

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

CRIMINAL APPLICATION NO. 1804 OF 2015

SHANKAR S//O BHAGWAN JAGTAP
VERSUS
SANTOSH S/O BASAVRAJ GASTGAR

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Advocate for Applicant : Mr Surve Hemant
Advocate for Respondent : Mr Patne Santosh N.

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CORAM : V.K. JADHAV, J.

Dated: November 28, 2016

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PER COURT :-

1. Being aggrieved by the order passed below Exh.108 dated 9.2.2015 in Summary Criminal Case No.4586/2007 passed by the Judicial Magistrate First Class, Court No.2, Aurangabad, original accused has preferred this criminal application.

2. Brief facts, giving rise to the present application are as follows :-

The applicant is original accused in S.C.C. No.4586/2007 filed by the respondent under section 138 of the Negotiable Instruments Act, 1881. On 30.8.2014 the applicant-accused moved an application Exh.108 before the trial court contending therein that in

the light of the decision of the Hon'ble Supreme Court of India in Dashrath Rupsingh Rathod Vs. State of Maharashtra reported in 2014 ALL MR (Cri) (S.C.) 3333, the trial Court lack territorial jurisdiction and therefore, proceeding therefore may kindly be returned back/transferred. The learned Magistrate by impugned order dated 9.2.2015 rejected said application. Hence, this application.

3. The learned counsel for the applicant-original accused submits that, admittedly the cheque in question Exh.22 came to be issued by the Bank located at Solapur. In light of the observations made by the Apex Court in paragraph No.20 of the case Dashrath Rupsingh Rathod Vs. State of Maharashtra, the complaint is liable to be returned to the respondent-complainant. Learned counsel submits that, initially the evidence was commenced before the Trial Court in the complaint and the applicant-accused has filed an application for various reliefs and said application was pending since 29.8.2011. The learned Judicial Magistrate First Class, Court No.6, Aurangabad by order

dated 21.10.2013 while deciding said application observed that, *the proceedings are summary in nature. The evidence recorded by the predecessor in the office of the preceding office of this Court, cannot be appreciated by the officiating predecessor of this Court and same principle has been reiterated by the Hon'ble Supreme Court in the case of Nitinbhai Saevatilal Shah and anr. Vs. Manubhai Manjibhai Panchal reported in 2011 AIR SC 3076.* So, in view of the said aspect, the learned Magistrate has directed the complainant to adduce his evidence afresh and in the backdrop of the same, since the application filed by the applicant-accused loses its significance rejected the same. The learned counsel submits that thereafter, the respondent-original complainant instead of adducing fresh evidence as directed by the Court filed pursuis at Exh.82 to treat his earlier evidence as evidence before the same Court. Learned counsel submits that tendering pursuis at Exh.82 would not cover the stage expected under section 145 of the Negotiable Instruments Act. Learned counsel submits that in the backdrop of these factual aspects and primary in the spirit of the observations of

the Apex Court in paragraph No.20 of the Dashrath Rupsingh(supra), the trial court should not have entertained the complaint and should have allowed the application Exh.108.

4. Learned counsel for respondent-original complainant submits that, respondent-original complainant filed SCC No.4586/2007 under section 138 of the Negotiable Instruments Act and 420 of the Indian Penal Code against present applicant before the Judicial Magistrate First Class, Aurangabad. By filing an application Exh.21, the applicant-accused raised an objection before the court about jurisdiction with a prayer to dismiss the complaint or return the same to the respondent-complainant for presentation in the proper court. By order dated 16.4.2009 passed below Exh.21 the trial court was pleased to return the complaint for presentation before the proper court. Being aggrieved by the same, respondent-original complainant preferred criminal revision no.155/2009. By order dated 11.3.2010 the learned Sessions Judge has allowed criminal revision and quashed and set aside

the order passed by the Magistrate. The present applicant-original accused filed criminal writ petition No.682/2010 against the order passed by the first revisional court and this court by order dated 25.4.2013 dismissed the aforesaid criminal writ petition.

