learned JMFC to complete the criminal cases' judgments and issue certified copies immediately. The learned JMFC was directed to report compliance and was informed that the matter would be reported to the Guardian Judge if this was not done. A copy of this letter dated 06.04.2021 is annexed to the report of the Principal District Judge.

[17] On 23.04.2021, since there was no response from the learned JMFC, the matter was reported to the Registrar General, High Court of Bombay, through a proper channel, i.e., the Registrar (Administration), High Court of Bombay, at Panaji. Upon receipt of a complaint, the Principal District Judge reported that on 25.10.2021, he

requested the learned JMFC to expedite the matter. The Principal District Judge stated that on 27.10.2021, yet another letter was sent to the learned JMFC. However, no response was received from the learned JMFC.

[18] Based on all this, by judgment and Order dated 11.07.2022, the Division Bench of this Court issued the following directions in paragraphs 20,21 & 22:

> "20. Therefore, we hereby direct the Judicial Magistrate First Class, "A" Court at Quepem to provide the Petitioner as well as the accused persons the certified copies of the Judgments and Orders dated 05.03.2021 within a maximum period of 10 days from the date of receipt of an authenticated copy of this Order. The Registry to ensure that an authenticated copy of this Order is served upon the JMFC at Quepem at the earliest against her endorsement of receipt. The copy may be served through the Principal District and Sessions Judge, South Goa. The JMFC at Quepem should file a compliance report in this case on or before 07.09.2022.
>
> 21. This Order and the report of the Principal District Judge must be placed before the Registrar (Admin) to enable him to do the needful on the administrative side by following the law.
>
> 22. This Petition is disposed of with the above directions. Accordingly, there shall be no order for costs."

[19] After the above directions were issued, it was expected that the learned JMFC would prepare the judgment for whatever it was worth and give certified copies to the parties as directed. However, despite receiving the judgment and Order dated 11.07.2022, we are sorry to say the learned JMFC has reported no compliance. Therefore, when this petition was instituted by the Petitioner - the original complainant, we made an order on 26.09.2022, and paragraphs 5,6 & 7 of this Order read as follows:

> "5. The Petitioner complains about non-compliance with the directions contained in our Order dated 11.07.2022 in Criminal Writ Petition No.73 of 2022. The Principal District & Sessions Judge, South Goa at Margao, is requested to file report latest by 03.10.2022 confirming whether or not there is compliance with the directions issued by us in paragraph 20 of our Order dated 11.07.2022.
>
> 6. From the material placed on record at least prima facie it appears to be no compliance. However, we wish to ascertain this position and therefore, request the learned Principal District & Sessions Judge, South Goa, Margao, to file a report at the earliest.
>
> 7. Stand over to 04.10.2022, high on board."

[20] In compliance, the Principal District and Sessions Court, South Goa at Margao, has filed a compliance report dated 01.10.2022 before us after inspecting the

Court of the learned JMFC. The above report dated 01.10.2022 is transcribed below for the convenience of reference:

"CONFIDENTIAL

M A R G A O

No.DSC/MAR/PF-APF/CONF/2022/232

Establishment Code: GASGOI

Dated: 1 st October, 2022

To,

The Registrar (Judicial)

High Court of Bombay at Goa,

Penha de Franca,

Provorim - Goa.

Sub: Compliance report in view of Para-20 vide order dated 11.07.2022 in Criminal Writ Petition No.73/2022.

Ref: Letter No.HCB/GOA/R(J)- 223/2022, dated 29.09.2022.

Sir,

This is to report that in view of the directions issued by the Hon'ble High Court, I have carried out inspection of the Court of Adhoc Senior Civil Judge & J.M.F.C. "A" Court, Quepem, presided over by Ms. XXXXX, today, i.e. 01.10.2022, at 10.30 a.m.

2. I have inspected the records and proceedings in Criminal Case No.161/NI/OA/2016/A and Criminal Case No.162/NI/OA/ 2016/A. I have found a typed copy titled as "judgment continued" dated 05.03.2021 in both the files. I have obtained Xerox copy of the said Order. I did not find any typed copy of the main judgment on record in both the matters.

3. I inquired about the same with Ms. Ruby De Cunha, Stenographer attached to the said Court, and she stated that the said judgment titled as "judgment continued" was typed on the very same day, i.e. on 05.03.2021. The concerned Stenographer also informed me that the Judicial Officer dictates the Operative part of the Orders or the Order of Sentence in the Open Court and thereafter, the same is uploaded by the Bench Clerk on the CIS in the roznama.

4. At 12.45 p.m., I personally spoke to the concerned Judicial Officer. She also informed me that the judgment continued was pronounced on 05.03.2021 and signed on the same day.

5. Annexed hereto are the Xerox copies of the judgment continued in Criminal Case No.161/NI/OA/2016/A and Criminal Case No.162/NI/OA/ 2016/A.

6. The matter may be placed before the Hon'ble Lordship for necessary information.

Yours faithfully,

Sd/-

(IRSHAD AGHA)

Principal District & Sessions Judge,

South Goa Margao.

Encl: As above."

[21] To the above report was a document entitled as follows:

"Order reserved on: 02.03.2021

Pronounced on: 05.03.2021.

JUDGMENT (continued)

(Delivered on this the 5 th day of the month of March, of the year 2021)

15. Heard Ld. Adv. Mr. E. Dias for Accused and Ld. Adv. Mr. S. Noronha on behalf of complainant.

16. ...

17. ...

18. .....Therefore, I pass the following:

O R D E R

Accused No. 1 Gogi Constructions is convicted under section 138 of the Negotiable Instruments Act and sentenced through its partners accused Nos. 2, 3 and 4.

Accused No.2 Prakash Gogi being partner of Gogi Constructions is convicted for offence punishable under section 138 of the Negotiable Instruments Act and is sentenced to undergo simple imprisonment for a period of 30 days.

Accused No.3 Subhash Gogi being partner of Gogi Constructions is convicted for offence punishable under section 138 of the Negotiable Instruments Act and is sentenced to undergo simple imprisonment for a period of 30 days.

Accused No.4 Subhash Gogi being partner of Gogi Constructions is convicted for offence punishable under section 138 of the Negotiable Instruments Act and is sentenced to undergo simple imprisonment for a period of 30 days.

Further Accused Nos. 1, 2, 3 and 4 are jointly directed to pay compensation of Rs.20,00,000/(Rupees twenty lakhs only) to the complainant and in default, accused Nos, 2, 3 and 4 have to undergo simple imprisonment of six months.

The compensation amount if recovered from the accused to be paid to the complainant.

Accused to furnish bond in terms of section 437-A of Cr. P. C. to the extent of Rs. 20,000/with one surety each in like amount.

Authenticated copy of Judgment and Order to be given free of cost to the accused.

Pronounced in Open Court.

Proceedings closed.

Quepem

Dated: 05.03.2021

Sd/-

(XXXXXXXXX)

Judicial Magistrate First Class,

' A' Court, Quepem."

[22] Thus, from the above, it does appear that the learned JMFC pronounced the operative portion convicting respondents nos.2 & 3 for offences under Section 138 of the Negotiable Instrument Act 1881 but failed to prepare and issue any certified copy to the petitioner (complainant) and respondent nos.2 & 3 (accused persons) till date, despite directions from the Division Bench on 11.07.2022.

[23] The above omission, in our judgment, is contrary to the provisions of the Code of Criminal Procedure, 1973 and in breach of the law laid down by the Hon'ble Supreme Court of India from time to time in matters of providing reasons to litigants in the form of a judgment after the operative portion is pronounced in the open Court.

[24] Section 353(1) of Cr.P.C. provides that the judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the Presiding Officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, by delivering the whole of the judgment; or by reading out the whole of the judgment; or by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader. Section 353(4) of Cr.P.C. provides that where the judgment is pronounced in the manner specified in clause (c) of sub-section (1), the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost. Both these crucial provisions appear to be a casualty in the present case.

[25] In **Anil Rai V/s. State of Bihar**, 2001 7 SCC 318 , the Hon'ble Supreme Court was concerned with the state of affairs prevalent in some Courts where judgments were not pronounced within a reasonable period after the conclusion of arguments. The Supreme Court noted that the prevalence of such a practice and the horrible situation in some of the High Courts in the country had necessitated the desirability of considering the effect of such delay on the rights of the litigant public. Though reluctantly, the Court decided to consider this aspect and give appropriate

directions for preserving and strengthening the belief of the people in the institution of the judiciary.

[26] The Hon'ble Supreme Court referred to **R.C. Sharma V/s. Union of India**, 1976 3 SCC 574 held that though the CPC did not provide a time limit to deliver a judgment, unreasonable delay between hearing of arguments and delivery of a judgment unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points the litigants consider important may have escaped notice. But, more importantly, litigants must have complete confidence in litigation results. This confidence tends to be shaken if there is an excessive delay between hearing arguments and delivery of judgment. Justice must not only be done but manifestly appear to be done. The Court also referred to **Bhagwandas Fatechand Daswani V/s. H.P.A. International**, 2000 2 SCC 13 , where it was held that "a long delay in delivering the judgment gives rise to unnecessary speculation in the minds of parties to case".

[27] The Hon'ble Supreme Court explained that the intention of the legislature regarding the pronouncement of judgments could be inferred from the provisions of Section 353(1) of the Criminal Procedure Code, which provides that judgment in every trial in any criminal court of original jurisdiction, shall be pronounced in open Court immediately after the conclusion of the trial or on some subsequent time for which due notice shall be given to the parties or their pleaders. The words "some subsequent time" mentioned in Section 353 contemplates the passing of the judgment without undue delay, as delay in the pronouncement of judgment is opposed to the principle of law. Such subsequent time can at the most be stretched to a period of six weeks and not beyond that time in any case. The pronouncement of judgments in the civil case should not be permitted to go beyond two months.

[28] The Hon'ble Supreme Court held that in a country like ours, where people consider the Judges only second to God, efforts should be made to strengthen the common person's belief. Delay in the disposal of the cases facilitates the people to raise eyebrows, sometimes genuinely, which, if not checked, may shake the people's confidence in the judicial system. A time has come when the judiciary itself has to assert to preserve its stature, respect and regards for the attainment of the Rule of Law. For the fault of a few, the glorious and glittering name of the judiciary cannot be permitted to be made ugly. It is the policy and purpose of the law to have speedy justice, for which efforts are required to come to society's expectation of ensuring speedy, untainted and unpolluted justice. Finally, the Hon'ble Supreme Court issued directions in paragraph 10 providing guidelines regarding the pronouncement of judgments.

