

IN THE HIGH COURT OF BOMBAY AT GOA.**CRIMINAL MISCELLANEOUS APPLICATION NO.154 OF 2017.**

Kala Mines and Minerals,
through its partner Shri Bipin
Chandra S. Kantak. ... Applicant.

Vs

Shri M. V. Krishnamurthy and
ors., ... Respondents.

Mr. Ajit Kantak, Advocate for the applicant.

Mr. Dharmanand Vernekar, Advocate for the respondents

Coram:-PRITHVIRAJ K. CHAVAN,J.
Reserved on :-25th July, 2017.
Pronounced on:-1st August, 2017.

ORDER:

By this application under Section 378(4) of the Cr.P.C. The applicant/original complainant seeks leave to appeal against the judgment of acquittal passed by the Sessions Judge, Panaji in Criminal Appeal No.129/2014 dated 30.9.2015 which was preferred against a judgment and order of conviction under Section 138 of the Negotiable Instruments Act passed by the learned Judicial Magistrate, First Class, Panaji, on 11.09.2014 in Criminal Case no.OA/860/2004/D.

2. I have heard the respective learned Counsel for a considerable period. The respective Counsel took me through the

evidence on record vis-a-vis the impugned judgment passed by the learned Sessions Judge.

3. Shri Kantak, learned Counsel for the applicant submits that undisputedly the respondents and the applicant had entered into a contract of supply and sale of Iron ore having 63.5% Fe on 06.3.2004. The respondents agreed to supply and sell around 43000 tons of the iron ore of the aforesaid grade to the applicant. Consideration was fixed at the rate of ₹2,425/- per metric ton as per the contract. It was also agreed between the parties that the payment was to be made on daily basis to one Pandurang@ Bhai Naik at Margao Goa. It is not disputed that the applicant accordingly deposited a sum of ₹35,00,000/- with said Pandurang@ Bhai Naik vide demand draft dated 6.3.2004 on HDFC Bank, Bangalore. It is also not in dispute that on the same day the respondent issued a cheque in favour of the applicant in the sum of ₹35,00,000/- drawn on Bank of India, Rajaji Nagar Branch, Bangalore. Since the cheque was returned unpaid for the reason stated in the complaint, the proceedings under Section 138 of the Negotiable Instruments Act came to be instituted by the applicant against the respondent no.1. The learned Counsel for the applicant also drew my attention to clause 3 and 4 of the contract which reads thus:-

"3 The SECOND PARTY shall effect payment for the Contract Grade Ore daily, for the ore delivered during

the previous day. Such payment shall be effected by handing over at Margao-Goa to Shri. Pandurang alias Bhaik A. Naik of Margao-Goa, a Demand Draft for the value of ore supplied during the previous day, which Demand Draft shall be drawn in favour of the FIRST PARTY(Business India Inc.) and payable at Bangalore. Payment so made by handing over the Demand Draft to Shri. Pandurang alias Bhai A. Naik shall relieve the SECOND PARTY from the obligation of making payment of the Contract Grade ore.

- 4. At the time of execution of this Agreement, the SECOND PARTY has deposited a sum of ₹35,00,000/- with the above referred Shri Pandurang alias Bhai A. Naik vide Demand Draft No.059100 dated 06.3.2004 of HDFC Bank, Bangalore Branch. Such deposit shall be held by the FIRST PARTY throughout the tenure of this agreement and shall be appropriated towards the price of the last delivery of ore."*

4. It is also brought to my notice clause 7 of the contract which contemplates that analysis of the order to be made by S. K. Mitra, Assayers, whose analysis report was agreed to be final and binding on both the parties. Since the respondents had committed breach of the contract though they had encashed the amount of ₹35,00,000/- by way of demand draft, it is contended on behalf of the applicant that they ought to have returned the amount. The learned Counsel also submits that the respondents had failed to rebut the presumption provided under Section 139 of the NIA.

5. On the other hand, Shri D. Vernekar, the learned Counsel for the respondents states that the cheque in question was given by the said Pandurang@ Bhai Naik and not by the respondents. He also drew my attention to the cross examination of the complainant at page 24 of the compilation wherein there is an admission that on 6.3.2004 the accused did not owe any liability or money towards the applicant.

6. It appears that the respondents had failed to honour the commitment to supply quality and quantity of the ore as agreed upon in the contract proved at Exh. 33.

7. In view of the evidence before the trial Court as well as recitals of Exh.33 needs to be meticulously re-appreciated and scrutinized in order to ascertain as to whether the learned Session Judge has correctly appreciated the facts and evidence. Without going deeply into merits, prima facie it reveals that this is a fit case in which leave needs to be granted to the applicant. Leave to appeal is granted. Office is directed to register the appeal.

8. Application stands disposed off.

PRITHVIRAJ K. CHAVAN,J.

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