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

CRIMINAL APPEAL NO. 553 OF 1994

The State of Maharashtra,
at the instance of
Police Investigation Cell,
Sales Tax, C.D.C.I.D, Bombay } **...Appellant**

Versus

Kishor Chandulal Mehta,
R/o B/57, 1st Floor, Girdhar
Nagar, Jivdaya Lane,
Ghatkopar (W), Bombay. } **...Respondent**
400 086 **(Orig. Accused)**

Mr. Arfan Sait, APP for Appellant – State.
Mr. A.H. Ponda, Senior Counsel, i/by Ms. Usha R. Tiwari
for Respondent.

**CORAM : PRASANNA B. VARALE &
N.R. BORKAR, JJ.**

**RESERVED ON : AUGUST 11, 2021.
PRONOUNCED ON : DECEMBER 23, 2021.**

JUDGMENT (PER PRASANNA B. VARALE, J)

1. Being aggrieved by the judgment and order passed by the learned Additional Chief Metropolitan Magistrate, 46th Court, Mazgaon, Bombay, in C.C. No. 7/P/1994, dated 18th May, 1994, whereby Respondent herein (Original Accused) was convicted for the offences punishable under Sections 467, 465, 468, 471, 420 read with Section 34 of the Indian Penal Code (for short "IPC"), and sentenced to suffer imprisonment till

rising of the Court and to pay fine of Rs. 1,000/- on each count in default to suffer Rigorous Imprisonment for 3 months on each count, the Appellant – State of Maharashtra prayed for enhancement of the sentence, by way of present Appeal.

2. We may refer to the facts giving rise to the present Appeal as follows:

The Respondent – Original Accused is an proprietor of M/s. K.K. Corporation situated at B.57 Girdhar Nagar, Jivadaya Lane, Ghatkopar (W), Bombay and possessing the certificates issued by the revenue authorities under the relevant acts namely, R.C. No.: NIN-17146 under Bombay Sales Tax Act and R.C. No.: MAH/IN-24814 under C.S.T. Act. The Respondent was acting as reseller in edible oil. He presented various documents such as, sale invoices, delivery challans, letter heads of another firm namely, M/s. Rashmi Agencies for the period from 01.04.1990 to 18.02.1991. It was alleged that with an intention and in connivance with the other accused persons, the Respondent presented those documents showing them as genuine, whereas he was knowing and aware that these documents were fabricated

and by use of these documents, the Respondent evaded tax liability and resultantly caused loss to the public exchequer. Thus, the accused was facing the above referred charges.

3. On completion of investigation, charge-sheet was filed in the Court of learned Metropolitan Magistrate, Mumbai against the present Respondent as well as another absconding accused namely, Jayant P. Dinoja.

4. The charges were read over and explained to accused. The accused admitted his guilt and further prayed for leniency. It was the submission of the Respondent accused that the questionable acts were done by the other absconding accused.

5. Learned Metropolitan Magistrate, on the backdrop of the submissions of the Counsel appearing for the Respondent with prayer of leniency, passed the following order:

"ORDER

Accused Kishor Mehta is hereby convicted of the offence punishable under Section 467, 465, 468, 471, 420 r.w. 34 I.P.C. and he is therefore sentenced to suffer S.I. till

rising of the court and to pay a fine of Rs. 1,000/- on each count in default to suffer R.I. for 3 months on each count. Total fine of Rs.5,000/- (Rs. Five Thousand only). The police is directed to file separate chargesheet against absconding accused Jayant P. Dinoja whenever he would be available to the police. The accused is on cash bail of Rs. 5,000/- (Rs. Five Thousand) as the cash deposit of Rs. 5,000/- he adjusted in the total amount of Rs. 5,000/- which is imposed on the accused."

6. Learned APP submitted before this Court that though the Respondent pleaded guilty and prayed for leniency, but considering the nature of offence committed by Respondent accused whereby there was an evasion of taxes and ultimately loss of revenue to the State, the trial Court was not justified in imposing the punishment of till rising of the Court. It is the submission of learned APP that considering the nature of offence the learned Metropolitan Magistrate ought to have awarded the maximum punishment to the Respondent. Hence, learned APP prayed for allowing the Appeal.

7. *Per contra*, learned Senior Counsel Mr. Ponda appearing with Ms. Tiwari vehemently submitted that the Appeal filed by the State itself is not maintainable, and secondly, no error is committed by learned

Metropolitan Magistrate either in appreciating material on record or in awarding the sentence to Respondent. It is the submission of Mr. Ponda that the Appellant – State was unable to trace-out the absconding accused and it was specific case of the State that the Respondent accused in connivance with other accused committed the alleged crime as such, the entire burden of the alleged act could not be fasten only on Respondent accused and considering all these aspects, the learned Metropolitan Magistrate awarded the proportionate punishment to the Respondent.

8. Learned Senior Counsel Mr. Ponda further submitted that as the judgment and order of the learned Metropolitan Magistrate is based on proper and sound reasoning, it cannot be said that the impugned judgment and order suffers from either illegality or perversity and as such, the order impugned needs no indulgence at the hands of this Court.

9. On 12th July, 2021, we passed the following order:

"1] This appeal is filed by the State with a prayer for enhancement in the sentence awarded to

the respondent in Criminal Case No.7/P/1994.

2] *The Appeal is filed by making a reference in the title clause of the appeal as Appeal under Section 377(1) of the Code of Criminal Procedure, 1973.*

3] *On perusal of record and more particularly the order passed by the learned Additional Chief Metropolitan Magistrate 46th Court, Mazgaon, Bombay dated 18.05.1994 it reveals that the respondent was charged for the offences punishable under Sections 467, 465, 468, 471 and 420 of the Indian Penal Code.*

4] *The respondent/accused pleaded guilty to the alleged charges. It would not be out of place to make a reference to the order of the learned Additional Chief Metropolitan Magistrate and it reads, "The present accused Kishor Mehta voluntarily pleaded guilty to the alleged charges which were framed and explained to him. His plea is guilt the accused is convicted." And then the accused was awarded sentence.*

5] *In the backdrop of these facts, if we read the relevant provision i.e. Section 377(1) of the Code of Criminal Procedure, it states that the State Government may "in any case of conviction of a trial held by any court other than High Court direct the Public Prosecutor to present appeal against the sentence on the ground of it's inadequacy".*

6] *Sub Section (3) to Section 377 of the Code of Criminal Procedure states that,*

"When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of

the sentence."

7] The conjoint reading of sub-section (1) and (3) would prima facie show that, the appeal is provided against the conviction on a trial held by the court and not against the conviction where an accused has pleaded guilty."

10. The learned APP has not pointed out any judgment either of this Court or the Hon'ble Supreme Court on the point of maintainability of the appeal.

11. Considering the wordings of sub-section (1) & (3) of Section 377 of the Cr.P.C., we are of the opinion, that the present Appeal filed by the State is not maintainable. Accordingly, Criminal Appeal is dismissed.

(N.R. BORKAR, J.)

(PRASANNA B. VARALE, J.)