

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

CRIMINAL APPLICATION NO. 3795 OF 2015

Vijaykumar Gulabchand Baldava,
Age: 54 years, Occ: Business,
R/o. Marvadi Galli, Shevgaon,
Tq. Shevgaon, Dist. Ahmednagar. ...Applicant

versus

Gautam Prakash Kulkarni,
Age: Major, Occ: Service,
Suncity, Singhgad Road,
Pune, Pin. 411 051. ...Respondent

.....
Mr. N.S. Jaju, Advocate for applicant
Mr. S.R. Andhale, A.P.P. for respondent
.....

CORAM : N.W. SAMBRE, J.

DATE : 6th APRIL, 2016

ORAL ORDER :

In Summary Criminal Case No. 338 of 2006, the applicant-accused moved an application at Exhibit-242 referring the cheque in question to the hand writing expert, as the applicant-accused has raised defence that the blank cheque signed by him is misused by the respondent-complainant.

2. The said application came to be rejected by learned Judicial Magistrate, First Class, Shevgaon on 09/07/2015 on the ground that the Section 20 of the Negotiable Instruments Act confers

the powers on the holder of cheque to fill up the same and there is presumption as against present applicant-accused that the cheque was issued for an admitted debt. The said order of the learned Magistrate dated 09/07/2015 is questioned in the present application.

3. Upon perusal of the impugned order and after hearing the parties at length, it is noted that the complainant is disputing his hand writing on the cheque as is apparent from the pleadings in the complaint, so also in the answer given to the Court's query to that effect. In this background, if the claim of the applicant for referring the cheque to hand writing expert so as to establish his defence. If tested, it is required to be noted that the accused since is entitled for opportunity of fair trial, it is claimed that he must be given chance to refer the cheque in question for experts opinion. The said opportunity is available to the present applicant-accused, particularly so as to establish his defence that the cheque was misused by its holder in due course. Learned Counsel for the applicant has rightly relied upon the law laid down by the Apex Court in the matter of ***T. Nagappa vs. Y.R. Muralidhar*** reported in ***AIR 2008 SC 2010***. Paragraphs-6 to 11 are worth referring to, which reads thus:

“6. The learned Trial Judge, as also the High Court, in support of their respective orders, have relied upon Section

20 of the Negotiable Instruments Act, which reads as under:

"Section 20 - Inchoate stamped instruments. - Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in 1 [India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

By reason of the aforementioned provision only a right has been created in the holder of the cheque subject to the conditions mentioned therein. Thereby only a prima facie authority is granted, inter alia, to complete an incomplete negotiable instrument.

The provision has a rider, namely, no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid therein.

7. When a contention has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised under Section 118(a) or 139 of the said Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places the burden on the accused, he must be given an opportunity to discharge it.

An accused has a right to fair trial. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India. The right to defend oneself and for that purpose to adduce evidence is recognized by the Parliament in terms of sub-section (2) of Section 243 of the Code of Criminal Procedure, which reads as under :

"Section 243 - Evidence for defence. - (1)

(2) If the accused, after he had entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice."

8. 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 therefore, 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.

9. The learned Trial Judge as also the High Court rejected the contention of the appellant only having regard to the provisions of Section 20 of the Negotiable Instruments Act. The very fact that by reason thereof, only a prima facie right had been conferred upon the holder of the negotiable instrument and the same being subject to the conditions as noticed hereinbefore, we are of the opinion that the application filed by the appellant was bona fide.

The issue now almost stands concluded by a decision of this Court in Kalyani Baskar (Mrs.) v. M.S. Sampooranam

(Mrs.) [(2007) 2 SCC 258] (in which one of us, L.S. Panta, J., was a member) wherein it was held :

"12. Section 243(2) is clear that a Magistrate holding an inquiry under CrPC 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 to compare the disputed signature or writing with the admitted writing 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 relied 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 handwriting 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. However, it is not necessary to have any expert opinion on the question other than the following :

"Whether the writings appearing in the said cheque on the front page is written on the same day and time when the said cheque was signed as "T.Nagappa" on the front page as well as on the reverse, or in other words, whether the age of the writing on Ex.P2 on the front page is the same as that of the signature "T.Nagappa" appearing on the front as well as on the reverse of the Cheque Ex.P2?"

11. Ms. Suri, however, pointed out that the application of the appellant being one under Section 293 of the Code of criminal Procedure was rightly rejected. It is now a well settled principle of law that non-mentioning or wrong mentioning of provision of law would not be of any relevance, if the Court had the requisite jurisdiction to pass an order."

4. In the above referred background, though it is brought to my notice that the complaint is pending since 2006 and evidence of both the parties is already over, it will be appropriate, in the interest of justice, to extend an opportunity of fair trial to the applicant, to allow the application at Exhibit-242 in Summary Criminal Case No. 338 of 2006, by quashing the order dated 09/07/2015 passed by learned Judicial Magistrate, First Class, Shevgaon on the said application.

5. It is expected that the report of handwriting expert be submitted before learned Judicial Magistrate, First Class, Shevgaon, pursuant to the prayer of the applicant, within period of eight weeks from today.

6. The present application, as such, succeeds and disposed of in above terms.

[N.W. SAMBRE, J.]