



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

**CRIMINAL APPLICATION (ALP) NO. 14 OF 2022
(For Leave to Appeal)**

Morries Energies Limited

Office at 11-A, Embassy Apartments,
46, Napean Sea Road, Mumbai – 400 036.

Through its representative
Mr. Hemant Kumar Garg

...Applicant

Vs.

1. Sumit Agarwal

Adult 53 years, Indian Inhabitant,
Residing at : 1901,
Whispering Palms,
6A, Lokhandwala Township,
Kandivali (East), Mumbai – 400 101.

2. The State of Maharashtra

...Respondents

Mr. Niranjan Mundargi, Ms. Keral Mehta i/by Mr. Kunal Ambulkar	Advocate for the Applicant in ALP 14 of 2022.
Mr. Aabad Ponda, Senior Advocate a/w Ms. Nikita Vardhan, Ms. Nidhi Pathak and Mr. Vishal Tiwari i/by Kanga and Company	Advocates for Respondent No. 1 in ALP 14 of 2022
Mr. A. D. Kamkhedkar and Ms. R. S. Tendulkar	APP for the Respondent-State in ALP 14 of 2022

**ALONGWITH
CRIMINAL APPLICATION (ALP) NO. 15 OF 2022**

(For Leave to Appeal)

Morries Energies Limited

Office at 11 -A, Embassy Apartments,
46, Napean Sea Road, Mumbai – 400 036.

Through its representative
Mr. Hemant Kumar Garg

...Applicant

Vs.

1. Anubhav Agarwal

Age 41 years, Indian Resident
Residing at : 601, Khatav
Condominium,
J. M. Marg, Mumbai – 400 101.

2. The State of Maharashtra

...Respondents

Mr. Ashok Mundargi, Senior Counsel i/by Mr. Kunal Ambulkar	Advocate for the Applicant in ALP 15 of 2022.
Mr. Nilesh Ojha a/w Mr. Abhishek Mishra, Mr. Hania Shaikh, Mr. Chaitanya Raote i/by Dipashri Raorane	Advocate for Respondent No. 1 in ALP 15 of 2022
Mr. H. J. Dedhia and Ms. R. S. Tendulkar	APP for the Respondent-State in ALP 15 of 2022

CORAM : S. M. MODAK, J.

RESERVED ON : 11th OCTOBER 2024
& 20th FEBRUARY 2025
& 04th MARCH 2025

PRONOUNCED ON : 26th MARCH 2025

JUDGMENT :-

1. There was a complaint bearing No. 3661/SS/2014 filed by M/s. Morries Energy Limited-present applicant (hereinafter referred to as 'Morries') before the Court of Metropolitan Magistrate, Mumbai. It was filed for commission of an offence under Section 138 read with Section 142 of the Negotiable Instruments Act. It was filed against four accused persons. All were tried. The learned Magistrate disposed of the case vide judgment dated 29/05/2019. The result is as follows:-

- a) Accused No. 1-M/s. Chamber Constructions Private Limited
(hereinafter referred to as 'Chamber')
- b) Accused No. 2-Anubhav /director
- c) Accused No. 4-Sumit/VP Finance & Taxation
All the three were convicted.
- d) Accused No. 3-Gokul Aggarwal/director was acquitted.

2. Amongst them two convicted individuals have preferred appeals. Both were allowed and conviction was set aside by the Court of Judge City Civil on 18/06/2021. (Criminal Appeal 529 of 2019 – accused No. 4-Sumit and Criminal Appeal No. 530 of 2019 by Appellant /

accused No. 2-Anubhav). On this background, Morries has sought leave to prefer an appeal (ALP 14 of 2022 against accused no. 4 Sumit and ALP No. 15 of 2022 against accused No. 2 – Anubhav).

Facts

3. The facts averred in the complaint and in the documents are little bit different from normal prosecution under Section 138 of the Negotiable Instrument Act. The liability of Chamber to Morries is preceded by different transactions in between different parties. They will be referred in due course. Trial Court accepted the claim of Morries “as legally recoverable debt”. However, the Appellate Court refused to accept said claim. This is one of the ground of challenge on behalf of Morries. At this stage, it is not expected to decide about the challenge to those findings. The evidence need to be considered only for the purpose of granting leave or not to grant leave.