[29] In this case, as noted earlier, the learned JMFC only declared the trial result by pronouncing in open Court that the accused persons were convicted and sentenced.

No judgment, as such, was prepared and furnished to the parties despite the mandate of Sections 353 and 354 of Cr.P.C. notwithstanding.

[30] In **Ajay Singh & Anr. V/s. State of Chhattisgarh & Anr.**, 2017 3 SCC 330 the Hon'ble Supreme Court was concerned with an order passed in the order sheet that the accused persons had been acquitted as per the judgment separately typed, signed and dated. However, a complaint was made that the learned Trial Judge had acquitted the accused persons, but no judgment had been rendered. The High Court issued a memorandum to the District and Sessions Judge to inquire into the matter and submit the report. The report indicated that no judgments were found in the records of the cases. The learned Trial Judge had purportedly delivered the judgment, but they were not available on record as the judgments were not actually dictated, dated or signed.

[31] After that, the matter was placed before the Full Court of the High Court, and the resolution was passed, placing the Trial Judge concerned under suspension in contemplation of a departmental enquiry. The Full Court also decided to transfer the cases in question from the Court of trial Judge concerned to the Court of the District and Sessions Judge concerned for rehearing and disposal.

[32] In the above facts, The Hon'ble Supreme Court was called upon to consider whether the learned Trial Judge had really pronounced the judgment of acquittal on 31.10.2007 and whether the High Court could have, in the exercise of its administrative power, treated the trial as pending and transferred the same from the Court of Second Additional Sessions Judge to the Court of District and Sessions Judge for rehearing and disposal.

[33] Accordingly, the Hon'ble Supreme Court commenced its judgment by observing the following:

> "Performance of judicial duty in the manner prescribed by law is fundamental to the concept of rule of law in a democratic State. It has been quite often said and, rightly so, that the judiciary is the protector and preserver of rule of law. Effective functioning of the said sacrosanct duty has been entrusted to the judiciary and that entrustment expects the courts to conduct the judicial proceeding with dignity, objectivity and rationality and finally determine the same in accordance with law. Errors are bound to occur but there cannot be deliberate peccability which can never be countenanced. The plinth of justice dispensation system is founded on the faith, trust and confidence of the people and nothing can be allowed to contaminate and corrode the same. A litigant who comes to a court of law expects that inherent and essential principles of adjudication like adherence to doctrine of audi alteram partem, rules pertaining to fundamental adjective and seminal substantive law shall be followed and ultimately there shall be a reasoned verdict. When the accused faces a charge in a court of law, he expects a fair trial. The victim whose grievance and agony have given rise to the trial also expects that justice

should be done in accordance with law. Thus, a fair trial leading to a judgment is necessitous in law and that is the assurance that is thought of on both sides. The exponent on behalf of the accused cannot be permitted to command the trial as desired by his philosophy of trial on the plea of fair trial and similarly, the proponent on behalf of the victim should not always be allowed to ventilate the grievance that his cause has not been fairly dealt with in the name of fair trial. Therefore, the concept of expediency and fair trial is quite applicable to the accused as well as to the victim. The result of such trial is to end in a judgment as required to be pronounced in accordance with law. And, that is how the stability of the creditability in the institution is maintained."

[34] The Hon'ble Supreme Court referred to the provisions in Section 353, 354, 362 and 363 of the Criminal Procedure Code and made the following observations:

"17. It is apposite to note that though CrPC does not define the term "judgment", yet it has clearly laid down how the judgment is to be pronounced. The provisions clearly spell out that it is imperative on the part of the learned trial judge to pronounce the judgment in open Court by delivering the whole of the judgment or by reading out the whole of the judgment or by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

18. We have already noted that the judgment was not dictated in open Court. Code of Criminal Procedure provides reading of the operative part of the judgment. It means that the trial judge may not read the whole of the judgment and may read operative part of the judgment but it does not in any way suggest that the result of the case will be announced and the judgment would not be available on record. Non- availability of judgment, needless to say, can never be a judgment because there is no declaration by way of pronouncement in the open Court that the accused has been convicted or acquitted. A judgment, as has been always understood, is the expression of an opinion after due consideration of the facts which deserve to be determined. Without pronouncement of a judgment in the open Court, signed and dated, it is difficult to treat it as a judgment of conviction as has been held in **Athipalayan, In re,1960 SCCOnLineMad 33** .

19. As a matter of fact, on inquiry, the High Court in the administrative side had found there was no judgment available on record. Learned Counsel for the appellants would submit that in the counter affidavit filed by the High Court it has been mentioned that an incomplete typed judgment of 14 pages till paragraph No. 19 was available. The affidavit also states that it was incomplete and no page had the signature of the presiding officer. If the judgment is not complete and signed, it cannot be a judgment in terms of

Section 353 CrPC. It is unimaginable that a judgment is pronounced without there being a judgment. It is gross illegality. In this context, we may refer to a passage from **State of Punjab and others V/s. Jagdev Singh Talwandi**, 1984 1 SCC 596 , wherein expressing the opinion for the Constitution Bench, Chandrachud, C.J. observed thus:-

"30. We would like to take this opportunity to point out that serious difficulties arise on account of the practice increasingly adopted by the High Courts, of pronouncing the final Order without a reasoned judgment. It is desirable that the final Order which the High Court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. Suppose, for example, that a final order without a reasoned judgment is announced by the High Court that a house shall be demolished, or that the custody of a child shall be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional or, as in the instant case, that a detenu be released from detention. If the object of passing such orders is to ensure speedy compliance with them, that object is more often defeated by the aggrieved party filing a special leave petition in this Court against the Order passed by the High Court. That places this Court in a predicament because, without the benefit of the reasoning of the High Court, it is difficult for this Court to allow the bare Order to be implemented. The result inevitably is that the operation of the Order passed by the High Court has to be stayed pending delivery of the reasoned judgment.

31. It may be thought that such orders are passed by this Court and therefore there is no reason why the High Courts should not do the same. We would like to point out respectfully that the orders passed by this Court are final and no appeal lies against them. The Supreme Court is the final Court in the hierarchy of our courts. Besides, orders without a reasoned judgment are passed by this Court very rarely, under exceptional circumstances. Orders passed by the High Court are subject to the appellate jurisdiction of this Court under Article 136 of the Constitution and other provisions of the concerned statutes. We thought it necessary to make these observations in Order that a practice which is not very desirable and which achieves no useful purpose may not grow out of its present infancy."

20. We have reproduced the aforesaid two passages from Jagdev Singh Talwandi (supra) case as the larger Bench has made such observations with regard to unreasoned judgments passed by the High Courts. The learned Chief Justice had noted that the practice is not desirable and does not achieve any useful purpose and it should not grow out of its present infancy. Despite the said observations, sometimes this Court comes across judgments and orders where the High Courts have announced the result of the case by stating

> "reasons to follow". We can only reiterate the observations of the Constitution Bench.
>
> 21. Having stated that, as is evincible in the instant case, the judgment is not available on record and hence, there can be no shadow of doubt that the declaration of the result cannot tantamount to a judgment as prescribed in the CrPC. That leads to the inevitable conclusion that the trial in both the cases has to be treated to be pending.

[35] The Hon'ble Supreme Court also held that the High Court had sufficient powers under Article 227 of the Constitution not only to quash and set aside the conviction but further to transfer the case to a different Judge for purposes of rehearing and disposal. It was held that the High Court was under a legal obligation to set aside the Order, which had no effect in law. The High Court had correctly done so as it must see that sanctity of justice is not undermined. The High Court had done so as it has felt that an order which is a mere declaration of result without judgment should be nullified and become extinct.

[36] Finally, the Hon'ble Supreme Court concluded by making the following observations:

> "29. The case at hand constrains us to say that a trial Judge should remember that he has immense responsibility as he has a lawful duty to record the evidence in the prescribed manner keeping in mind the command postulated in Section 309 of the CrPC and pronounce the judgment as provided under the Code. A Judge in charge of the trial has to be extremely diligent so that no dent is created in the trial and in its eventual conclusion. Mistakes made or errors committed are to be rectified by the appellate Court in exercise of "error jurisdiction". That is a different matter. But, when a situation like the present one crops up, it causes agony, an unbearable one, to the cause of justice and hits like a lightning in a cloudless sky. It hurts the justice dispensation system and no one, and we mean no one, has any right to do so. The High Court by rectifying the grave error has acted in furtherance of the cause of justice. The accused persons might have felt delighted in acquittal and affected by the Order of rehearing, but they should bear in mind that they are not the lone receivers of justice. There are victims of the crime. Law serves both and justice looks at them equally. It does not tolerate that the grievance of the victim should be comatosed in this manner."

[37] Even recently, the Hon'ble Supreme Court (in **K. Madan Mohan Rao V/s. Bheemrao Patil** C.A No. 6972/2022 decided on 26.09.2022), after considering Anil Rai (supra), Jagdev Singh Talwandi (supra) held that a party to litigation could not be expected to wait indefinitely for the availability of reasons of the Order of the Court. The guidelines and observations in Anil Rai (supra), Jagdev Singh Talwandi (supra) remain fundamental to the course of disposition of justice in any case before the Court,

and the principle set out therein must be followed. The Hon'ble Supreme Court was concerned with an issue where an order was pronounced but even after more than three months, reasons were not forthcoming, and the judgment was not available to either of the parties.

