

IN THE HIGH COURT OF BOMBAY AT GOA
Criminal Revision Application No.11 of 2016

M/s. Kalpana Mines and Minerals,
Through its Proprietress,
Smt. Kalpana Gawade,
Major in age, married,
House No.852/5, Mainkar Niwas,
Laxmi Nagar, Behind Indian Overseas Bank,
Alto-Porvorim, Bardez, Goa.

..... Applicant

V e r s u s

M/s. Muneer Enterprises,
having their Branch officer at A1 – Hoor Mansion,
Near Bilal Mashid, Chandravaddo,
Fatorda, Margao, Goa through its
Attorney Tabrej M. H.

..... Respondent

Mr. S. Vales, Advocate for the Applicant.
Mr. Shivan Desai, Advocate for the Respondent.

CORAM: C. V. BHADANG, J.
RESERVED ON 14TH JUNE, 2016.
PRONOUNCED ON 4TH JULY, 2016.

JUDGMENT:

By this criminal revision Application, the petitioner takes exception to the judgment and order dated 13/1/2016 passed by the learned Sessions Judge at Margao in Criminal Appeal No.60/2013, by which the appeal filed by the petitioner is dismissed and the judgment and order dated 10/4/2013 passed by the learned Judicial Magistrate First Class at Margao in Criminal Case No.209/OA/NIA/2010/D convicting the petitioner for the offence punishable under section 138 of the Negotiable Instruments Act 1881 (the Act for short) and the

consequent sentence of simple imprisonment for six months and for payment of compensation of Rs.1.5 crores has been confirmed. This Court (S. B. Shukre, J) by an order dated 3/3/2016 in Criminal Misc. Application no.45/2016 had fixed this revision application for final disposal at the admission stage. In such circumstances, the revision application is taken up for final disposal by consent of the parties.

2. The facts necessary for the disposal of the application may be stated thus.

The accused, Smt. Kalpna Gawade is the proprietress of Kalpna Mines and Minerals and is engaged in the business of supplying iron ore. According to the respondent/complainant, the petitioner had agreed to supply 50,000 DMT of iron ore having 54.00% Fe content and the respondent had agreed to purchase the same as per the agreement between the parties. The respondent had paid an amount of Rs.2.50 crores by Demand Draft which was duly acknowledged by the petitioner. However, the petitioner failed to supply the iron ore as agreed. She however repaid Rs.1 crore towards part payment/refund of the amount which was received by the respondent. It was contended that towards the balance amount, the petitioner issued a cheque bearing no.699624 dated 12/3/2010 for an amount of Rs.1.50 crores drawn on Indian Overseas Bank, Porvorim branch. The cheque got dishonoured for want of sufficient funds. Hence the respondent issued a notice dated 22/7/2010, which was returned unclaimed. This led the

respondent to file a complaint under section 138 of the Act against the petitioner.

3. At the trial the respondent examined Shri Tabrej Hinglajkar, PW1. and produced certain documents on record. The petitioner did not examine herself nor led any evidence in defence.

4. The learned Magistrate convicted the appellant and sentenced her to simple imprisonment for six months and to pay compensation of Rs.1.5 crores to the respondent. This was affirmed by the learned Sessions Judge in appeal, which brings the petitioner to this Court.

5. I have heard Shri Vales the learned counsel for the petitioner and Shri Desai the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have perused the record and have gone through the judgments of the Courts below.

6. The learned counsel for the petitioner has pointed out to an agreement (Exhibit 51) dated 13/1/2010 between M/s. Grand Resources as the buyer and M/s. Kalpna Mines and Minerals as the seller. The learned counsel has specifically referred to Clause 7 of the same under which the buyer was supposed to pay to the seller an advance amount of Rs.2.5 crores by demand draft in favour of M/s.