Background

4. Mafatal Engineering Industries Limited has availed of loan from various Banks. They were in arrears. Banks have initiated proceedings before Debt Recovery Tribunal Mumbai. Furthermore, some of the banks have assigned financial assets in favour of certain Assets

Reconstruction Companies constituted as per the provision of SARFAESI Act. There were recovery certificates issued in favour of Banks/Assets Reconstruction Company. There was further assignment of financial assets acquired by Assets Reconstruction Company in favour of Chamber/accused company. The details are given in the complaint/affidavit of evidence. That is how Chamber came into picture.

5. Morries has offered various services to Chamber in the said assignment process. Chamber is involved in construction business. Whereas Morries is involved in the business of electricity generation. Earlier name of the Complainant was M/s. Gujrat Gems Pvt. Ltd.. The Complainant is part of group Companies. Whereas the accused No. 1 is also part of group companies owned and controlled by Aggarwal family.

6. The 16 cheques which is the foundation of criminal prosecution were issued on behalf of Chamber in favour of Morries towards the discharge of liability arisen out of the services rendered by them. Morries offered their services to Chamber while acquiring and sale of real estate. Morries and its allied companies used to issue debit note to

Chamber for the professional services rendered by them. Morries has also assisted Chamber in acquisition of financial assets/debts from Assets Reconstruction Companies (ARC). Debt recovery tribunal issued recovery certificates. While adjudging the amount, the interest is granted. But it was inadequate. Chamber has moved for grant of proper interest. Morries has also offered their services in that behalf. Both have entered into Memorandum of Understanding on 20.07.2013. As per this MOU, Chamber has agreed to pay 10% of amount of enhanced interest to Morries.

7. Prior to issuance of present 16 cheques, Chamber has also issued earlier slot of cheques. Towards discharge of part of the liability three cheques were issued. It has happened (in between the Parties) few of the cheques were not encashed and Chamber has issued fresh cheques. There was correspondence exchanged in between them. Accused Nos. 2, 3 and 4 have participated at different levels. Even one Anil Agrawal participated later on, he expired. In the year 2014, 16 post dated cheques were issued “prior to realization of those cheques, fresh 16 cheques drawn on Central Bank of India, Churchgate branch were issued on behalf of Chamber”.

8. All 16 cheques got dishonoured on presentation, for the reason “funds insufficient”. There was statutory notice dated 01/08/2014 sent to all the accused. Chamber did not comply with the notice. That is how complaint was filed. There was oral evidence given by one Hemant Kumar Garg, Director of Morries Energies Limited. One Santosh Date, Chartered accountant of M/s. Morries Energy Limited is also examined. Accused have not adduced any evidence.

9. I have heard learned Advocate Shri Niranjana Mundargi for the Complainant in Criminal Application for leave to Appeal No. 14 of 2022, also heard learned Senior Advocate Shri Aabad Ponda for the Respondent-accused. Also heard learned Senior Advocate Shri Ashok Mundargi in Criminal Application for leave to Appeal No. 15 of 2022 and learned Advocate Shri Nilesh Ojha for the Respondent-accused. Also heard learned APP Mr. Kamkhedkar in ALP No. 14 of 2022 and Shri Dedhia in ALP No. 15 of 2022.

10. The facts averments and documents pointed out on behalf of Morries (in both the matters) are as follows :-

(i) Averments in the complaint

(ii) Averments in the evidence

- (iii) Averment in the documents
- (iv) Findings of the trial Court
- (v) Findings of the Appellate Court.

Scope of an appeal

11. The learned Advocate Shri Ojha read over the following judgments from the compilation:-

- (a) *Rajaram Vs. Maruthachalam*¹, specifically para nos. 34 and 35.
- (b) *Mallappa Vs. State of Karnatka*², specifically para no. 42
- (c) *Prakash Madhukarrao Desai Vs. Dattatraya Sheshrao Desai*³
- (d) *Smt. Tasneem Murshedkar Mazhar v/s Shri Ramesh S/o. Dhanraj Mahajan Trimurti Medical and Gen. And Anr.*⁴
(para no. 12).

12. Learned Senior Advocate Shri Ponda also relied upon observations in case of *Chandrappa and Ors. v/s State of Karnataka*⁵ and *Golbar Hussain and others v/s State of Assam and Anr.*⁶, the

1 (2023) SCC Online SC 48
 2 (2024) 3 SCC 544
 3 (2023) 458 ITR 174
 4 (2020) ALL MR (Cri) 1182
 5 (2007) 4 SCC 415
 6 (2015) 11 SCC 242

Hon'ble Supreme Court reiterated principles to be considered by the appellate court while dealing with an appeal against the judgment of acquittal (para no.42).

