

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**  
**CRIMINAL APPEAL NO.412 OF 2023**

PALLAVI  
MAHENDRA  
WARGAONKAR

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M/s. Prince Marine Transport Services Private Limited  
 A Private Limited Company, a Company incorporated  
 under the Companies Act, 1956,  
 having its Registered address at 255,  
 Shahid Bhagat Singh Road,  
 Near G.P.O. Fort, Mumbai.  
 (through its Authorized Representative)

Mr. Hashim Abdul Razak

...Appellant

vs.

1. State of Maharashtra
2. Mr. Boppana G. Choudhary  
 Proprietor of M/s. Boppana Civil Constructions  
 Having their office at D. No.32-1-186/6,  
 Pragathi Complex, Bowdara Road,  
 Visakhapatnam, Andhra Pradesh and  
 also 8-2-269/90-91 Road No.2,  
 Banjara Hills, Hyderabad – 500 033.

...Respondents

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Mr. Abad Ponda, Senior Advocate a/w Mr. Shyam Kalyankar, for the  
 Appellant.

Mr. A.D. Kamkhedkar, APP for Respondent – State.

Mr. R. Satyanarayanan a/w Mr. Prathamesh Naik i/b. Fenila Nair,  
 Advocate for Respondent No.2.

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**CORAM : S. M. MODAK, J.**  
**DATE : 8<sup>th</sup> FEBRUARY 2024**

**JUDGMENT :-**

1. Heard learned Senior Advocate Shri Ponda for the Complainant

and learned Advocate Shri Satyanarayanan for Respondent No.2 – original accused.

2. It is true that while granting leave on 27<sup>th</sup> March 2023, this Court has crystalised the issue involved in this Appeal. Though the Court of Metropolitan Magistrate has given findings to point Nos.2 and 3 in favour of the complainant, learned Magistrate has acquitted the Respondent – Accused as point No.1 was answered against the complainant.

3. Point No.2 pertains to **proof of liability** whereas, Point No.3 pertains to **service of demand notice**. The trial Magistrate has observed ‘the liability is proved’. The relevant observations find place in paragraph Nos.21 to 24 whereas, learned Magistrate has dealt with in Issue No.3 on the point of notice and its service in paragraph Nos.25 to 34. Whereas, failure of the complainant to prove the authorization has been dealt with in Paragraph Nos.9 to 17.

4. It is submitted during the arguments by learned Advocate Shri Satyanarayanan that the findings by the trial Court on the point of liability and receipt of notice are not challenged and he has restricted his arguments only by supporting the findings of the trial Magistrate in

respect of 'non-proving of the authorization'.

5. In view of the same, I have heard both of them on the point of correctness of findings to Point No.1. So the issues involved in this Appeal are :--

- a. *“whether the complainant company has proved their representative C.W. No.1 **was authorised by them to give evidence before the court**”?*
- b. *“whether the trial court has **committed wrong in discarding** the oral and documentary evidence”?*

#### Submission for Appellant

6. According to Mr. Ponda, there are various circumstances available on record and if considered together, it can safely be concluded *“authorisation is proved”*. According to him, trial Court has not appreciated them properly by overlooking to the view expressed by Supreme Court. This Court can certainly correct the mistake. He invited my attention to the following averments:-

- (a) The **averments in the affidavit of examination-in-chief** sworn by witness and more specifically paragraph No.2 (page 41) of the paper-book.

(b) It is the affidavit of one Mr. Hashim Abdul Razak,  
Chairman and Authorized Representative of the  
 Complainant – Company.

7. He submitted that there is a categorical statement about the production of the two documents. There is also categorical statement that '*their certified true copies are also produced and the witness has requested to verify them with the original and then original may be returned to the Complainant – Company*'. Such reference finds place in paragraph No.2.

8. He invited my attention to Page No.8 of the paper-book. They are nothing but the **remarks made by the learned Magistrate**. It records the following facts:-

(a) Further examination-in-chief of C.W. 1 – Hashim Abdul Razak and further cross-examination was adjourned due to Court time over.

(b) The documents (certified) verified earlier were exhibited today (i.e. 24/06/2016). It consists of various documents. **Only two** documents are relevant for deciding the issue involved. They are as follows:-

- (i) Original true extract of **Board Resolution** dated 2<sup>nd</sup> December 2010;
- (ii) Certified true copy of the **minutes book**.