[38] In **Balaji Baliram Mupade & anr. V/s. The State of Maharashtra & Ors.** (Civl Appeal No.3564/2020 decided on 29.10.2020) , the Hon'ble Supreme Court held that judicial discipline requires promptness in the delivery of judgments - an aspect repeatedly emphasized by the Court. The problem is compounded where the result is known but not the reasons. This deprives any aggrieved party of the opportunity to seek further judicial redressal in the next year of judicial scrutiny. The Hon'ble Supreme Court referred to the decision of the Constitution Bench in Jagdev Singh Talwandi (supra) and Anil Rai (supra). The Court held that this Court has forcefully restated the principles in these decisions on several occasions, including in **Zahira Habibulla H. Sheikh & Ors. V/s. State of Gujarat & Ors.**, 2004 AIR(SC) 3467 , **Mangat Ram V/s. State of Haryana**, 2008 7 SCC 96 and Ajay Singh & anr. (supra)

[39] Finally, the Hon'ble Supreme Court disposed of the appeal by making the following observations:

> "10. We must note with regret that the Counsel extended through various judicial pronouncements including the one referred to aforesaid appear to have been ignored, more importantly where oral orders are pronounced. In case of such orders, it is expected that they are either dictated in the Court or at least must follow immediately thereafter, to facilitate any aggrieved party to seek redressal from the higher Court. The delay in delivery of judgments has been observed to be a violation of Article 21 of the Constitution of India in Anil Rai's case (supra) and as stated aforesaid, the problem gets aggravated when the operative portion is made available early and the reasons follow much later.
>
> 11. It cannot be countenanced that between the date of the operative portion of the Order and the reasons disclosed, there is a hiatus period of nine months! This is much more than what has been observed to be the maximum time period for even pronouncement of reserved judgment as per Anil Rai's case (supra).
>
> 12. The appellant undoubtedly being the aggrieved party and prejudiced by the impugned Order is unable to avail of the legal remedy of approaching this Court where reasons can be scrutinized. It really amounts to defeating the rights of the appellant to challenge the impugned Order on merits and even the succeeding party is unable to obtain the fruits of success of the litigation.
>
> 13. We are constrained to pen down a more detailed order and refer to the earlier view on account of the fact that recently a number of such orders have

come to our notice and we thought it is time to send a reminder to the High Courts.

14. We have little option in the aforesaid facts of the case but to set aside the impugned Order and remit the matter back for reconsideration of the High Court on merits, uninfluenced by the reasons which have been finally disclosed in respect of the impugned Order.

15. Needless to say, the matter would be taken up by a Bench not consisting of the Members who constituted the Bench earlier."

[40] In the facts of the present case, the learned Counsel agreed that the best course of action to be followed would be to quash and set aside the orders dated 05.03.2021 convicting and sentencing the respondents and remanding the matter to the learned JMFC, Quepem, B Court (and not A Court) for hearing final arguments based on the evidence already led by the parties and passing judgments and orders within a prescribed timeline.

[41] Considering the unfortunate facts and circumstances, the submissions made, and the law on the subject, we quash and set aside the orders convicting the respondents in Criminal Case no.161/NI/OA/2016/A and Criminal Case No.162/NI/OA/2016/A and remand and restore the two cases to the file of the learned JMFC, B Court at Quepem. Accordingly, these two cases shall stand transferred from A Court to B Court. For all this, we invoke the provisions in Article 227 of the Constitution.

[42] Upon remand, the learned JMFC, B Court must, based on the evidence already led in the matters, rehear the parties through their Counsel and pass final judgment and Order in terms of the law most expeditiously mindful of the directions in Anil Rai (supra). Copies of such final judgment and orders should be furnished immediately to the parties. Considering the peculiar facts and circumstances, the learned JMFC, B Court is directed to complete this exercise as expeditiously as possible, and no later than six weeks from the date an authenticated copy of this Order is filed before it.

[43] Since we have quashed the conviction orders and remanded the cases before learned JMFC, B Court, Quepem, the Criminal Appeal nos.52/2021 and 53/2021 instituted by some of the respondents seeking the same relief are rendered infructuous. Therefore, even those criminal appeals are hereby disposed of. Parties should produce an authenticated copy of this Order before the learned Sessions Court taking up these two appeals so that even these two appeals can be marked as disposed of.

[44] In our Order dated 11.07.2022, disposing of Criminal Writ Petition No.73/2022, we had directed that the said Order and the report of the Principal District and Sessions Judge be placed before the Registrar (Administration) to enable him to do the needful on the administrative side by following the law. Similarly, we now direct that a copy of this Order and the report dated 01.10.2022 made by the Principal

District and Sessions Judge be placed before the Registrar (Administration) so that he can do the needful in terms of the law. With reluctance, we adopt this course, as otherwise, we think that we too might be failing in our duties of superintendence.

[45] On behalf of the judicial institution, we sincerely apologize to the parties for the prejudice they suffered due to the non-preparation and non-furnish of the certified copies by the learned JMFC, A Court, Quepem, even though she convicted and sentenced some of the respondents in the above two cases. She suspended the sentence. But without the judgement, the convicted accused could not pursue their appeals, nor could the Petitioner recover the compensation awarded. As a result, the appeal Court could not proceed with the appeals, and the Petitioner had to institute two writ petitions before us for redressal.

[46] The rule is made absolute in the above terms. There shall be no order for costs

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2023(1)GDCJ100

PUNJAB AND HARYANA HIGH COURT

[Before Sureshwar Thakur; Kuldeep Tiwari]

Crm A (Criminal Miscellaneous Petition Against Acquitals) No 2456 of 2018

dated 16/11/2022

State of Haryana

Versus

Shyam Sunder

ORDER OF ACQUITTAL

Indian Penal Code, 1860 - Sections 376, 228-A, 420, 328 and 506 - Code of Criminal Procedure, 1973 - Section 164 - Negotiable Instruments Act, 1881 - Section 138 - Appeal - Order of acquittal - Held - Upon a bare reading of the examination-in-chief and cross examination of the complainant, it is crystal clear that there are material contradictions in the statements - She clearly admitted during her cross-examination that she never got her statement recorded before any authorities or any person regarding commission of rape upon her by the respondent till the time she filed the application upon which present FIR was registered - As per the complainant, the reason for not disclosing the incidence of rape for complete one year was because the accused was in possession of her obscene photographs, which were taken by him when she was unconscious - However, neither the prosecution agency recovered those photographs specifically when three different disclosure statements of respondent were recorded nor the complainant produced on record those photographs in order to substantiate the reason for delay in lodging the FIR - Appeal dismissed.

[Paras 15 and 22]

ભારતીય દંડ સંહિતા, 1860 - કલમ 376, 228-એ, 420, 328 અને 506 - ફોજદારી કાર્યરીતિ સંહિતા, 1973 - કલમ 164 - નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ એક્ટ, 1881 - કલમ 138 - અપીલ - નિર્દોષ છૂટકારોનો આદેશ - ઠેરવ્યું - ફરિયાદીની સર તપાસ અને ઊલટતપાસના ખુલ્લા વાંચન પર, તે સ્પષ્ટ છે કે નિવેદનોમાં ભૌતિક વિરોધાભાસ છે - તેણીએ તેની ઊલટતપાસ દરમિયાન સ્પષ્ટપણે કબૂલ્યું હતું કે જ્યાં સુધી તેણીએ અરજી દાખલ કરી ન હતી, જેના પર હાલની એફઆઈઆર નોંધવામાં આવી હતી ત્યાં સુધી તેણીએ પ્રતિવાદી દ્વારા તેના પર બળાત્કારના ગુના અંગે કોઈ પણ અધિકારીઓ અથવા કોઈ પણ વ્યક્તિ સમક્ષ પોતાનું નિવેદન નોંધ્યું ન હતું - ફરિયાદીના જણાવ્યા અનુસાર, બળાત્કારની ઘટનાને એક વર્ષ સુધી જાહેર ન કરવાનું કારણ એ હતું કે આરોપી પાસે તેના અશ્લીલ ફોટોગ્રાફ્સ હતા, જે તે બેભાન હતી ત્યારે તેના દ્વારા લેવામાં આવ્યા હતા - જો કે, ફરિયાદી એજન્સીએ ખાસ કરીને જ્યારે પ્રતિવાદીના ત્રણ જુદા જુદા ડિસ્ક્લોઝર સ્ટેટમેન્ટ રેકોર્ડ કરવામાં આવ્યા હતા ત્યારે તે ફોટોગ્રાફ્સ પ્રાપ્ત કર્યા ન હતા અથવા ફરિયાદીએ એફઆઈઆર નોંધવામાં વિલંબનું કારણ સાબિત કરવા માટે તે ફોટોગ્રાફ્સ રેકોર્ડ પર રજૂ કર્યા ન હતા – અપીલ ના મંજૂર.

[Paras 15 and 22]

Acts Referred:

Indian Penal Code, 1860 Sec. 376, Sec. 228A, Sec. 420, Sec. 328, Sec. 506
Code of Criminal Procedure, 1973 Sec. 164
Negotiable Instruments Act, 1881 Sec. 138

Counsel:

P P Chahar

JUDGEMENT

Kuldeep Tiwari, J.

[1] CRM-38642-2018

This is an application for condonation of delay of 92 days in filing the present appeal.

Heard, sufficient cause has been shown for condoning the delay in filing the appeal. Hence, the application is allowed.

Main case

[2] Instant application, for grant of leave to appeal, is directed against the order of acquittal recorded by Addl. Sessions Judge (Exclusive Court for Heinous Crime against Women and Children), Yamuna Nagar at Jagadhri. The Trial Court acquitted the accused-respondent from the charges framed under Sections 420, 376, 328, 506 IPC, 1860 vide judgment dated 28.03.2018.

[3] The appellant-State has assailed the impugned order on the ground that the statement of complainant/prosecutrix (name of the prosecutrix is withheld in view of provisions of Section 228(A) of IPC) hereinafter, referred as complainant, was not appreciated by the trial Court in its right perspective. And that the prosecution has proved its case beyond reasonable doubt. It is further submitted that apart from the statement of the complainant, prosecution successfully proved documentary evidence (that are/that were brought) on record, which further corroborate the version of the complainant and that the same is sufficient to bring home the guilt of accused.

[4] Before we examine the legality of the order of acquittal recorded by learned trial court, it would be apt to first deal with the factual matrix of the present case.

