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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.444 OF 2017

Vinayak Enterprises & Ors.

... Applicants

(Orig. Accused nos.1,2,5 & 7)

v/s.

Madhav Constructions & Anr.

... Respondents

Mr. Niteen Pradhan a/w Ms. Ameeta Kuttikrishnan i/b. Ms. Shubhada D.Khot
for the applicants.

Ms. Krupali Hiren Rajani for respondent no.1.

Mr. Vinod Chate, APP, for the respondent-State.

CORAM : A. K. MENON, J.

DATE : 3rd AUGUST, 2017

P.C. :

1. By consent of the parties, application is taken up for final hearing.
2. By this criminal application, the applicants seek to challenge an order dated 3rd March, 2017 rejecting an application under Section 243 of the Cr.P.C. read with Section 45 of the Evidence Act for sending the disputed cheques to the Forensic Science Laboratory.

3. The facts in brief are narrated below:-

The applicant no.1 is a partnership firm and applicant nos.2, 3 and 4 are its partners. The respondent no.1 is also a partnership firm. Respondent no.1 has filed a complaint under Section 138 of the Negotiable Instruments Act alleging that the present applicants and three partners namely Viral Bhanji

Patel, Sudakar Rao Halwe and Abhijeet A. Goswami were liable for offences under Section 138 of the Negotiable Instruments Act in respect of pursuant to certain business transactions resulting in the execution of a Memorandum of Understanding (MOU).

4. The admitted facts are as follows:-

Applicant no.1 issued two cheques; one for Rs.14 crores and a second cheque for Rs.2.5 crores. Both cheques were dishonoured on 12-11-2008. Upon dishonor of the cheque, a statutory notice came to be issued on 25th November, 2008. The respondent demanded the payment of 16.50 lakhs with interest. A reply was sent on 8th November, 2008 wherein it was contended that the signature of the applicant no.1 on the agreement of cancellation was obtained by force and that the respondent did not hand over the original MOU and the cancellation of agreement which was franked on 28th June, 2008 was actually undated except for mentioning the month "June 2008".

5. In respect of the cheque of Rs.2.50 crores, the applicant contends that the cheque has been materially altered and therefore an application was made seeking reference to a hand writing expert. An application under Section 243(2) of the Code of Criminal Procedure read with Section 45 of the Indian Evidence Act, came to be filed on or about 10th February, 2017 by the accused no.1, 2, 5 and 7. According to the applicants, the complainant materially altered the cheque at Exhibit 50 for Rs.2.5 crores by entering the date on the cheque and also altered the agreement for cancellation. The date of the

cheque is an important issue to be decided especially since in the reply it was contended that the cheque (Exhibit 50) was blank dated and was allegedly given by the first applicant company to the respondent herein by way of security for performance of the agreement and the date was intentionally left blank. According to the applicants it is necessary to submit the cheque obtain opinion of a handwriting expert to obtain an expert's opinion therefore the cheque and document be sent to the Forensic Science Laboratory so as to determine the age of ink used to fill out details.

6. The application is opposed on behalf of the complainant on the ground that the Court was required to form opinion about the need for reference to a handwriting expert and no such opinion had been formed by the Court and therefore no case has been made out for referring to the cheque to the handwriting expert and especially since the signatures on the cheque and the document have not been disputed.

7. After hearing the parties the impugned order came to be passed by the Magistrate's Court holding that matter was pending for defence evidence. The accused had admitted the document Exhibit 48 as being the agreement of cancellation of MOU and had also admitted the signatures thereon. They had admitted the execution of the cheque Exhibit 50 and the signature on it. The accused had issued blank cheque to the complainant for security purposes which had been misused by the complainant by filling the contents on the cheques and document. The Magistrate rejected the application on the ground that the contents are not in dispute.

