IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1676 OF 2018

Vinay S/o. Vijaykumar Saboo,
Age: 33 years, Occu: Business,
R/o Manjitnagar, Akashwani,
Aurangabad. … **Petitioner**

Vs.

1. Vaibhav S/o. Dwarkadas Naole,
Age: 34 years, Occu: Business,
R/o: Ravideep Apartment, N-5,
CIDCO, Aurangabad.

2. The State of Maharashtra … **Respondents**

Mr. Vikaram S. Kadam, Advocate for the Petitioner.
Mr. Sushil M. Biyani, Advocate for the Respondent no.1.
Mr. S.P. Deshmukh, Advocate for the Respondent/State.

CORAM : MANGESH S. PATIL, J.
DATE : 14.01.2019

JUDGMENT :

Heard. Rule. Rule is made returnable forthwith. Learned advocate for the respondents waives service. At the request of both the sides the matter is heard finally at the stage of admission.

2. Shortly stated the facts leading to the filing of his writ petition may be summarized as under:

The respondent no.1 filed a complaint against the petitioner for

an offence punishable under Section 138 of the Negotiable Instruments Act. The Magistrate recorded the plea and commenced the trial. The evidence of the respondent no.1 was over. The petitioner entered into his defence. He stepped into the witness box and also examined one more witness. It is at that juncture he submitted application (Exhibit-89) and contended that it was his defence since inception that the cheque was issued only by way of security for the repayment of hand loan. A blank but signed cheque was given by him to the respondent no.1 and it was misused by the latter. He therefore requested that cheque be sent to Forensic Analysis and an opinion of the hand writing expert C.I.D., Aurangabad be called. The learned Magistrate rejected the application (Exhibit-89) after hearing both the sides. Being aggrieved and dissatisfied by the rejection of his application (Exhibit-89) the petitioner preferred Criminal Revision Application No.261 of 2018 before the Sessions Court at Aurangabad. The learned Additional Sessions Judge by the impugned order dated 03.11.2018 dismissed the revision. Hence this writ petition.

3. The learned advocate for the petitioner vehemently submitted that it has been his consistent defence since inception that the cheque was issued only by way of security. It was blank and was only bearing his signature. The presumption available under Section 139 of the Negotiable Instruments Act is rebuttal one and every opportunity should have been extended to the petitioner to substantiate his defence.

The learned advocate places reliance on the decision of the Supreme Court in the case of **T. Nagappa V/s. Y.R. Muralidhar; (2008) 5 SCC 633**. The learned advocate also referred to the decision of Single Judge of this Court in **Criminal Writ Petition No.1541 of 2015 Bandeppa S/o Mallikarjun Kante V/s. Madhav S/o Narayanrao Birajdar and Anr.** dated **14.10.2016**, wherein, in similar set of facts and by referring to the decision in the case of **T. Nagappa** as well the decision of the Supreme Court in the case of **Mrs. Kalyani Baskar V/s. Mrs. M.S. Sampornam; (2007) 2 SCC 258**, the writ petition preferred by the complainant against the order directing the cheque to be forwarded to the hand writing expert soliciting his opinion was dismissed by this Court. The learned advocate would submit that it should be left to the petitioner/accused as to how he would want to substantiate his defence. An opportunity ought to have been extended to him to solicit an opinion of the handwriting expert. By rejection of his request he has been deprived of an opportunity in that respect of rebutting the burden. Since he is facing a criminal case, it would cause a serious prejudice to him. The learned Magistrate as well as the learned Additional Sessions Judge have erroneously refused the request. The orders are illegal, perverse and arbitrary which has resulted in miscarriage of justice and it may be rectified in this writ petition.

4. The learned advocate for the respondents points out that though a bald suggestion was put to the respondent no.1 during his

cross-examination on behalf of the petitioner to the effect that only a blank signed cheque was given by way of security, it was not further substantiated by any statement on oath by the petitioner when he had stepped into the witness box and had deposed as a witness. Even during his examination under Section 313 of the Cr.P.C. he failed to stick to his such stand. Thus according to the learned advocate only a lame attempt has been made to protract the trial and the application (Exhibit-89) was moved only as a dilatory tactic. The writ petition therefore may be dismissed.

5. There cannot be any dispute about the observations and the conclusions of the Supreme Court in the case of **T. Nagappa (supra)**. Presumptions available under Section 118 (a) or Section 139 of the Negotiable Instruments Act are indeed rebuttable presumptions and an accused can lead evidence in rebuttal. It is also trite that the Court can't dictate to an accused as to how and by what evidence he sould rebut such presumptions and it should be left to him to take suitable steps. Similarly, by relying upon the decision in the case of T. Nagappa this Court has taken a similar view in the case of **Bandeppa (supra)**.

6. However, it is equally important to note the peculiar facts and circumstances obtaining in the matter in hand. Perusal of the deposition of the respondent no.1 who is the complainant does reveal that suggestions were put to him on behalf of the petitioner to the effect

that the cheque was issued only by way of a security and it was blank and was bearing only his signature. However. it is equally important to point out that this appears to be an isolated and bald suggestion. A copy of the statement of the petitioner recorded under Section 313 of the Cr.P.C. (Exhibit-45) clearly shows that in the entire examination he has not come out with such a defence commensurate with the suggestions put to the respondent no.1 during his cross-examination on his behalf. He simply vaguely asserted that he had obtained the money from the respondent no.1 and had repaid it and the cheque was merely issued by way of security but the respondent no.1 has misused it. He has nowhere stated that only a blank cheque signed by him was given.

7. More importantly, the petitioner also stepped into the witness box and his deposition was recorded (Exhibit-47). Careful perusal of his examination-in-chief reveals that he has not at all stated about having given a blank and signed cheque to the respondent no.1. He has apparently given a complete go by to the suggestion that was put to the respondent no.1 on his behalf.

8. If such is the state of affairs, when he has not substantiated his defence either in reply under examination under Section 313 of the Cr.P.C. or even in his deposition, an attempt now being made by him by application (Exhibit-89) of soliciting opinion of a hand-writing expert is clearly a dilatory tactic. It is quite apparent that the learned Magistrate

has clearly referred to these aspects and has come to a correct conclusion that the application was not *bona fide*. He also pointed out that it is only after the application of the petitioner seeking adjournment for examining third witness was rejected that the application (Exhibit-89) was filed.

9. Considering all the aforementioned aspects, in my considered view, the petitioner is not entitled to seek any benefit from the decision in the case of **T. Nagappa** or in the case of **Bandeppa**. The fact situation in the matter in hand is entirely different. As demonstrated above the defence sought to be made out is only a haphazard attempt. There is no apparent illegality or perversity in the orders passed by the Magistrate and the learned Additional Sessions Judge.

10. The Writ Petition is dismissed.

11. The Rule is discharged.

(MANGESH S. PATIL, J.)

KAKADE