

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

Criminal Appeal No. 871 of 2008

Venugopal Jainarayan Bhattad
Age 40, Proprietor of M/s. Shree Pawan
Enterprises, having his office at S-1/34
Jai Krishna Sudam Co-operative Housing
Society Ltd., Bangaur Nagar, Goregaon
(W), Mumbai - 400 090.

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... Appellant
(Orig.Complainant)

Vs.

1. M/s. Harishchandra & Co. Jaliwala
& Co., Jaliwala, a partnership firm, duly
registered under the Partnership Act 1932,
having its office at 233 Abdul Rehman Street,
Opp. Sutar Chawl, Mumbai – 400 003.

2. Shri Dilip Parekh, partner
Harishchandra & Co. Jaliwala
having its office at 233, Abdul Rehman Street,
Opp. Sutar Chawl, Mumbai – 400 003.

3. The State of Maharashtra
(through the Public Prosecutor-
High Court (A.S.), Bombay.

... Respondents.
(Res.Nos.1 & 2-Org.Accused)

Mr Sumit Kothari, for Appellant
Mr HR Desai, for respondents No.1 and 2
Mr AD Kamkhedkar, APP for State/respondent No.3.

Coram: R.N.Laddha, J.
Reserved on: 4 December 2023.
Pronounced on: 8 January 2024.

Judgment:

The challenge in this Appeal is to the Judgment and Order dated 22 August 2006 passed by the learned Metropolitan Magistrate, 6th Court, Mazgaon, Mumbai, in CC No.2133/SS/2005, whereby the accused/ respondents No.1 and 2 came to be acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the NI Act').

2. The facts of the case are rather peculiar. The accused/ respondents No.1 and 2 are acquitted on the ground that the affidavit in lieu of examination-in-chief was neither verified nor sworn before the Commissioner of Oath or the Court as contemplated under Section 297 of the Code of Criminal Procedure, 1973 (for short, 'the Code').

3. On 11 March 2005, the appellant filed a criminal complaint bearing No.2133/SS/2005 under Sections 138 read with 141 of the NI Act for dishonour of cheques bearing Nos.972122, 972135, and 972144 for a total sum of Rs.8,00,000/-. The learned Magistrate took cognisance of the offence and summoned the accused, and on their appearance, the particulars of the offence were read over and explained to them. The accused abjured their guilt and claimed trial.

4. During the trial, the complainant/ appellant filed an affidavit

of examination-in-chief. This affidavit was not sworn before the competent authority and stated that the accused issued three cheques totalling Rs.8,00,000/- to discharge their liability. On presentation of these cheques, they were returned unpaid due to insufficient funds. The complainant issued a statutory notice through his advocate, which the accused received. The accused replied to this notice but did not make the payment. Based on this affidavit of the examination-in-chief, the accused cross-examined the complainant.

5. After appraisal of the evidence and the documents on record, the learned Magistrate was persuaded to acquit the accused. By the impugned judgment and order dated 22 August 2006, the learned Magistrate acquitted the accused on the ground that the complainant's affidavit of examination-in-chief was defective and not in consonance with section 297 of the Code. Being aggrieved and dissatisfied thereby, the complainant has preferred the present appeal.

6. I have heard Mr Sumit Kothari, the learned Counsel for the appellant; Mr HR Desai, the learned Counsel for respondents No.1 and 2; and Mr AD Kamkhedkar, the learned Additional Public Prosecutor for respondent No.3/State; and perused the impugned judgment, grounds in appeal memo, evidence, and material on

record.

7. Mr Sumit Kothari, the learned Counsel for the appellant, submitted that the affidavit of evidence of the complainant was filed in the presence of the learned Magistrate; thereafter, the complainant was cross-examined by the accused. He further submitted that during the cross-examination, the accused did not question the complainant as to why the affidavit was not sworn, and the entire trial proceeded on the basis of the affidavit of evidence being proper. He contends that for want of proper legal guidance, the complainant should not suffer as the Code being procedural, technical defects ought not to come in the way of substantial justice. To support his contentions, he relied upon (i) *Owners and Parties Interested in M.V. Vali Pero Vs. Fernando Lopez*¹; (ii) *Bijoy Shankar Mishra Vs. The State of Jharkhand*²; (iii) *Jang Singh Vs. Brij Lal*³; and (iv) *Commercial Toyota Vs. State of Uttarakhand*⁴.

8. Mr HR Desai, the learned Counsel for respondents No.1 and 2, submitted that the defect in the affidavit was pointed out to the complainant by the learned Magistrate and the same is also recorded in the impugned judgment and order. He further

1 (1989) 4 SCC 671

2 SLP (Cri) No.894 of 2022 dated 12 September 2023

3 AIR 1966 SC 1631

4 Cri Revision No.252 of 2019 dated 31 July 2019 (Uttarakhand High Court at Nainital)

submitted that the learned Magistrate has rightly passed the impugned judgment and order.

9. This Court has considered the rival contentions and the applicable law. To determine the controversy in the present matter, it is imperative to refer to Section 145 of the NI Act, which reads thus:

“145. Evidence on affidavit. —

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.”