13. It is true, when there is judgment of acquittal, appellate court should be slow in interfering because the presumption of innocence is reinforced. But it is also true when there is prosecution for an offence punishable under Section 138 of Negotiable Instruments Act, the test of "*minimum interference*" by the appellate court does not apply with full force. It is for the reason, the trial for this offence is different from the trial of an offence under Indian Penal Code. The burden lies on both the sides. Even the accused is permitted to rebut the presumption. In that eventuality, the initial presumption applicable in favour of the complainant gets rebutted. The accused can discharge the burden on the basis of admissions brought in cross-examination or even he can adduced evidence. With this view in mind, the issue needs to be decided.

14. In present two matters, both the learned Advocates for the complainant submitted for grant of leave whereas learned advocates for accused Nos. 2 and 4 have vehemently opposed grant of leave.

According to them, the appeals need not be entertained.

15. When I have gone through the judgment given by the Appellate court, I find grounds for acquittal for accused No. 2 and grounds for accused No. 4 are different. **Accused No. 2-Anubhav** was acquitted for the reason “*he does not fall within the clutches of section 142 of the Negotiable Instrument Act. He is not that category of person who can be held liable for acts of company Chamber*”. **Whereas accused No. 4-Sumit** (who is signatory to all cheques) was acquitted on the ground of “*non-proof of the liability of accused Chamber in favour of Complainant-Morries company.*” The stage of both the proceedings is not final hearing of appeals, but they are at the stage of granting of leave.

Provisions for grant of leave

16. This issue is governed as per the provisions of Section 378 (4) of the Code of Criminal Procedure. Such an appeal lies against judgment of acquittal in this Court when complaint is filed. Such an appeal lies against judgment of acquittal passed by the trial court or appellate court. “When to grant leave or refuse it” law is settled. There are certain parameters. When there is judgment of acquittal, Court should be slow

in interfering. Because presumption of innocence is reinforced. When the acquittal judgment is challenged on certain grounds, substance of those grounds is to be tested. However, standard of inquiry (expected for testing those grounds) to be carried out at the stage of grant of leave and that inquiry carried out while deciding the appeal, finally differs. Same standard of inquiry cannot be carried out at the stage of grant of leave.

17. It depends upon facts and circumstances. On some occasion, ground of challenge can be decided on the basis of plain reading of documents or on the basis of provisions of law. Such issues can be decided at leave stage only. However, when detail appreciating of evidence is required, then issue cannot be decided at leave stage. Nevertheless, grant of leave does not mean the judgment of acquittal has to be interfered. Now I will deal with the individual applications.

IN CRIMINAL APPLICATION (ALP) NO. 14 OF 2022

18. In order to show complicity of accused-Sumit, learned advocate Shri Niranjana Mundargi invited my attention to the following documents :-

a)	An agreement dated 20 th July 2013	executed in between Morries as consultant and Chamber as a developer		
b)	Copy of a letter dated 19 th August 2013	forwarding three cheques by Chamber to Morries.		
c)	Copy of debit note	dated 1 st January 2013	issued by Savlani Trading and Investment Company Limited (signed by Hemant Garg) in favour of Anil Agrawal, director of Chamber.	
d)	Copy of recovery certificates at enhanced rate of interest.			
e)	Copy of email dated	27 th November 2013	sent by Morries to Sumit-accused No. 4	intimating about expiry of cheques
f)	Copy of email dated	07 th December 2013	Sent by Morries to Sumit-accused No. 4	Requesting to issue fresh cheques
g)	Copy of email dated	07 th December 2013	Sent by accused no. 4-Sumit to Morries	Assuring to replace old cheques
h)	Copy of email dated	23 rd December 2013	Sent by Morries to accused no. 4-Sumit	Requesting to issue fresh cheque

19. According to learned Advocate Mr Niranjan Mundargi, accused No. 4-Sumit has made correspondence and assured to replace the

cheque shows his complicity. It shows his knowledge about issuance of cheque. To buttress his submission, he relied upon judgment in case of *S. P. Mani and Mohan Dairy Vs. Dr. Snehalatha Elangovan*⁷. He criticized the judgment of acquittal.

