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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.379 OF 2016**

1. M/s. Bharat Jyoti Impex
Represented by Ranjay P. Patil
"JASU BUILDING", 30,
Dadabhai Road, Vile Parte (W)
Mumbai 400 056 ... Applicant/Appellant

Vs.

1. Rachit Haresh Mehta and Ors.
Mangal Murthi Building,
2nd Floor, Zaver Road,
Near Axis Bank, Mulund (W)
Mumbai 400 080 ...

2. Global Marketing
B-302, Konark Darshan,
Above Axis Bank, Zaver Road,
Mulund (W)
Mumbai 400 080 ...

3. State of Maharashtra ... Respondents

**WITH
CRIMINAL APPLICATION NO.174 OF 2016**

1. M/s. Bharat Jyoti Impex
Represented by Ranjay P. Patil
"JASU BUILDING", 30,
Dadabhai Road, Vile Parte (W)
Mumbai 400 056 ... Applicant/Appellant

Vs.

1. Rachit Haresh Mehta and Ors.
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2. Global Marketing
B-302, Konark Darshan,
Above Axis Bank, Zaver Road,
Mulund (W)
Mumbai 400 080

...

3. State of Maharashtra ... Respondents

Mr. G. Krishna Mohan Nair for the Applicant in both Applications.
Ms. Lalita Savekar i/b Kulkarni & Associates for Respondent No.1.
Mr. Y. Y. Dabke APP for Respondent No.3-State.

CORAM : S. M. MODAK, J.

DATED : 9TH FEBRUARY 2023

JUDGMENT :

1. The Court of Metropolitan Magistrate, 44th Court, Andheri, Mumbai as per two separate judgments dated 23rd March 2016, and 28th September 2016, passed in C.C.No.1343/SS/2012 and C.C.No.1535/SS/2012 respectively has acquitted Respondent No.1, who is proprietor of Respondent No.2 for the offence punishable under section 138 of the Negotiable Instruments Act. The correctness of those judgments are challenged by the complainant.

2. After hearing both learned Advocates, I am inclined to grant special leave to prefer both the Appeals. It is for the reason that while delivering the judgments, learned Metropolitan Magistrate has given finding only in respect of legally recoverable debt or liability. He has

not given finding on other issues that is to say the reason for dishonour, issuance of notice, receipt of notice and period of limitation. On this aspect there is consensus on behalf of both sides that there are not findings. In view of that special leave to file Appeals is granted. Both the Appeals are admitted.

3. Even though there is prayer for setting aside the judgment and convicting the Respondent-accused for the offence punishable under section 138 of the Negotiable Instruments Act, learned Advocate for the Appellant-complainant graciously submitted that let both these matters be sent back to the trial Court to give findings on other issues. At the same time he submitted that let the findings given by the trial Court in both the impugned judgments be set aside. In order to support that such course of action is available, he relied upon the judgment in case of *Jain P. Jose Vs. Santosh and Others*¹.

4. Learned Advocate for the Respondent vehemently opposed the prayer for setting aside the finding which have been arrived at after full fledged trial.

5. So even though there is no much dispute about remanding the matter, the dispute pertains to setting aside the findings. Hence, I have heard learned Advocates for respective parties on this aspect. Both of them have taken me through oral and documentary evidence and the findings thereon.

1 Criminal Appeal No.SLP No.5241 of 2016 dated 10/11/2022 (Supreme Court)

6. Learned Advocate for the Appellant to buttress his submission relied upon the following judgments :

- (i) *Purushottam Umedbhai & Co. Vs. M/s. Manilal and Sons*²
- (ii) *Padmavati Finance Vs. Md. Yosuf Ali s/o Haji Abdul Hameed Sab*³
- (iii) *Regional Director Employees (A State Insurance Corporation) Vs. Ramanuja March Industries*⁴
- (iv) *Jai Ambe Industries Vs. Garnet Speciality Paper Ltd.*⁵
- (v) *Rohitbhai Jivanlal Patel Vs. State of Gujarat & Anr.*⁶

7. The relevant facts are quoted below :

The complainant is the partnership firm registered with the Registrar of Firms. They have sold the chemicals to Respondent No.2. Respondent No.2 is proprietary firm and Respondent No.1 is proprietor. As per the business practice the invoices have been issued. The Respondent owes the amount of Rs.17,38,800/- as per invoice dated 14th July 2011. Towards discharge of part payment of the liability, cheque for Rs.11,92,128/- was drawn on Kotak Mahindra Bank, Mulund, Mumbai was issued in favour of the firm. Case No.1343/SS/2012 was filed in respect of dishonour of this cheque.

8. Whereas case No.1535/SS/2012 was filed in respect of non payment of cheque No.547102 dated 5/03/2012 issued for

2 1961 AIR 325

3 Criminal Appeal No.3606/2009, High Court of Karnataka dt.5/07/2013

4 1985 AIR 278

5 First Appeal No.5228/2019, High Court of Gujarat dt. 07/01/2022

6 Criminal Appeal (SLP) No.1883 of 2018 dt. 15/03/2019

Rs.13,73,920/-. This was issued on Indian Bank. The amount of this cheque includes remaining liability on the basis of earlier invoices and it also includes liability arisen out of chemicals supplied to the Respondent by one Sanjay Chemicals. It was pointed out that the complainant shall first pay to Sanjay Chemicals for chemicals supplied by them to the Respondent and then recover that amount from the Respondent.

