

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

CRIMINAL WRIT PETITION NO.2412 OF 2017

Ashutosh Mukhyopadyay .. Petitioner.
Vs.
State of Maharashtra & Anr. .. Respondents.

Mr.Chaitanya Pendse for the Petitioner.
Mr.S.V. Gavand APP for the Respondent-State.
Mr. Satyanarayanan for Respondent No.2.

CORAM : A. K. MENON, J.

DATED : 3RD AUGUST, 2017

P.C. :

1. By this petition, the petitioner seeks a writ under Article 227 of the Constitution of India for setting aside the order dated 26th October 2016, 5th February 2017 and 6th June 2017 passed by the Magistrate, 64th Court. Esplanade in case No.6103/SS/2012 and order dated 15th March, 2017 passed by the Sessions Judge in Criminal Revision No.2/2017.

2. Considering the issue involved, this Court vide order dated 28th June, 2017 thought it fit to dispose of this writ petition at the admission stage. Accordingly, the notice was issued and the matter is taken up for final disposal at the stage of admission. The facts revealed that : The petitioner a resident of Mumbai and a businessman, is accused of having committed an offence under

Section 138 of the Negotiable Instruments Act. The complainant was introduced to the accused by relative. The petitioner induced the complainant into believing the representations of the petitioner and convinced the complainant to part with the funds to tune of Rs.23,35,000/- on different dates between June 2002 and April 2003. For various reasons the complainant believed that he had made a good investment relying upon representations held out by the petitioner/accused. Finally, towards repayment of the amounts advanced the accused issued four cheques totalling to Rs.17,75,000/-. The first two cheques were dishonoured by reason that the funds were insufficient. Subsequently on or about 29th October, 2003 the remaining two cheques were also dishonoured for the same reason.

3. On 29th November, 2003 the accused was issued the statutory notice. The accused received the notice on 3rd December, 2003 and replied to the same denying liability. Subsequently, a complaint came to be filed. In the course of hearing the complainant filed an application for returning the complaint for filing it to the appropriate Court on the ground that as per notification issued on 15th June, 2015 the said Court had no jurisdiction to entertain the complaint.

4. Learned counsel for the petitioner relied upon the Negotiable Instruments (Amendment) Act, Second Ordinance 2015 and submitted that by virtue of the said ordinance which came into force at the material time, it was

incumbent upon learned Magistrate to transfer the case. The impugned order rejected the application by observing that the ordinance did not operate retrospectively since the trial has reached fag end and hence there is no question of transfer. This order was challenged in the Court of Sessions which rejected the application by observing that on perusal of Section 142(2) of the Act there is no manner of doubt that the Court at the place where the cheque is presented for collection is the Court where the payee or holder in due course maintained his account would have territorial jurisdiction.

5. In the present case, the bank came under jurisdiction of the Metropolitan Magistrate, 14th Court, Mumbai and the complaint was filed in that Court. No objection was taken in that behalf. It is not case of the petitioner that the complaint was filed initially in the Court which had no jurisdiction. Finally, in view of the efforts to expedite and fast track this matter it was transferred to Special Magistrate, Small Causes Court and then transferred to 64th Court purely for administrative purposes. There was no fault in the order passed by the Magistrate's Court since the Court at Girgaon had jurisdiction. This order was passed on 15th March, 2017 and this is also called into question in this petition.

6. Thereafter an application was made under Section 311 of the Code of Criminal Procedure for recalling the complainant's witness no.1 on the ground that he was held up in shifting of his house and could not give proper

instructions to his Advocate. On the complainant filing a say opposing the application, an order came to be passed on 12th May, 2017 observing that the accused had failed twice to avail of opportunity granted and it would defeat the interests of justice if he was permitted further cross examination by recalling the witness. Hence, the application was rejected on 12th May, 2007.