20. Whereas according to learned Senior Advocate Mr. Ponda, merely signing a correspondence is not enough. According to him, a person should not only be in-charge of affairs, but he must also be responsible to the management. He emphasized on the factual aspects. He made correspondence through email, which is not directly connected to the accused Chamber. He relied upon following judgments:-

- (i) Siby Thomas Vs. Somany Ceramics Ltd.⁸
- (ii) Ashok Shewakramani and Others Vs. State of Andhra Pradesh and Another⁹
- (iii) Girdhari Lal Gupta Vs. D. H. Mehta and Anr.¹⁰
- (iv) S. M. S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Anr.¹¹
- (v) N. Rangachari Vs. Bharat Sanchar Nigam Ltd.¹²

7 Manu/SC/1189/2022

8 (2023) SCC Online SC 1299

9

10 (1971) 3 SCC 189

11 (2005) 8 SCC 89

12 (2007) 5 SCC 108

- (vi) K. K. Ahuja Vs. V. K. Vora and Anr.¹³
- (vii) National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and Anr.¹⁴
- (viii) Chandrappa and Ors. Vs. State of Karnataka¹⁵
- (ix) Gunmala Sales (P) Ltd. Vs. Anu Mehta and Ors.¹⁶
- (x) Golbar Hussain and Ors. Vs. State of Assam and Anr.¹⁷
- (xi) Ashok Mal Bafna Vs. Upper India Steel Manufacturing and Engineering Company Ltd.¹⁸
- (xii) S. P. Mani and Mohan Dairy Vs. Dr. Snehalatha Elangovan¹⁹
- (xiii) Lalankumar Singh and Ors. Vs. State of Maharashtra²⁰

21. With their assistance, I have read all the judgments. The principles laid down in those judgments about interpretation of provisions of Sections 141 of the Negotiable Instruments Act are, more or less, the same. Only facts of those cases are different. That is why I am not dealing with them individually. In Criminal law, a

13 (2009) 10 SCC 48

14 (2010) 3 SCC 330

15 (2007) 4 SCC 415

16 (2015) 1 SCC 103

17 (2015) 11 SCC 242

18 (2018) 14 SCC 202

19 (2022) SCC Online SC 1238

20 (2022) SCC Online SC 1383

person is liable for his own acts and not for the acts of others. There are few exceptions incorporated in the provisions of I.P.C. new B.N.S.. Company is an artificial entity but having legal existence. It works through natural persons. But Company being juristic person, it is liable in law. At the same time, the persons who are involved in the process are also liable. But you cannot drag every person employed in the Company. There are certain parameters laid down in the Acts governing the subject. Section 141 of the Negotiable Instruments Act deals with the principle of vicarious liability when company is an accused. Section is in two parts. They are :--

- a. sub-section (1) which lay down the principle of “*person in charge of the company and person responsible to the company*” for what for conduct of business of the company.
- b. sub-section (2) lays down the test of “*consent, connivance or neglect on the part concerned director/officer of the company*”.

The director/officer of the company if falls in either of these two tests, then only he can be held responsible and not otherwise.

When I have read all the judgments, in nutshell three parameters are laid down. They are :--

- a. meaning of the phrase “*in charge of and responsible to the company for conduct of business of the company*”.
- b. necessary averment in the complaint.
- c. when it can be said there is consent, connivance or neglect.

Meaning of phrase “in charge of and responsible”

22. There is discussion of the phrase ‘*in charge of and responsible*’ in para nos. 19, 20 and 21 of *K.K.Ahuja’s* case. This phrase is not defined either in the Negotiable Instruments Act or even in the Companies Act. There are certain other Acts which holds Company responsible or guilty. The list of few of the Acts given in para no. 19 of the said judgment. Such as the Prevention of Food Adulteration Act, the Drugs and Cosmetics Act, the Employees Provident Fund Act, Payment of Gratuity Act and so on. But for understanding the meaning of the phrase, we have to bank on the provisions of Companies Act. There is reference of the provisions of Sections 5, 291 and few of the definition clauses in the Companies Act (para nos. 20,21 of the said judgment).

The list of such persons is also enumerated therein. The Managing Director is such kind of post which falls in that category.

Necessary averment in the Complaint.