Chowgule and Company payable at Vasco da Gama, Goa. The balance was to be released against every 5000 metric tonnes delivery. It is submitted that the agreement Exhibit 51 was produced during the cross examination of PW.1. He submits that the said agreement is not between the petitioner and the respondent for supply of iron ore. It is submitted that PW.1 has admitted that the respondent and M/s. Grand Resources are distinct entities and none of the partners of the respondent firm are the partners of M/s. Grand Resources. The learned counsel has extensively referred to cross examination of PW.1 in order to submit that it is in total variance of the case set up in the complaint. It is submitted that the Courts below were not justified in discarding the glaring inconsistencies in the evidence of PW.1 saying that they are of minor character. The learned counsel submits that although there is a presumption arising under section 118 r/w section 139 of the Act, it cannot be the sole basis for recording conviction. It is submitted that in any case the petitioner has discharged the burden on preponderance of probability. The learned counsel has placed reliance on the decision of **K. Prakashan Vs. P. K. Surenderan** reported in (2008) 1 SCC 258 and **Krishna Janardhan Bhat Vs. Dattatraya G. Hegde** reported in 2008 A.I.R S.C. 1325. It is submitted that there is no evidence on record that the amount of Rs.2.50 crores was transferred to the account of Ms. Chowgule and Company. The learned counsel has also pointed out that the demand draft Exhibit 53 is dated 11/1/2010. However, the amount of the demand draft is shown to be debited to the

account of the respondent, much thereafter i.e 12/3/2010, which is not properly explained. The learned counsel has also taken exception to the notice, Exhibit 44 saying that it was not addressed to Kalpana Gawade, Proprietress of M/s Kalpana Mines and Minerals. It is submitted that the Courts below were swayed away by the presumption arising under section 118 r/w 139 of the Act in finding the petitioner guilty. He, therefore, submits that the impugned orders are based on gross mis-appreciation of the evidence on record and resultantly the finding is rendered perverse which requires interference by this Court.

7. On the contrary, it is submitted by the learned counsel for the respondent that the petitioner has failed to discharge the burden arising out of the presumption under section 118 r/w 139 of the Act. It is submitted that although the petitioner came with a defence that the subject cheque was in respect of a different transaction, he failed to substantiate the same as the petitioner neither entered into the witness box nor examined any defence witnesses. It is submitted that the petitioner has also not explained as to why the amount of Rs.1crore was transferred by the petitioner in the account of the respondent by RTGS on 12/3/2010. It is submitted that the Courts below have rightly found that the discrepancies in the evidence of PW.1 are of a minor nature and that the respondent has established his case. He submits that the scope of interference available in revisional jurisdiction is limited. Unless and until it is found that the the finding recorded is

perverse, no interference is called for. In the submission of the learned counsel for the respondent the impugned orders do not exhibit any perversity requiring interference. He, therefore, submits that the petition be dismissed.

8. On hearing the learned counsel for the parties and on perusal of the record, I find that the impugned judgment and orders cannot be sustained for reasons more than one. Before proceeding to consider the rival circumstances and the submissions made, it is necessary to state that the parties have not raised any ground based on want of the territorial jurisdiction of the Magistrate to entertain the complaint or the authority of PW.1 to depose on behalf of the respondent. A perusal of para 12 of the judgment of the learned Magistrate would also show that the objections in respect of the authority of PW.1 to depose on behalf of the complainant was not pressed. Thus there is no need to examine the issue about the territorial jurisdiction of the learned magistrate or the authority of PW.1 to depose on behalf of the respondent. Let us now consider the material contentions raised by the parties.

9. The respondent came with a clear case that the petitioner had agreed to supply 50000 DMT iron ore to the respondent for consideration of Rs.2.50 crores which was paid to the petitioner vide demand draft Exhibit 53 dated 11/1/2010. This is the consistent case

set up right from the time when the notice Exhibit 44 was issued which is replicated in the complaint and the chief examination of PW.1. However a perusal of the cross examination of PW.1 would show that the respondent has drastically changed the said case and has introduced altogether a new case. PW.1 states that the agreement between the petitioner and the respondent for supply of iron ore was a written agreement and he can produce the same. Then he states that the said agreement was with the sister concern of the complainant. He thereafter produced a copy of the agreement at Exhibit 51. The said agreement clearly shows that it was between M/s. Grand Resources as the buyer and the petitioner as the seller and not between the petitioner and the respondent. That apart, Clause 7 of the said agreement shows that the consideration amount towards the purchase of iron ore was to be paid by demand draft in favour of M/s Chowgule and Company. Coming back to the evidence of PW.1, he states that the respondent is a partnership firm comprising of four partners namely, Sayeed Nayeemuddin, his two sisters and one Aleem Ahmed. He states that the respondent firm is registered in Karnataka and he was looking after the affairs of the said firm in Goa. He states that the notice and the complaint was drafted as per his instructions. He states that the written agreement referred by him between the petitioner and the respondent is the same agreement which is produced at Exhibit 51 (which is in fact an agreement between the petitioner and one M/s. Grand Resources). He claimed that M/s Grand Resources is also a

