

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL REVISION APPLICATION NO.407 OF 2001
WITH
CRIMINAL APPLICATION NO.477 OF 2017**

Gregory Roberts, Age 33 years,
Occ.Business, R/o.67, National Society,
Aundh, Pune-7.

Applicant

versus

1. The State of Maharashtra.

2. S.Badjate, Age 35 years, Occ.Business,
R/o.Konark Classic, Flat No.D-2, 1st Floor,
21 4/5 Bund Garden Road, Pune-1.

Respondents

Mr.Ameet Gharte i/by J.D.Khairnar, Advocate for applicant.
Ms.V.S.Mhaispurkar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

Date of reserving the Judgment : 25th January 2018
Date of pronouncing the Judgment : 4th June 2018

JUDGMENT :

1. The applicant has approached this Court by invoking revisional jurisdiction under Sections 397 and 401 of Code of Criminal Procedure, 1973 challenging the judgment and order dated 15th April 1998 passed by the Judicial Magistrate, First Class, Pune in Criminal Case No.2197 of 1996 and judgment and order dated 6th November 2001 passed by Sessions Court, Pune in Criminal Appeal No.88 of 1998.

2. The applicant was prosecuted for the offence under Section 138 of Negotiable Instruments Act, 1881 on the complaint filed by respondent no.2 which was numbered as Criminal Case No.2197 of 1996.

3. The brief facts of the complaint are as follows :

The complainant is a stock broker and deals in buying and selling of shares as his usual business on behalf of his clients. The accused approached the complainant to obtain his services and instructed him to enter into certain transactions on his behalf. The complainant duly complied with the instructions of the accused and on account of the same, a sum of Rs.5,43,474/- was due as on 12th February 1996 along with interest thereon. Towards part payment and in discharge of liability, the applicant-accused issued three cheques drawn on Bank of Maharashtra. Cheque No.46300 dated 13th February 1996 for Rs.1 lakh, cheque no.046299 dated 8th February 1996 for Rs.1.40 lakh and cheque no.046298 dated 7th February 1996 for Rs.1.45 lakh, were issued in favour of the complainant by the applicant-accused. All the three cheques in question were dishonoured by the bankers of the applicant-accused, when presented for encashment in the month of February-1996. The accused confirmed in writing the said dues as per statement of account in that behalf and further confirmed to pay a sum of Rs.5,43,474/- with interest thereon @ 2.5% per month and further stated that the said cheques be presented again for encashment with undertaking to honour the same. The complainant deposited the said cheques in his bank on 3rd July 1996. However, the said cheques

were returned by the bankers with remark “not arranged for”. The complainant received the written memo on 4th July 1996 issued by the bankers of the applicant-accused through his bank on 5th July 1996. The complainant thereafter issued notice to the accused on 13th July 1996 through his advocate and called upon him to pay the amount of cheques. The said notice was received by the applicant-accused, however, he failed to pay the amount. The applicant-accused forwarded the reply dated 24th July 1996 through his advocate raising false contentions. It was stated that there is an agreement between the complainant and the applicant-accused not to deposit the cheques by the complainant. The complainant denied the said agreement and called upon the applicant-accused to give particulars and copies of the agreement, as contained in letter dated 4th August 1996 and 19th August 1996. Thereafter the complaint was filed on 26th August 1996 before the Court of learned JMFC, Cantonment, Pune.

4. The Trial Court took cognizance of the complaint and issued process against the applicant-accused. In pursuance of the Court summons, the accused appeared before the Court. The particulars of the offence were read over and explained to the applicant-accused. The complainant examined three witnesses in support of his complaint. Witness no.1 is the complainant himself, witness no.2 Ramchandra Puranik is the bank officer of Bank of Maharashtra and witness no.3 Dhananjay Thite is the officer of Bank of Baroda, Pune Camp Branch. The applicant-accused examined himself as the defence witness. After recording the evidence and taking on record several documents, the learned Trial Court vide judgment and order dated 15th April 1998 convicted the applicant-accused for the offence

punishable u/s 138 of Negotiable Instruments Act, 1881 and sentenced him to suffer simple imprisonment for three months and directed to pay fine of Rs.10,000/- and in default, to suffer simple imprisonment for one month.

5. The applicant-accused challenged the said judgment by preferring Criminal Appeal No.84 of 1998. The said appeal was heard and finally decided vide judgment dated 6th November 2001. The appeal was partly allowed. The part of substantive sentence in the conviction order of the Trial Court was maintained. The order of Trial Court with respect to imposition of fine of Rs.10,000/- was set aside and in stead of payment of fine of Rs.10,000/-, the applicant-accused was directed to pay compensation to the complainant within ten days. During pendency of the appeal, the substantive sentence imposed by the Trial Court was suspended.

