

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1146 OF 2009

Dada Ghanshyam Pathak
age 45 years, Occ. Service,
R/o Ner, Tq. Dhule,
Dist. Dhule.

Petitioner
(orig. Accused)

V E R S U S

1. The State of Maharashtra.
(Copy to be served on Public
prosecutor before the Honourable
High Court at Aurangabad.)

2. Smt. Minabai Kishor Patil,
age 40 years, Occ. Business,
R/o Bhagat Singh Nagar,
Deopur, Dhule,
Dist. Dhule.

Respondent.
(R-2 is orig. complainant)

Shri R.V.Gore, Advocate for the petitioner.
Mrs. B. R. Khekale APP for respondent No.1
Mr. A.S. Sawant, Advocate for the respondent No.2.

CORAM : SHRIHARI P. DAVARE, J.

DATE : 15TH JULY, 2010.

ORAL JUDGMENT :-

1. Heard learned respective counsel for the parties.
2. Rule. Rule made returnable forthwith and with the consent of the parties, taken up for final hearing.
3. By the present petition filed under Article 227 of the Constitution of India, the petitioner prays for the appropriate writ, directing that order dated 11.2.2009, passed below Exh.53 in STCC No.1489/2006 by learned 5th Judicial Magistrate First Class, Dhule rejecting the application and also judgment and order dated 31.10.2009 rendered in Criminal Revision Application No.70/2009 by Learned Additional Sessions Judge, Dhule dismissing the said Revision be quashed and set aside.

FACTUAL MATRIX :-

4. The petitioner is the original accused and respondent No.2 is the original complainant, who filed STCC No.1489/2006 against the present petitioner wherein she alleged that she had given loan of Rs.3,50,000/- to the petitioner/accused and in discharge of the said liability, and towards repayment of the said loan, petitioner had issued a cheque No.378659 dated 22.11.2005 to the respondent No.2. Respondent No.2 presented said cheque for encashment purpose, however said cheque was dishonoured and returned unpaid with the endorsement "Want of sufficient Balance". Therefore,

respondent No.2 after observing necessary formalities, initiated proceeding against petitioner under section 138 of Negotiable Instruments Act.

5. Accordingly, respondent No.2 adduced her own evidence as well as adduced evidence of one witness namely Rohini to substantiate her contention. Respondent No.2 closed her evidence. Thereafter, petitioner herein preferred one application Exh. 53 (Exh.'A' page 12) and requested to send the disputed cheque to C. I. D. Crime Branch, Pune for opinion of hand writing expert on 20.09.2008. Respondent No.2 gave her say on the said application and opposed said application. Considering rival contentions, learned 5th Judicial Magistrate First Class, Dhule rejected said application by passing order on 11.2.2009 (Exh B page 14).

6. Being aggrieved and dissatisfied by the said order petitioner/accused preferred criminal revision application No.70/2009 before learned Sessions Judge, Dhule challenging the correctness and legality of the said order under section 397 of the Code of Criminal Procedure. Learned Additional Sessions Judge, Dhule rejected the said criminal revision application by passing order on 31.10.2009 and thereby confirmed the order passed by learned 5th Judicial Magistrate First Class, Dhule (Exh 'C' page 16).

7. Being aggrieved and dissatisfied by both the said orders petitioner (original accused) approached to this Court under Article 227 of the

Constitution of India, praying for quashment of both the said impugned orders.

SUBMISSIONS :-

8. Learned counsel for the petitioner submits that it is the contention of the petitioner that respondent No.2 lends money on interest and respondent No.2 had stolen disputed cheque from the possession of petitioner and forged signature of petitioner thereon and filled the contents of the said cheque falsely and same was presented for encashment purpose which was obviously returned unpaid and thereafter complainant/respondent No.2 has filed complaint in question under section 138 of the Negotiable Instruments Act against the petitioner herein falsely and therefore, it is the contention of the petitioner that the opinion of the hand writing expert is essential before the Court and petitioner's case is dependent upon the same and hence petitioner preferred application Exh.53 with the prayer to send the disputed cheque in question to CID Crime Branch, Pune to obtain hand writing expert's opinion in that respect. It is also contention of the petitioner that, principles of natural justice require that petitioner should get full opportunity to adduce evidence to prove his defence and also submitted that there is no question of protracting the matter as alleged. Learned counsel for the petitioner further submits that the very signature of the petitioner on the disputed cheque has been denied by him and therefore also, the hand writing expert's opinion is

inevitable to decide the controversy in the matter. According to learned counsel for the petitioner, the approach adopted by learned 5th Judicial Magistrate First Class, Dhule as well as learned Additional Sessions Judge, Dhule is erroneous and petitioner cannot be denied the opportunity to lead the evidence as per his choice and put forth his defence before the Court.