23. The Hon'ble Supreme Court has dealt with this issue in number of judgments. They are *S. M. S. Pharmaceuticals Ltd. (supra)*, (this is judgment given by three judges bench on reference), in case of *K.K.Ahuja (supra)* (para no. 28), in case of *National Small Industries Corporation Limited (supra)*, in case of *Gunmala Sales (P) Limited (supra)*, in case of *Ashoke Mal Bafna (supra)* and finally in case of *S. P. Mani (supra)*. It has been interpreted in case of *S. M. S. Pharmaceuticals Ltd. (supra)*, in so many words there has to be averment. By passage of time this requirement is elaborated. In case of *K.K.Ahuja (supra)*, J. R. V. Raveendran, while writing the judgment considered the contingency of a company having 100 branches and a cheque is issued from one branch. It will be absurd to join all the officers of all the branches. In *National Small Industries Corporation Limited (supra)*, the Hon'ble Supreme Court elaborated the principle further. Mere bald statement is not sufficient. One cannot presume every director is supposed to know about the transaction. However,

category of Managing Director, Joint Managing Director or a director who has signed the cheque stands excluded. They will certainly liable and there need not be specific pleading “in charge of and responsible” in the complaint. In *Gunmala Sales Private Ltd. (supra)*, this principle is further elaborated. Any particular director may produce incontrovertible or unimpeachable evidence to show his disconnection to the transaction. The High Court can quash such proceeding. That is why there is further necessity of pleading necessary averment with particular details. The same is the interpretation in case of *Ashok Bafna (supra)*. Finally, the Hon’ble Supreme Court in case of *S.P. Mani (supra)* diluted the principle of strict adherence of averment in the complaint. The complainant may not be aware about each and every transaction. The complainant is supposed to know only generally as to who were in charge of the affairs of the company. Other administrative matters would be within the special knowledge of the company.

Consent/connivance/neglect as defence

24. If we read the provisions of sub-section (1) and sub-section (2) of section 141, we will find every attempt is made to fasten liability on certain directors and officers of the company. Even if particular officer

is not falling under the category of sub-section (1), still he may fall under the category of sub-section (2) if the requirements of that sub-section are fulfilled. In case of ***K.K.Ahuja (supra)***, these two provisions are discussed. Sub-section (1) lays down a legal fiction of vicarious liability. Whereas the liability fastened under sub-section (2) is not on the basis of legal fiction but on account of specific part played that is consent, connivance or neglect (para no. 17 and 18). ***In case of S.P.Mani (supra)***, the functioning of any Company is explained and how it is correlated to the provisions of section 141 is elaborated. An offence means an aggregate of facts or omissions which are punishable by law and therefore can consist of several parts, each part being committed at different time and place involving different persons (para no.34). This is explained with the help of an example. 'A' might be in charge of the company at the time of drawing of cheque. 'B' might be in charge of the company at the time of dishonour of cheque and 'C' might be in charge of the company at time of failure to pay within 15 days. In such a case, the permissibility of prosecution of A, B and C, respectively, or any of them would advance the purpose of the provision and if, none can be prosecuted or punished, it would

frustrate the purpose of the provisions of section 138 and 141 (para no.35).

25. If we consider all the parameters together, we may find, the clause “*in charge and responsible*” is the only clause which fastens the liability on directors/officers. The complainant must aver about this clause. But certain details are necessary to substantiate this pleading. So also the complainant can also fasten the liability on other persons on the basis of clause relating to “*consent/connivance/neglect*”. At the same time the Managing Director or Joint Managing Director are responsible in view of posts they hold. So also a signatory to the cheque cannot disown the liability by contending he is not in charge of and responsible to the affairs of the company.

26. At the same time, it is important to note, all the judgments referred above are on the background of filing of quashing petition that is prior to recording of evidence. In present case, the evidence is already adduced. Every party has opened his cards. The principles are still applicable. But evidence has to be seen.

Evidence

27. Learned Advocate Shri Niranjan Mundargi invited my attention to the averments in para nos. 4, 7, 13, 16, 17, 20 and 21. Whereas

according to learned Senior Advocate Mr. Ponda his client has signed earlier cheques but not the present 16 cheques. The emails sent were not from his personal mail account and he was just an employee. Learned Senior Advocate Mr. Ponda has invited my attention to answer given by witness Hemant Garg running page 100. He has admitted "*I have not produced any documentary evidence before this Court to show that accused nos. 2 to 4 are looking the day-to-day affairs of the company accused no.1 and responsible to the company*".