They are marked as **Exh. 'P-2'** and **Exh. 'P-3'** as stated in paragraph 2 of the affidavit. (Trial Court marked them Exhibit as **Exh.11 and Exh.12**)

9. It is his further contention that when this witness was cross-examined, the averments made in paragraph 2 about reference of '*documents and production of original and of certified copy*' **were not challenged during the cross-examination.**

10. He further invited my attention to the **statement recorded under Section 313** of Code of Criminal Procedure on page 104 and more specifically answer to Question Nos.2 and 5 which reads thus:-

Question No. 2 reads thus:

*"It has come in the evidence of Mr. Hashim Abdul Razak-CW1 that, he is Chairman and Authorized Representative of the Complainant Company i.e. M/s. Prince Marine Transport Services Private Limited. What you have to say about it?"*

*Answer given by the respondent/accused is -- "He is not aware".*

Question No. 5 reads thus:

*“It has further come in his evidence that, Board of Directors of the Complainant Company have passed Resolution dated 02.12.2010 authorizing him to represent, file, depose, to give evidence and to initiate legal proceeding on behalf of the complainant company against you. What you have to say about it?”*

*Answer given by the respondent/accused is --“He is not aware”.*

11. He invited my attention to the **evidence given by the Respondent – Accused** on oath (page 98). His contention is even in his evidence before the Court he has not challenged those documents and not made grievance about non production of the original.

12. He submitted that the trial court has already marked them as :-

- a. **Exh.11** (**‘P-2** true copy of the resolution dated 2/12/2010 thereby authorising the Chairman to file complaint and give evidence) and
- b. **Exh. 12** (**‘P-3’** copy of minutes book of the meeting dated 2/12/2010).

According to him, two documents were exhibited only when the trial Court was satisfied about the mode of proof. Trial court has referred these documents along with other documents during preliminary discussion in paragraph 4 of the judgment.

### Law as to objections about documents

13. On the point of law, as proof of documents, it is submitted that there are different kinds of objections which can be taken at the time of proof of documents.

- (i) It pertains to “admissibility of document”.
- (ii) It pertains to “procedure as to how a document is to be proved i.e. to say original, photocopy or true copy” and
- (iii) It is about “insufficiency of stamp, if required by law”.

14. According to him, the objection relating to mode of proof of document i.e. either producing original or photocopy of true copy has to be taken at that stage itself and cannot be taken subsequently. According to him, in this case, on the basis of above references, the Respondent – Accused has not objected for not producing the original at subsequent stage. So in the set of facts, the complainant has discharged burden to prove documents in support of authorisation. To

buttress his submission, he relied upon the observations in the following judgments:-

### Judgments

- (a) Geeta Marine Services Pvt. Ltd. and Anr. vs. State and Anr.<sup>1</sup>.
- (b) R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and Anr.<sup>2</sup>.

15. In order to throw light on what is the view of the Hon'ble Supreme Court while dealing with the matters under Section 138 of the Negotiable Instruments Act, he placed reliance on the observations in case of C.C. Alavi Haji vs. Palapetty Muhammed and Anr.<sup>3</sup>

16. He read over the observations in paragraph 17. It deals with the defense taken by the accused about non-receipt of notice. The Hon'ble Supreme Court observed '*if the accused makes payment within 15 days of receipt of summons then only subsequently he is justified in raising plea about non-receipt of a notice*'. However, as this issue is not raised on behalf of the Respondent – Accused, there is no need for this Court to express any opinion. Suffice to say that the Hon'ble Supreme Court

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1. 2009 (2) Mh.L.J. 410

2. 2003 (8) SCC 752

3. 2007 (6) SCC 555

has reiterated approach to be adopted by the trial Courts while dealing with the pleas taken relating to non-receipt of notice.

