

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM No.A-489-MA of 2014 (O&M)

Date of decision: December 06, 2016

M/s Bhakti Promoters Pvt. Ltd.

...Applicant

Versus

Pandit Bhuri Dutt Education Society and others

...Respondents

CORAM: HON'BLE MR. JUSTICE INDERJIT SINGH

Present: Mr.Ajay Bishnoi, Advocate for
Mr.M.S.Sindhu, Advocate
for the applicant.

Mr.Amit Chaudhary, Advocate
for the respondents.

INDERJIT SINGH, J.

Applicant-M/s Bhakti Promoters Pvt. Ltd. through its Director Rajesh Kathuria has filed this application under Section 378(4) Cr.P.C. seeking permission for leave to appeal against respondents Pandit Bhuri Dutt Education Society, Yogesh Sharma and Rajender, challenging the impugned judgment dated 27.01.2014 passed by learned Judicial Magistrate Ist Class, Hisar, vide which the accused-respondents were acquitted.

It is mainly stated in the application that accompanying appeal is being filed which is likely to succeed on the grounds taken therein. It is, therefore, prayed that leave to appeal be granted.

As per the record, the complainant M/s Bhakti Promoters Pvt. Ltd. through its Director Rajesh Kathuria filed a complaint against accused Pandit Bhuri Dutt Education Society, Yogesh Sharma, President and Rajender, Cashier under Section 138 of the Negotiable Instruments Act. As per complainant's version, as per the agreement executed between the complainant company and the accused society, the complainant had done the construction work of the accused society and accused issued two cheques bearing No.324455 dated 20.07.2008 and bearing No.324456 dated 30.07.2008 for an amount of ₹3 lakhs each, for discharging existing, outstanding and legally enforceable liability, in favour of the complainant, which on, presentation before the bank for encashment, were returned back unpaid with the remarks 'payment stopped by drawers'. Legal notice was served. When the amount was not paid, then the complaint was filed within time.

The accused in the statement under Section 313 Cr.P.C., stated that the complaint is false one. In defence, accused examined DW-1 A.K.Jain, Deputy Manager, SBI, DW-2 Pardeep Kumar, Vice President and DW-3 Prem Parkash.

Learned JMIC, Hisar, after appreciating the evidence, acquitted the accused-respondents vide impugned judgment dated 27.01.2014.

Aggrieved from the above-said judgment, present appeal along with application for grant of leave to appeal has been filed.

Notice of motion was issued and learned counsel for the respondents appeared and contested the application.

I have heard learned counsel for the parties and have gone

through the record.

At the time of arguments, nothing has been pointed out as to which material evidence has been misread and which material evidence has not been considered by the Court below. Nothing has been pointed out as to how the findings are perverse or against the law and what illegality has been committed by learned Court below.

Learned counsel for the respondent argued that CW1 Rajesh Kathuria, has admitted that the construction work was not completed by the complainant company and it had left the site of the construction without completing it. He further argued that at the time of agreement Ex.C.2, the cheques were issued as a security cheques which have been misused by the complainant. The alleged bills were never received by accused or any other person on their behalf. The running bills are in contradiction to the agreement Ex.C.2 which contains the payment plans.

On the other hand, learned counsel for the applicant argued that when the issuance of the cheques has been admitted, then presumption arises against the respondents.

From the record, I find that agreement Ex.C2 was admittedly executed between the parties. CW-1 Rajesh Kathuria admitted that the payment was to be done in part. As per the agreement Ex.C2, whatever work has been done by him, the bill for it has been issued. In the cross-examination, he also deposed that apart from the payment through cheques, no other payment was done by the complainant company. So, as per CW1, the payment was to be done in terms of agreement Ex.C2. The Court below perused the agreement which shows that there are payment plans in the agreement and first payment was to be done when the construction was upto

payment was to be done when the construction was upto door level and the payment was to be to the extent of 15% and the third payment was to be done when the construction was upto slab level and the payment was to be to the extent of 30%. The bills allegedly issued by the complainant company have been placed on record. The first bill Ex.C2/A shows that it is for the payment upto 30% and for two storeys and the work done has been shown upto slab casting. The Court held that this bill is contrary to the agreement Ex.C2 and bill is to the extent of 30% and that is also upto two storeys. Learned Magistrate held that there is deviation to the normal payment plan, which has not been explained by the complainant on the file and the bill being contrary to the agreement Ex.C2, is not reliable.