28. I have gone through those averments and the documents. As said above mere averments are not sufficient. It needs to be substantiated. There will be onus on the accused, only when the complainant will discharge initial burden. It is for the complainant to prove, accused no.4 was involved in the transaction in either of the capacity. The Accused no. 4 is described as Vice President of Finance and Taxation. The correspondence which is referred above was in between the accused no. 4 and Morries. This correspondence relates to the previous cheques and not to the present 16 cheques. On the basis of that correspondence, it can certainly be said that accused no. 4 is aware about some transaction. **But this is not enough, to hold him vicariously**

liable. Something more is required. The Complainant ought to have adduced certain evidence to show his complicity in the manner laid down under Sections 141 (1) and 141 (2) of the Negotiable Instruments Act. The learned Additional District Judge has correctly appreciated the evidence, and he rightly acquitted the accused no. 4. So, no case for grant of leave is made out. This is such type of acts, wherein the detailed scrutiny is not required. But at the threshold, we can decide the issue of vicarious liability. On doing the same exercise, **I had come to conclusion not to grant leave in this application, hence Criminal Application (ALP) No. 14 of 2022 is dismissed.**

IN CRIMINAL APPLICATION (ALP) NO. 15 OF 2022

29. As said above accused no. 2-Anubhav has signed those 16 cheques. Learned Senior Advocate Mr. Mundargi has invited my attention to the following documents:-

- (i) 16 cheques signed by accused no. 2 on behalf of the Company Chamber.
- (ii) New recovery certificates thereby fulfilling the promises given as per the agreement.

- (iii) the cheque return memos.
- (iv) The mandatory notice and documents to show the receipt of the notice.
- (v) The oral evidence given by Hemant Garg and Chartered Accountant Shri Date.

30. According to him, the Appellate Court has misunderstood the evidence and misinterpreted it. The Appellate Court has lost sight of the difference in between Advocate doing non litigation work and a Party liaising with the Advocates and Government Authorities. On the other hand, he submitted that his client has nowhere pleaded about offering professional services as a legal practitioner. In fact, the witness has categorically said about doing liaison work. According to him, the documents on record are sufficient to prove the fulfillment of the promises assured as per the agreement with Chamber.

31. Learned Senior Advocate Shri Mundargi emphasized on original recovery certificate and new recovery certificates wherein the interest granted by Debt Recovery Tribunal was enhanced. That is how, he justified claim of the professional charges at 10% on enhanced rate of interest.

32. According to him, once the rate of interest is enhanced, his client is entitled to receive service charges. According to him, not mentioning those charges in income tax returns as receivables is justified on the basis of the accounting practice. He submitted the agreement is duly proved through witness Hemant Garg. According to learned Senior Advocate Shri Mundargi case for grant of leave is made out.

33. According to learned Advocate Mr. Ojha, the case of the Complainant fails on account of not showing any documents about spending of money or showing any account maintained by the Complainant's Company. According to him, the Complainant Company is not a law firm and the witness Garg is not legal practitioner. He supported the judgment of acquittal. To buttress his submission, he relied upon the following judgments:-

- (i) *G. Pankaikashi Vs. Malathi*²¹
- (ii) *K. M. Enterprises Vs. Garware Synthetics Ltd. and Ors.*²²
- (iii) *Smt Tasneem Murshedkar Mazhar Vs. Shri Ramesh s/o. Dhanraj Mahajan Trimurti Medical and Gen. And Anr.*²³
- (iv) *Jay Gramgita Gramin Bigarsheti Sahakari Pat Sanstha Maryadit*

21 (2004) 12 SCC 83

22 2015 ALL MR (Cri) 38

23 2020 ALL MR (Cri) 1182

Donduda Vs. Mohammad Latif s/o. Mohammad Ibrahim²⁴

34. Even though he filed various judgments, during his arguments, he referred few judgments only. The judgments are on the point of non proof of liability. Any observations made in the judgment is on the basis of the facts of those cases and slight variation in the fact may lead to different result. **The accused can rely upon those observations when evidence will be finally appreciated.** It is true once the cheques are issued, there is presumption in favour of passing of the consideration. This is rebuttable presumption. The Accused can rebut it by cross-examining the witness or by adducing evidence.