17. When there was an issue about not signing “*copy of Board Resolution*” when it was tendered before the Court, how the Hon’ble Supreme Court has dealt with the so called lacuna. There is reliance on the observations in the case of **Bhupesh Rathod vs. Dayashankar Prasad Chaurasia**<sup>4</sup>. He read over the observations in paragraph Nos.22 and 23. Whereas, learned Advocate Shri Satyanarayanan invited my attention to the specific lacuna as recorded in paragraph No.7 (b) of that judgment. It deals with :-

*‘ not signing copy of board resolution and whether it can be treated as true copy of the resolution’.*

Finally, the Hon’ble the Supreme Court observed as :-

*“If in the affidavit the witness has affirmed that there is an authorization in favour of the Managing Director that is sufficient compliance about the necessary authorization.”*

This issue arises only when the complaint is filed by an artificial entity just like the case before us. The only difference is ‘not about not signing the true copy of the resolution but about mode of proof of two

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4. 2022 (2) SCC 355

documents’.

### Submissions for Respondent

18. Whereas, learned Advocate Shri Satyanarayanan invited my attention to the noting by the learned Magistrate which is referred above on page no.8 of the paper book. He made the following submissions:-

(i) Those noting does not disclose:-

*“in fact, original of two documents i.e. minutes book and resolution were produced at any time before the Magistrate and they were verified by the learned Magistrate”.*

(ii) According to him, if this basic requirement is not fulfilled by the witness for the complainant, there was absolutely no need for the Respondent – Accused to put questions during the cross-examination.

(iii) According to him, when the complainant themselves have not discharged their burden why the Respondent – Accused should bring it to the notice of the witness

about the said lacunae.

- (iv) He invited my attention to the re-examination of the witness of the complainant recorded on page 92. It is as per the order passed below Exh.22 moved by the complainant for the purpose of recalling of CW1.
- (v) According to Mr. Satyanarayanan, at least on that occasion, CW1 ought to have produced the original of these two documents for satisfaction of the Court, however, the complainant has not availed this opportunity.
- (vi) According to him, the reasoning given by the trial Magistrate in paragraph No.16 is the “logical reasoning and on the basis of the evidence”.
- (vii) There cannot be any findings other than this.
- (viii) He further submitted that this finding cannot be said to be perverse and hence, cannot be set aside in an Appeal against judgment of acquittal.

19. By way of reply, learned Senior Advocate Shri Ponda submitted that findings can be said to be perverse if they are arrived at by not

considering evidence which is already on record and such findings can certainly be set aside by the Appellate Court when the trial court has wrongly refused to consider that evidence.

### Findings by trial Court

20. Trial Court was conscious of the fact that original minute book cannot be permanently placed in the record. That is why, he observed as :-

*“It is pertinent to note that, this Court is also not of the view that, the minute book should be permanently placed on the record.”*

21. However, when question of actually dealing with the ‘copies of those documents’ have arisen, trial court refused to accept them. It will be relevant to see what are the findings given in paragraph 16, they are as follows:-

- (i) “When the true copy of resolution is filed on record, the original minutes books can be placed on record at the time of evidence to verify the correctness of the resolution.”
- (ii) “True copy of a resolution produced on record can be

verified from the original minutes book and original minutes book can be returned to the complainant.”

- (iii) “It was very much easy and convenient for the complainant to produce the original minutes book on the record at the time of evidence.”
- (iv) “But though there was sufficient opportunity with him minutes book was not brought before the Court” and
- (v) “Therefore, in absence of original minutes book copy of minutes of Resolution cannot be read in evidence as proof of authorization.”

#### Ratio in the judgment

**22.** Considering this reasoning, it will be relevant to see what are the observations in the judgments relied upon by Mr. Ponda. It is true that in case of **Geeta Marine Service Pvt. Ltd. (supra)**, this Court has elaborately dealt with the practice being followed while recording the evidence of the complainant in the light of the provisions of Section 145 of the Negotiable Instruments Act. There is elaborate discussion about how the documents are to be marked as exhibit and when objections can be taken and how they are to be dealt with. In paragraph

No.23, three categories of objections are reflected, in the judgment of Apex Court they have been reproduced. They are categorized as follows :-

- (a) First objection regarding insufficiency of proof or irregular mode of proving the document.
- (b) Second objection is that the document is not properly stamped.
- (c) The document sought to be proved is otherwise inadmissible.