[5] The prosecution agency was set into motion on an application Ex.PW-6/A filed by the complainant, who was examined during trial as PW-7. In her complaint, she levelled allegations against respondent-accused that he had induced her to deliver Rs.10 lakhs and her jewellery items to him, under the assurance of providing job to her. Secondly, that on 22.10.2014, accused-respondent called her in his office "Prime Tech International" and gave her juice to drink and thereafter, she became unconscious and in her unconscious state accused raped her and took her obscene photographs. The respondent-accused also gave two affidavits and two cheques amounting to Rs.10 lakhs and Rs.1 lakh respectively. On the basis of aforesaid application Ex.PW-6/A, a formal FIR was registered. Matter was investigated; respondent-accused was arrested and he was subjected to medico-legal examination by Dr. Anoop Goel, Medical Officer, MLGH, Yamuna Nagar, examined as PW-2, during trial. The statement of the complainant was recorded under Section 164 Cr.PC. She was also subjected to medico-legal examination by Dr. Pragati Garg, Medical Officer, MLGH, Yamuna Nagar, examined as PW-3, during trial. It is apt to mention here that the victim refused to get her medical examination done. After completion of investigation proceedings, final report was filed before the learned trial court.

[6] Trial Court framed charges against the respondent-accused under Sections 420, 376, 328, 506 IPC, 1860 vide order dated 04.02.2016. In order to prove its case, prosecution examined as many as 10 witnesses whereas, Inspector/SHO Rajeev, Smt. Nirmal Kanta and Constable Pardeep were given up as unnecessary witnesses and witness Sanjay Tyagi was given up being won over by respondent-accused.

[7] Apart from the oral evidence, prosecution placed on record various documentary evidence. Learned trial court after considering the ocular and

documentary evidence recorded the finding of acquittal. Now the State has filed present application for grant of leave to appeal to challenge the order of acquittal. There is no dispute that the Code does not impose any such restriction upon Appellate Court while dealing with an order of acquittal. High Court has full power to appreciate the entire evidence to reach its own independent conclusion. It is open for High Court to re-determine the question of facts and law. For this, we place reliance upon the judgment passed by Hon'ble Supreme Court in **State of Maharashtra vs. Sujay Mangesh Poyarekar**, 2008 9 SCC 475.

[8] Hon'ble Supreme Court in **Chandrappa vs. State of Karnataka**, 2007 2 RCR(Cri) 92 laid down broad principles to be followed while dealing with an appeal against an order of acquittal, which are as under:

(1) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court, based on the evidence before it, may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as,'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

[9] In **Bishan Singh vs. State of Punjab**, 1974 3 SCC 288, Hon'ble Supreme Court held as under:

"22. It is well settled that the High Court in appeal under Section 417 of the Code of Criminal Procedure has full power to review at large the evidence on which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. No limitation

should be placed upon that power unless it be found expressly stated in the Code, but in exercising the power conferred by the Code and before reaching its conclusion upon fact the High Court should give proper weight and consideration to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge, who had the advantage of seeing the witnesses."

[10] Ordinarily, the order of acquittal will not be interfered with, lightly, merely because other view is possible. Upon passing of an order of acquittal, presumption of innocence in favour of the accused gets reinforced and strengthened, as laid down by Hon'ble Supreme Court in **Harijana Thirupala vs. Public Prosecutor, High Court of A.P.**, 2002 6 SCC 470.

[11] In view of the above legal preposition, as laid down by Hon'ble Supreme Court, we have examined the impugned order of acquittal and oral as well as documentary evidence led by the prosecution. We do not find any perversity or illegality in the order of acquittal recorded by the trial Court.

[12] The case of prosecution mainly revolves around the statement of the prosecutrix, who was examined as PW-7, apart from other documentary evidence. Therefore, it is important for us to examine whether the statement of the complainant is trustworthy and credible enough to bring home the guilt of the accused. It is a settled preposition of law that the testimony of the prosecutrix is sufficient to base conviction of the accused and no corroboration for the same is required. However, to that end, it is required that such testimony shall be credible and inspire enough confidence of the Court for it to be relied upon. The prosecution has to prove its case beyond reasonable doubt and onus cannot be discharged by merely establishing a fact on preponderance of probability.

[13] In the present case, complainant in her application Ex.PW-6/A made the following allegations:

"She (complainant) is resident of 'J' Colony, Camp, District XXX. She has filed a dowry case against her husband and in connection of that case, she used to come to Jagadhri Court. In August, September, 2013, she met with Shyam Sunder s/o Dharam Pal, resident of Buria Road, Jagadhri in the Premises of Jagadhri Court and they started talking each other. He assured her that he will get the decision in her favour as he is having contact with Higher Officers and will manage Government job for her, as he is having contact with Chief Minister, Uttar Pradesh. She came into his assurance because of her tension. Shyam Sunder used to meet her in car with red light. He demanded Rs.10 lacs from her for arranging job for her. From October 2013

to October, 2014, he called her in his office name and style as 'Prime Tank International' and pressurised her for doing bad act with her, but she shouted on him. He told her to have juice and after taking same, she became unconscious and taking the benefit of her unconsciousness, he raped her. He clicked her obscene photographs. She objected but Shyam Sunder said that if she wanted to get job, she will have to do all this. Thereafter, Shyam Sunder maintained physical relations with her forcibly. She said that she will complain against him before police. He started feeling sorry and said that he will return her money. He gave two affidavits and two cheques of his account to her in January and February, 2015 and he obtained her signatures on blank papers in connection with arranging job. Money and jewellery were given by her to Shyam Sunder in the presence of her relative Sanjay Tyagi s/o Sh. Prem Nath, resident of 'J' Colony, District XXX. Thereafter, Shyam Sunder met her for one/two times in her house and assured that he will return her money, but he did not return the same. Shyam Sunder met her at Pyara Chowk, where she asked about her money and photographs, otherwise, she will make complaint in the police station, on this, he extended threat to injure her life and fled from there. Action be taken against Shyam Sunder and her money, jewellery and photographs be recovered."

[14] When she was put to cross-examination, she could not stand by that. During her cross-examination, she categorically admitted that in her earlier complaint dated 04.07.2015 she did not allege the fact that on 22.10.2014 the accused called her to his office by the name "Prime Tech International" situated at Lal Dwara, Yamuna Nagar and offered her juice and thereafter she became unconscious and in her unconscious stage, accused committed rape upon her. It is important to reproduce the relevant extract of cross-examination, which may be read as under:

"I did not get scribe in my complaint, which was got filed in 04.07.2015 that on 22.10.2014, accused called me to his office by the name Prime Tech International situated at Lal Dwara, Yamuna Nagar and accused Shyam Sunder offered me juice as well as I drank the juice and became unconscious or that accused Shyam Sunder committed rape upon me. I never got recorded in my complaint dated 04.07.2015 that when I regained consciousness after some time, accused Shyam Sunder showed my obscene photographs which he had clicked in his mobile or that he threatened me not to disclose about that incident to anybody or that on the pretext, he started blackmailing me. Volunteered stated that I have not got recorded these facts in said complaint due to pendency of my matrimonial litigations and due to social blemish. I never got scribed in my complaint as well as in affidavit that accused also threatened me that he will tell the entire incident to my in-laws. I never got recorded in my complaint dated 04.07.2015 that he used to force me to maintain sexual relations with him under the pretext of showing my obscene

photographs to all. No such photographs on file. Volunteered stated that I have not got recorded these facts in said complaint due to pendency of my matrimonial litigations and due to social blemish. Accused Shyam Sunder has also moved complaint against me before S.P., Yamuna Nagar apprehending his false implication at my instance before the present case. Accused had filed another complaint against me on 19.03.2015. The enquiry of my complaint, which was filed in the month of July, 2015 was conducted firstly by DSP, Yamuna Nagar and thereafter, it was enquired by DSP, Bilaspur. I am aware of the fact that DSP, Bilaspur had given the findings on my complaint that this matter is related to money transaction."

[15] Upon a bare reading of the examination-in-chief and cross examination of the complainant, it is crystal clear that there are material contradictions in the statements. She is a well educated woman and is M.A. M.Phil. She clearly admitted during her cross-examination that she never got her statement recorded before any authorities or any person regarding commission of rape upon her by the respondent-accused till the time she filed the application on 02.10.2015 upon which present FIR was registered.

[16] From the above facts, it is crystal clear that the complaint dated 02.10.2015 was result of gross vice of pre-mediation and concoction.

[17] As per complainant, she was blackmailed by the respondent-accused on the pretext of her obscene photographs. However, those photographs were not placed on record by the prosecution. In her complaint filed before the police, she did not mention any date when she was subjected to rape. However, when she stepped into the witness box, during trial, she stated for the first time that the incident of rape occurred on 22.10.2014. For a complete year she opted to remain silent. Moreover, she filed a different complaint dated 04.07.2015 against the accused wherein, no allegation of rape was made.

[18] The complainant at the time of cross-examination has duly admitted that she had filed a complaint against the accused under Section 138 of Negotiable Instrument Act, 1883, which was subsequently dismissed vide judgment dated 04.12.2017 Ex.D-3. A perusal of the said judgment clearly depict that she did not level any allegation with regard to commission of rape by the accused person. In that complaint, the complainant alleged that she gave total sum of Rs.6,01,200/- and jewellery weighing 12 tolas to the respondent-accused for the purpose of doing some work/providing government job. However, when she stepped into the witness box and was subjected to cross-examination, she stated that the amount was taken by the accused for some personal work, which was never disclosed by the accused but she also stated that accused had also assured her to provide some government job. Upon finding a contradictory statement of the prosecutrix, learned Judicial Magistrate, Ist Class dismissed the complaint filed against the respondentaccused under Section 138 of Negotiable Instrument Act.

[19] Prosecution also examined Dr. Pragati Garg, Medical Officer MLGH, Yamuna Nagar as PW-3, who categorically deposed that prosecutrix refused to get herself medico-legally examined. The relevant extract of statement of PW-3 is read as under:

> "Stated that on 02.10.2015, L/ASI Menka had brought prosecutrix for medical examination, but she refused for the medical examination and also given in writing to this effect. MLR is Ex.PW-3/A, which bears my signatures. She had specifically stated that she is not under any pressure to refuse her medical examination."

[20] It is also important to note here that one of the important witnesses, namely, Sanjay Tyagi was not examined by the prosecution. As per the prosecution, Sanjay Tyagi was present at the time when the accused gave two affidavit and two cheques in January and February, 2015 and obtained signatures of the prosecutrix on blank papers in connection with the arranging some job. Hiding of an important witness causes dent in the prosecution story. Moreover, there is no evidence on record to prove that the complainant was administered some stupefying/intoxicating substance.

