

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.132 OF 2015

1. The Quepem Urban Co-op.
Credit Society,
Having its registered office at
Cindio Apartments,
Ground Floor, Quepem, Goa .. Petitioner

V/s

1. Mr. Seby Noronha,
Son of late Assis Noronha,
Major of age,
Resident of H. No.707,
Ambaji, Fatorda,
Margao, Goa.
2. The State of Goa
Through the Public Prosecutor,
High Court of Bombay at Goa,
Having office at the office of the
Advocate General,
Altinho, Panaji, Goa .. Respondents

Mr. A. Nachinolkar, Advocate for the petitioner.

Ms. Marie Rosette Pereira, Advocate for the respondent no.1.

CORAM :- C. V. BHADANG, J.

Date : 9th January, 2018.

ORAL JUDGMENT :

The challenge in this petition under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, is to the order dated 04/08/2015, passed by the learned

Additional Sessions Judge, Margao in Criminal Revision Application No.30/2015. By the impugned judgment, the learned Sessions Judge had allowed the Criminal Revision Application filed by the respondent no.1, thereby allowing the application filed by the respondent no.1 for referring the disputed cheque to the handwriting expert.

2. The brief facts are that the petitioner has filed a complaint against the respondent no.1 under Section 138 of the Negotiable Instruments Act for dishonour of cheque. During trial, the petitioner examined Mr. Surendra Gaonkar and his cross-examination on behalf of the respondent no.1 was concluded on 11/04/2015. Thereafter, the respondent no.1 filed an application on 13/04/2015 for referring the disputed cheque to the Handwriting Expert. It was contended that the subject cheque was a blank cheque signed by the respondent no.1 and was obtained by the petitioner as a security. In other words, it was contended that the said cheque was not passed for repayment of any existing liability, which is the requirement of Section 138 of the Act.

3. The application was opposed on behalf of the petitioner, *inter alia*, contending that this is an attempt to delay

the proceedings.

4. The learned Magistrate, by an order dated 20/04/2015, dismissed the application, *inter alia*, holding that since neither the signature on the cheque is disputed nor a specific suggestion is put in that regard to the witness of the petitioner, the application cannot be granted as “no purpose would be served”. The learned Magistrate specifically found that the application is filed only to delay the proceedings.

5. The respondent no.1 challenged the said order before the learned Sessions Judge, who by the impugned judgment, has allowed the application.

6. I have heard Shri Nachinolkar, the learned Counsel for the petitioner and Ms. Pereira, the learned Counsel for the respondent no.1. With the assistance of the learned Counsel for the parties, I have gone through the record.

7. It is submitted by the learned Counsel for the petitioner that the respondent no.1 has neither issued a reply to the statutory notice nor has disputed the signature on the cheque. It is submitted that the respondent no.1 has also not entered into

the witness box and has closed his defence evidence and as such, the application filed, was clearly misconceived and the learned Magistrate had rightly come to the conclusion that the application was filed with a view to delay the proceedings. It is submitted that the learned Sessions Judge was in error in interfering with the said order in exercise of revisional jurisdiction, particularly when there was no irregularity in the exercise of the discretion by the learned Magistrate. On behalf of the petitioner, reliance is placed on the decision of this Court in the case of ***Prakash Sevantil Vora Vs. State of Maharashtra & Anr.***; (2011)0 Cr.LJ 2207 and the judgment of the Supreme Court in the case of ***I.C.D.S. Ltd Vs. Beena Shabeer***; (2002)6 SCC 426. It is submitted that as held by the Supreme Court in the case of ***ICDS Ltd*** (supra), it is not necessary that the body of the cheque has to be filled in by the accused and it is sufficient for raising a presumption under Section 139 read with Section 118 of the Act that the cheque is signed by the accused. It is submitted that this Court in the case of ***Prakash Vora*** (supra), in a similar factual matrix, has upheld the order of the learned Magistrate refusing to refer the disputed cheque to the Handwriting Expert.

8. On the contrary, it is submitted by Ms. Pereira, the learned Counsel for the respondent no.1 that the application for

referring the subject cheque to the Handwriting Expert was filed within about 13 days of the closure of the evidence of the petitioner and thus, it cannot be said that the respondent no.1 was trying to delay the proceedings. It is submitted that it is the specific defence of the respondent no.1 that there was a blank signed cheque obtained by the petitioner by way of security. It is submitted that the respondent no.1, thus, should be granted a fair opportunity to establish his defence. On behalf of the respondent no.1, strong reliance is placed on the decision of this Court in the case of **Govind Prabhugaonkar Vs. Romaldina Carneiro**; (WPCR Nos.97, 98 and 99/2015), in which this Court has upheld an order passed by the learned Magistrate referring the disputed cheque to an Handwriting Expert.

