IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 100 OF 2019

Sanjay Rathodkar .... Petitioner
Versus
Bonny Fernandes & Another .... Respondents

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Mr. Samir Taleigaonkar, Advocate for the Petitioner.

CORAM : C.V. BHADANG, J.

DATE : 3rd MAY, 2019

ORAL ORDER:

By this petition, the petitioner/complainant is challenging the order dated 11.02.2019, passed by the learned Magistrate, below application Exhibit-D/57. By the impugned order, application for production of documents, filed by the petitioner, has been dismissed.

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, 1881 (Act, for short). The case made out by the petitioner is that on 14.06.2008, the petitioner and the respondent no. 1 had entered into a Memorandum of Understanding (MoU) with one Mr. Ajit Parkar, for purchase of land at Vadem, Sanguem Taluka and the consideration agreed was Rs.20 lakhs, which was to be shared equally by the

petitioner and the respondent no. 1. The petitioner paid his share of Rs.10 lakhs to the respondent no. 1 and the respondent no. 1 was to pay the same along with his contribution of Rs.10 lakhs, to Mr. Ajit Parkar. The draft agreement for sale was also prepared, which was not executed, as the transaction had fallen through. In such circumstances, the respondent no. 1 issued a cheque in favour of the petitioner on 17.02.2009 for Rs.10 lakhs on his account with YES Bank, Panaji Branch, towards refund of the amount of Rs.10 lakhs, which was paid by the petitioner to the respondent no. 1. The said cheque got dishonoured on presentation for realisation, which led the petitioner to file the said complaint, which is pending before the Judicial Magistrate First Class, Panaji.

3. In that case, the petitioner has examined himself and produced certain documents. When the case was at an advanced stage of hearing, the petitioner filed application, Exhibit-D/57 on 27.09.2018, for production of the following documents:

(a) Copy of draft of agreement of sale dated 18.07.2008.

(b) Fixed deposit receipt of VPK Urban Co-operative Credit Society Ltd. of Rs.50,000/- each (4 in number) all having transaction No. 5641, 5642, 5643 and 5644.

(c) Account statement of Pundalik Rathodkar (father of the complainant) of State Bank of India, Ponda Branch, bearing Saving Account No. 80348251920.

(d) Statement of Federal Bank Ltd. wherein the amount of Rs.2,20,560/- is shown disbursed in favour of the complainant.

4. The application was opposed on behalf of the respondent no. 1.

5. The learned Magistrate, by the impugned order, has refused to allow the production of the said documents. Hence, this petition.

6. I have heard Mr. Taleigaonkar, the learned Counsel for the petitioner. Perused record.

7. It is submitted by Mr. Taleigaonkar, the learned Counsel for the petitioner that the documents, as sought to be produced, are relevant for the purpose of deciding the complaint, filed by the petitioner. It is submitted that out of sheer inadvertence, the petitioner failed to produce the documents earlier and the learned Magistrate ought to have granted opportunity to the petitioner to produce the said documents.

It is submitted that although the agreement for sale is not formally executed, it can be used for collateral purpose, to show that indeed there was a transaction between the petitioner and the respondent no. 1 and Mr. Parkar, for purchase of land. It is submitted that the other documents are necessary, to show the capacity and ability of the petitioner to pay the amount of Rs.10 lakhs. It is submitted that the petitioner had realised Rs.2 lakhs, by encashing four fixed deposit receipts and had obtained certain amount from his father and had also obtained gold loan for repayment of the amount obtained from certain other individuals. It is submitted that thus, the documents are relevant for the purpose of deciding the complaint.

8. I have carefully considered the circumstances and the submissions made and I am not inclined to interfere with the impugned order, at this stage, when the criminal case is now fixed for judgment. *Prima facie*, it cannot be accepted that the unexecuted document, in the nature of agreement for sale can be used even for any collateral purpose. In order that certain document can be used for collateral purpose, it has to be a document, which is formally executed and not otherwise. *Prima facie*, it appears that according to the petitioner, an

amount of Rs.10 lakhs was paid to the respondent no. 1, somewhere in the month of June, 2008, while the four fixed deposit receipts have been encashed on 12.07.2008, which is subsequent to June, 2008. Even in so far as withdrawal from the account of the father of the petitioner with State Bank of India is concerned, the learned Magistrate has found that this is subsequent to June, 2008. Thus, at this stage, it is not possible to entertain the petition, leaving it open to the petitioner to challenge the impugned order in an appeal, if at all, the final judgment and order in the complaint, is adverse to the petitioner.

9. In such circumstances, the petition is dismissed. However, the petitioner shall be at liberty to raise appropriate contentions against the impugned order, in an appeal, challenging the final outcome of the complaint, under Section 138 of the Act, if at all it is adverse to the petitioner.

C. V. BHADANG, J.

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