

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1023 OF 2018

Niranjan s/o. Suresh Bhatwal,
 Age: 40 years, Occupation: Business,
 R/o. Sinic House, Behind Gurudwara,
 Mumbai-Agra Road, Dhule,
 Taluka & District Dhule. ... **Petitioner**

V/s.

Dr. Swapnil Nitin Pagare,
 Age: 35 years, Occupation: Doctor,
 R/o. Plot No.5, Gopal Nagar, Dhule,
 Taluka & District Dhule. ... **Respondent**

Mr. Surendra V. Suryawanshi, Advocate for the Petitioner.
 Mr. Patil Shrikant S., Advocate for the Respondent.

CORAM : MANGESH S. PATIL, J.

DATE OF RESERVING THE JUDGMENT : 06.03.2019
DATE OF PRONOUNCING THE JUDGMENT : 29.04.2019

JUDGMENT :-

Heard. Rule. The rule is made returnable forthwith. With the consent of both the sides the matter is heard finally at the stage of admission.

2. By way of this writ petition under Article 226 and 227 of the Constitution of India, the petitioner who is an accused in a proceeding bearing STC No. 260 of 2015 pending in the Court of J.M.F.C. Court No.3, Dhule filed by the respondent under Section 138 of the Negotiable Instruments Act is impugning the order passed on

24.07.2018 by the learned Magistrate rejecting his application (Exhibit-75) whereby he had prayed for the three cheques (Exhibit-7, 8 and 9) to be transmitted to handwriting expert to ascertain if the contents in the cheques are in his handwriting and whether the signatures on the cheques and the other contents are in different ink.

3. The learned advocate for the petitioner referring to the decisions in the case of **Kalyani Baskar Vs. M.S. Sampooram; 2006 DGLS (SC) 1217**, **T. Nagappa Vs. Y.R. Murlidhar; 2008 DGLS (SC)599**, **Nandkumar s/o Rajkumar Harane V/s. Vishwas s/o Vilasrao Kshirsagar & Anr; 2012(2) Mh.L.J. and Bandeppa Mallikarjun Kante V/s. Madhav Narayanrao Birajdar; 2016 DGLS (Bom.) 486** submitted that in order to have a fair trial, every opportunity ought to have been extended to the petitioner and failure to do so would result in miscarriage of justice. The petitioner being an accused should be given an opportunity to rebut the presumptions available in favour of the respondent-complainant. His such right to defend himself cannot be abrogated. The learned Magistrate has committed a gross illegality in rejecting the application.

4. The learned advocate for the respondent vehemently submitted that the petitioner is bent upon to protract the trial which has already delayed considerably. Submitting the application (Exhibit-75) is yet another attempt to protract the trial. It is only for the first time by

way of this application (Exhibit-75) the petitioner has requested for transmitting the cheques to the handwriting expert at a belated stage. No such defence was taken at an earlier point of time. Neither in the cross-examination of the respondent nor in his own examination under Section 313 of the Cr.P.C. has the petitioner come out with any such defence which he now is trying to built upon and under the pretext he is requesting to transmit the cheques to the handwriting expert. The learned advocate further submitted that going by the fact situation of the matter in hand, the petitioner is not entitled to rely upon the decisions cited on his behalf (supra). On the contrary, the fact situation is duly covered by the instances in the case of **Shri Prakash Sevantilal Vora V/s. State of Maharashtra & Anr.; 2011 All.M.R. (Cri) 713** and **Simratmal Hiralal Gandhi V/s. Kedarnath Badrinarayan Bang & Ors.; 2011 All.M.R. (Cri) 3505**.

5. I have carefully gone through the papers of the decisions cited by both the sides. There can be no doubt about the right of an accused to defend himself which cannot be taken away. Fair trial includes a fair opportunity to allow him to prove his innocence by adducing evidence which would enable him to rebut the presumptions operating against him in law as well as on facts. The principle has been reiterated by the Supreme Court in the cases of **Kalyani Baskar and T. Nagappa** (supra). One need not repeat those particularly when in the impugned order the learned Magistrate has reproduced relevant

observations from the case of **Kalyani Baskar** (supra) and few such other decisions of some High Courts.

6. The question in the matter in hand is as to whether as has been observed in the case of **Kalyani Baskar** (supra) there is material to show that the attempt by the petitioner in filing the application (Exhibit-75) is *bona fide* or with an ulterior motive of delaying the trial, in which case he would not be entitled to seek referral of the cheques to the handwriting expert.

7. A perusal of the impugned order shows that the learned Magistrate has rejected the application on the following grounds:

- a) During the entire cross-examination of the respondent on behalf of the petitioner there was not a single suggestion put, regarding handwriting in the contents of the cheques;
- b) There was no cross-examination even in the form of suggestion to show that the ink in which the contents are filled and that of the signatures on those cheques was different;
- c) The petitioner during his cross-examination admitted to have received the statutory notice (Exhibit-16) but had not replied it when he could have raised such a dispute by sending a reply;
- d) The defence was tried to be built at a belated stage and was an afterthought.

As can be seen the grounds put-forth by the learned Magistrate are duly corroborated by the fact situation and there is no dispute about correctness of availability of these grounds. In my considered opinion,

these are indeed unassailable grounds which cumulatively demonstrate as to how filing of the application (Exhibit-75) at that stage was clearly an afterthought and the petitioner had not raised such defence at an appropriate stage.

8. Coupled with the above grounds, it is equally important to note that there is one more reason which justifies the observations and the conclusions of the learned Magistrate. As is pointed out by the learned advocate for the respondent, even in his examination under Section 313 of the Cr.PC. the petitioner had not come out with any such concrete defence which would have justified his request which he had made by the application (Exhibit-75). He has given evasive replies and have denied all the facts simplicitor except by saying that he had given blank cheques to the respondent and that the case was false. He could have but has not at all stated that he had issued blank signed cheques which the respondent has misused.

9. In the cases of **Nandkumar** and **Bandeppa** (Supra) the accused therein had taken the defence at earlier point of time, unlike the petitioner who has applied at a belated stage which demonstrates same obvious motive to protract the trial. His case is rather covered by the instances in **Prakash Sevantilal Vora** and **Simratmal Hiralal Gandhi** (supra).

10. Taking into account all these aspects, I find no apparent illegality committed by the learned Magistrate while passing the impugned order. The grounds referred to herein-above clearly justify the conclusion reached by him.

11. The writ petition is dismissed. The Rule is discharged.

(MANGESH S. PATIL, J.)