

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

Criminal Application No. 3138 of 2016

District : Aurangabad

Kiran s/o. Rameshlal Bhandari,
Age : 32 years,
Occupation : Business,
R/o. 7, Madan Niwas,
Swarsangam Housing Society,
Sherya Nagar,
Aurangabad.

.. Applicant
(Original complainant)

versus

Narayan s/o. Purshottam Sarda,
Age : 40 years,
Occupation : Business,
R/o. Mahesh Apartment,
B-3, B-Wing,
Behind Mahesh Auto,
Adalat Road, Aurangabad.

.. Respondent
(Original accused)

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Mr. Shyam C. Arora, Advocate, for the applicant.

Mr. Rajendra S. Deshmukh, Advocate, for the respondent.

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CORAM : Smt. SADHANA S. JADHAV, J.

DATE : 7TH JULY 2016

ORAL JUDGMENT:

Heard the learned Counsel for the applicant
and the learned Counsel for the respondent.

2. Rule. Rule made returnable forthwith with the consent of the parties.

3. The applicant herein questions the correctness and validity of the order dated 31st March 2016, passed by the Judicial Magistrate (F.C.), Court No.5, Aurangabad, in S.C.C. No. 5638/2013.

4. In nutshell, facts of the case are as follows :-

The applicant herein, after issuing statutory notice under Section 138 of the Negotiable Instruments Act, 1881, had filed a complaint before the Judicial Magistrate (F.C.), Aurangabad, alleging therein that the complainant had given a hand loan to the accused / respondent, by way of cheque amounting to Rs. 15,00,000/- on 12.05.2013. The cheque was drawn on Kotak Bank, in favour of Kapilkumar & Company, a Firm belonging to the accused. The cheque was dishonoured. The complainant issued a statutory notice to the accused. The accused / respondent had not replied the statutory notice and hence the applicant / complainant was constrained to file a complaint alleging that the respondent has committed an offence punishable under Section 138 of the Negotiable Instruments Act.

5. The applicant had filed his affidavit on evidence. At the trial, the accused had chosen to examine himself on oath. Hence, he was examined as defence witness no.1. In the course of cross examination, the accused had specifically stated on oath, that he is in no way concerned with Kapilkumar & Company. It was in these circumstances, that the complainant was constrained to file an application under Section 311 of the Code of Criminal Procedure, 1973 [For short, "Cr.P.C."], for calling upon the Branch Manager of Malkapur Urban Co-operative Bank Ltd., Malkapur, Branch at Station Road, Aurangabad, to be examined as a witness. The whole endeavour of the complainant was to demonstrate before the Court that the cheque was in favour of Kapilkumar & Company, a Firm belonging to the accused. Since the accused has denied, in totality, any concern with the said Firm, there was no other alternative but to call upon the Branch Manager of the Bank to substantiate his contention.

6. The learned Counsel for the respondent vehemently submits that, in fact, it was incumbent upon the complainant to be diligent with the proceedings which he has initiated. That, the Branch Manager of Malkapur Urban Co-operative Bank Ltd., Branch at Aurangabad, was not cited as a witness by the complainant. It was at the stage of final arguments of the case i.e. even after statement of

the accused was recorded under Section 313 of the Cr.P.C., the said application under Section 311 of the Cr.P.C. was filed and hence, according to the learned Counsel for the respondent, the learned Magistrate was justified in rejecting the said application.

7. Section 311 of the Cr.P.C. contemplates as follows :-

"Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

8. In fact, in the facts of the present case, it was incumbent upon the complainant to call the Branch Manager of the Bank to be examined as a court witness, only in order to substantiate his contention that the cheque issued by him was drawn in favour of Kapilkumar & Company, a Firm belonging to the accused. The said application ought to have been considered in the interest of justice. Diligence apart, it is also necessary to see that the court

cannot be a silent spectator to the proceedings and allow any of the parties to leave any loopholes as the administration of justice would be of paramount importance. In that view of the matter, the Application deserves to be allowed.

9. The Application is accordingly allowed.

(a) The order dated 31st March 2016, passed by the Judicial Magistrate (F.C.), Court No.5, Aurangabad, below Exhibit 41 in S.C.C. No. 5638/2013, is quashed and set aside. The application Exhibit 41 stands allowed.

(b) The learned Magistrate shall issue summons to the Branch Manager of Malkapur Urban Co-operative Bank Ltd., Malkapur, Branch at Station Road, Aurangabad, and record the evidence in accordance with law.

(c) The Application stands disposed of. Rule is made absolute in the above terms.

(Smt. SADHANA S. JADHAV)
JUDGE

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