[21] As per the complainant, the reason for not disclosing the incidence of rape for complete one year was because the accused was in possession of her obscene photographs, which were taken by him when she was unconscious. However, neither the prosecution agency recovered those photographs specifically when three different disclosure statements of respondent-accused were recorded nor the complainant produced on record those photographs in order to substantiate the reason for delay in lodging the FIR. There is no dispute that in case where there are allegations of rape, delay in general is not fatal to prosecution case. However, in the present circumstances, where the statement of the prosecutrix is not credible, the relevant delay is also but one of the reasons, which was aptly considered by the trial Court in recording the order of acquittal.

[22] We thus, do not find any merit in the application for grant of leave to appeal filed by the applicant-State and therefore, the same is dismissed.

[23] Case property, if any, be dealt with and destroyed after the expiry of the period of limitation. Trial Court record be sent back

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2023(1)GDCJ107

HIGH COURT FOR THE STATE OF TELANGANA

[Before K Surender]

Criminal Appeal No 1158 of 2009 **dated 27/10/2022**

T Narayana Rao

Versus

S Sujatha

INTEREFERENCE FOR ACQUITTAL

A) Negotiable Instruments Act, 1881 Sec. 138 - Acquittal - Intereference for - Appellate Court in appeal cannot interfere with order of acquittal - Unless reasons given by trial Court are found to be not based on record or improbable, appellate Court in appeal against acquittal can show indulgence and reverse order of acquittal - Court while adjudicating appeal against appeal cannot reverse said order of acquittal only for reason of there being another view which can be taken to convict accused - Cannot be interfered with to set aside order of acquittal - Appeal dismissed

B) Criminal Jurisprudence - Indian criminal jurisprudence, accused has two fundamental protections available to him in a criminal trial or investigation - Firstly, he is presumed to be innocent till proved guilty and secondly that he is entitled to a fair trial and investigation - Both se facets attain even greater significance where accused has a judgment of acquittal in his favour - Judgment of acquittal enhances presumption of innocence of accused and in some cases, it may even indicate a false implication, has to be established on record of Court.

[Para 6]

એ) વટાઉખત અધિનિયમ, (નેગો. ઈન્સ્ટ્રુ. એક્ટ) 1881 – કલમ 138 – નિર્દોષ છોડી મૂક્યાંમાં દખલ કરવા બાબતે – અપીલ અદાલત નિર્દોષ છોડી મૂકવાનાં હુકમમાં દખલ કરી શકશે નહીં – જ્યાં સુધી ટ્રાયલ કોર્ટ દ્વારા નિર્દોષ છોડ્યાં સામેની અપીલમાં કારણ આધારિત અથવા અસંભવિત હોવાનું એપેલેટ કોર્ટને જણાયું ન હોય તો, તે તેને માણવા લાયક બનાવી શકે છે અને દોષમુક્ત થવાના હુકમને ઊલટાવી શકે છે – જ્યાં સુધી ટ્રાયલ કોર્ટ દ્વારા અપાયેલ કારણો આધારભૂત ન હોય, ત્યાં સુધી અથવા દોષમુક્ત કરવા સામેની અપીલમાં દોષમુક્ત કરવાનાં કારણો માટે કોઈ અન્ય દ્રષ્ટિકોણ મુજબ દોષિત ઠરતાં હોય, ત્યાં સુધી હુકમને ઊલટાવી શકતી નથી – અપીલ નામંજૂર.

બી) ફોજદારી ન્યાયશાસ્ત્ર – ભારતીય ફોજદારી ન્યાયશાસ્ત્ર – આરોપીને ખટલો ચલાવવામાં અથવા તપાસમાં તેના માટે બે પ્રકારના મૂળભૂત રક્ષણો મળી રહે છે – પ્રથમ તો જ્યાં સુધી તે દોષિત સાબિત ન થાય ત્યાં સુધી, તે નિર્દોષ છે એમ માનવામાં આવે છે અને બીજું એ કે, તે સુનાવણી અને તપાસ માટે હકદાર છે – બંને પાસાંઓ વધુ મહત્વતા ધરાવે છે, જેમાં આરોપમાં નિર્દોષ હોવાના ચુકાદા તેની તરફેણમાં આવી શકે છે – નિર્દોષ જાહેર કરવાનો ચુકાદો દોષિતની નિર્દોષતાની ધારણાંને વધારે છે – અને

કેટલાંક કિસ્સામાં તે ખોટી રીતે તેને સંડોવવામાં આવ્યો હોવાનું પણ સૂચવી શકે છે, જે તેણે આ બાબત કોર્ટના રેકર્ડ પર સ્થાપિત કરવી પડે છે.

Acts Referred:
Negotiable Instruments Act, 1881 Sec. 138

Counsel:
V Ch Naidu

JUDGEMENT

K Surender, J.

[1] The appellant aggrieved by the acquittal of the respondent/accused for the offence under Section 138 of the Negotiable Instruments Act vide judgment in CC No.41 of 2005 dated 13.02.2009 passed by the XI Additional Chief Metropolitan Magistrate, Secunderabad, filed the present appeal.

[2] The case of the complainant is that he has given hand loan of Rs.50,000/- to the accused on 06.05.2004. Ultimately on 10.09.2004, a cheque for Rs.50,000/- was given towards repayment of the debt to the complainant. When the said cheque was presented for clearance, the same was returned unpaid for the reason of 'funds insufficient' on 08.10.2004. A registered legal notice was sent on 25.10.2004 and having received the said notice, the accused gave reply notice on 01.11.2004.

[3] Learned Magistrate having examined the evidence produced by the complainant, who examined himself as P.W.1 and marked Exs.P1 to P5 and the evidence of accused who entered into the witness box and examined herself as D.W.1 and also examined another witness PW2 in support of the defence of the accused, found that the accused not guilty of the offence under Section 138 of the Negotiable Instruments Act on the following grounds;

i) Except the oral evidence of P.W.1, there is no other evidence to corroborate the handing over of loan amount to the accused in the back ground of the defence of the accused of denying totally the outstanding amount, the complainant ought to have produced evidence in support of his claim;

ii) No proof is filed by the complainant that he was having Rs.50,000/- at his disposal.

[4] XXX XXX XXX

[5] The defence of the accused was that the cheque was given to one Tara Kumari and misused by the complainant to file a false case. The said Tara Kumari is the friend of the wife of the complainant. In the back ground of the complainant failing to prove that the loan amount was advanced to the accused, the finding of the learned Magistrate that the accused had issued the cheque to one Tara Kumari and not to the complainant can be accepted in the back ground of the facts and circumstances of the

present case. The trial Court had the opportunity of examining the witnesses and also assessing the witnesses. The learned Magistrate having conducted trial found that the statement made by the complainant that an amount of Rs.50,000/- being given, was found to be false. The said finding appears to be probable, for which reason, the appeal cannot be sustained.

[6] The Hon'ble Supreme Court in the case of **Radhakrishna Nagesh v. State of Andhra Pradesh**, 2013 11 SCC 688 held that under the Indian criminal jurisprudence, the accused has two fundamental protections available to him in a criminal trial or investigation. Firstly, he is presumed to be innocent till proved guilty and secondly that he is entitled to a fair trial and investigation. Both these facets attain even greater significance where the accused has a judgment of acquittal in his favour. A judgment of acquittal enhances the presumption of innocence of the accused and in some cases, it may even indicate a false implication. But then, this has to be established on record of the Court.

[7] Only for the reason of there being another view which can be taken in the facts, the appellate Court in appeal cannot interfere with the order of acquittal. Unless the reasons given by the trial Court are found to be not based on record or improbable, the appellate Court in appeal against acquittal can show indulgence and reverse the order of acquittal. However, in the present case, when the reasons given by the learned Magistrate are reasonable, this Court while adjudicating the appeal against appeal cannot reverse the said order of acquittal only for the reason of there being another view which can be taken to convict the accused.

[8] For the said reasons, this Court is of the view that the findings of the learned Magistrate cannot be interfered with to set aside the order of acquittal.

[9] Accordingly, the Criminal Appeal is dismissed

2023(1)GDCJ110

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

[Before Bharat P Deshpande]

Bharat P Deshpande **dated 22/11/2022**

Tanveer Khatib; Oscar Vaz

Versus

State

TIME BARRED COMPLAINT

Code of Criminal Procedure, 1973 Sec. 354-Negotiable Instruments Act, 1881 Sec. 140, Sec. 139, Sec. 138, Sec. 142-complaint filed under Section 138 - dismissed-Appeal against rejected- complaint is found to be time barred- no application for condonation of delay -failed to prove case beyond all reasonable doubts-

rebutting presumption under Section 139- Cognizance of offences- after the prescribed period - Appeal allowed

[Para 48, 53, 54, 55]

ફોજદારી કાર્યરીતિ સંહિતા, 1973 કલમ 354-નેગોશિયેબલ ઇન્સ્ટ્રુમેન્ટ્સ એક્ટ, 1881 કલમ 140, કલમ 139, કલમ 138, -કલમ 138 હેઠળ નોંધાયેલી ફરિયાદ - નામંજૂર - ફરિયાદ સામે અપીલ સમય નો બાધ હોવાનું જણાયું છે - વિલંબના પાલન માટેની કોઈ અરજીનથી - તમામ વાજબી શંકાઓથી આગળ કેસ સાબિત કરવામાં નિષ્ફળ - કલમ 139- કલમ 139હેઠળની ધારણાને દૂર કરવી - નિર્ધારિત સમયગાળા પછી – અપીલ મંજૂર

[Para 48, 53, 54, 55]

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 354

Negotiable Instruments Act, 1881 Sec. 140, Sec. 139, Sec. 138, Sec. 142

Counsel:

Barbara Andrade, Pravin Faldessai, C Collasso

JUDGEMENT

Bharat P Deshpande, J.

[1] The appellant/original complainant is hereby challenging the judgment and order dated 16th December 2016 arising out of Private Criminal Complaint No.87/NIA/2011/B whereby the learned Magistrate at Mapusa dismissed the complaint filed under Section 138 of Negotiable Instrument Act and acquitted the respondent.

[2] Heard Ms. Barbara Andrade, learned Counsel for the appellant, Mr. Pravin Faldessai, learned Additional Public Prosecution for respondent No.2 and Ms. C. Collasso, learned Counsel for Respondent No.1.

[3] With the assistance of the learned Counsel for the respective parties, I perused the entire records and proceedings of the trial Court as well as the paperbook.