35. Now in order to determine the legally enforceable debt, we have got cheques signed by accused no. 2 and the agreement . He has not denied the issuance of the cheque. As against this, it is true there are no documents showing incurring of expenses by Morries on account of professional expenses to advocates and other expenses (except debit note), but it is matter of record that rate of interest is subsequently enhanced by Debt Recovery Tribunal. It is very well true the evidence has to be appreciated on the basis of the documents produced and also

24 2019 ALL MR (Cri.) 1155

on the basis of documents which could have been produced but not produced. The learned Appellate Judge has given more stress on the documents which are neither mentioned nor produced. The cross-examination of the witness also needs to be considered. It is admitted fact that accused has not given any evidence.

36. According to learned Advocate Mr. Ojha, the objection about non-professional doing non litigation work being a question of law was rightly raised before the Appellate Court. Whereas according to learned Advocate Shri Niranjana Mundargi, if it is not raised before the trial Court, it cannot be raised before the Appellate Court. In order to show the relationship in between the Advocate and the client, learned Advocate Mr. Ojha relied upon the observations in case of Lawyers Collective Vs. Bar Council of India and Others²⁵, the Division bench and the view confirmed by the Hon'ble Supreme Court in case of Bar Council of India Vs. A. K. Balaji and Others²⁶. The issue that has cropped up in that case was about right of foreign law firms to do non litigation practice in India. Basically, in a case before me the Complainant has never pleaded that they are law firm. In fact, they

25 2009 SCC Online Bom 2028

26 (2018) 5 SCC 379

have pleaded that they have coordinated with professionals, assisted in acquisition and with government authorities.

37. Learned Advocate Shri Ojha also relied upon the observations in case of **B. Sumitha Vs. State**²⁷ that was clear case of professional misconduct. That it to say advocate is intending to enforce a contract of professional fees on percentage basis in motor accident compensation. **In this case, the Complainant not being an advocate firm is not bound by the professional obligations.**

38. According to him, the learned Appellate Judge was wrong in concluding that the agreement dated 20.07.2023 is not proved. In fact according to him, the witness Hemant Garg has signed it, and he has deposed about the same. This agreement is foundation about offering services by the Morries to the Chamber.

39. Learned Advocate Mr. Ojha relied upon the observations in case of **Rajaram Vs. Maruthachalam (supra)** and **Prakash Madhukarrao Desai Vs. Dattatraya Sheshrao Desai (supra)** (DB for the reference) to buttress his submission that the amount recoverable ought to be reflected in the income tax returns and then only it can be considered as legally recoverable debt.

²⁷ (2018) 1 SCC 638

40. Whereas according to learned Advocate Shri Niranjan Mundargi, the Division bench in case of *Prakash Madhukarrao Desai (supra)* has categorically observed not mentioning in the income tax returns does not invalidate the debt.

41. *Prima-facie*, I find the observations of the Appellate Court as **erroneous**. Any business carried out by the Company which is not incorporated in object clause cannot be *ipso facto* becomes unlawful, atleast, an outsider cannot make that complaint.

42. I feel this Court is required to ascertain the correctness of the findings by the Appellate Court while acquitting the accused no. 2. It needs to be seen whether the findings on the point non proof of the liability is correct or not. The documents which are already on record are to be given weightage or documents which are not produced are to be given weightage. This has to be considered in totality of the evidence on the basis of the cross-examination. No doubt the Complainant by examining the Chartered Account has offered an explanation for not showing the amount in income tax returns. It is also true that Constitutional Courts have opined in certain judgments that reflecting the amount in income tax returns has got different connotation and it cannot be the factor to disbelieve the claim of the Complainant.

43. There is merit in the submissions made on behalf of the Morries. For the above discussion, I feel this Court is required to ascertain the correctness of the findings by the Appellate Court. This can be done only after grant of leave. Hence, the case is made out for grant of leave.

44. Parties are at liberty to advance their further arguments when the appeal will be heard in due course. It is a fact Company has not preferred an appeal before the City Civil Court. When the appeal will be heard finally, the issue of not filing such appeal can be considered. Observations in above order are made only for deciding grant of leave. Final appreciation will be done later on. Hence, the following order:-

ORDER

- (i) Leave to prefer an appeal is refused against the accused no. 4-Sumit.
- (ii) Criminal Application No. 14 of 2022 is dismissed.
- (iii) Leave to prefer an appeal against accused no. 2-Anubhav is granted.
- (iv) Criminal Application No. 15 of 2022 is allowed and is disposed of. Appeal be numbered.
 - (a) Admit the appeal. For further orders, it be placed before the Regular bench.

[S. M. MODAK, J.]