6. The applicant thereafter preferred this revision application. By order dated 10th December 2001, this revision application was admitted and the applicant was released on bail of Rs.5,000/- with one surety in the like amount. During pendency of the appeal, the applicant preferred Criminal Application No.477 of 2017 seeking directions for bringing additional material on record in the nature of report of Securities and Exchange Board of India (`SEBI') at Exhibit-X by amending the revision application accordingly. The revision application was dismissed for default since the advocate for the applicant was not present on 2nd July 2012. The applicant preferred Criminal Application No.350 of 2012 for restoration of the revision application. By order dated 14th January 2013, the revision application was restored to file subject to deposit of Rs.3.85 lakh by

the applicant in this Court. The notice of hearing of the revision application was served by the applicant-accused upon respondent no.2 and the affidavit dated 18th January 2018 has been filed in these proceedings.

7. Learned advocate for the applicant-accused submitted that both the Courts below have committed an error in convicting the applicant. The Courts below failed to take into consideration that the cheques were not issued in discharge of legally enforceable debt or other liability, which is a requirement to prosecute an accused for offence u/s 138 of Negotiable Instruments Act, 1881. It is further submitted that the transaction between the applicant-accused and the complainant is in the nature of Badla Trading which was banned from December-1993. Therefore, any amount claimed out of such Badla Trading is not a debt, which can be legally recoverable. Both the Courts have ignored the said aspect and have not appreciated the evidence in proper perspective. The Courts have erroneously rejected the claim of the applicant-accused that forward transactions or Badla transactions were banned by Pune Stock Exchange and the brokers indulging in the said practice were penalized and their licenses were suspended on the stock exchange. It is submitted that the Courts have failed to take into consideration the agreement executed between the parties wherein it was agreed that the subject cheques shall not be deposited by the complainant. It is submitted that the cheques were not issued for discharge of the liability of debt which is legally enforceable by law. It is also contended that the loss incurred by the complainant was not shown by him in his income tax return. Learned counsel relied upon Exhibits-22, 44 and 48. The documents refer to settlement no.37 of the financial year 1995 of

Pune Stock Exchange. It is submitted that shares of Reliance Industries Limited were sold on 15th December 1995. The settlement period was from 15th December 1995 to 21st December 1995. It is submitted that at the end of settlement, there was an outstanding position of 2000 shares of RIL sold short. These were carried forward at the official closing of Rs.210/- per share that is squared off the outstanding position at the end of settlement and renewed transaction in the next settlement with the same counter party in the same scrip for the same quantity at a price difference from the contracted price which included the interest payment. Exhibit-48 which is a bill dated 4th January 1996 refers to the settlement no.40 and indicate the carry forward of the transaction from settlement no.39 to settlement no.40 with the same counter party, the same scrip, the same quantity at the price difference from the contracted price, which included interest payment also. It is, therefore, contended that the transactions in Exhibit-22 made with Pune Stock Exchange were illegal in terms of sub-Section (2) of Section 16 of Securities Contracts Regulation Act, 1956 and are not enforceable by law. When the shares were bought and sold on delivery basis, physical delivery of the share certificates was given along with share transfer form to facilitate the transfer of ownership from the seller to the borrower. On the carry forward transactions there is no delivery of share certificates along with share transfer form as there is no intention to transfer ownership of the security. It is submitted that the complainant had agreed in the cross examination that when he received the shares, he issued receipts for them. Exhibit-45 is one such receipt issued by the complainant. The complainant had also agreed with regards to Exhibit-22 that he did not issue delivery slips. The transactions at Exhibit-22 were made without any intention to

transfer ownership of the securities. The complainant did not prove that the transactions in Exhibit-22 were genuine by producing any documents.

8. Learned counsel for the applicant-accused further submitted that the bulk of transactions between the applicant-accused and the complainant are Badla transactions or forward transactions. It is also the case of the applicant-accused that it was agreed between them vide agreement dated 30th April 1996 that in view of the agreement and undertaking given by the applicant-accused to repay the same dues along with stipulated interest @ 1% per week from 15th February 1996. The cheques in question stood cancelled. He produced the agreement at Exhibit-49. It is submitted that even in his reply to the notice issued by the complainant for the dishonour of cheques, a reference was made to the said agreement to counter the liability. It is contended that in spite of the said claim, the complainant presented the cheques in bank for clearance and committed breach of agreement. It is thus submitted that the complainant has not established that the cheques were issued in respect to legally enforceable liability and, therefore, the applicant-accused cannot be convicted for the said offence. Both the Courts below have failed to appreciate the said vital aspect and committed an error in convicting the applicant-accused. The entire prosecution itself was not tenable against the applicant-accused as the transactions between both the parties in relation to which the cheques were issued, were illegal and in view of explanation to Section 138 of Negotiable Instruments Act, 1881, the prosecution for the said offence was not maintainable in law.

