

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 2 OF 2015

Mrs. Padmaja Rao,
Proprietor of
M/s. HI-TECH Medical Systems,
Major of age,
G2/A1 Caculo Enclave,
Opp. Fire force,
St. Inez, Panaji – Goa.

..... Petitioner.
(Original Complainant)

Versus

Mrs. Vijaylaxmi Rajesh Nevrekar
Proprietor of
M/s. Patholab, major of age,
F-10, Fatima Chambers, Near Saaj Hotel,
Margoa – Goa, 403 601.

..... Respondent.
(Original Accused)

Mr. Santosh H. Bharne, Advocate for the petitioner.

Mr. S. Shet, Advocate for the respondent.

Coram:-U. V. BAKRE, J.

Date:- 13th February, 2015

ORAL JUDGMENT:

Heard Mr. Bharne, learned Counsel for the petitioner and Mr. Shet, learned Counsel for the respondent.

2. Rule. Rule made returnable forthwith. By consent heard forthwith.

3. By this petition, the petitioner has challenged the order dated

22/12/2014 passed by the learned Judicial Magistrate First Class, Panaji in Private Criminal Case No. 350/OA/2010/B whereby the application dated 21/01/2013, filed by the complainant(petitioner) for production of certain documents and for leave to examine Mr. Sudesh Kudalkar as witness came to be rejected.

4. Mr. Bharne, learned Counsel for the petitioner submits that during his examination-in-chief, PW1, the complainant found that the reply to the legal notice sent by him to the accused (respondent) which was received subsequent to the filing of the complaint was relevant and should be produced. He submitted that the receipt of the statutory notice by the accused and reply dated 03/09/2010 sent by him are facts which are not denied by the accused. He submitted that therefore no prejudice of whatsoever nature will be caused to the accused by production of the reply dated 03/09/2010 and along with that further reply dated 29/11/2010 given by the complainant in turn to the reply dated 03/09/2010 of the accused. Learned Counsel further pointed out that during the course of examination-in-chief of PW1 certain documents like delivery challans and invoices etc. were taken on record subject to proof. He submitted that in order to prove the said documents, the complainant needs to examine the witness namely Shri Sudesh Kudalkar since he had submitted those documents to

the proprietary concern of the accused. He submitted that even the cross-examination of the PW1 has not started and, therefore, no prejudice would be caused to the accused by allowing the complainant to examine the said Sudesh Kudalkar. The learned Counsel therefore urged that the impugned order is arbitrary and perverse and need to be quashed and set aside and the application dated 21/01/2013 be allowed.

5. On the other hand, Mr. Shet learned Counsel for the respondent submitted that the reply sent by the accused is dated 03/09/2010 and the private complaint was filed by the complainant on 08/09/2010. He pointed out that the application which was rejected by the learned J.M.F.C. was filed belatedly on 21/01/2013. He further submitted that in the said application there is no averment as to when the complainant had received the reply dated 03/09/2010. He further submitted that the envelop containing the said reply has been suppressed by the complainant. In all the circumstances above, the learned Counsel for the respondent submitted that the impugned order is proper and no interference is called for with the same.

6. I have gone through the material on record and considered the submissions advanced by the learned counsel for the parties.

7. A perusal of the evidence of PW1, the complainant, reveals that the examination-in-chief is not yet completed. It is further seen that in paragraph 17 of the complaint, the complainant had stated that despite receiving the demand notice, the accused had not replied the same nor had he paid the cheque amount. It is seen that admittedly the accused had sent a reply dated 03/09/2010 to the said demand notice sent by the complainant to the accused. Since the fact of sending reply is admitted, by producing the said reply on record no prejudice of whatsoever nature would be caused to the accused. The question whether the said reply was received by the complainant prior to the filing of the complaint or whether it was received subsequent to it, as submitted by learned Counsel for the complainant, will be decided on merits after the cross-examination of the PW1 by the complainant. If necessary on account of non-production of the envelop containing the reply, adverse inference can be drawn, if in accordance with law, the same is required to be drawn by the learned Judicial Magistrate First Class. However, this cannot be a ground for not allowing the application for the production of the reply sent by the accused to the statutory notice by the complainant. Same is the case with further reply which was allegedly sent by the complainant dated 29/11/2010 to the accused. Since cross-examination of PW1 has not yet begun, the receipt or non-receipt and genuineness of the contents of the

said reply dated 29/11/2010 can also be tested in cross-examination. In such circumstances, production of this reply also will not cause any prejudice to the accused. The observation of the learned Judicial Magistrate First Class that the case of the complainant would be changed by production of the said documents is not acceptable. In fact, taking on record the said documents would assist the learned Judicial Magistrate First Class in coming to a proper decision in the matter.

8. A perusal of the examination-in-chief of PW1 reveals that carbon copies of the delivery challans as also the notarized copies of the invoices have been taken on record but subject to proof. It is the contention of the complainant that the said documents were submitted to the proprietary concern of the accused by Shri Sudesh Kudalkar. The complainant therefore wants to examine Shri Sudesh Kudalkar as his witness. I do not see anything wrong in examining the said witness. The accused will always have an opportunity to cross-examine the said witness Shri Sudesh Kudalkar also.

9. In the circumstances above, the impugned order dated 22/12/2014 is arbitrary and not sustainable and deserves to be quashed and set aside. The application dated 21/01/2013 deserves to be allowed.

- 10.** In the result, the petition is allowed.
- (a) Order dated 22/12/2014 is quashed and set aside.
 - (b) The application dated 21/01/2013 filed by the complainant stands allowed as per prayers made therein.
- 11.** Rule made absolute in the aforesaid terms. Petition stands disposed of.

U. V. BAKRE, J.

mv