5. Learned counsel submits that the present applicant consistently playing tactics to protract the hearing and decision in the matter and as such on 30.8.2014 moved an application Exh.108 relying on the Judgment of the Supreme Court in case of Dashrath Rupsingh's Case praying thereby to return the complaint. Even, the petitioner has not only mentioned his wrong age as 80 years, his actual age is not more than 65 years. Learned counsel submits that, even after passing the order dated 21.10.2013 and after filing of the purshis Exh.82, the applicant-accused has failed to cross examine the respondent-complainant and therefore, the learned Magistrate constrained to pass 'No Cross Order'. The applicant-accused has therefore filed an application Exh.107 praying therein for recalling of the 'No Cross Order' and the learned Magistrate by order

dated 9.2.2015 allowed said application on costs of Rs.1,000/- (Rs. One Thousand) and thereby directed the applicant-accused to complete the cross examination positively on or before the next date. Even on 16.2.2015 the applicant-accused has filed an application for compliance of the said order and sought permission to deposit the costs as directed by the Court. Instead of cross examining the complainant as directed by the Court, the applicant-accused has thereafter moved an application at Exh.108.

6. On perusal of the impugned order and annexures of the application as well as reply, it appears that said S.C.C No. 4586/2007 filed under section 138 of the N.I. Act is pending before the Magistrate without any progress. Initially, the applicant-accused has filed an application Exh.21 for return of the complaint and finally this court by order dated 25.4.2013 dismissed criminal writ petition no.682/2010 by confirming the order passed by the learned Sessions Judge in Criminal Revision No.155/2009 and, thus, application filed by the applicant-accused seeking return of the complaint to

the respondent-complainant for presentation before the Court having jurisdiction was finally rejected. Meanwhile, the applicant-accused has filed an application seeking various reliefs and the learned Magistrate while deciding said application declined to proceed with the evidence recorded by his predecessor in the light of the ratio laid down by the Supreme Court in case of Bhai reported in AIR 2011 SC 3076. The learned Magistrate has, therefore, directed the respondent-complainant to adduce his evidence afresh.

7. In the light of the said order, respondent-complainant has filed purshis Exh.82. The applicant-accused, as it appears from the record, has not raised any objection to the said purshis Exh.82 and further not cross examined the complainant. Consequently, respondent-complainant has filed an application Exh.85 requesting therein the Court to pass 'No Cross Order' against the applicant-accused. On 30.8.2014 the applicant-accused filed an application Exh.107 praying therein to recall the 'no cross order.' It has simply stated in the said application that said order of 'No

Cross' passed by the court gone unnoticed by the applicant-accused and it was detected only on the last date when file was perused. The learned Magistrate by order dated 9.2.2015 allowed said application on costs of Rs.1,000/- by directing the applicant-accused to complete the cross examination positively on or before the next date. Even on 16.2.2015 applicant-accused sought permission to deposit said costs of Rs.1,000/-. It further appears that instead of cross examining the witness, the applicant-accused has filed application Exh.108.

8. On the backdrop of these factual aspects, it has to be seen as to what is present stage of the case. As per the submission made by learned counsel for respondent and the case details report produced by him obtained from INTERNET, now the case is posted for recording of the statement of the applicant-accused under section 313 of the Cr.P.C. The learned counsel for the applicant-accused has submitted that applicant-accused has also filed an application for setting aside 'no cross order' and said application is still pending.

However, in the given set of facts, it is manifest that, stage as expected under section 145 of the N.I.Act has already been crossed. There is no bar as such to file a purshis for treating the affidavit of evidence filed earlier to be treated as evidence after the Court directed to adduce evidence afresh on the ground that in a summary criminal case the evidence recorded by the predecessor of the Court cannot be read in evidence by the Successor in his office.

9. In light of the above, paragraph no.20 of the Dashrath Rupsingh Rathod's case (supra) cannot be made applicable to the facts and circumstances of the present case. It appears that, the aforesaid case is pending since 2007 and though the same is posted for recording statement of accused u/s 313 of Cr.P.C as submitted by the learned counsel for the applicant-accused application for setting aside 'no cross order' is also filed and pending before the Magistrate.

10. In view of this, I do not find any substance in this criminal application, however, while disposing off the

present criminal application certain directions are required to be given to the Magistrate for expeditious disposal of the case. Hence, following order.

O R D E R

- I. Criminal Application is hereby dismissed.
- II. The learned Judicial Magistrate First Class, Aurangabad is hereby directed to expedite the hearing of S.C.C. No.4586 of 2007 pending before the Judicial Magistrate First Class, Court No.13 (XIII), Aurangabad and dispose it off within THREE MONTHS from the date of this order.
- III. The parties shall appear before the Trial Court on **13.12.2016**.
- IV. Criminal Application accordingly disposed of.
- V. At this stage, the learned counsel for the applicant is seeking time to challenge this order before the Hon'ble Supreme Court. As observed in the foregoing paragraphs, the complaint is pending since 2007 with very little progress. In view of this request is refused.

(V.K. JADHAV, J.)

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