10. Sections 143 to 147 of the NI Act were introduced when the criminal courts were swamped with complaints filed under section 138, and a need was felt to amend the NI Act to bring into place a robust mechanism which would assist the courts in deciding such cases expeditiously. These sections provide for a separate summary procedure to try the offence punishable under section 138 of the NI Act, and they explicitly depart from and override the provisions of the Code. Sub-section (1) of Section 145 permits the

complainant to record his evidence by way of an affidavit. Sub-section (2) of Section 145 enables the accused on an application to examine the complainant, who has given evidence on an affidavit. The object behind this is to facilitate the purpose of the amendment and not let procedural technicalities affect the disposal of the complaints.

11. A perusal of the record reveals that the complainant tendered his affidavit of examination-in-chief on 29 August 2005, which was endorsed and marked as '*filed*' by the learned Magistrate. When this affidavit was taken on record, it was not sworn before the competent authority. This affidavit was assumed to be proper, and on 4 August 2006, the accused was permitted to cross-examine the complainant based on the material contained therein. Subsequently, the allegations in this affidavit were referred to the accused for his statement under section 313 of the Code. After recording the accused's statement, the matter was adjourned for arguments. On 19 August 2006, the learned Magistrate heard the arguments of both sides and adjourned the matter for pronouncement of judgment.

12. Based on the aforesaid events, it transpires that the learned Magistrate proceeded to conduct the entire trial on the assumption that this affidavit was proper. From the date of filing of the

complainant's affidavit in lieu of examination-in-chief till the date of completion of the arguments, the roznama does not indicate that the learned Magistrate directed the complainant to cure the defect in his affidavit of evidence. Moreover, in the impugned judgment and order, the learned Magistrate observed that the accused's defence and evidence were not sufficient to rebut the presumption under section 139 of the NI Act, yet without considering other aspects of the matter, he acquitted the accused for the complainant's non-compliance of section 297 of the Code.

13. Section 138 of the Indian Evidence Act, 1872, lays down the order of examinations. Firstly, the complainant shall be examined-in-chief. Secondly, if the accused so desires, the complainant shall be cross-examined. Thirdly, if the complainant so desires, he may be re-examined. Lastly, if the accused so desires, he shall be permitted to cross-examine the complainant on his re-examination. Section 145 of the NI Act, being a special provision, allows the complainant to conduct his examination-in-chief on an affidavit. Only after the examination-in-chief is done can the accused cross-examine the complainant. The fact that the learned Magistrate permitted the accused to cross-examine the complainant would mean that the complainant's affidavit of examination-in-chief was accepted as the way it was tendered and treated as proper. Thus, the learned Magistrate could not have acquitted the accused based on

only ground that the affidavit was not sworn when, in fact, he endorsed that affidavit as '*filed*' instead of returning it to the complainant to cure the defect and permitting the accused to cross-examine the complainant.

14. Before passing the impugned judgment and order, the learned Magistrate ought to have considered that there was a lapse on the part of the complainant's advocate in guiding him on the procedural aspects. The complainant should not have to suffer due to the improper legal assistance rendered by his advocate, which could have been easily remedied by giving appropriate directions. This is more so when the complainant was cross-examined on the basis of the affidavit of examination-in-chief, and the accusations therein were referred to the accused in his statement under section 313 of the Code. Once the complainant files an affidavit of examination-in-chief, and if the same is defective, it is the duty of the Magistrate to return the affidavit and direct the complainant to rectify the defect. As stated above, the enactment of section 145 was to facilitate expeditious disposal of complaints under the NI Act; this section and the provisions of the Code are enacted to regulate the procedure to try criminal cases; therefore, these technicalities ought not to come in the way of dispensation of justice, especially when a defect in following the procedure is curable.

15. A Magistrate is expected to be vigilant and not a silent spectator while conducting a trial. The Hon'ble Supreme Court in ***Munna Pandey v. State of Bihar***⁵, observed as follows:

“70. This Court has condemned the passive role played by the Judges and emphasized the importance and legal duty of a Judge to take an active role in the proceedings in order to find the truth to administer justice and to prevent the truth from becoming a casualty. A Judge is also duty bound to act with impartiality and before he gives an opinion or sits to decide the issues between the parties, he should be sure that there is no bias against or for either of the parties to the lis. For a judge to properly discharge this duty the concept of independence of judiciary is in existence and it includes ability and duty of a Judge to decide each case according to an objective evaluation and application of the law, without the influence of outside factors.

71. If the Courts are to impart justice in a free, fair and effective manner, then the presiding judge cannot afford to remain a mute spectator totally oblivious to the various happenings taking place around him, more particularly, concerning a particular case being tried by him. The fair trial is possible only when the court takes active interest and elicit all relevant information and material necessary so as to find out the truth for achieving the ultimate goal of dispensing justice with all fairness and impartiality to both the parties.”

16. Given the above, the Judgment and Order dated 22 August

5 2023 SCC OnLine SC 1103

2006 passed by the learned Metropolitan Magistrate, 6th Court, Mazgaon, Mumbai, in CC No.2133/SS/2005 is set aside, and the matter is remitted to the learned Magistrate to give the complainant an opportunity to cure the defect and consider all other aspects of the case and, thereafter, decide the matter afresh in accordance with the law.

17. The appeal is disposed of accordingly.

[R.N. Laddha, J.]