

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

CRIMINAL APPEAL NO. 931 OF 2006

Balaji Constructions,
partnership firm,
1159, E, Mauli Krupa, Rajaram Road,
Kolhapur, through Partner -
Prafulla Gopalrao Kadam
Age 40, R/o. 13,
Rajmouli Apartment,
Takala, Kolhapur.

...Appellant

vs.

1. Dattatraya Bapurao Ghadage
R/o 34 Mahalxminagar,
Kupwad Road, Vishrambag, Sangli.

2. State of Maharashtra

...Respondents

Mr. Shriram S. Kulkarni a/w Mr. Sujay Palshikar -Advocate for the
Appellant

None for the Respondent No. 1.

Mr. S. R. Agarkar – APP for the Respondent No. 2-State

CORAM : S. M. MODAK, J.

DATE : 03rd JULY, 2023

JUDGMENT :-

1. Written notes of the arguments filed by the Appellant is taken on record and marked as 'Annexure-X'. No one is present on behalf of the Respondent No. 1. His learned Advocate has already argued the matter.

2. I have heard learned Advocate Mr. Shriram S. Kulkarni assisted by learned Advocate Mr. Sujay Palshikar for the Appellant-Complainant and learned Advocate Shri Indrajeet Joshi for the Respondent No. 1 and learned APP for the Respondent No. 2-State.

3. The Court of the JMFC, Kolhapur has acquitted the Respondent-accused mainly for two reasons :-

- a) The firm of the Complainant was not registered and as such the complaint for the offence punishable under Section 138 of the Negotiable Instruments Act is not maintainable in view of the bar laid down as per Section 69(2) of the Indian Partnership Act.
- b) Second ground is the Complainant could not prove the mercantile transaction with the Respondent No. 1.

The correctness of the judgment is challenged by the Appellant.

Leave was granted on 20/09/2006. Party will be referred to as per their original status.

4. This appeal needs to be decided on certain principles about interference by the Appellate Court when there is judgment of the acquittal. If the findings are perverse that is to say given by neglecting a particular piece of evidence or by not considering a particular provision of the law it can be said to be a perverse

findings. Just because two views are possible, there is no scope for interference.

5. There were two versions told by the parties before the trial Court. The complainant states that he has given on hire Poclain machine to the accused and he owes an amount to him. Towards discharge of that liability, he has issued two cheques for Rs. 1,00,000/- each. The case pertains to one of such cheque, whereas the accused has taken two defences. One is about denial of the liability and pleading that in fact machines were given on hire to one J. K. Construction owned by one Jugal Kishor Bansilal Tiwari. Second ground he has pleaded is about issuing a cheque through one Bhalerao particularly when the Complainant was in need of finance. He also raised a plea that the Complainant's firm was not registered and hence it is not maintainable.

6. With the assistance of both the sides, I have read the evidence orally as well as documentary. The Complainant has examined the following witnesses :-

- (i) Complainant himself
- (ii) One Parmeshwar S. Kannore, a Banker from Sangli Bank, that is Bank of the Complainant

(page no. 21)

(iii) Khaled Ismail Patel representative from the Kolhapur Urban Co-operative Bank, being the Banker of the accused page no. 27.

(iv) Kapil P. Sharma – The Poclain machine operator.
(page no. 32)

7. As against this, the accused examined Jugalkishor Tiwadi, who is owner of the J. K. Construction and he relied upon a notice reply dated 01/06/1999, at Exh.- 45 (page no. 36)

Non Registration of the firm

8. There is no dispute that firm was not registered. The learned Magistrate while treating the complaint as not maintainable relied upon a judgment in case of *Suraj Prakash Gupta v. State of Jammu & Kashmir*¹. The complaint filed by unregistered firm was held not maintainable (para no. 13). Whereas there is a reliance placed on observations by the Division Bench in case of *Narendra Vs. Balbirsingh*² on behalf of the Complainant.

9. In view of the divergent of the opinion the issue was referred to the Division bench about maintainability of the complaint

1 2000, Cr. LJ., 2386

2 2020 SCC Online Bom 223

by unregistered firm. It is observed that bar under Section 69(2) of the Indian Partnership Act will not come in the way of the Complainant in filing the complaint under Section 138 of the Negotiable Instruments Act (para no. 17)

10. According to the learned Advocate for the Accused when trial Magistrate has decided this objection there was only one view prevailing as mentioned above. Be that it may it is clarified by the Division Bench that the complaint will be maintainable. This observation is required to be considered. Even though it may be true that this observation was not in force when the complaint was decided, however when the Appeal is argued, the Division bench has already decided the matter. Hence it can be considered. So it has to be held that complaint will be maintainable.