9. I have given my anxious consideration to the rival circumstances and the submissions made.

10. In the present case, the respondent no.1 is not disputing his signature on the subject cheque. The only contention is that a blank cheque was obtained by the petitioner by way of a security. In this regard, it would be significant to note that the respondent no.1 has neither issued any reply to the notice nor has entered into the witness box in his defence. The

application for referring the subject cheque to the Handwriting Expert was filed on 13/04/2015 and shortly thereafter, the respondent no.1 closed his side on 15/04/2015. The application does not mention as to under which provision, the same is filed. During the course of arguments at bar, the learned Counsel for the respondent no.1 submitted that it is filed under Section 243(2) of Cr.P.C. Section 243 of Cr.P.C. speaks about the evidence for defence. Subsection (2) of Section 243 of Cr.P.C. provides that if the accused, "after he had entered upon his defence" applies to the Magistrate to issue any process for compelling the attendance of the witness for the purpose of examination or cross-examination or the production of any document or the other thing, the Magistrate shall issue such process unless he considers that such an 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 a ground shall be recorded by the Magistrate in writing. It can, thus, be seen that under subsection (2) of Section 243 of Cr.P.C., the accused can apply for issuance of process for compelling the attendance of any witness for the purpose as envisaged in the said section. In the present case, as noticed earlier, the respondent no.1 had not entered into the witness box. The respondent no.1 was the best person to state on oath that the portion except the signature appearing on the cheque, was not in

his handwriting. It is not necessary that the entire cheque has to be filled in by the accused for the purposes of raising presumption under Section 118 and Section 139 of the Act. It is sufficient that the cheque is signed by the accused. The question of bonafides and whether or not the application is filed with a view to delay the proceedings, has to be examined in the context of the aforesaid facts obtaining in this case. The learned Magistrate had come to the conclusion and has recorded in his order that the application was filed in order to delay the proceedings. The question is whether the learned Sessions Judge was justified in interfering with the said discretionary order, in the exercise of revisional jurisdiction. It may be significant to note that the learned Sessions Judge, in para 6 of the impugned judgment, has accepted that "there is no hard and fast rule that the body of the cheque has to be filled in by the accused to make him liable for the offence punishable under Section 138 of the Act and it may also be that when a blank cheque signed by the accused is issued, there is an implied authority to fill in the cheque". Once having accepted this and in the face of the specific finding by the Magistrate that the application was filed with a view to delay, in my considered view, the learned Sessions Judge was not justified in interfering with the discretionary order of the Magistrate, rejecting the application.

11. This Court, in the case of **Prakash Vora** (supra), after taking a survey of the various decisions holding the field and in an identical factual situation, has upheld the order rejecting the application for referring the cheque to the Handwriting Expert. This Court has found that when the application is made in a case of the present nature, for sending the cheque to the Handwriting Expert, the same has to be considered in the facts and circumstances of each case. On one hand, the accused has to be given fair opportunity to rebut the presumption, which is raised under Section 118 and Section 139 of the Act, however, on the other hand, it is the duty of the Magistrate to ensure that by filing frivolous application, the accused does not protract the trial. There may be cases where either the signature is disputed or there is overwriting or alternation made in the body of the cheque, which in the given case, would require the cheque being sent for the report of the Handwriting Expert. Here is a case where the respondent no.1, without himself entering into the witness box, is seeking sending of the cheque to Handwriting Expert, which in my considered view, could not have been allowed.

12. Reliance on the judgment in the case of **Govind Prabhugaonkar** (supra), in my humble view, is misplaced. There, the Magistrate had allowed the application for referring the

cheque to the Handwriting Expert, which order has been confirmed by this Court. In other words, there was no finding in that case that the application was filed with a view to delay the proceedings. That apart, from the facts as available from that judgment, it cannot also be gathered whether the accused had entered into the witness box or not. Be that as it may, considering the overall circumstances, in my considered view, the learned Sessions was in error in interfering with the impugned order passed by the learned Magistrate in exercise of the revisional jurisdiction.

13. In the result, the petition is allowed. The impugned judgment and order passed by the learned Sessions Judge is hereby set aside. The order passed by the learned Magistrate dismissing the application Exh.D-52 is hereby restored.

14. It is, however, made clear that the observations herein are made only for the limited purpose of examining the question of referring the subject cheque to the handwriting expert. The learned Magistrate shall not be influenced by the same while deciding the complaint on merits.

C. V. BHADANG, J.

SMA