[4] In nutshell, it is the case put forth by the appellant/complainant that there was Memo of Understanding (MOU) dated 19th November 2009 executed between the appellant and respondent No.1 wherein the appellant agreed to buy property bearing Survey No.32/1 of village Colvale for a consideration of Rs. 7,50,000/- from the respondent. Since the respondent failed to perform his part, he issued a cheque for an amount of Rs. 15,00,000/- towards breach of contract and damages. On presentation of the said cheque with the bankers, it was returned with an endorsement “Opening balance insufficient”. A demand notice dated 19th February 2021 was issued which

was replied to by the respondent vide letter dated 7th March 2019 refuting the allegations in the notice. Complaint was filed under Section 138 of the Negotiable Instrument Act before the learned Magistrate at Mapusa. Process was issued against the respondent who appear and contest the matter. The appellant examined himself. Respondent No.1 examined himself and one witness. The learned Magistrate vide impugned judgment and order dated 16th December 2016 dismissed the complaint and acquitted the respondent.

[5] The learned Counsel for the appellant submitted that the impugned judgment is perverse and against the settled proposition of law as the learned Magistrate failed to draw presumption under Section 139 of Negotiable Instrument Act. The material brought on record by the respondent is not at all reliable to rebut such presumption. The appellant has produced receipt wherein respondent admitted that he is liable to pay Rs. 15,00,000/- towards non-performance of the contract and damages. Therefore, the impugned judgment needs to be quashed and set aside and the respondent be held guilty for the offence punishable under Section 138 of the Negotiable Instrument Act. Learned Counsel Ms.Barbara Andrade placed reliance on the following decisions:

1. Dr. Srishti Ashutosh Prabhu Dessai v/s. Mr. Dadamiyan M. Bagewadi and another (Cria No.23 of 2015)
2. **K.N. Beena v/s. Muniyappan and Another**, 2001 8 SCC 458
3. TarMahomed Haju Abdul Rehman v/s. Tyeb Ebrahim Bharamchari (O.C.J. Appeal No.58 of 1948)
4. **APS Forex Services Pvt. Ltd. v/s. Shakti International Fashion Linkers and others**, 2020 12 SCC 724
5. **Bir Singh v/s. Mukesh Kumar**, 2019 4 SCC 197
6. Bharthi Bhanudas Gaonkar v/s. Suresh Vinayak Azgaonkar,2011 SCCOnLineBom 141

[6] The learned Counsel for respondent No.1 supported the findings of the learned Magistrate and claimed that though presumption was drawn in view of the appellant, it stands rebutted by cogent and convincing evidence. Thereafter, the appellant failed to prove its case beyond all reasonable doubt and hence private complaint has been rightly dismissed. The learned Counsel for respondent No.1 then submits that the complaint filed under Section 138 of Negotiable Instrument Act was barred by limitation as it was filed beyond the period of limitation. She then claimed that there is no material on record to show as to how the figure of Rs. 15,00,000/- is arrived at towards damages and other expenses. She claimed that the receipt produced subsequently by the appellant is a fabricated document and the same is not reliable. She claimed that the cheque was issued somewhere in the year 2009 as security. However, the appellant failed to prove that the amount mentioned in the cheque was legally recoverable debt.

[7] Rival contentions falls for the consideration of this Court as under:

i) Whether the respondent succeeded in rebutting presumption under Section 139 of the Negotiable Instrument Act?

ii) Whether complaint is within limitation?

[8] In the complaint filed under Section 138 of the Negotiable Instrument Act, there are clear averments that the appellant and respondent were known to each other and that the respondent is in the business of selling properties in the State of Goa. The appellant was interested in purchasing some property whereas the respondent was holding Power of Attorney for Ms. Iris D'Souza and Mr. Walter Diniz Mendonca with respect to immovable property having a residential house bearing House No.15/3, together with larger property known as "Tolencho Sorvo" or "St. Roque Waddo" admeasuring 675sq.mtrs. bearing Survey No.32/1 of village Colvale, Bardez, Goa. The respondent offered the said property to the appellant for an amount of Rs. 7,50,000/-. The respondent also represented that the said property is having clear and marketable title and there is no dispute of any nature. Since the appellant liked the said property and on the basis of the representations made by the respondent, he agreed to purchase it for Rs. 7,50,000/-. Accordingly, a MOU dated 19th November 2009 was executed between the appellant and respondent who represented the owners of the said properties as their lawful attorney. The said MOU dated 19th November 2009 was registered before the Notary on the same date.

[9] The complaint further shows that the appellant noticed that some third party was trying to interfere with the said property and upon local inquiry he got the name of the said person as Paul Fernandes claiming to be caretaker of the said property. On inquiring with Mr. Paul Fernandes the appellant was informed that Ms. Iris D'Souza and Mr. Walter Diniz Mendonca are not the sole owners of the property. There was a notice board installed in the said property informing the general public that the said property is not for sale and the trespassers will be prosecuted. On seeking this information the appellant approached the respondent and requested him to restrain the said Paul Fernandes from interfering with the said property. However, the respondent started evading and giving flimsy reasons. The appellant made several attempts to obtain clear title of the said property by settling the issue with Paul Fernandes. Since there was no success, the appellant asked the respondent to return his amount with damages/loss. The respondent in due compliance and with mutual understanding issued a cheque of Rs.15,00,000/- in favour of the appellant drawn on Bank of Baroda, Mapusa Branch towards the return of amount paid by the appellant to him as well as compensation/damages due to failure on the part of the respondent in conveying the said property.

[10] The appellant then presented the said cheque with his bankers. However, it was returned unpaid for insufficient funds. Legal notice was issued to the respondent demanding the amount mentioned in the cheque, however, the respondent flatly refused to pay and threatened the appellant to file a false complaint at the police

station. The respondent replied to the legal notice by making false and frivolous allegations and thereby denying the liability to pay the said amount.

[11] The appellant filed his affidavit-in-evidence and thereafter, he was cross-examined at length. Respondent No.1 then stepped into the witness box by filing affidavit-in-evidence and examined one witness by Rajesh Ranjan, the Chief Manager of Bank of Baroda through whom the statement of Account in the name of respondent No.1 is produced on record.

[12] The learned Magistrate framed six points as observed in paragraph No.6 of the impugned judgment and order. All these six points are answered in negative.

[13] At this stage, it is required to observe that Chapter XVII of Code of Criminal Procedure 1973 ('CrPC' for short) deals with the judgment. Section 354 of CrPC mandate that the judgment contained point or points for determination, decisions thereon and the reasons for such decision. The whole purpose of framing of points is to understand the case put forth, the law applicable to the fact and the decision against it.

[14] In the matters arising out of Section 138 of the Negotiable Instrument Act, framing of point while delivering judgment assumes much importance as first of all the Magistrate has to consider ingredients of Sections 138 r/w. 139 of the Negotiable Instrument Act. Similarly, the Magistrate has to keep it in mind provision of Section 140 of the Negotiable Instrument Act which says that it shall not be a defence in a prosecution for an offence under Section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

[15] Thus, framing of points is a stage only when the judgment is dictated and not prior to it. At that stage, entire material is available with the Magistrate including the arguments of both sides. In the light of above facts, the duty of the Magistrate is to frame the correct point so as to arrive at a proper finding. If incorrect points are framed, a burden is unnecessarily shifting on either complainant or the accused and accordingly reasons are also affected.

[16] The matter in hand is one such example wherein points have been framed without looking at the material placed before it. Admittedly, in the present matter the accused did not dispute his signature on the cheque. The only explanation that came forward from the defence is that such cheque was issued towards some security. Thus considering ingredients of Section 138 r/w. Section 139 of the Negotiable Instrument Act, it was incumbent upon the Magistrate to frame proper points. The first point ought to have been as under:

1. Whether the accused succeed in rebutting presumption under section 139 of the Negotiable Instrument Act?

[17] Instead of framing such a point, the learned Magistrate presumed that the accused succeeded in rebutting such presumption and framed point No.1 putting burden on the complainant to prove that such cheque was issued toward legally

enforceable liability. By putting the unnecessary burden on the complainant by ignoring presumption of law under Section 139 of the Negotiable Instrument Act, the learned Magistrate mis-directed herself while forming the points and also discussing such points unnecessarily. Be that as it may, the fact remains that the entire case is based on MOU which is dated 19th November 2009 and the contents therein. Perusal of such MOU produced at Exh.8 before the Trial Court, it shows that Ms. Iris D'Souza and Mr. Walter Diniz Mendonca through their duly appointed and constituted attorney i.e. respondent No.1 represented to the appellant that there is a property bearing Survey No.32/1 together with house admeasuring 675sq.mts. for sale. The history as to how this property devolved upon the said vendors is disclosed. On page 5 before the start of terms and conditions it is mentioned in the MOU as under:

> "AND WHEREAS the party No.1 through their duly appointed Attorney Mr. Oscar Vaz have represented to the Party No.2 that they have a sufficient, clear and marketable title to the said property and have agreed towards the sale of the said property which is clearly described in the schedule below for Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand only)"

[18] The MOU then proceeds further and record as under in paragraphs No.1 to 9.:

> 1. That Party No..1 has agreed to sell the said property to Party No.2 for fair market value price of Rs. 7,50,000/- (Seven Lakhs Fifty thousand only).
>
> 2. That the party No.2 has advanced to Party NO. 1 Rs. 5,00,000/(Rupees Five Lakhs) towards this agreement for sale. Out of which is Rs. 2,50,000/- (Rupees Two lakhs fifty thousand only) issued through ING VYSYA., PANJIM BRANCH, CHEQUE NO.349732, dated 9/05/08 and Rs. 2,50,000/- (Rupees Two Lakhs fifty thousand only) by way of cash which is duly acknowledged by Party No. 1 of sum of having received the said sum of Rupees 5,00,000(Rupees Five Lakhs only).
>
> 3. That the balance sum of Rs. 2,50,000/- (Rupees Two lakhs fifty thousand Only) will be paid at the time of execution of sale deed.
>
> 4. That the Party No.1 has represented to Party No 2 that they have no lien, and encumbrances or loans of whatso ever nature on the said property.
>
> 5. That the party No.1 have represented to party No.2 that they have not signed any agreement for sale /Agreements, mortgage deeds/Sale Deeds/towards the said property in favour of any party.
>
> 6. That the party No.1 states that the said property is not involved in any process of acquisition , by the Government or any local body or any authority and keeps the party No. 2 indemnified toward the same.
>
> 7. That the Party No.1 undertakes to provide Party No.2 a clean, clear and marketable title of the said property including vacant and peaceful possession of the said property.