9. Learned counsel for the petitioner relied upon the observations made by Honourable Supreme Court in case of **T. Nagappa Vs. Y.R. Muralidhar** reported at 2008 AIR (SCW) 3349 in which it is observed that :

"What should be the nature of evidence is not a matter which should be left only to the discretion of the Court. It is the accused who knows how to prove his defence. It is true that the Court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the Court for obtaining its assistance with regard to summoning of witnesses etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protracting the trial or summon witnesses whose evidence would not be at all relevant. "

The issue now almost stands concluded by a decision of this Court in Kalyani Baskar (Mrs.) Vs. M.S. Sampooram (Mrs.) (2007) 2 SCC 258 (in which one of us, L.S. Patna, J., was a member) wherein it was held :

"12. Section 243 (2) is clear that a Magistrate holding an inquiry under Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243 (2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has replied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the hand writing expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them."

10. Learned counsel for respondent No.2 countered said arguments and opposed present petition vehemently and submitted that the petitioner has sought number of adjournments and protracted the matter at every stage and even roznama would disclose that petitioner started cross examination of the complainant on 4.8.2007 which was completed on 8.8.2008 i.e. after a period of one year. It is also submitted that even the petitioner did not reply to the notice sent by the respondent No.2-complainant and even till filing of the

application Exh.53, did not raise any objection about the cheque in question or signature thereon. Even the petitioner has not filed the complaint so far in respect of alleged theft of cheque by respondent No.2 herein. Learned counsel for respondent No.2 submitted that even no suggestions have been given by the petitioner to the respondent No.2 in her cross examination in respect of alleged theft of cheque and after closure of the evidence of respondent No.2, suddenly petitioner came with the application Exh.53, certainly with a view to protract the matter. Learned counsel for respondent No.2 further submitted that even after appearance of the petitioner in the complaint, petitioner neither disputed cheque nor filed any application in respect of disputing his signature on the said cheque or alleged theft of said cheque. Hence, learned counsel for respondent No.2 submitted that, conduct of the petitioner is self explicit and application Exh.53 was preferred by the petitioner to protract the matter and with ulterior motive. Hence, it is submitted that learned trial judge rightly rejected the application as well as learned Additional Sessions Judge rightly upheld the said order and no interference is warranted under the writ jurisdiction.

CONSIDERATION :

11. After considering rival submissions, the controversy revolves around very short question "*Whether cheque in question to be sent to the*

C.I.D. Crime Branch, Pune for obtaining Hand Writing Expert's opinion as prayed for by the petitioner by application under Exhibit 53 in STCC No. 1489/2006 or not ?. True it is, that the complaint was filed by the respondent No.2 in the year 2006 and it may be true that the accused might have protracted the matter by one or other reason as alleged by the respondent No.2 by filing various applications for adjournment but it does not mean that doors of adducing evidence as per his choice to put forth his defence can be closed to the petitioner/accused forever by rejecting the application Exh.53. As regards, the allegations of respondent No.2, that petitioner even did not reply to the notice sent to him, the learned counsel for the petitioner invited my attention to the aspect that petitioner did not receive said notice and therefore same could not be replied. There is also no dispute that petitioner did not put forth his case of alleged theft of his cheque earlier and suggestion was not given to the complainant in the cross examination to that effect, but the petitioner can put forth his defence through his statement under section 313 of Code of Criminal Procedure to be recorded or by adducing defence witnesses and the said stage is yet to come, and therefore only because the petitioner has not put forth his case earlier and has not confronted the complainant with the said suggestions, he cannot be prevented to make request to send the disputed cheque to CID Crime Branch, Pune, for obtaining

hand writing expert's opinion.

12. In fact, what should be the nature of evidence of the petitioner/accused should be left upon him and accused knows how to prove his defence and ordinarily accused should be allowed to approach to the Court for obtaining its assistance to put forth his defence before the court, as happened in the instant case, since accused preferred application Exh.53 requesting to send the said cheque for obtaining hand writing expert's opinion, which could have been allowed but simultaneously there is no doubt that the accused should not be permitted to protract the trial unnecessarily. Hence, apprehension of respondent No.2 in respect of protracting of trial by the accused can be met with by giving specific directions by trial court to the concerned authorities to submit the hand writing expert's opinion within a reasonable specified time frame and application Exh.53 preferred by the petitioner deserves to be decided afresh by setting aside impugned orders, in the interest of justice, taking aforesaid precaution and measures and relying upon the observations made by Honourable Supreme Court in case of **T. Nagappa Vs. Y.R. Muralidhar reported at 2008 AIR (SCW) 3349** (supra) cited by learned counsel for petitioner.

13. In the result, present petition is allowed in terms of prayer clause 'B' thereof and order passed by learned 5th Judicial Magistrate First Class,

Dhule on Exhibit 53 in S.T.C.C. No.1489/2006 on 11.2.2009 as well as order passed by learned Additional Sessions Judge, Dhule in Criminal Revision Application No.70/2009 on 31.10.2009 stand quashed and set aside and matter is remitted back to learned 5th Judicial Magistrate First Class, Dhule to pass the appropriate and suitable order on Exhibit 53, afresh taking the proper and suitable measures as mentioned herein above. Considering the position that STCC No.1489/2006 is pending since the year 2006, learned trial judge is directed to make endeavour to decide the said trial as expeditiously as possible within the period of six months from the date of receipt of Writ from this Court.

14. Rule is made absolute in aforesaid terms.

(SHRIHARI P. DAVARE, J.)

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