The Court below further held that this bill is suspicious as CW1 has deposed that he had done the construction on the ground floor and on the first floor, he had done the 'column work' and the area of the construction on the ground floor was 16,000 square feet and on the first floor was 10,000 square feet. It is also held that the first bill is of slab casting of two storeys, whereas, CW-1 has admitted in cross-examination that the work done on the second floor was only of the 'column work'.

Learned Magistrate, after discussing all this evidence on record, held that it appears that the third running bill was prepared by the complainant with malafide intention to cover the cheque amount. The third bill is also of the work done upto the level of slab casting. If the first running bill Ex.C2/A and third running bill Ex. C2/C are read in comparison to each other and the complainant had already claimed the payment for the work done upto slab casting in the first bill, there was no occasion to

issue/prepare the third running bill Ex.C2/C.

The Court below also gave the findings that as per the argument of the learned counsel for the complainant and endorsement given against mobile charges of ₹1 lakh and the factum of advance payment shown in the first running bill, it is clear that the amount of ₹1 lakh was paid by the accused to the complainant and if the amount of ₹1 lakh is deducted from the total amount of second and third running bills that Ex.C2/B and Ex.C2/C then it comes out to be ₹6,06,744/- minus ₹1,00,000/- equal to ₹5,06,744/- but the total of the cheques amount comes out to be ₹ 6 lakhs and the Court below held that there was no occasion for the accused to issue the cheque for ₹6 lakhs. The Court further held that as per cross-examination of CW-1, the cheques were issued by the accused after September 2008 but the cheques are dated 20.07.2008 and 30.07.2008 and the Court held that this fact also creates doubt.

The above minutely discussed evidence on record by learned Magistrate, shows that the findings have been given by the Court below as per evidence and cannot be held as perverse. It is settled law that even if the appellate Court has second view, it cannot set aside the findings, if the view taken by the trial Court is also correct as held by the Hon'ble Supreme Court in *Arulvelu & another vs. State represented by the Public Prosecutor & another, 2009(4) RCR (Criminal) 638*, has held as under:-

39. In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, a two Judge Bench of this Court of which one of us (Bhandari, J.) was a member had an occasion to deal with most of the cases referred in this judgment. This Court provided guidelines for the Appellate Court in dealing with the cases in which the trial courts have acquitted the accused. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the

presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, the Appellate Court must give due weight consideration to the decision of the trial.

3. The appellate court should always keep in mind the trial court had the distinct advantage of the demeanour of the witnesses. The trial court is in a better position to evaluate the of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

*40. This Court in a recently delivered judgment **State of Rajasthan v. Naresh @ Ram Naresh 2009 (11) SCALE 699** again examined judgments of this Court and laid down that "An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused. This Court has dealt with the scope of interference with an order of acquittal in a number of cases."*

41. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law.

*42. In **State of Uttar Pradesh v. Banne Alias Baijnath and Ors. (2009) 4 SCC 271**, a two-Judge Bench of this court of which one of us (Bhandari, J.) was a member had an occasion to deal with this controversy in detail has laid down some of the circumstances in which this court would be justified in interfering with the judgment of the High Court. The circumstances discussed in the judgment are illustrative not exhaustive.*

- i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;*
- ii) The High Court's conclusions are contrary to evidence and documents on record;*
- iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;*
- iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;*
- v) This Court must always give proper weight and consideration to the findings of the High Court;*
- vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.*

43. The appellate courts must keep in view these aforementioned observations in dealing with the appeals where the trial court has acquitted the accused.”

In view of the above law and discussion, I find that the impugned judgment dated 27.01.2014 passed by learned JMIC, Hisar, is correct, as per law and evidence and does not require any interference from this Court. No ground is made out for grant of leave to appeal and therefore, the present application stands dismissed.

December 06, 2016
Vgulati

(INDERJIT SINGH)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No