7. Thereafter on 6th June, 2017 the petitioner sought an adjournment and exemption from appearance on the ground that his wife was sick. Respondent No.2, who is complainant preferred an application stating that the case was 14 years old and on last date of hearing an application under Section 311 of the Code of Criminal Procedure has already been rejected and since 6th June, 2017 was fixed for recording statement of the accused under Section 313, the accused had absented himself intentionally to protract the proceedings. The learned Magistrate observed that accused was absent and the statement under Section 313 was dispensed with and evidence was treated as closed. This order is also assailed by the petitioner in this writ petition.

8. Although, initially when it was pointed out that the petitioner seeks to assail three orders, the counsel for the petitioner restricted his submission to the order of closing evidence and in respect of other two impugned orders, the application could be made. He sought liberty in this respect. Since the matter is already pending for so many years it will not have been appropriate to grant such liberty considering the fact that further

applications can be filed by the petitioner. Mr.Pendse therefore made submissions in respect of all three orders assailed in the Writ Petition. In the circumstances by consent of parties counsel I have proceeded to hear the matter finally as the interests of justice would require prompt disposal of the petition.

9. Mr.Pendse, learned counsel on behalf of the petitioner submitted that the Negotiable Instruments (Amendment) Act is deemed to have come into force on 15th June, 2015. and that the decision of the Supreme Court in *Dashrath Rupsingh Rathod vs. State of Maharashtra (2014) 9 SCC 129*, the Supreme Court held that perusal of the amendment to Section 142(2) leaves no manner of doubt, especially the explanation that in respect of offence under Section 138 when the cheque is sent for collection at any branch of the bank of the payee or holder of cheque in due course, then, the cheques shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account irrespective of the place of territorial jurisdiction. Therefore, the Court having jurisdiction would be the one exercising jurisdiction over the bank where the payee or holder in due course maintains the account. Learned counsel for the petitioner also relied upon unreported decision of the Gujarat High Court in *Brijendra Enterprise C/o Shail Enterprise vs. State of Gujarat Criminal Misc. Application No.13062 of 2011* dated 30th March, 2016 and relied upon the observations in the said judgment.

10. On behalf of respondent no.2 Mr.Satyanarayanan, learned counsel opposed the admission of the petition on the ground that the petitioner is constantly attempting to drag the proceedings and that an application for recall of witness was also made in November 2014. He relied upon a copy of the said application. The petitioner has not disputed the fact that such application had been preferred earlier. Mr.Satyanarayanan pointed out that the application now made is similar to the earlier application on which an order was passed on 26th November, 2014. The learned Judge recorded that accused had remain continuously absent and delayed the completion of trial. However, despite that the application was allowed subject to payment of costs of Rs.5000/-. Even though permission to recall the said witness was granted, the petitioner had deliberately remained absent. He therefore opposed the grant of relief.

11. Having heard learned counsel for the parties I find considerable force in the submissions of counsel for the respondent inasmuch as an earlier application for recall was made on 14th October, 2014 which came to be allowed on 26th November, 2014 but instead of proceeding with the matter an application was filed on 25th October, 2015 seeking return of the complaint. After this came to be rejected on 26th October, 2015 and a revision application was filed in the Sessions Court. The revision came to be rejected on 15th March, 2017. Despite this further application under Section 311 of the Code of Criminal Procedure was filed for recall of the very same witness on 12th May,

2017.

12. I have perused the contents of the application and considered the two applications in Exhibit-75 and Exhibit-88. The contents of Exhibit-88 are a verbatim reproduction of Exhibit-75 save and except for a minor change in paragraph 3. All other paragraphs are identical in content. The grounds taken are also the same. In the circumstances, I am convinced that the petitioner is only interested in delaying conclusion of the trial. There is no substance in the challenge to any of the orders impugned in the present petition. The challenges are hollow and intended to delay proceedings. There is a deliberate attempt to prolong the litigation and frustrate the administration of justice. No indulgence can be shown in the facts of the case. The Writ petition is an abuse of the process of law. In the circumstances this petition fails and I pass the following order :

- (a) Writ petition is rejected.
- (b) The petitioner shall pay costs to the Respondent No.2 fixed at Rs.50,000/- within two weeks of the order being uploaded.
- (c) The trial Court shall proceed with trial on the scheduled date without giving unnecessary adjournments.

(A.K. MENON, J.)