

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

**INTERIM APPLICATION NO. 591 OF 2024
IN
REVISION APPLICATION NO. 98 OF 2024**

Sachin R. Kadam Proprietor
M/s. Mega Computer and Solutions

...Applicant

vs.

M/s. Balaji Infotech and Anr.

...Respondents

Adv. Samir A. Vaidya a/w Mr. Kevin Gala, Adv. Prathamesh D. Sarang, Adv. Kaivalya M. Raul	Advocate for the Applicant
Mr. Y. Y. Dabke	APP for the Respondent-State

CORAM : S. M. MODAK, J.

DATE : 24th APRIL 2024

P. C. :-

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1. Heard learned Advocate Shri Vaidya for the Applicant-convicted accused.
2. He is convicted by the Court of Metropolitan Magistrate, 43rd Court Borivali, Mumbai on 23/09/2011, for the offence punishable

under Section 138 of the Negotiable Instruments Act. Accused No. 1 is Proprietary Concern and accused no. 2 is Proprietor. The sentence is as follows:-

- (i) The proprietor is sentenced to undergo simple imprisonment for three months.
- (ii) To pay compensation of Rs. 25,00,000/- and it is to be paid to the Complainant, at page no. 59.

3. When the Proprietor filed a Criminal appeal, he could not convince the Appellate Court about defence taken before the trial Court and his appeal came to be dismissed on 17/01/2024, at page no. 89. Out of compensation amount of Rs. 25,00,000/-, the Applicant has deposited Rs. 12,46,000/- before the Appellate Court. Even the Complainant has applied for withdrawal of the said amount as per his application dated 05/04/2018, at page no. 78.

4. Learned Advocate Shri Vaidya is not having clear instructions as to whether the withdrawal was permitted during pendency of the appeal. However, there is a direction for withdrawal by the Appellate Court while dismissing the appeal. The legality of the judgments is challenged by way of this revision.

5. According to learned Advocate Mr. Vaidya, both the Courts below have not at all appreciated the evidence adduced by the accused. He has not taken simple defence of denial but taken a specific defence thereby denial of the liability and misuse of the cheque. He has examined the following witnesses:-

Sachin Kadam	Examined himself
Nitin R. Gujar	the employee of the Complainant to prove the fact of the payment in cash. (this is not accepted by the trial court)
Uday Sahastrabudhe	Manager of New India Co-operative Bank in order to show the certain payments to the Complainant by cheque.
Subhash Trivedi	Chartered accountant in order to prove the entries in books of accounts about repayment made to the Complainant from time to time.

6. The contention of learned Advocate Mr. Vaidya is that both the Courts below have not at all expressed any opinion about evidence of the bank witnesses and the chartered accountant and that is how the findings arrived at against his client is erroneous.

7. All these issues can be gone into once the revision will be argued for admission.

8. At this stage, issue notice to the Respondent No. 1 returnable on

26th June 2024. Additionally, private notice is allowed and service affidavit be filed.

9. Matter be kept on **26th June 2024**.

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10. The Applicant is asking for suspension of the sentence. About condition to deposit further amount, learned advocate Shri Vaidya is having strong objection. He made following submissions:-

a) The condition to deposit further amount is directory as clear from the wordings of Section 148 of the Negotiable Instruments Act.

11. He placed reliance on two judgments:-

a) *Jamboo Bhandari Vs. M. P. State Industrial Development Corporation Ltd. and Ors.*¹

b) *Rakesh Ranjan Shrivastava Vs. The State of Jharkhand and Anr.*
in Criminal Appeal No. 741 of 2024, dated 15.03.2024.

12. According to him, the directions given by the Appellate Court dismissing the appeal are not as per the law. He objected to the following directions:-

¹ 2023 (10) SCC 446

a) The Appellate Court directing the trial Court to execute the judgment as per law. According to him, once the Appellate Court has dismissed the appeal, he has become functus officio and he cannot do the same. He relied upon the following judgment:-

(i) Dilip Umare Vs. State of Maharashtra²

So far as liberty granted to withdraw the amount of Rs. 12,46,000/-, learned Advocate Mr. Vaidya is comfortable with this arrangement.

13. It is true that in case of Jamboo Bhandari (supra), the issue about putting a condition to pay compensation has arisen post conviction. Whereas in case of Rakesh Ranjan Shrivastava (supra) during pendency of the case, the trial Court issued direction in exercise of the power under Section 143-A of the Negotiable Instruments Act.

14. When I have read both the judgments, what I *prima-facie* find is the power of the Court to impose compensation, the provisions are held directory and not mandatory.

15. Even in Rakesh Ranjan Shrivastava (supra) case, the Hon'ble Supreme Court in para no. 16 has laid down the factors to be

² 1996 (Cri. L.) 721

considered while exercising the discretion. Those factors are not exhaustive. There is one difference. When the case is pending, the considerations are different and when it has resulted into conviction and the confirmation, the considerations are different.

16. Even in Jamboo Bhandari (supra) case, the Hon'ble Supreme Court in para no. 6 have observed '*the Appellate Court will be justified in imposing the condition of deposit the amount as provided in Section 148*'. It is further observed that '*there can be exception to this power and condition can be relaxed by giving specific reason*'.

17. Learned Advocate Mr. Vaidya submitted that considering the evidence adduced before the trial Court, the Applicant need not be imposed with the condition to deposit further amount. He emphasized about failure of both the Courts below to appreciate the evidence. The defence was about absence of the liability and also discharge of the liability. An attempt was made to prove it by examining the witnesses.

18. For deciding this aspect, detailed hearing is required and that can be done at the time of the admission.

19. At this stage, I am not inclined to totally exempt the Applicant from depositing further amount. At the most, the Respondent –

Complainant may not be permitted to withdraw further amount unless and until he made out the case for withdrawal.

20. In view of that following order is passed:

ORDER

- (i) The substantive sentence of the imprisonment for three months for the offence punishable under Section 138 of the Negotiable Instruments Act in CC. No. 641/S/2002 is suspended during pendency of the revision on furnishing Personal bond and surety bond of Rs. 15,000/- before the trial Court within a period of two weeks from today.
- (ii) The Applicant is directed to deposit Rs. 5,00,000/- within a period of eight weeks before this Court.
- (iii) It is made clear that the Respondent-Complainant will be entitled to withdraw the amount only when he will make out the case.
- (iv) If he has not withdrawn Rs. 12,46,000/-, he is at liberty to withdraw that amount on furnishing an undertaking to refund the amount alongwith interest as directed by this Court.

21. Issue notice to Respondent No. 1 before admission, returnable on 26th June 2024. Additionally, private notice is allowed and service affidavit be filed.
22. Interim application No. 591 of 2024 is disposed of.
23. Revision application be kept on **26th June 2024.**

[S. M. MODAK, J.]