IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1518 OF 2017

Gururaj Dhirendrarao Kadim Diwan
alias G.D.K. Diwan. ... Petition.
Versus
Mr. Rajesh Wadhwa & anr. ... Respondents.

Mr. Mayur S. Sonavane, advocate for Petition.

Ms. Anamika Malhotra, APP for State.

CORAM : SMT.SADHANA S. JADHAV,J
DATE : APRIL 17, 2017

P.C.:

1 Heard the learned Counsel for the Petitioner and learned APP for State.

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

3 Present Petitioner happens to be an accused in C.C. No. 4654/SS/2005 pending before Metropolitan Magistrate, 58th Court, Bandra, Mumbai. It appears that after cross-examination complainant had filed an application seeking re-examination. That it appears from the cross-examination that in the cross-examination pursuant to the question put by the accused petitioner, the complainant had stated as follows :

> "It is true to say that I have not produced any invoices raised against the accused No. 1 company on record. I can produce some of the invoices raised against the accused no. 1 company on record by taking search of my records."

4 It appears that the complainant has filed an application seeking re-examination. By an order dated 21st March, 2012 the learned Magistrate had allowed the application for re-examination and had also permitted the complainant to place on record the documents pursuant to his reply in the cross-examination. The order was

challenged. According to the accused, the learned Magistrate ought not to have granted permission for re-examination.

5 The accused/Petitioner had filed Criminal Writ Petition No. 2009 of 2012 before this Court, which was decided on 10/8/2012. At the time of hearing, the Hon'ble Court was pleased to observe that -

> "Though the petitioner has challenged the permissibility of permitting the complainant to be re-examined, in the oral arguments advanced before me, this challenge is given up. What is submitted is that, if at all the complainant is to be re-examined, he cannot be permitted to file an affidavit in lieu of the re-examination. In view of this concession, I have not gone into the correctness or otherwise of the order, permitting the complainant to be re-examined."

The Hon'ble Court after referring to section 145 of the Negotiable Instruments Act has observed that the complainant cannot be permitted to file affidavit in lieu of the re-examination. The Hon'ble Court had passed an order to the effect, which is as follows :

> "The order dated 21.3.2012, permitting re-examination of the complainant is maintained, with the clarification that such re-examination has to be as per the normal procedure i.e. by oral examination and not by filing any affidavit in lieu thereof."

6 The learned Counsel for the Petitioner submits that the accused/petitioner had objected to filing of the additional documents at the time of re-examination. An oral objection was raised. By an order dated 11/8/2016 the learned Magistrate had rejected the oral prayer and had observed that the said objection can be considered at the time of final hearing.

7 It is pertinent to note that the learned Magistrate has rightly observed that the accused is having every right to cross-examine the complainant and no prejudice would be caused to the accused on production of the documents. That it is incumbent upon the complainant to prove his case beyond reasonable doubt and the presumption which can be drawn under section 139 of the Negotiable

Instruments Act is a rebuttable presumption, which can be considered at the time of cross-examination.

8 It is pertinent to note that the case is pending before the learned Magistrate since 2005. After the prayer was rejected, the accused had approached to the Sessions Court. Revision was also dismissed on the ground that the order is interlocutory order. In 2012 also, the accused Petitioner had adopted the same means while challenging the permission granted to the complainant for cross-examination. The earlier application was rejected by the Sessions Court on 18/4/2012, which was carried to the High Court by filing Writ Petition No. 2009 of 2012, which was disposed of by an order dated 10/8/2012. The Learned Magistrate would be the best Judge in the facts of the case. It is observed that there is nothing on record to show that the accused is surprised by the documents produced by the complainant in the course of re-examination, as it was the accused/petitioner who had asked for the invoices. The learned Magistrate has further observed

that there is no ambiguity in recording the evidence. The learned Magistrate has rightly observed that there are some documents, which are coming from the third party and it would be incumbent upon the complainant to prove it in accordance with law. It is also observed that so far as the documents tax invoices are concerned, they are taken on record. It is misconstrued by the accused that the documents which are taken on record are said to be proved and exhibited. In fact, the order passed by the learned Magistrate does not reflect that those documents are proved and hence, exhibited. These documents are taken on record. They are only exhibited for the purpose of identification of the documents. It was incumbent upon the complainant to prove the contents of the documents in reference to the context. The accused has every opportunity to cross-examine the witness and hence, the present petition appears to be filed at pre-mature stage.

9 In view of these observations, the petition stands disposed of with direction to the Magistrate that the documents produced by the complainant in the course of re-examination shall be proved in accordance with the provisions of Indian Evidence Act. The Petition stands dismissed with the above observations. The rule is discharged.

10 The learned Magistrate shall make every endeavour to conclude the case as far as possible within 4 months from the receipt of this order. The learned Magistrate shall not grant any unwarranted adjournment to either parties.

11 Writ Petition stands disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)