8. That the necessary stamp duty will be paid at the time of Executing the Sale deed in favour of party no 1

9. That this Agreement for Sale is signed as a stop gap arrangement between the parties and is enforceable in accordance to the provisions of Law applicable."

[19] From the reading of the above paragraphs and more specifically paragraph 2, it is clear that the appellant being party no.2 in the said MOU advanced to party No.1 i.e. the vendor through their attorney/respondent No.1 herein an amount of Rs. 5,00,000/- towards the agreement for sale. Out of said amount of Rs. 5,00,000/-, Rs. 2,50,000/- were paid through cheque dated 9th May 2008 issued through ING Vysya, Panaji Branch. Remaining amount of Rs. 2,50,000/- was paid by way of cheque which was duly acknowledged by respondent No.1. Thus, it is clear that before executing the MOU dated 19th November 2009, the amount of Rs. 2,50,000/- by cheque from ING Vysya Bank was paid in the month of May, 2008. There is no date with regard to the payment of Rs. 2,50,000/-. Be that as it may, the MOU shows that an amount of Rs. 5,00,000/-was paid by the appellant to the vendors through respondent No.1 intending to purchase the said property. Admittedly, the MOU is not the Agreement Of Sale. It is only an understanding that the appellant intends to purchase the said property. The appellant failed to produce on record the Agreement of Sale though it was considered that the MOU is itself an Agreement to Sale the suit property.

[20] The disputed cheque is dated 7th February 2011 for an amount of Rs. 15,00,000/- issued in favour of the appellant. It is the contention of the appellant that though he paid only Rs. 5,00,000/- intending to purchase the said property, respondent No.1 issued a cheque of Rs. 15,00,000/- which includes the costs and damages for non-performance of the said agreement. Thus, admittedly the amount which the appellant paid to respondent No.1 as per the MOU was Rs. 5,00,000/-. Therefore, it was for the appellant to establish as to how additional amount of Rs. 10,00,000/- is calculated towards the so called damages/compensation and whether the respondent no.1 acknowledged that he is liable to pay such amount which include the initial payment of Rs. 5,00,000/- together with additional amount of Rs. 10,00,000/- towards damages and compensation.

[21] MOU produced at Exh-8 is totally silent about the eventuality of non-performance of the said agreement and what would be method of refund of the advance paid and whether the appellant would be entitled to claim damages/compensation. Returning back to the complaint filed under Section 138 of the Negotiable Instrument Act, there are no averments or calculations disclosed therein as to how the figure of Rs. 15,00,000/- was arrived at when amount paid by the appellant was only Rs. 5,00,000/-. Averment in paragraph Nos.12 and 13 of the complaint show that the appellant directed the respondent to return the said amount along with damages/loss caused to him for non-performance of the said agreement. Accordingly, the respondent in due compliance of the said MOU issued a cheque for an amount of

Rs. 15,00,000/-, towards the return of the amount advanced by the accused as well as compensation/damages for having failed to execute the Sale Deed. Thus, the complaint filed before the learned Magistrate is silent as to how the figure of Rs. 10,00,000/- is arrived at towards damages/compensation. Similar are the averment in the affidavit-in-verification at Exh-4 and also in affidavit-in-evidence at Exh-31 filed on behalf of the appellant before the learned Magistrate. Cross-examination of the appellant therefore assumes importance. It was suggested to the appellant that he obtained the said cheque as security from respondent No.1 which he had denied. Similarly, the appellant admitted on page 4 of the cross-examination that in the MOU an amount of Rs. 7,50,000/-was mentioned. He claimed that the said amount was received in the year 2008 but subsequently incidental costs such as surveyor fees, Form I and XIV taxes, to do succession deed, lawyer fees which were not accounted were included and that is how the accused issued a cheque of Rs. 15,00,000/-.

[22] Further question put to the appellant asking whether such amount of Rs. 15,00,000/- is reflected in any document. He answered that there is one receipt to that effect. He claimed that such receipt was given to him by respondent No.1 in the month of March 2010 along with the cheque. He admits that there is no date on the said receipt. He denied the suggestion that no such receipt was issued along with the cheque by respondent No.1. He also denied the suggestion that the contents of the said receipt including the amount is in his own handwriting.

[23] It is admitted fact that after the cheque was dishonoured, the appellant issued legal notice which is dated 19th February 2011 wherein the details of cheque issued in favour of the appellant which include advance amount together with compensation/damages for failure to execute Sale Deed is mentioned in paragraph No.1. Respondent no.1 responded to such legal notice by his reply notice dated 7th March 2011. In the said reply respondent no.1 clearly denied about his liability to pay the amount mentioned in the cheque. It is a specific case that such a cheque was issued as security at the time of executing MOU in the year 2009 and the same has been misused. Whereas specific statement that such cheque was never issued in discharge of any legally enforceable liability or debt. Thus respondent No.1 made his defence clear at the time of sending reply i.e. before filing the complaint under Section 138 of Negotiable Instrument Act. In such circumstances, it was incumbent upon the appellant to come up with the appropriate averments in the complaint by showing as to how the amount of Rs. 15,00,000/- is arrived at when the MOU only refers to payment of Rs. 5,00,000/- as advance. The only document which appellant subsequently relied upon is the so called receipt, the contents of which reads thus:

> "Given to Mr. Tanveer Khatib, a sum of Rs.15,00,000/- by cheque No. 513842, drawn on Bank of Baroda, Mapusa Branch, towards security deposit against the Agreement for sale of the property (House plot) bearing Survey No.32, Sub-Division 1 of Colvale Village admeasuring about 700m2, situated at Colvale, Bardez, Goa. In the event that on the stipulated dated being 16-5-

09 I am unable to deliver the above said house plot by completing the Deed of Sale, in that case you may deposit the given cheque for recovery of advance paid amount alongwith calculated damages.

Sd/-

[24] On perusal of contents therein, though figure of Rs. 15,00,000/- is mentioned therein, it clearly shows that such cheque was handed over to the appellant towards security deposit against the agreement for sale of the property (house property) bearing Survey No.32 Sub division 1 of the Colvale village. It further refers that in the event that on the stipulated date being 16th May 2009, respondent No.1 is unable to deliver the above said house plot by completing the deed of sale, in that case the appellant may deposit the said given cheque for recovery of advance paid amount along with calculated damages. The stipulated date found referred in the above receipt is dated 16th May 2009, which is admittedly prior to MOU dated 19th November 2009. Thus, one thing is clear that even if such receipt is executed by respondent No.1 which bears no date, it was prepared and signed much prior to 16th May 2009. It further show that the cheque in question was given as security deposit against the agreement for sale, much prior to the MOU. Thus, by executing MOU, the terms and conditions between the appellant and the respondent stands modified. This MOU executed on 19th November 2009 is conspicuously silent about in such receipt signed and executed by respondent No.1 in favour of the appellant and more so handing over of any cheque bearing No.513842 drawn on Bank of Baroda for an amount of Rs. 15,00,000/- as security deposit against the agreement of sale. There is absolutely no explanation coming forward from the appellant as to why the MOU is silent about execution of any receipt by respondent No.1 in favour of the appellant much prior to 16th May 2009. Thus, it clearly shows that the terms and conditions agreed between the parties were modified by the MOU dated 19th November 2009 which nowhere reflect or refer to any receipt executed much prior to 16th May 2009.

[25] In the cross-examination of Dw1, he admits the signature on the said receipt at point "A". However, he specifically claimed that such receipt was signed by him when he handed over the cheque to the appellant. Apart from this, there is absolutely no cross-examination of Dw1 on this receipt.

[26] Thus, it is clear from the above observation that the so called receipt at Exhibit-9 is much prior to the MOU dated 19th November 2009 and, therefore, in absence of any reference of such receipt in the MOU, contents of such letter cannot be considered as terms and conditions executed between the parties specifically when such terms and conditions, if any, were modified by the MOU dated 19th November 2009.

[27] Respondent No.1 stepped in the witness box and filed his affidavit-in-evidence in support of his defence. He has been examined at length. Testimony of respondent no.1 is not at all shaken in the cross-examination except the fact that he was unable to produce clear title to the property which he agreed to sell to the

appellant. That apart, evidence of respondent No.1 clearly goes to show that he received only Rs. 5,00,000/- towards advance for sale of such property. In cross-examination of respondent No.1/Dw1, no suggestion was put to him that the cheque amount includes damages/compensation to the tune of Rs. 10,00,000/- over and above Rs. 5,00,000/-paid as advance. Even the receipt at Exh.-9 nowhere mentioned that the amount of Rs. 15,00,000/- is legally due to the appellant including damages. Neither the complainant nor any document justify quantifying such damages to the tune of Rs,10,00,000/-. No prudent man would agree to pay damages/compensation to an amount of Rs. 10,00,000/- for receipt of advance of Rs. 5,00,000/-. At the most such person may agree to return advance together with interest. Even calculating interest, it would not come to the figure of Rs. 10,00,000/-. No doubt it is not the case of complainant/appellant herein that additional amount of Rs. 10,00,000/- was toward the interest. Thus, from the material produced before the trial Court, it is clear that there is serious doubt in connection with the amount over and above Rs. 5,00,000/- as received by respondent No.1 towards advance. This aspect has been brought on record from the cross-examination of the appellant and also from the evidence of respondent No.1 in clear terms. The preponderance of probability clearly shows that no prudent man would agree to pay compensation of Rs. 10,00,000/- in such circumstances. Thus, the amount mentioned in the cheque as Rs. 15,00,000/- cannot be considered as legally recoverable debt from respondent No1. Accordingly, respondent No.1 succeeded on preponderance of probability in discharging the onus and dislodging presumption under Section 139 of Negotiable Instrument Act.

[28] The learned Magistrate though in other words, found favour with the defence raised by respondent No.1 and accepted that the amount mentioned in the cheque cannot be considered as legally recoverable debt. In other words, the learned Magistrate observed that respondent No.1 succeeded in dislodging presumption under Section 139 of the Negotiable Instrument Act.