8. Mr. Pradhan, the learned counsel on behalf of the applicant contended that it was vital for the defence to ascertain the age of the ink that once there is a finding that the cheque was not dated according to its apparent tenor the applicants defence would stand established. He submitted that the original agreement for cancellation Exhibit 48 and original cheque of Rs.2.50 crores were the only two documents in respect of which the applicants-accused had a grievance since they were materially altered and the dates were filled in. Ascertaining the date on which the particulars were entered crucial so that all avenues open to the accused for establishing their defence. Mr. Pradhan relied upon the following decisions:-

- 1) *Kalyani Bhaskar v/s. M.S. Sampooranam 2006 DGLS (SC) 1146;*
- 2) *T. Nagappa v/s. Y. R. Muralidhar 2008 DGLC (SC) 599;*
- 3) *Criminal Writ Petition no.984 of 2010 of this Court, Aurangabad Bench, dated 26th April, 2011;*
- 4) *Nandkumar Rajkumar Harane v/s. Vishwas Vilasrao Kshirsagar & Ors. 2011 DGLS (SC) Soft 1509;*
- 5) *Avon Organics Ltd. v/s. Pioneer Products Limited & Ors. 2003 DGLS (A.P.) 1376;*
- 6) *Jayantilal Goel v/s. Smt. Zubeda Khanum AIR 1986 Andhra Pradesh 120; and*
- 7) *Goyal Enterprises v/s. State and Anr. 2011 DGLS(Jha.) 1565.*

9. Relying upon the observations of the Supreme Court in Kalyani Bhaskar(supra), Mr. Pradhan submitted that the Magistrate holding an inquiry under the Cr.P.C. in respect of the offences triable by him does not

exceed his powers under Section 243(2) if he found that the document was required to be sent for comparison by a handwriting expert because the purpose was to enable the Magistrate to compare the disputed signature or writing with an admitted one. The applicant is entitled to rebut the case of respondent if document on which he has relied upon for initiating criminal proceedings against the applicant would furnish good material for rebutting that case. The Magistrate having declined to send the document for opinion of the handwriting expert would deprive the applicant of an opportunity of rebutting the case against him and the applicant cannot be convicted without an opportunity being given to present evidence and the denial of such opportunity would not be a result in a fair trial. He submitted that the decision of Kalyani Bhaskar(supra) was also reiterated by the Supreme Court in T. Nagappa v/s. Y.R. Muralidhar (supra).

10. Mr. Pradhan also relied upon the decision of a Baburao Madhavrao Munnermanik (supra) in Criminal Appeal no.984 of 2010 in which the decision of the Supreme Court in Kalyani Bhaskar & T.Nagappa (supra) were relied upon. The learned single Judge held that it is imperative to send the cheques to the expert so as to determine the age of the ink used for signature and age of the ink used to fill up other details and that such exercise was necessary to ensure a fair trial.

11. Mr. Pradhan further placed reliance on Nandkumar wherein the single Judge of this Court once again following Kalyani Bhaskar (supra) and

T. Nagappa (supra) case. In the Avon Organics Ltd. case (supra), Mr. Pradhan relied upon the observation of the Andhra Pradesh and submitted that a presumption can be rebutted if the accused has not given consent to fill up the cheque for a particular amount in figures and words and the date portion. Blanks cannot be filled up without the consent of the party who issued the cheque. It would constitute an alteration of the cheque. In Avon (supra) the Court followed its own decision in A. Subba Reddy v/s. Neelapa Reddi (AIR 1966 Andh Pra 267) wherein English law on the subject was alluded to, that it is wrong to assume that the date of the promissory note is merely a description. It actually indicates the time when the promissory note was executed. The date is very material in calculating the date of performance of the contract. Mr. Pradhan relied upon the commentary in Halsbury's Laws of England, 4th Edition in support of his plea.

12. Lastly Mr. Pradhan relied upon Goyal Enterprises (supra) in support of his contention that interpretations in cheques without any evidence to the effect as to how the alterations were made were absolutely false. He therefore submitted that the impugned order is bad in law and deserves to be set aside and the application for permission to the handwriting expert in support should be allowed.

13. Ms. Rajani appearing on behalf of the respondent opposed the application on the ground that the cheque was admittedly undated in anticipation of the date being entered. In order to enable the complainant to

enter a suitable date when the amount was payable she submitted that the case of the applicant was baseless inasmuch as the contention that the document and the cheque had been materially altered is not believable. She invited my attention to Exhibit "D collectively" to the present application in which the agreement of cancellation (Exhibit 48) originally filed in the complaint is annexed. She pointed out that the agreement of cancellation was undated but the month "June 2008" was mentioned in the recital clause and the fact that it was intended to be executed in June was evident from the date of franking was 26th May, 2008. Furthermore, clause 3 contained reference to both cheques the cheque of Rs.14 crores as well as cheque of Rs.2.50 crores. The copy filed in the complaint makes reference to the cheque of Rs.2.5 crores in clause 3 and the particulars of the cheque were already filled in. This can be verified by cross referenced with Exhibit 50 which appears at page 55. The cheque number, name of the bank and date entered in clause 3 are the same appearing on Exhibit 50.