partnership firm of which one Sayeed Nazeemuddin, Sayeed Asimuddin, Sayed Zuber and 7 others are the partners. He states in categorical terms that none of the partners of the respondent firm are the partners of M/s. Grand Resources. However, still maintains that they are sister concerns. He thereafter, ventured to add that as the partners of the respondent and M/s Grand Resources are related to each other, they are sister concerns. He further states that the amount of Rs. 2.5 crores was paid from the account of the respondent to Chowgule and Company (and not to the petitioner). He further states that the demand draft was in the name of Chowgule and Company and it was handed over to the petitioner. He adds that the demand draft was drawn in the name of M/s Chowgule and Company as the accused informed that the ore would be supplied through Chowgule and Company. He thereafter claims that the demand draft of Rs.2.5 crores was encashed. It is apparent that this case is not set up in the complaint.

10. PW.1 produced a statement of account issued by State Bank of India (Exhibit 52) and the demand draft at Exhibit 53, which is dated 11/1/2010. He admits that the money towards the demand draft should have been debited to the account of the respondent on 11/1/2010 or prior to that. When he was confronted with the entry in Exhibit 52 where the said amount is shown to be debited on 12/3/2010 he makes a volt face saying that this is not the statement he intended

to produce and will produce the relevant statement on the next date. He in categorical terms states that he does not have any power of attorney on behalf of M/s Grand Resources. He admits that the respondent and M/s. Grand Resources are separate entities and he has no authority on behalf of M/s. Grand Resources. When he was confronted with the agreement dated 13/1/2010 stating that there is no reference of M/s. Muneer Enterprises in the said agreement, the witness states that the "complainant" as mentioned in para 6 of the complaint is wrongly mentioned and it should have been M/s Grand Resources.

If this is to be accepted, then the complaint ought to have been filed by M/s Grand Resources and not by the respondent which are said to be independent entities. Be that as it may, PW.1 further states that he has no document to show that the petitioner had agreed to supply iron ore to the respondent. He in categorical terms has admitted that no money was paid directly to the petitioner either by the respondent or Grand Resources, in terms of the agreement Exhibit 51. When a specific question was asked to PW.1 whether the petitioner had received the amount of Rs.2.5 crores (as per para 3 of the complaint) or whether the amount was paid in favour of M/s. Chowgule and Company, the witness stated that the amount was paid to Chowgule and company as per the instructions of the accused. At this stage it may be mentioned that this is yet another version coming for

the first time in evidence. In further cross examination this witness has stated that he has not stated anything in the complaint about repayment of Rs. 1 crore made by the petitioner. Last but not the least, this witness has stated in the concluding part of the cross examination that the statement Exhibit 58 does not show that the amount of Rs.2,50,12,500/- has been remitted to M/s. Chowgule and Company.

12. Thus, it is evident that there is total variance in the case set up in the notice and complaint and the one given in the cross examination. The agreement Exhibit 51 runs counter to the case set up in the complaint although PW.1 maintains that it is the same agreement under which the amount of Rs.2.5 crore was paid to the petitioner. It is true that the demand draft which was drawn in the name of M/s Chowgule and Company Exhibit 51 was shown to be handed over to the petitioner. However, the physical handing over of the demand draft to the petitioner cannot mean that the proceeds of the demand draft were drawn was paid to the petitioner. That apart, PW.1 has clearly admitted that the amount was paid to Chowgule and Company and in the concluding part of the cross examination has even admitted that the statement Exhibit 58 does not show that the amount was eventually credited to the account of Chowgule and Company. Thus even assuming that the amount was paid to Chowgule and Company on the instructions of the petitioner (which case has been for the first time set up in the cross examination), there is no evidence that the amount had

been eventually credited to the account of Chowgule and Company. As noticed earlier, PW.1 has gone to the extent of saying that the complainant in the case ought to have been M/s Grand Resources for which he has no authority. If that be so, can it be said that the discrepancies were of minor nature and not striking at the root of the case set up by the complainant. In my humble view the answer has to be in the negative. From the consideration of the evidence on record I find that the respondent has not come out with the real nature of the transaction and a clear case in which the subject cheque was allegedly issued by the petitioner towards the refund of the balance amount of Rs.1.5 crore.

