

Milind Shripad Chandurkar vs Kalim M.Khan & Anr on 3 March, 2011

Equivalent citations: AIR 2011 SUPREME COURT 1588, 2011 AIR SCW 1773, (2011) 104 ALLINDCAS 202(2) (SC), 2011 CRI. L. J. 1912, AIR 2011 SC(CRI) 769, 2011 (3) AIR BOM R 126, 2011 (2) AIR KANT HCR 571, (2011) 3 MH LJ (CRI) 15, 2011 ACD 458 (SC), (2011) 2 RECCRIR 568, (2011) 2 ALLCRIR 1185, (2011) 3 SCALE 285, (2011) 2 CIVILCOURTC 690, AIR 2011 SC (CIV) 975, (2011) 3 MAD LJ(CRI) 774, 2011 (4) SCC 275, (2011) 2 RECCIVR 687, (2011) 1 DLT(CRL) 874, (2011) 1 NIJ 353, 2011 CALCRILR 2 852, (2011) 1 CRILR(RAJ) 255, (2011) 2 GUJ LR 1670, (2011) 2 KER LT 271, (2011) 2 RAJ LW 1135, 2011 CRILR(SC MAH GUJ) 255, (2011) 102 CORLA 128, (2011) 2 BANKCAS 542, (2011) 3 CIVLJ 237, (2011) 1 KER LJ 720, (2011) 4 MAH LJ 96, (2011) 3 MPLJ 67, (2011) 48 OCR 1024, (2011) 2 CURCRIR 9, (2011) 2 BOMCR(CRI) 1, (2011) 74 ALLCRIC 573, (2011) 3 ALL WC 2(145), 2011 CALCRILR 2 244, (2011) 2 CAL LJ 61, (2011) 2 ALLCRILR 348, 2011 CRILR(SC&MP) 255, 2011 (2) SCC (CRI) 208, 2011 (3) KCCR SN 211 (SC), (2011) 2 BOM CR 482

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Bench: B.S. Chauhan, P. Sathasivam

REPORTAB

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 643 OF 2011

(Arising out of SLP(CrL.) No.3045 of 2008)

Milind Shripad Chandurkar

...

Appellant

Versus

Kalim M. Khan & Anr.

... Respondents

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. Leave granted.

2. This appeal has arisen out of judgment and order dated 18.2.2008 passed by the High Court of Judicature at Bombay in Criminal Revision No.656 of 2007 by which the High Court has set aside the judgments and orders of the trial Court as well as of the Appellate Court convicting the respondent no.1 for the offences punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called the Act 1881) and sentencing him for the period, till the rising of the Court and to pay compensation of a sum of Rs.7,00,000/-. Failing which, the respondent would serve simple imprisonment for a period of six months.

3. The facts and circumstances giving rise to this case are that the appellant/complainant claimed to be the sole proprietor of the Firm, namely, Vijaya Automobiles, which had the business of supplying fuel. The firm had supplied a huge quantity of diesel to respondent no.1 in the month of March 2005. In order to meet the liability, the Respondent no.1 made the payment vide Cheque No.490592 dated 28.4.2005 in the name of the said proprietary Firm drawn on Development Credit Bank, Kurla Branch, Bombay for an amount of Rs.7,00,000/- (Rupees seven lakhs only). The appellant/complainant deposited the said cheque in the account of the said Firm in Bank of India Uran Branch on 12.9.2005.

4. The Development Credit Bank returned the said cheque mentioning "unpaid" with a Memorandum "funds are insufficient".

The appellant/complainant sent notice dated 11.10.2005 by Registered A.D. post as well as under certificate of posting. The respondent no.1/accused did not accept the notice sent by Registered A.D. post.

However, the notice sent by certificate of posting stood served upon him as the respondent no.1 admitted the said fact in his statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.). The respondent no.1/accused neither replied to the notice, nor made the payment within 15 days of the receipt of the notice.

5. The appellant/complainant filed a complaint case no.545 of 2005 before the Judicial Magistrate, First Class, Uran under section 138 of the Act 1881 on 22.11.2005. The case was tried, however, the respondent no.1/accused did not enter the witness box and after considering the case, the trial Court vide judgment and order dated 22.12.2006 concluded the trial convicting the respondent no.1 to suffer simple imprisonment till rising of the court and to pay compensation of Rs.7,10,000/- and in default of payment thereof, to suffer simple imprisonment for six months. It was directed that out of the aforesaid amount of compensation, a sum of Rs.10,000/- be credited to Raigad District Legal Aid Committee.