9. The applicant-accused has also preferred an application for bringing additional material on record in the nature of report of SEBI annexed at Exhibit-X to the Criminal Application No.477 of 2017 preferred by the applicant. It is contended that the defence of the applicant is that the cheques were issued in discharge of legally enforceable debt as the transactions were in the nature of Badla transactions which are also called as forward trading transactions. It is stated that the applicant-accused had attempted to obtain relevant information but due to non availability of Right to Information Act then, the applicant could not secured the said information. The relevant information i.e. the report of SEBI was received by the applicant on 5th March 2010 from SEBI under Right to Information Report, 2005. It is submitted that there were genuine attempts by the applicant to obtain the relevant documents in support of his grounds from the beginning and hence, in exercise of powers u/s 391 of Cr.P.C, the applicant-accused be permitted to bring additional material on record.

10. I have perused the evidence on record and the findings of the Trial Court and the Appellate Court. There are concurrent findings of both Courts below convicting the applicant-accused for the offence u/s 138 of Negotiable Instruments Act, 1881. I could not find any reason to deviate from the findings of both the Courts below resulting in conviction of the applicant. The Trial Court has taken into account all the aspects. The defence raised by the applicant-accused has been dealt with by assigning reasons. The judgment of the Trial Court also indicate that the Court has scrutinized and appreciated the evidence on record and after giving opportunity to the defence, has held that the applicant-accused is liable to be

convicted for the said offence. The Appellate Court has confirmed the judgment of conviction by taking into consideration the evidence on record and the submissions advanced by both the parties. The complainant has examined himself and two other witnesses. The accused has examined himself as a defence witness to contend that the transactions were in the nature of Badla transactions, which are prohibited in law.

11. Admittedly from February-1993, the applicant-accused was dealing with the complainant in connection with purchase and sale of shares. The accused has issued cheques in question which were exhibited in evidence vide Exhibits-19, 20 and 21. The applicant-accused has admitted that the amount of cheques is due and payable to the complainant. However, the defence of the applicant-accused is that the alleged transactions are forward trading transactions, which are also called as Badla transactions, which were prohibited by Pune Stock Exchange, and therefore, the same are not legally enforceable. The complainant (PW-1) has brought on record that the applicant-accused is having previous transactions with him. There were transactions of buying and selling of shares. There is outstanding amount which was not paid by the applicant-accused. The case of the complainant is that the cheques were issued by the applicant-accused in favour of complainant in discharge of his liability. The complainant has proved the cheques in question. It is pertinent to note that the applicant-accused has admitted in evidence that he issued the cheques to the complainant, which were drawn on Bank of Maharashtra totally amounting to Rs.3.85 lakh. He also admitted that the cheques produced by the complainant are the same cheques. Thus, admittedly, the applicant-accused had issued the said cheques.

The applicant-accused also admitted that in February-1996 there was outstanding dues payable by him to the complainant. On the basis of this evidence, the Trial Court has observed that the applicant-accused has issued the cheques in question to the complainant in discharge of outstanding dues from him to the complainant. It is also observed that dishonour of cheque will attract penal provision envisaged under the Act only if the cheque had been drawn for the discharge, in whole or in part, of any debt or other liability of the prior to the payee. The test applied is not the amount of debt which is payable or recovered and a debt due means that particular liability is in existence.

12. In accordance with Section 138 of Negotiable Instruments Act, it shall be presumed unless contrary is proved, that the holder of the cheque received the cheque of the nature referred to in Section 138 of the Act for the discharge in whole or in part of any debt or other liability. In the present case, the complainant has proved that the cheques were issued by the applicant-accused. The said presumption is not rebutted by the applicant-accused in any manner. The applicant-accused had admitted issuance of cheques and that there were outstanding due from him to the complainant in February-1996. He also admitted that the cheques in question produced by the complainant are the cheques issued by him to pay for the amount due and payable to the complainant by him. Thus, the cheques were issued by the applicant-accused towards payment of amounts due and payable by him to the complainant. The complainant's case is that the transactions were bona fide. He produced the extract of account of the applicant, Exhibit-22. The applicant-accused admitted that he had signed the said extract of account but denied the written