14. On the other hand, the document filed along with evidence shows that in clause 3 particulars of the second cheque of Rs.2.50 crores are not entered. Exhibit 48 was filed along with the complaint in the year 2009 and no objection was taken nor was the defence now taken set up at the relevant time. It is only after commencement of trial that this application has been made to further protract the trial. It is therefore submitted that the entire application is only to delay the trial and therefore devoid of merit.

15. Ms. Rajani relied upon the following decisions of this Court:-

- (a) Prakash Sevantilal Vora v/s. The State of Maharashtra & Anr. (Criminal Application no.2987 of 2010) in which the learned single Judge had occasion to consider the decisions in the case of Kalyani Bhaskar and T. Nagappa and some other decisions and in paragraph 17 it was held that the Magistrate was justified in rejecting the application filed by the accused. There was no dispute regarding the signature on the cheques and the complainant had not denied having been filled details in cheques and therefore the Magistrate was justified in coming to the conclusion that it is not necessary to send the cheques to a handwriting expert since there was no material alterations in the form of erasure or over writing or corrections. The defence of the accused was that he had given a blank cheque as security and whether any authority was given to the complainant to fill in the contents could have to be decided after the evidence was led by both the parties. In the circumstances, the application came to be dismissed.
- (b) Ms. Rajani also relied upon the decision of the Delhi High Court in Ravi Chopra v/s. State and anr. dated 13th March, 2008.

16. Having heard the learned counsel for the parties at length and having perused the contentious documents namely Exhibit 48 and 50 I am of the view that there is no substance in the application. It is an admitted fact that the agreement of cancellation had been executed by the parties. Equally, it is

admitted that the cheque with all material particulars filled in, save and except for the date was also handed over to the complainant. However, it is the case of the complainant that the filling in of the date of the cheque without consent of the complainant constituted a material alteration and such a material alteration having been made without the consent of the applicants would relieve them of the obligation to honour the instrument.

17. The impugned order in my view correctly records that there is no occasion to send the cheque and document for ascertaining the age of the ink used since it is admitted that the date was blank when the cheque was issued with the intention that it could be entered on some other appropriate date and that fact is mentioned in the MOU. The contents of MOU are admitted, so also the contents of the agreement of cancellation are admitted. In clause 3 the accused no.1 has clearly admitted its liability to pay sum of Rs.16.50 crores. The date of the cheque and the name of the bank were left blank since the cheque itself was blank dated at the material time when it was handed over. Thus, the relevancy of checking the age of the ink is not understood. In my view the age of the ink would only indicate the approximate date when the cheque was dated. This by itself would not amount to a material alteration inasmuch as parties contemplated handing over the blank cheque. Furthermore in the evidence the accused/applicant, the applicants had already admitted the execution of the agreement of cancellation Exhibit 48, including their signature thereon as also the issuance of cheque Exhibit 50 and the signature on it. The accused no.1 had admitted having issued the

blank dated cheque. The only defence is that the issuance of the cheque is inconsistent with the contents of the agreement of cancellation.

18. That is a contention to be considered during trial. In the facts of the present case entering of the date is not a material alteration which would justify the referring the cheque and agreement for the opinion of a handwriting expert under the provisions of section 45 of the Evidence Act. Thus it is only when the Court finds that the opinion of the handwriting expert is relevant. In the present case, the Court has not found it necessary to give send the documents for expert's opinion. In the course of submission on behalf of the applicant reliance was placed upon Section 20 of the Negotiable Instruments Act however in my view the section is of no assistance in the facts of the present case.

19. For the aforesaid reasons, I am unable to find any reason to interfere in this application. Hence, I pass the following order:—

(i) Application is dismissed.

(ii) No orders as to costs.

(A. K. MENON, J.)