6. Being aggrieved of the aforesaid judgment and order, the respondent no.1/accused filed Criminal Appeal No.85 of 2006. The learned Sessions Judge vide judgment and order dated 18-19/9/2007 dismissed the said appeal, with the amount of compensation being reduced from Rs.7,10,000/- to Rs.7,00,000/-. Thus, the direction to credit the amount of Rs.10,000/- to Raigad District Legal Aid Committee was set aside.

7. Being aggrieved, respondent no.1 preferred Criminal Revision Application No.656 of 2007 before the High Court which has been allowed vide judgment and order dated 18.2.2008 (impugned) only on the ground that the appellant could not produce any evidence to establish that he was the sole proprietor of the proprietary concern in question. Hence, this appeal.

8. We have heard Shri Shekhar Naphade, learned senior counsel for the appellant, Shri Viraj Kadam, learned counsel for respondent no.1 and Shri Shankar Chillarge, Additional Advocate General for respondent no.2 and perused the record.

All the three courts below have dealt with the issues elaborately and recorded the following findings of fact:-

(i) The cheque had been issued by the respondent no.1 in favour of the Firm concerned towards discharge of pre-existing liability and not as security.

(ii) The substantive sentence of imprisonment in default of payment could be imposed.

So far as the findings on the aforesaid two issues are concerned, the same are not under challenge before us. Learned counsel appearing for the respondents have accepted the aforesaid findings.

9. The only issue involved herein is as to whether the appellant owns the said firm i.e., whether he is the proprietor of the said firm?

The trial Court as well as the Appellate Court have held that a sole proprietary concern is no independent legal entity and its identity remains inseparable from its proprietor. But it merely remains a legal proposition. None of the said courts held that the appellant was the sole proprietor of the said firm.

10. The High Court has set aside the judgments of the trial Court as well as the Appellate Court in Revision only on the ground that as the appellant did not produce any evidence to show that he was the proprietor of the Firm, he had no locus standi to file the complaint.

11. The trial Court held that the complainant had deposed that he was proprietor of the Firm, namely, "Vijaya Automobiles" which had the business of supplying fuel etc. and the Firm had supplied the fuel on credit to respondent no.1/accused. The Court also took note of the pleadings taken by the respondent no.1/accused that he had given the cheque to the appellant for Vijaya Automobiles but it was as a security and not to meet any legal liability. Therefore, the respondent no.1/accused had admitted that the appellant had actual control over the said firm. The respondent no.1/accused admitted his signature on the cheque and execution of the cheque. Therefore, the presumptions under sections 118 and 139 of the Act 1881 were attracted.

12. Dealing with the issue involved herein, the Appellate Court has noted that perusal of the cross-examination indicated that the appellant did not produce any documentary evidence to show that he was the proprietor of Vijaya Automobiles. Rather it was admitted by the appellant in the cross-examination that he did not have any documentary evidence to show that the complainant was the owner of the petrol pump.

13. In spite of making the aforesaid observations, the appeal was dismissed on the ground that admittedly diesel had been supplied to the respondent no.1/accused, and the said respondent had issued the cheque to meet the liability, which could not be encashed for want of funds. All other requirements in law, i.e., issuance of notice etc. also stood completed.

14. Relevant part of the affidavit filed by the appellant/complainant before the trial Court reads as under:

"I, Shri Milind Shripad Chandurkar, Aged about 37 years, Indian Inhabitant, Occ. Business, Proprietor of M/s. Vijay Automobiles, having address at Sector-29, Dronagiri Node, Uran, Dist. Raigad, take oath and state on solemn affirmation as under.....

I state that in due discharge of legal liability of the accused as mentioned in foregoing paras, the accused issued one cheque dtd. 28.4.2005 in my name i.e. in the Name M/s. Vijaya Automobiles which was drawn on Development Credit Bank, Kurla Branch, Mumbai-70 bearing Cheque No.490592, for Rs.7,00,000/- (Rupees Seven Lakhs only)."

Relevant part of his cross-examination reads as under:-

"It is true that till today I had not produced any documentary evidence to show that I am owner of Vijaya Automobiles.....Till today I had not produced any documentary evidence to support."

15. The complainant had also examined Shri S.K. Sharma, owner of M/s. Vikas Travels under whom the respondent no.1 had been working as a sub-contractor. In his cross-examination, Shri S.K. Sharma also stated as under:-

"I have no documentary evidence to show that complainant Milind Shripad Chandurkar owns the petrol pump."