contents of Exhibit-22. There is an endorsement on Exhibit-22 and below that endorsement the applicant-accused has signed. As per the said endorsement, the applicant-accused confirmed its dues to the complainant as per said statement of account. The applicant-accused undertook to honour the cheques. He admitted that he had some accounts with the complainant and the extract of account at Exhibit-22 is pertaining to the period from February-1996 and 31st May 1996. The accused has admitted that there were 12 to 15 genuine sale transactions maintained in Exhibit-22 extract of accounts and remaining transactions are Badla transactions. The applicant-accused also relied upon settlement no.39 at Exhibit-44 and receipt dated 29th May 1995 at Exhibit-45 as well as bill dated 29th October 1995 and 4th January 1996 vide Exhibits-45 to 48. In cross-examination, however, the applicant-accused admitted that there is no reference to these documents at Exhibits-44 to 48 that the alleged transactions are Badla transactions and does not mention in Exhibit-49 that the said transactions are in the nature of Badla transactions. He also admitted that in the correspondence between him and the complainant also, there is no reference of any Badla transactions.

13. After looking into all the aspects, the Trial Court has observed that there are two versions on record. According to the complainant the transactions are illegal and according to the complainant the same are bona fide. The complainant has proved that the cheques were issued by the applicant-accused in discharge of amount due. It was further observed that the defence has not examined any officer of Pune Stock Exchange to prove that the disputed transactions between him and the complainant are forward trading transactions,

which were banned by Pune Stock Exchange. The applicant-accused has also relied upon the agreement dated 30th April 1996, which according to him, cancels the cheques. The Trial Court perused the said documents at Exhibit-49 and it was noticed that the same was signed by applicant-accused and two attesting witnesses, however, the complainant is not a party to the said agreement and has not signed the same. The applicant-accused has admitted the claim of the complainant of sum of Rs.5,43,474/- and has given an undertaking to pay the said amount to the complainant with interest. However, according to the applicant-accused, in accordance with the agreement, the cheques in question were treated to be cancelled. It is apparent that the applicant-accused has admitted issuance of cheques. It is also borne by record that the amounts were due. The applicant-accused has also adopted dual defence which is contradictory to each other, that the transactions were forward trading transactions and banned by the stock exchange and also that the cheques stood cancelled in view of agreement wherein the liability was admitted but allegedly certain outstanding was incorporated in the agreement. It may be noted that the accused has admitted during the cross-examination that Exhibit-49 does not bear the signature of the complainant and there is no reference about the place of executing the said document and that the attesting witnesses have signed the said document in the presence of of complainant. He also admitted that by notice dated 23rd August 1996 the complainant had called upon the applicant-accused and informed him that he has not produced the copy of the agreement and that he has not mentioned in the correspondence with complainant that the alleged transactions are Badla transactions. The Trial Court, therefore, has observed that the agreement is not binding on the

complainant. The original was not brought before the Court and it was contended that the original is with the complainant. Thus, there is no substance in the defences raised by the applicant-accused.

14. On perusal of the documents at Exhibits-42 to 48, the Trial Court observed that there is no reference in those documents that the alleged transactions are Badla transactions. The accused failed to examine the Secretary of Pune Stock Exchange or any other witness to prove that the transactions between him and the applicant-accused are Badla transactions. It is also pertinent to note that the applicant-accused had presented the list of witnesses vide Exhibit-42 and stated that the Secretary of Pune Stock Exchange and the Director of SEBI, Mumbai are the defence witnesses. He had also prayed for issuance of summons to these witnesses, however, the applicant-accused did not examine the said witnesses to prove that the transactions between him and the complainant are Badla transactions and are banned by Pune Stock Exchange.

15. On the basis of evidence on record, the depositions of witnesses, cross-examination, documents exhibited in evidence, the Court has opined that the applicant-accused is liable to be convicted for the said offence. I have scrutinized the material on record and considered the observations made by the Trial Court as well as Appellate Court and I find no reason to accept the defence of the accused which was rejected by both the Courts below by concurrent findings. The Appellate Court in addition to the observations of the Trial Court, has also observed that the applicant-accused had entered into said transactions and thereafter issued the cheques and now contends that the said transactions were forward trading and illegal

transactions to save himself from the liability and he cannot take advantage of his own wrong even if the said contention is accepted as true.