13. The defence of the petitioner as elicited from the cross examination of PW.1 is that in March 2010, Advocate Dessai from Mapusa had introduced one representative of the respondent to Prakash Mainkar, the husband of the proprietress Kalpna Gawade and informed that the respondent supplies ore from Mines at Hospet in Karnataka and Prakash Mainkar had informed the representative that he requires about 10-50 tonnes of iron ore for blending and he is in immediate need of the same. It is further the defence that the representative of the respondent demanded an advance payment of Rs.2.50 crores towards which the respondent had passed two cheques one bearing no.699624 dated 12/3/2012 and for Rs.1.50 crores and cheque no. 699625 dated 15/3/2012 for Rs. 1.00 crore. However, as

the representative of the respondent insisted for immediate payment and therefore an amount of Rs.1.00 crore was transferred to the account of the respondent by RTGS on 12/3/2010. It is further the defence that as the representative failed to supply the iron ore on account of a ban on transportation of ore from Karnataka, the petitioner requested for refund of the amount of Rs.1 crore and also return of the cheque, which was not done. The defence so suggested to PW.1 has been denied. However, the question is whether the case as set up by the complainant itself is acceptable with glaring discrepancies and when the fact about payment of Rs.2.50 crores to the petitioner is not proved on record. At any rate, going by the evidence of PW.1 the amount was paid to Chowgule and Company and thus it cannot be accepted that the subject cheque issued by the petitioner was towards the refund of the balance consideration amount of Rs.1.5 crores.

14. The learned Magistrate has accepted in para 21 of the judgment that there are discrepancies in the complaint and the evidence of PW.1 "as regards the transaction for which the disputed cheque is alleged to be given". However, the learned Magistrate has held that the explanation given by PW.1, (which to my mind is none), "the discrepancies have to be accepted". The learned Magistrate has relied upon the acknowledgment on the draft Exhibit 53 saying that the petitioner has not disputed her signature on the demand draft. The learned counsel for the petitioner has pointed out that this aspect which

is specifically disputed. That apart as indicated earlier, the physical handing over of the draft and its acknowledgment cannot tantamount to payment of the amount which such draft represents. Further more, PW.1 himself stated that the amount was paid to Chowgule and Company. It is thus difficult to accept the reasoning that the discrepancies are either minor or have been properly explained.

15. It appears that it was argued before the learned Sessions Judge that the evidence is contrary to the contents of the complaint which is dealt with in para 34 and 35 which reads thus as under:

34. PW1, Tabrej has also clarified that before filing of the complaint there was a meeting between them and the Accused and the Accused assured them that the payment will be made as they will receive the amount from Chowgule and Company as no iron ore is supplied and accordingly, they made payment of one crore in favour of the Complainant and that is the reason he has not stated so in the complaint or in the legal notice as to why Demand Draft was drawn in favour of Chowgule and Company. He also stated that demand draft was drawn in the name of Chowgule and company since it was the Accused who had informed them that ore would be supplied

through Chowgule and Company. Merely because the fact is not mentioned in the complaint, the evidence cannot be belittled or disbelieved nor it can be said that the complainant has not proved the said transaction.

35. It needs to be mentioned that the Agreement at Exhibit 51 has been voluntarily produced by PW1, Tabrej and necessary averments have been made in the complaint with regard to ingredients of Section 138 of Negotiable Instruments Act. The contention of learned Advocate Dinesh Naik that there is evidence beyond averments which cannot be considered, cannot be accepted. The Demand Draft has been exhibited as Exhibit 53. The said Demand Draft dated 11.1.2010 is for 2.50 crores drawn in favour of Chowgule and Company. Importantly, there is an endorsement of Kalpana Mines and Minerals which has not been disputed nor there is any suggestion disputing the said endorsement of the Accused nor there is any clarification in that regard. The said Demand Draft at Exhibit 53 with the rubber stamp of the Accused having received the original of the Demand Draft

supports the case of the Complainant that the Demand Draft was drawn at the instance of the Accused and that she was involved in the said transaction, which was subject matter of the complaint."

16. In so far as the reference to M/s Grande Resources in the agreement Exhibit 52 is concerned it is held thus :

What therefore, emerges from the deposition of PW1, Tabrej coupled with the documents adduced on record is that payment of Rs.2.5 crores at Exhibit 52 was made by the Complainant on behalf of M/s Grand Resources of which complainant is a sister concern and that the ore was to be supplied by the Accused through Chowgule and Company and that it was at the instance of the Accused that the Demand Draft was drawn in favour of Chowgule and Company and that the Accused refunded rupees one crore by way of RTGS as reflected in Exhibit 58 and that the cheque dated 12.3.2010 at Exhibit 41 was issued in favour of the complainant in respect of the transaction of sale of ore arising out of agreement dated 13.1.2010.