**23.** The observations of the Hon'ble Supreme Court on this issue were also considered. If it is objection regarding proof of document, the same has to be decided then and there only. In other words, the objection has to be taken when recording of evidence is underway (and not otherwise). In Appeal before this Court, the issue is about proof of the two documents i.e. copy of Resolution and the minutes book. The observations in case of R.V.E. Venkatachala Gounder (supra) are already considered in case of Geeta Marine Services Pvt. Ltd. and Anr. (supra).

24. As said above, even if copy of Board Resolution was not signed, the Hon'ble Supreme Court has opined '*averment in the affidavit about passing of a Board Resolution is sufficient*'.

25. The contentions raised by learned Advocate Shri Satyanarayanan needs to be considered. When I have perused the affidavit of examination-in-chief by the complainant - Hashim Abdul Razak, he has referred about :--

- a. tendering of the true copy of Board Resolution.
- b. passing of the resolution in the meeting dated 2/12/2010.
- c. contents of the resolution was recorded in the minutes book.
- d. tendered certified true copy of the minutes book.
- e. contents of original true extract of board resolution and minutes book are true and corrects and it bears his signature as a Chairman.
- f. the original minutes book may be verified and returned to them.

26. It is no doubt true that when the learned Magistrate has dealt

with the issue of exhibiting the document as noted down on page 8, there is no reference that the originals were seen by the Court and they were returned and then the true copies were marked as Exhibit. Even if considered from the angle of averments in the affidavit, we find that necessary averments to prove documents are there.

27. I do not think not making an endorsement about perusing original of minutes book is of vital importance. It is important to say something about nature of these two documents. One is minutes book and another is board resolution. Minutes book is the primary documents and it contains recording of discussion in the meeting and then decision taken. Whereas copy of the board resolution is nothing but the reproduction of decision taken in the meeting.

28. On this background, it will relevant to consider the line of cross examination. Learned Advocate for the Respondent - Accused is not contending that either while cross-examining the witness or by way of 313 statement or by way of his own evidence, the Respondent – Accused has challenged about *‘not following the procedure and has challenged about existence of these documents’*.

29. When the complainant avers in his complaint that he has

brought the originals and it may be returned to the complainant and certified true copies may be kept on record, what he really mean to suggest is 'let the originals may be returned to him and what is to be returned is minutes book only'. It is no doubt true that copy of affidavit of examination-in-chief is given to the Respondent – Accused. It is no doubt true that the Respondent – Accused is aware about what the complainant's witness has stated in the affidavit.

**30.** It is a rule of evidence that a document has to be proved by producing the original that is primary evidence. It is also true that a document can be proved by way of secondary evidence. There are rules for producing a secondary evidence. It is laid down in Section 65 of the Indian Evidence Act. If the conditions therein are fulfilled the party can rely upon secondary evidence. So can it be said that the complainant was justified in relying upon certified true copy of board resolution instead of producing the original minutes book?

**31.** It is also true that the minutes books, considering its nature, it is difficult to be kept in the record of the particular case because the Court is concerned only with the relevant page of the minutes book. When the complainant has averred in the affidavit about production of

the original and prayed for return of document, I think the complainant has fulfilled its responsibilities of proving the same. I am saying so, on the basis of the circumstances brought to my notice. In fact, it was necessary for the accused at least to point out during the cross-examination that their originals are not produced. He need not call upon the complainant's witness to produce their original, he could have certainly asked the complainant's witness that the original minutes book is not produced. This was not put during the cross-examination. So that was the best opportunity for the accused to point out that lacuna. In fact, he allowed the complainant to go on with the case on the basis of the line of cross-examination he has adopted. If this was not put through cross-examination, it was not expected from the complainant to produce the original minutes book at subsequent stage when re-examination was conducted. Further more clause (a) of section 65 of Evidence Act permits a party to adduce secondary evidence, when the original is shown. In this case this procedure is complied. The witness has referred about original minutes book and also prayed for his return after verifying with the original. The accused has not taken that opportunity.

32. Ultimately, the trial is conducted on the basis of what case you are putting. When it comes to the accused it is by way of cross-examination. When these questions were not put to complainant at a subsequent stage, you cannot put him to surprise by raising that plea subsequently at the time of arguments. This objection is not of such a kind which goes to the root of the matter. This objection is about mode of proof of the document. By way of his conduct, the Respondent – Accused was not justified in raising this plea at subsequent stage.