9. In both these complaints, the Appellant gave evidence through their authorised representative, one Ranjay Pandurang Patil whereas Respondent's proprietor also gave evidence in both these complaints. The trial Court acquitted the Respondents mainly on following grounds :

- (a) There was no proper authorisation by the Appellant in favour of representative to Shri Ranjay Patil.
- (b) Copy of minutes book and copy of resolution was not produced.
- (c) There was reconstitution of partnership firm, however, it was not registered.
- (d) Cheque was issued as security.
- (e) Respondent No.1 being proprietor of Respondent No.2, was not proved.
- (f) Case set up in C.C.No.1535/SS/2012 thereby explaining circumstances in which Sanjay Chemicals supplied goods to the Respondents was not pleaded in the complaint.

10. I have perused both these judgments. It is true that the trial Court has not given any finding about timely deposit of cheque, what is reason for dishonour, issuance of timely notice, proper receipt of

notice and timely filing of complaint. Merely because there is presumption under section 139 of the Negotiable Instruments Act in favour of complainant, it does not mean that the Court is relieved from giving findings on this aspect. It is true that if the matter is not remanded to the trial Court for giving findings on this aspect, certainly either of the parties may lose one opportunity to challenge those findings.

11. So while remanding the matter I am inclined to set aside the findings of the trial Court. I will give reasons for that.

12. While giving reasons, I will restrain myself from giving any categorical finding. It is for the reason that it will prejudice the parties to argue before the trial Court. I will give only those reasons which are necessary.

13. When the trial Court concluded that the representative Shri Patil is not properly authorised, I feel that the trial Court has not considered the provisions of Indian Partnership Act. It gives authority to every partner to act on behalf of the firm. In case of ***Purushottam Umedbhai & Co.*** (supra) the Hon'ble Supreme Court has dealt with issue about signing by all the partners when it is required and when it is not required. Whereas in case of ***Padmavati Finance*** (supra) the High Court of Karnataka has also considered the provisions of section 19 of the Indian Partnership Act which deals with implied authority of partner to act as agent of the firm. Similarly, in case of ***Ramanuja March Industries*** (supra) what is authority of the partner to act as agent on behalf of the firm is considered.

14. Secondly, it is noticed that learned Magistrate has mixed up the issue about entity-company and entity-partnership firm. I say so because while concluding that representative is not authorised, learned Magistrate considered the observation made in case of ***Ashish Shah Vs M/s. Sheth Developers Pvt. Ltd.*** (para 10) and ***Candy Spirit Pvt. Ltd. Vs. Reeves Mia and Anr.*** (para 11). There is a lot of difference in between functioning of the company and of the partnership firm.

15. So also when the judgment dated 28th September 2016 was pronounced in CC No.1535/SS.2012 at that time the judgment in case of CC No.1343/SS/2012 was already pronounced on 23rd March 2016. However, learned trial Magistrate has mechanically applied the observations in earlier decided matter without considering the difference in that. In case No.CC/1535/SS/2012 the facts were little bit different and amount of cheque consisted of earlier liability and also liability arising out of payment made to Sanjay Chemicals on behalf of the Respondent by the Appellant. So CC No.1535/SS/2012 ought to have been decided by considering evidence in that matter.

16. Whereas in case of ***Jai Ambe Industries*** (supra) the High Court of Gujarat had an occasion to deal with the proof of invoices and delivery challan. The provisions of section 59 of the Indian Evidence Act are referred, stamping and signing those challans by the defendant amounts to their admission and oral evidence is not required.

17. Whereas in case of ***Rohitbhai Jivanlal Patel*** (supra) the Hon'ble Supreme Court dealt with law relating to provisions of section 139 and rebuttal of presumption as envisaged by section 139 of the NI Act. In fact the Court has to start with presumption under section 138 of the Negotiable Instruments Act and to scan evidence on the basis of grievance of the Respondent-accused. The accused is having right to rebut the evidence. Whether it is by way of simple denial or whether probable case is to be made out has to be seen. The trial Court has overlooked these principles laid down in various judgments.

18. So I certainly feel that the findings given by the trial Court in both judgments needs to be set aside. So I am inclined to remand both these matters to the trial Court. It is made clear that they are remanded only for hearing arguments of the parties and it is made clear that this Court has not given any opportunity to the parties to adduce fresh evidence. The matter is to be decided on the basis of available material. Hence, the following order is passed :

ORDER

- (a) Both Appeals are allowed.
- (b) The judgments passed by learned Metropolitan Magistrate, 44th Court, Andheri, Mumbai in C.C. No.1535/SS/2012 dated 28/09/2016 acquitting the accused for the offence punishable under section 138 of the Negotiable Instruments Act is set aside.
- (c) The judgments passed by learned Metropolitan Magistrate, 44th Court, Andheri, Mumbai in C.C. No.1343/SS/2012 dated

23/03/2016 acquitting the accused for the offence punishable under section 138 of the Negotiable Instruments Act is set aside.

- (d) Both the matters are remanded back to the trial Court for hearing the parties and to give decision according to law.
 - (e) Both parties are directed to appear before the trial Court on 28/02/2023.
 - (f) It is made clear that the trial Court to decide both these matters within a period of six months from today.
 - (g) Record and Proceedings be sent back.
 - (h) The Registrar Judicial-II to ensure that record and proceedings are sent back immediately and in any eventuality before 28th February 2023 and to issue necessary instructions to the office.
 - (i) Both the cases be decided by the same judge.
19. Both Appeals are disposed of in the aforesaid terms.

(S. M. MODAK, J.)