17. Ultimately in para 38 the learned Sessions Judge has concluded that "the minor discrepancies which were clarified by PW.1, Tabrej have not assisted the accused in rebutting the presumptions nor establishment of the defence of the accused on the basis of preponderance of probabilities".

18. A perusal of the judgments of the Courts below show that they were swayed away by the applicability of section 118 r/w with section 139 of the Act. It is now well settled that while the complainant is required to establish the case beyond reasonable doubt, the accused can discharge the burden on preponderance of probabilities. This can be done on the basis of the cross examination of the witness of the complainant and any other material available on the record and it is not necessary that for this purpose the accused should enter into the witness box. The question really is about the extent to which such presumption can operate and, can the benefit of such presumption be availed when the case set up by the complaint, is found to be not substantiated. At the cost of repetition, it is necessary to state that the case is that the amount of Rs.2.50 crores was paid as consideration for purchase of iron ore which transaction never materialized and towards refund of the part of the consideration the cheque was passed. The proof of such a case presupposes that the payment by the respondent/complainant to the petitioner/accused is proved. In the present case admittedly the payment is made to Chowgule and

Company and not to the accused and as noticed earlier, even that aspect is not proved on record, as has been admitted by PW1 on basis of the statement Exhibit 58. Though the respondent claims that the said transaction is the same transaction as in Exhibit 51, the agreement on the contrary shows that it is between Ms/ Grand Resources and the petitioner. In my considered view, the findings as recorded by the Courts below are against the weight of the evidence and not borne out of the record and are clearly unsustainable.

19. There is one more aspect to which I would briefly refer.

20. In the case of **Dashrath Rupsingh Rathod Vs. State of Maharashtra** reported in (2014) 9 SCC 129, the Hon'ble Apex Court has held in para 58 of the judgment as under :

58(3) The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if

(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.

(b) if the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque, and

(c) if the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

21. Thus the issuance of the notice and non payment of the amount by the accused within the stipulated period is a part of the requirement of the cause of action. It is trite that section 138 of the Act being a piece of penal provision has to be strictly construed and there is no scope for its liberal interpretation. It would be necessary to examine whether the legal notice as required by the said section was properly issued and said to be served. The legal notice is addressed as under:

To
M/s. Kalpana Mines & Minerals,
H. No. 852/5, Mainkar Niwas,
Laxmi Nagar, Behind Indian Overseas Bank,
Alto-Porvorim, Bardez,
Goa- 403 521.

22. It is trite that unlike a company a proprietary firm has no independent existence as a legal entity. It is just a trade name under which an individual conducts his business. The notice does not show that it was addressed to the proprietress, Ms. Kalpna Gawade. The Courts below have relied upon the fact that the summons in the complaint was sent on the same address as that of the notice and therefore, the notice which was returned unclaimed must be held to be served on the petitioner. This may not be strictly correct because in the

complaint the petitioner was described as under:

M/s. Kalpana Mines & Minerals,
Through its Proprietress,
Smt. Kalpana Gawade Wife of Prakash Y. Mainkar
H. No.852/2, Mainkar Niwas,
Laxmi Nagar, Behind Indian Overseas Bank,
Alto-Porvorim, Bardez,
Ga- 403 521.

23. This is an additional reason why the impugned judgments cannot be sustained. For the foregoing reasons, I find that the impugned judgment of conviction and sentence recorded by the learned Magistrate and confirmed by the learned Sessions Judge will have to be set aside.

24. In the result the following order is passed:

ORDER:

- (i) The Criminal Revision application is allowed. The impugned judgment passed by the learned Sessions Judge in Criminal Appeal no.60/2013 and the judgment dated 10/4/2013 passed by the Judicial Magistrate First Class in Criminal Case No.209/NIA/2010/D convicting the petitioner for the offence punishable under section 138 of the N.I. Act are hereby set aside.
- (ii) The the petitioner is acquitted of the offence punishable under section 138 of the N.I. Act.

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(iii) The bail bonds of the petitioner stand cancelled.

C. V. BHADANG, J.

ap/-