[29] After holding that respondent No.1 dislodged presumption successfully, the onus then shift on the appellant and this time he has to prove that amount mentioned in the cheque is legally recoverable debt, beyond all reasonable doubt and without having in his favour any presumption under Section 139 of the Negotiable Instrument Act.

[30] Evidence brought on record nowhere proves that respondent No.1 was liable to pay Rs. 15,00,000/- as debt to the appellant. Thus,by considering above aspects, observations of the learned Magistrate cannot be faulted with.

[31] In the case of **Dr. Sristhi**(supra), this Court while relying upon case of **Rangappa** (supra) observed that presumption under Section 139 of the Negotiable Instrument Act could be rebutted by the cogent and convincing evidence though on preponderance of probabilities. Such observations are in fact support the arguments and contentions raised by respondent No.1 in the present matter.

[32] In the case of **K.N. Beena**(supra), the Supreme Court relied upon the case of **Hitel Dalal v/s. Bratindranath Banerjee**, 2001 6 SCC 16 and observed that

presumption could be rebutted or discharged by proving contrary. Mere denial or rebuttal in reply to the legal notice is not enough. Applying the same principle to the matter in hand, respondent No.1 stepped into the witness box and led evidence which is sufficient enough to prove contrary and to rebut the presumption and this again support the case of respondent No.1.

[33] In the case of **TarMohomad Haji Abdul Rehman, APS Forex Services Pvt. Ltd., Bir Singh and Bharthi Bhanudas Gaonkar**(supra), proposition is same that the presumption under Section 139 of the Negotiable Instrument Act is a rebuttable presumption and the accused is entitled to rebut it by showing preponderance of probability either through the material placed by the complainant and his cross-examination and/or by leading evidence to prove contrary. Thus, it is in fact support a case of respondent No.1 herein.

[34] The decision cited by the learned Counsel Ms. Collasso as referred above are also on the same proposition of law which need not to be discussed again and again. Each case has to be considered on its own facts and circumstances and it is for the Magistrate to conclude as to whether presumption has been rebutted successfully.

[35] Coming back to the matter in hand, above discussion found in the impugned judgment cannot be faulted with as the entire material has been considered and only thereafter the learned Magistrate observed that the presumption under Section 139 of the Negotiable Instrument Act stands rebutted.

[36] The impugned judgment up to paragraph 12 shows discussion with regard to point No.1. However, what is disturbing is the remaining portion of a judgment starting from paragraph No.13 onward wherein the points framed in paragraph No.6 and more specifically points No.2 to 6 were taken together. While adverting to such points and giving findings on it, the learned Magistrate in paragraph No.17 of the impugned judgment decided points No.2 to 5 in negative only on the ground that point No.1 was answered in negative.

[37] Respondent No.1 raised a specific plea that the complaint filed under Section 138 of the Negotiable Instrument Act was beyond limitation and point No.6 in paragraph No.6 of the judgment was framed with that effect. However, there is absolutely no discussion on the aspect of limitation though finally it was answered in negative.

[38] Surprisingly, point No.2 which reads thus:

> "Whether the complainant proves that the cheque was present within its validity period?"
>
> Record goes to show that the cheque is dated 07th February 2011 drawn on Bank of Baroda in the name of the appellant/ complainant. It was presented for encashment with Canara Bank, Vasco on the same date i.e. on 7th February 2011 and it was returned unpaid by Bank of Baroda vide its memo dated 8th February 2011 which is at Exh-6. Thus, it clearly shows that the

cheque dated 7th February 2011 was presented on the same day and it was returned unpaid on the next date.

[39] Thus, cheque was presented within its valid period. The normal validity of an negotiable instrument/cheque is three months from the date of issue of such cheque. Therefore, answering the point No.2 in negative is clearly required to be considered as perverse as evidence suggest otherwise.

[40] The point No.3 which reads thus:

"Whether the complainant proves that such cheque was dishonest (to be read as dishonoured) for the reason "opening balance sufficient"?

Interestingly the learned Magistrate answered this point also in negative though the memo of return of cheque produced at Exh-6 by the appellant from Bank of Baroda, Panaji, shows reason of return of cheque as "opening balance insufficient". Thus, answering this point No.3 in negative is against evidence on record and therefore needs to be considered as perverse.

[41] Point No.4 reads thus:

"Whether the complaint proves that the demand notice was sent within the prescribed period?

Surprisingly, this point is also answered in negative. The record shows that the appellant issued legal notice dated 19th February 2011 addressed to respondent No.1 which is produced at Exhibit-7 (Colly). This notice was sent to two different addresses of the respondent. The acknowledgment card produced at Exhibit-7 (Colly) shows that such notice was received by respondent No.1 on 21st February 2011. Section 138 of the Negotiable Instrument Act and more specifically clause (b) reads thus:

"138 (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid."

[42] Thus reading of above provision show that the drawer of cheque or the holder in due course must issue notice in writing demanding the amount mentioned in the cheque to the payee within a period of 30 days from the date of intimation from the bank regarding return of cheque. In this matter as discussed earlier, the Bank of Baroda intimated the appellant vide memo dated 8th February 2011 at Exhibit-6 that the cheque is returned for the reasons "opening balance insufficient". The legal notice demanding the amount mentioned in the cheque was issued on 19th February 2011 and it was received by respondent No.1 on 21st February 2011. Thus, the appellant/complainant proved that demand notice was seen within the prescribed period and hence point No.4 ought to have been answered in affirmative and not in negative.

[43] The learned Magistrate was therefore misdirected herself in answering these points even though evidence suggests otherwise.

[44] Coming to the last point No.6 which reads thus:

"Whether the complainant proves that the complaint is filed within the limitation period?"

[45] No doubt this point is answered in negative which means that the complaint is not filed within limitation. However, there is absolutely no discussion in the reasoning part of the judgment as to on what ground complaint was not filed within limitation. The casual approach in answering points is writ large.

[46] The written submissions filed on behalf of respondent No.1 before the learned Magistrate are on record wherein specific arguments were advanced that the complaint was time barred. Such written arguments are found at Exhibit-99 in the record of the trial Court. The first statement in the written argument is that the complaint is time barred and specific dates are mentioned therein.

[47] Since the entire material is on record and there are no disputes with regard to the dates, it is necessary to look into such argument which was also canvassed by the learned Counsel Ms. Collasso while arguing the present appeal. Relevant dates are necessary to find out whether the complaint under Section 138 of the Negotiable Instrument Act was filed within limitation. The dates which are relevant are as under:

1. Cheque is dated 7th February 2011.

2. Cheque was returned by Bank of Baroda on 8th February 2011

3. Demand notice was issued on 19th February 2011

4. Demand notice was received by respondent No.1 on 21st February 2011

5. The period of 15 days from the date of receipt of demand notice expired on 7th March 2011.

6. The period of one month for filing a complaint expired on 6 th April 2011.

7. The complaint was filed before the learned Magistrate on 8 th April 2011.

[48] Section 142 of the Negotiable Instrument Act reads thus:

142. Cognizance of offences

[(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138:

[Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.]

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.

[(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,-

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.-For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]

[49] Above provision starts with a non-obstante clause and, therefore, the period of limitation mentioned to entertain the complaint excludes all other provisions mentioned in Criminal Procedure Code. It further says that no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint in writing made by a payee or as the case may be the holder in due course of the cheque and as such complaint is made within one month of the date on which cause of action arise under clause 'c' of proviso to Section 138.

[50] Thus clause 'c' of Section 138 needs to be considered which says thus:

"(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

[51] The words "within 15 days of the receipt of the said notice" assumes importance. In the present matter, admittedly respondent No.1 received demand notice on 21st February 2011. Thus, he was supposed to make payment of the amount mentioned in the cheque within 15 days of the receipt of the said notice. Such period expired on 7th March 2011.

[52] The complaint is required to be filed in writing within one month of the date on which cause of action arises. Thus, the cause of action accrued to the appellant on expiry of 15 days from the date of receipt of notice i.e. on 7th March 2011. Thus, he was required to file the complaint in writing "within one month from 7th March 2011". Admittedly, the complaint was filed on 8th April 2011 i.e. beyond the period of one month from the date of cause of action. Perusal of record and proceedings show that the complaint was presented on 8th March 2011 and it was registered on the same day. Neither the Registry at the office of learned Magistrate nor the learned Magistrate

noticed the above aspect and did not raise any objection at that time. Similarly, the appellant stepped into the witness box by filing an affidavit in verification at exhibit-4 and producing necessary documents. However, the complaint as well as the affidavit-in-verification show that cause of action to file complaint arised on 9th February 2011 as no payment was effected by 8th March 2011.

[53] The dates mentioned above clearly show that respondent No.1 received notice on 21st February 2011 and from that date he was supposed to make payment within 15 days. Thus considering 8days of February and 7days of the month of March 2011 which comes to total of 15 days, the said period of 15 days expired on 7th March 2011. Thus cause of action arose on expiry of 15 days i.e. on 8th March 2011 as mentioned in Section 138(c) of Negotiable Instrument Act. However, Section 142(c) specifically provides that the complaint in writing shall be filed within a period of one month. Therefore, the word within is significant and not to be construed otherwise. The complaint must be filed within a period of one month. Thus, if cause of action arose on 8th March 211, the complaint ought to have been filed within one month i.e. on or before 7th April 2011 as it has to be within a period of one month from the accrual of cause of action. The complaint was admittedly filed on 8th April 2011 and there is no application for condonation of delay. Though the learned Magistrate answered point No.6 in negative holding that the complaint was beyond the period of limitation, there was no proper discussion while answering such point.

[54] Having said so, it is clear that the appellant has miserably failed to prove his case beyond all reasonable doubts as respondent No.1 succeeded in rebutting presumption under Section 139 of the Negotiable Instrument Act. Secondly, the complaint is found to be time barred and thus appeal must fail.

[55] As observed earlier, it is high time for the Magistrate specially dealing with the matters under Section 138 of the Negotiable Instrument Act to properly frame points so as to answer it independently or if taken jointly with reasoning on all points. The impugned judgment though gives separate reasons while answering point No.1, such findings are recorded in view of incorrect framing of points. Be that as it may, from the material placed on record, the appeal deserves to be rejected for the reasons recorded above.

O R D E R

1. Appeal stands rejected.
2. Parties shall bear their own costs