33. Learned Magistrate was wrong in observing that the original was not produced. In fact, learned Magistrate has marked the certified copies at **Exh.11** and **Exh.12**. We cannot put a blame on the learned Magistrate. The averments in the affidavit must have been considered. It is true that there is no remark that the originals are verified, but when these documents are marked as exhibits that reference was very much there in the affidavit. I do not think in the set of these facts any specific observation is required from the learned Magistrate that he has seen the originals and returned them. This Court has already observed the conduct of the Respondents in not putting questions in the cross-examination. So the findings of the trial Court cannot be sustained.

Even the Hon'ble Supreme Court has not considered the lacuana 'in not signing Board Resolution and considered the facts stated in chief-examination as sufficient'. Ultimately, we have to see what is the purport of law. This finding needs to be set aside.

34. Certainly, the findings can be considered as perverse. Because the trial court has unnecessarily observed about non-production of the original minutes book while writing the judgment. The observation is erroneous and unwarranted in the set of facts and circumstances mentioned above. When the witness has produced the original at some point of time, it was not objected throughout the trial, then the learned trial judge was wrong in discarding the true copy of the resolution simply for the reason that original minutes book is not produced. This is hypertechnical view and needs to be corrected.

35. All other points were already answered in favour of the Complainant. I answer Point No.1 'about proving the authorisation by the witness of the Company' in favour of the Complainant. Both these documents are proved by the complainant. It is sufficient to produce board resolution in order to prove the contents of minutes book.

### Conclusion

36. In view of the above, it is held that the complainant has proved that the Respondent – Accused has committed an offence punishable under Section 138 of the Negotiable Instruments Act. Hence, judgment of acquittal needs to be set aside and Respondent – Accused needs to be convicted for offence under Section 138 of the Negotiable Instruments Act.

### Hearing on the point of sentence

37. When query is put to both the learned Advocates on the point of hearing the Respondent – Accused on the point of sentence, Mr. Ponda submitted that as per the provisions of Section 255(2) of the Cr.P.C., the hearing of the accused is not contemplated whereas, procedure about hearing the accused finds place under Sections 235(2) and 248(2) of Cr.P.C. the provisions of section 255(2) are relevant. But certainly, I can hear the respective counsels and accordingly, I have heard them. Mr. Ponda submitted that the sentence as per law may be imposed as the liability is in existence since 2009 whereas, learned Advocate Mr. Satyanarayanan submitted that the age of the Respondent – Accused being 85 years be considered by way of lenient

circumstance.

**38.** It is true that there can be a sentence of imprisonment for two years and there could be a fine being twice the amount of cheque. I think the interest of both the parties will be protected by asking the Respondent – Accused to pay twice the amount of the cheque by way of fine. Considering his age, I am not inclined to impose the sentence of imprisonment. The total amount of two cheques involved is Rs.50 Lakhs. Hence, the following order :-

### **ORDER**

- i. Appeal is allowed.
- ii. Judgment dated 9<sup>th</sup> August 2019 passed by the Court of Metropolitan Magistrate, 16<sup>th</sup> Court, Ballard Pier, Mumbai, in Case No.261/SS/2011 thereby acquitting the Respondent – Accused – Boppana G. Chaudhary, for the offence punishable under Section 138 of the Negotiable Instruments Act is set aside.
- iii. Respondent – Accused is held guilty for the offence punishable under Section 138 of the Negotiable Instruments Act.

- iv. Respondent – Accused is sentenced to pay a fine of Rs.1,00,00,000/- (Rupees One Crores Only).
- v. Respondent to deposit the amount before the Court of Metropolitan Magistrate, Ballard Pier, Mumbai within a period of two months from today.
- vi. Out of above-said fine amount, an amount of Rs.99,90,000/- (Rupees Ninety Nine Lakhs Ninety Thousand Only) be paid to the Complainant and Rs.10,000/- be appropriated to the State Government.
- vii. In case the Respondent – Accused fails to pay the amount of fine, he is directed to undergo simple imprisonment for a period of six months.
- viii. A copy of this order be provided to the Respondent – Accused free of cost.

[S. M. MODAK, J.]