16. The application for bringing additional material on record in the nature of report of SEBI is devoid of merits. The powers u/s 391 of Cr.PC cannot be exercised in the facts and circumstances of present case. It is contended by the applicant that he was making attempts to call the opinion right from inception but Right to Information Act was not available at the earlier point of time, and subsequently the applicant called the requisite information through RTI. In the application, however, it is submitted that the report of SEBI was received by him on 5th March 2010. However, he has preferred the said application on 4th September 2017 before this Court. Section 391 of Cr.PC empowers the Appellate Court to take further evidence or direct it to be taken while dealing with any appeal, if the Appellate Court thinks it fit that additional evidence is necessary and by recording its reasons may take such evidence itself or direct it to be taken by Magistrate. On perusal of the application preferred by the applicant-accused it can be seen that the prayer is to bring additional material on record in the nature of report of SEBI annexed at Exhibit-X. The application is bogus. It does not mention as to which witnesses the applicant-accused intends to examine to bring the said documents on record. In any case, there is no substance in the application as in the light of the observations of the Trial Court and the Appellate Court, the defence of the applicant that the cheques were issued in respect of Badla transactions has been rejected by assigning proper reasons. The Trial Court has observed that the complainant has proved that the cheques were issued by the

applicant-accused and that there were dues payable by the applicant-accused to the complainant at the relevant time. The applicant had also raised another defence on the basis of purported agreement stating that the cheques were annulled while admitting his liability. It is also pertinent to note that the applicant-accused has not examined any officer of Pune Stock Exchange or broker to prove that the disputed transactions between him and the complainant, are forward trading transactions and which are banned by Pune Stock Exchange. In spite of liberty, the applicant-accused did not avail of the same in support of his purported defence and now belatedly he cannot be permitted to prefer such an application which is also devoid of merits. From the record and as has been observed by the Trial Court, the applicant-accused had tendered the list of witnesses vide Exhibit-42 stating that he will rely upon the defence witnesses like the Secretary of Pune Stock Exchange and Mr.D.R.Mehta, Director, SEBI, Mumbai. He had also prayed for issuance of summons to these witnesses, however, he did not examine the said witnesses to prove that the transactions between him and the complainant are Badla transactions, which were banned by Pune Stock Exchange. He chose to examine himself as defence witness but could not fortify his defence. It is also pertinent to note that the complainant has produced the extract of account of applicant-accused at Exhibit-22. He has admitted that he has signed the same but only denied the contents of the same. The said document shows that the applicant-accused had admitted to pay liability of the amount of cheques in the statement of account. There was no reference in any correspondence or any other document that the transactions between both the parties were forward trading. Thus, there is no substance in the said defence and the same deserves to be rejected.

17. In view of the above, the findings of conviction imposed by the Trial Court and confirmed by the Appellate Court, are required to be accepted. While imposing sentence, however, the Trial Court has ordered that the applicant is sentenced to suffer imprisonment for three months and to pay fine of Rs.10,000/-. The sentence of fine was modified by the Appellate Court by maintaining substantive sentence of imprisonment. The Appellate Court directed that instead of payment of fine, the applicant-accused shall pay the compensation in the said amount to the complainant. These proceedings are pending between the parties since 1996. During pendency of the revision application, the applicant was directed to deposit Rs.3.85 lakh which is subject matter of the cheques in question. Learned counsel for applicant-accused submitted that liberal view may be adopted while imposing sentence by showing leniency. It is submitted that the applicant-accused has deposited Rs.3.85 lakh in this Court. He has also deposited Rs.10,000/- towards fine amount imposed by the Trial Court. Taking into consideration all the aspects and also looking into the fact that it is proved that the cheques were issued to the tune of Rs.3.85 lakh by the applicant-accused in favour of complainant in the year 1996, the sentence can be modified.

18. Hence, I pass following order :

OEDER

(i) The impugned judgment and order dated 15th April 1998 passed by the learned Judicial Magistrate, First Class, Cantonment Court, Pune in Criminal Case No.2197 of 1996 convicting the applicant for the offence u/s 138 of Negotiable Instruments Act,

1881, as well as the judgment and order dated 6th November 2001 passed by Additional Sessions Judge, Pune in Criminal Appeal No.84 of 1998, is confirmed, subject to modification of sentence;

(ii) The substantive sentence of imprisonment of three months imposed by the Trial Court vide judgment and order dated 15th April 1998 and confirmed by the Sessions Court, Pune vide judgment and order dated 6th November 2001 is set aside and the applicant is sentenced to pay fine of Rs.3.95 lakh. The amount of Rs.3.85 lakh out of the fine amount is directed to be paid to respondent no.2-complainant towards compensation;

(iii) Since Rs.3.85 lakh has been deposited by the applicant-accused in this Court during pendency of this revision application, the respondent no.2-complainant is permitted to withdraw the same;

(iv) Criminal Revision Application No.407 of 2001 and Criminal Application No.477 of 2010 stand disposed off in above terms.

(PRAKASH D. NAIK, J.)

MST