16. Thus, from the above, it is evident that the appellant/complainant could not produce any document to show that he was the proprietor of Vijaya Automobiles in spite of the fact that the issue had been agitated by the respondent no.1/accused at every stage. It is also evident from the documents on record that in the list of witnesses the complainant had mentioned the name of his banker as a witness, however, the said banker was not examined.

17. It may also be pertinent to mention here that appellant did not make any attempt to adduce additional evidence at the appellate stage also. No document has ever been filed to substantiate his averment in this regard.

18. Section 7 of the Act 1881 defines "Payee" as the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid. Section 8 defines "the holder of the cheque" as any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Section 9 defines "holder in due course" as any person who for consideration became the possessor of a cheque if payable to a bearer or the payee or endorsee thereof.

Section 138 provides for penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts. However, exception contained in clause (c) thereof reads as under:

"The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice." (Emphasis added)

19. Section 142 provides for taking cognizance of the offence notwithstanding anything contained in Cr.P.C. which reads as under:

"(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque." (Emphasis added)

20. This Court in Shankar Finance and Investments v. State of Andhra Pradesh & Ors., (2008) 8 SCC 536, dealt with the issue involved herein elaborately and held that where the "payee" is a proprietary concern the complaint can be filed (i) by the proprietor of the proprietary concern describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern describing itself as the sole proprietary concern represented by its proprietor; and (iii) the proprietor or the proprietary concern represented by the Attorney Holder under the power of attorney executed by

the sole proprietor.

However, it shall not be permissible for an Attorney Holder to file the complaint in his own name as if he was the complainant. He can initiate criminal proceedings on behalf of the principal.

In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 of the Act 1881 but the case shall be governed by the general law i.e. the Companies Act 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern.

The Court placing reliance on earlier judgments, particularly, in *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.*, (2005) 2 SCC 217, held that the general principles of company law or civil law would apply for maintaining the complaint under Section 138 of the Act 1881.

21. In *National small Industries Corporation Ltd. v. State (NCT of Delhi) & Ors.*, (2009) 1 SCC 407, this Court held as under:

"The term "complainant" is not defined under the Code. Section 142 of the NI Act requires a complaint under Section 138 of that Act to be made by the payee (or by the holder in due course)..."

22. Thus, in view of the above, the law stands crystallised to the effect that a person can maintain a complaint provided he is either a "payee" or "holder in due course" of the cheque.

23. In the instant case, it is evident that the firm, namely, Vijaya Automobiles, has been the payee and that the appellant cannot claim to be the payee of the cheque, nor can he be the holder in due course, unless he establishes that the cheques had been issued to him or in his favour or that he is the sole proprietor of the concern and being so, he could also be payee himself and thus, entitled to make the complaint.

The appellant miserably failed to prove any nexus or connection by adducing any evidence, whatsoever, worth the name with the said firm, namely, Vijaya Automobiles. Mere statement in the affidavit in this regard, is not sufficient to meet the requirement of law. The appellant failed to produce any documentary evidence to connect himself with the said firm. It is evident that the firm had a substantial amount of business as in one month it sold the diesel to respondent no.

1 - a single party, for a sum of Rs. 7 lakhs. The appellant would, in addition, have also been carrying out business with other persons.

Thus, a person with such a big business must have had transactions with the bank and must have been a payee of income tax, sales tax etc. Thus, in such a fact-situation, there would be no dearth of

material which could have been produced by the appellant to show that he was the sole proprietor of the said firm. The appellant failed to adduce any evidence in this regard, nor made any attempt to adduce any additional evidence at the appellate stage, in spite of the fact that the respondent is raising this issue from the initiation of the proceedings.

24. In view of the above, we do not see any cogent reason to interfere with the impugned judgment and order of the High Court.

The appeal is devoid of any merit and, accordingly, dismissed.

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.....J. (P. SATHASIVAM)J. (Dr. B.S. CHAUHAN) New Delhi,
March 3, 2011 NON-REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL
APPELLATE JURISDICTION Special Leave Petition (Criminal) No.3122 of 2008 Milind Shripad
Chandurkar ... Appellant Versus Naimulla M. Khan & Anr. ... Respondents WITH Special Leave
Petition (Criminal) No.3124 of 2008 J U D G M E N T Dr. B.S. CHAUHAN, J.

1. In view of the judgment in Criminal Appeal No. 643 of 2011 arising out of Special Leave Petition (Criminal) No. 3045 of 2008, the above Special Leave Petitions are dismissed.

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.....J. (P. SATHASIVAM)J. (Dr. B.S. CHAUHAN) New Delhi,
March 3, 2011