

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

CRIMINAL WRIT PETITION NO.966/2017

Sunil S/o Baliram Pawar
Age: 43 Years, Occ.: Business
Proprietor, Sunil Industries,
D-189/2, Shendra Five Star MIDC
Aurangabad

..PETITIONER

Versus

Laxman s/o Uttam Patil
Age Major, Occ : Business
Proprietor, Utkamal Electricals
Engineering and Contractors,
Utkamal Building,
Opp. State Bank of India
Mayani Road, Vita,
Tq. Khanapur, Dist.Sangli.

..RESPONDENT

Mr.Amol Gandhi h/f Mr.P.S.Mehta, Advocate for petitioner.
Mr.D.G.Nagode, Advocate .for Respondent sole

**CORAM : MANGESH S.PATIL,J.
DATE : 03/07/2018**

ORAL JUDGMENT:

1] Rule. Rule is made returnable forthwith. With the consent of both sides the matter is heard finally.

2] The complainant from a case instituted under Section 138 of the Negotiable Instruments Act has approached this Court under Article 227 of the Constitution of India, impugning the order passed by the learned Judicial Magistrate First Class, Aurangabad on 19/6/2017 thereby rejecting his application (Exh.63) whereby he had requested to recall a witness, his Accountant Sunil Pralhad Kharat to prove a statement of account.

3] The learned Advocate for the petitioner would submit that the petitioner examined his accountant Sunil Pralhad Kharat to prove the account maintained with him in the name of the respondent accused, to prove that the disputed cheque was issued in discharge of a legally enforceable debt. The statement of accountant was also tendered during examination in chief of the witness. However, it transpired that it did not bear his signature as a person who has prepared that statement as an extract of the accounts book. After the lapse was realised application (Exh.63) was moved and a request was made to allow the petitioner complainant to lead additional evidence of the accountant to prove the statement of the accountant with his signature. Even an additional statement of the accountant certified under his signature was also sought to be produced and still the learned Magistrate took a hyper technical view and rejected the request.

4] The learned advocate would further point out that the evidence of the petitioner complainant was yet to be over. Respondent accused would have got an opportunity to cross examine the witness and no prejudice would have been caused to him. There was no question of filling up of any lacuna and therefore, the impugned order may be quashed and set aside and the application may be allowed.

5] The learned advocate for the respondent accused strongly opposes the request. He submits that an opportunity was given to the petitioner complainant by pointing out the defect which he could have cured before the conclusion of examination in chief. Instead he allowed the witness to be cross examined on behalf of the accused. It is now the defect is sought to be cured which is likely to cause prejudice to him. The learned Magistrate has considered all these aspects and has rightly rejected the application (Exh.63).

6] I have carefully gone through the impugned order and the papers.

7] Admittedly, the evidence of the petitioner/complainant was not closed. It is immediately after the accountant Sunil Kharat was examined and cross examined that this application Exh.63 was presented seeking to rectify the mistake of not getting the account statement exhibited for want of his signature on the statement. Apparently, as can be seen from the

observations of the learned Magistrate in paragraph no.4 of the order, it is not that the defect was revealed during the cross examination of the witness. In fact the learned advocate who was representing the petitioner complainant had taken a conscious decision to allow the witness to be cross examined. It is only thereafter that the learned advocate seems to have realised the apparent lapse and by way of precaution submitted the application seeking to recall the witness and to record his further examination in chief.

8] It is trite that *actus curiae neminem gravabit* is the principle followed while dispensing justice. The learned advocate who represented the petitioner/complainant, had taken a decision to allow the witness to be cross examined instead of deferring his examination in chief and making an attempt to rectify the mistake by producing a signed copy of the statement of the accountant. If such was the state of affairs, the petitioner cannot be allowed to suffer for such a decision by his advocate. As the defect had not surfaced during the cross examination of the witness it cannot be said that the application was moved to fill up any such lacuna which was pointed out during the cross examination.

9] The evidence of the petitioner complainant was not yet over and the respondent accused would have got an opportunity to cross examine the witness. In these circumstances, in my considered view, it would be just and proper in the interest of

justice to allow the petitioner to recall and examine witness Sunil Kharat however it would be his further examination in chief which would be followed by his cross examination on behalf of the respondent accused.

10] The Writ Petition is allowed. The impugned order is quashed and set aside. The petitioner complainant is permitted to recall the witness Sunil Pralhad Kharat whose further examination in chief shall be recorded extending an opportunity to the respondent accused to cross examine him. His application (Exh.63) stands allowed accordingly.

11] Rule is made absolute in above terms.

(MANGESH S.PATIL,J.)

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