Proof of the debt/liability

11. It is true that the Respondent-accused has not denied execution of the cheque in the notice reply at Exh. 45. He has stated that he has issued the cheque at the instance of one Bhalerao. Even in his statement under Section 313 of the Criminal Procedure Code, he has stated the same fact while answering question no. 4. If it is so then presumption under Section 139 of the Negotiable Instruments

Act will come into picture or not and by way of seeing whether it is rebutted by the accused or whether the findings of the trial Court are correct or not.

Rebuttal of presumption

12. It is settled law that the presumption can be rebutted by adducing evidence separately or by cross-examining the Complainant. In case of Pankaj Mehra and Anr. Vs. State of Maharashtra and Others³, there is observation of the Hon'ble Supreme Court to interpret the meaning of the word "the drawer of such cheque fails to make the payment" and "the drawer refuses to make the payment". Failure to make payment can be for various reasons:- when there is failure to make payment, offence is committed. In nutshell, this failure to make payment has been interpreted in wider sense. Just because winding up petition was pending is no ground to avoid prosecution. In this case, there is not only failure but refusal to make payment.

13. In case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Anr.⁴, the Hon'ble Supreme Court opined that once the signature on cheque is admitted, presumption comes into picture and burden is

³ (2000) 2 Supreme Court Cases 756

⁴ (1999) 7 Supreme Court 510

on accused to rebut the presumption, there cannot any dispute on this preposition of law.

14. As against this Mr. Joshi relied upon the observation in case of Rajaram S/O Sriramulu Naidu (since deceased) Through LRS. Vs. Maruthachalam (since deceased) Through LRs.⁵, the scope of the powers of the Appellate Court to interfere in a judgment of the acquittal are also interpreted. For rebutting the presumption the test of the preponderance of the probabilities has to be considered.

15. It is important to note when notice under Section 138 of the Negotiable Instruments Act was issued on 15/05/1999, page no. 19, it was replied on behalf of the accused on 01/06/1999. The notice mentions that cheque was issued towards discharge of the liability of hiring charges. Whereas notice reply mentions that the Poclain machine was given on hire not to him but to one J. K. Construction. In other words, he has denied that he has taken on hire the Poclain machine. Furthermore, notice reply mentions that J. K. Construction has paid the bills. In addition to that contention, there is averment of issuance of the cheque but for different consideration.

⁵ 2023 LiveLaw (SC) 46

16. It is true that accused has not examined the said Bhalerao at whose instance the cheque was issued. He has examined the Jugalkishor Bansilal Tiwari as owner of the J. K. Construction. He has also produced work orders. He has taken on hire the Poclain machine from the Complainant.

17. So on this background, I think the Complainant ought to have been substantiated his contention that in fact he has given on a hire Poclain machine to the accused, this is not plea which is taken by way of after thought while cross-examining the Complainant. This plea was taken while dealing notice reply.

18. On this background, when the averment in the complaint on page no. 10 and evidence of the Complainant Prashant Kadam have perused, we find that he has not substantiated as to when the Poclain machines are given on hire to him. He could have substantiated by producing the bills. No doubt he has examined P.W. No. 4 as a Poclain driver. But oral evidence will not dispense the filing of the documentary evidence. Once the machines are given on hire he ought to have some documentation. But that evidence was not produced on behalf of the Complainant.

19. So for this reason, I do not find any fault in the findings

of the trial Court. On one hand he has denied the relationship with the Complainant and on the other hand he has brought on record through evidence of Mr. Tiwari that in fact it is Tiwari who has taken a machine on hire from the Complainant and not by him. It is sufficient to rebut the presumption.

20. On this background, it was necessary for the Complainant to adduce some evidence in the form of the document. Unfortunately, it has not happened. So I find no fault in the findings of the trial Magistrate.

21. Not examining the Bhalerao will not weaken the case of the accused, at the most it can be said that it is not substantiated by the accused. However the accused has already created dent in the case of the Complainant and the said contention was not repelled by the Complainant by adducing some evidence.

22. In Pankaj Mehra's case, there was a winding up petition filed against the Company and defence was taken that debt has become unenforceable. It was turned down. What is the wording used in clause (c) of Section 138 of the Negotiable Instruments Act is 'failure to make payment'. Now this failure can be for various reason and all are included. Reliance was placed on the provisions of

Section 536(2) of the Old Companies Act. It says about payment made after winding up are void. It was not accepted. Because debt does not become unenforceable.

23. Learned Advocate for the Appellant relied upon these observations to contend that Respondent cannot take up a plea that there was no mercantile transaction. This argument is illogical. Because Section 139 of the Negotiable Instruments Act itself say about rebuttal of presumption. It is one thing to say that you cannot take up plea and another thing to say that plea is not proved. In this case defence taken by the accused was permissible and he has proved it also.

24. So I find no fault in the findings recorded by the trial Court. It cannot be said that findings are perverse. Hence no interference is wanted. Hence appeal is dismissed.

[S. M. MODAK, J.]