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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.569 OF 2020

Chandrashekhar s/o Vilasappa Mange = PETITIONER
(Orig.Accused)

VERSUS

1) The State of Maharashtra
and another. = RESPONDENTS

Mr.SJ Salunke, Advocate for Petitioner;
Mrs.RP Gour, APP for Respondent-State;
Mr.SS Rathi, Advocate for Respondent No.2-
orig.Complainant

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 16th October, 2020.

PER COURT:-

1. Present petition has been filed for invoking the constitutional powers of this Court under Article 227 of the Constitution of India to challenge the judgment and order dated 7.3.2020 passed by learned Additional Sessions Judge, Ambejogai, District Beed, in Criminal Revision No. 60/2019, whereby order below Exhibit-61 passed by learned JMFC, Ambejogai, District Beed in SCC No. 1063/2015 dated 1.10.2019 was confirmed. The application at Exh. 61 was filed by the present petitioner, who is original accused in the said case, for referring the cheque-Exh.34, to Hand-writing expert for opinion in respect of the hand-

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writing as well as ascertaining age of the ink of the signature of the accused.

2. Heard learned Advocate Shri SJ Salunke for petitioner; learned APP Mrs. RP Gour for Respondent No.1-State and learned Advocate Shri SS Rathi for Respondent No.2.

3. Learned Advocate appearing for the petitioner vehemently submitted that the present petitioner has taken a defence that he had kept certain cheques, after signing in the year 2013, in the Tax related files of his brother. The informant is a Tax Consultant of brother of the petitioner. The said file went in possession of the complainant. In fact, the complainant had sustained huge loss in gambling and betting. He has misused the cheques, which were signed by the accused and filed false case. The accused had never issued the disputed cheque Exh.34 towards discharge of legal debt or liability. The complainant has falsely contended that a transaction had taken place in 2015. However, in fact, the accused had signed those cheques in 2013.

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Further, the complainant had examined CW 2 – Sidram Kamble – Chief Officer of Vasundhara Mahila Nagari Sahakari Bank, Ambejogai. The documents have been filed at Exhibit-44 and 45 in respect of Ledger Account, which has endorsement under Section 65(b) of the Indian Evidence Act. However, the copies supplied to the accused of these documents do not compare the alleged endorsement. It is stated that it is not in hand-writing of authorized person and, therefore, he wants bank account cheque Exh.34 to be sent for hand-writing expert's opinion; opinion in respect of Exh. 44 and 45 should also required to be sent. The learned Advocate for the petitioner further submitted that the learned JMFC as well as the learned Additional Sessions Judge failed to consider that the accused has denied the entire transaction. In fact, he had prayed the learned JMFC to send the documents for opinion of the hand-writing expert earlier also. That application was rejected which was below Exh. 47. Thereafter, the accused has challenged the said order by filing Criminal Revision Petition No. 2/2019 before learned Additional Sessions Judge. That revision petition was dismissed on 2.4.2019.

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That order was challenged before this Court by filing Writ Petition No.820/2019. That Writ Petition was disposed of as withdrawn as the petitioner withdrew the said petition with liberty to file an application afresh before the lower court at appropriate stage. Now, the statement of the accused under Section 313(1)(b) of Cr.P.C. has been recorded. He has examined himself and denied the issuance of cheque in 2015. So also, specific question was asked to the complainant as to in whose hand-writing the other contents of cheque at Exh.34 are. Only on the basis of presumption under Sections 118 and 139 of Negotiable Instruments Act, the complainant cannot say that there is legally enforceable debt or liability. Further, when opportunity is given by the statute itself to the accused to rebut the said presumption, then fair opportunity should be given to the accused.

3. Learned Advocate for the petitioner relied on the following authorities, -

Sr. Nos .	CITATIONS	RATIO
1)	<u>T.Nagappa Vs. YR Muralidhar</u> <u>AIR 2008 SC 2010</u>	When a contention has been raised that the complainant has misused the cheque, an

		opportunity must be granted to the accused for adducing evidence in rebuttal thereof. Accused has a right to fair trial
2)	<u>Natasha Singh Vs. CBI (State)</u> <u>2013 AIR SCW 3554</u>	Adducing evidence in support of defence is a valuable right and denial of such right would be denial of a fair trial.
3)	<u>O.P.Sharma Vs. Ashok Bohara</u> <u>2011 Cri.LJ 4892 (Raj. High Court.)</u>	While Section 139 of the Act creates presumption in favour of the holder, it also permits the offender the right to prove "to the contrary". Hence, it is not in absolute presumption, but is a rebuttal one.
4)	<u>Baburao Madhavrao Munnermanik Vs. Vishwajit Pratapsingh Pardeshi and Anr.</u> <u>(Cri.WP 984/2010, decided on 26.4.2011)</u>	Relied on T.Nagappa's case (supra) and ratio laid down therein.
5)	<u>Sayaji Tukaram Shinde Vs. the State of Mah. And Anr.</u> <u>Cri WP 359/2013 decided on 27.9.2013)</u>	When the handwriting and signature on the cheque was denied and disputed and if the same is established, then it would be fatal to case of the complainant and, therefore an opportunity to establish the claim is necessary to to be provided.
6)	<u>Kamlakar Vithalrao Padwal Vs. State of Mah. And anr.</u> <u>Cri WP 1053/2013 decided on 3.12.2013)</u>	After prosecution evidence is adduced and accused is examined under the provisions of Section 313 opf Cr.P.C.

		or during the course of such examination, if accused makes a prayer for sending the cheque to the handwriting expert's opinion such prayer shall be allowed bdy the Magistrate.
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4. Per contra, learned Advocate for Respondent No.2 vehemently submitted in support of the affidavit in reply filed by Respondent No.2 that the learned Advocate representing the petitioner had cross-examined the complainant. It can be gathered from the said cross-examination that the accused is putting forward the theory of blank cheque. That means, he is not denying his signature on the cheque. No suggestion was given as to how mistakenly the cheque went in possession of the complainant. There is no suggestion to the complainant in his cross-examination on behalf of the accused that the contents of the cheque are written by him. Under such circumstance, there is absolutely no propriety in sending the cheque for opinion of the hand-writing expert. Further, as regards the ink of his signature, no concrete statement has been made that there is such science developed. The petitioner had entered the witness

box. So also, his statement under Section 313 of Cr.P.C. has been recorded. From the said statement under Section 313 of Cr.P.C., it can be seen that he has accepted his signature over the cheque, in question. As regards the documents at Exh.44 and 45 are concerned, they were produced by the bank official. Merely because the copies, which are given to the accused, do not bear the certificate under Section 65(b) of the Evidence Act, those documents cannot be sent for opinion of the Hand-writing expert. Even if we accept for the sake of arguments that the cheque, which was given to the complainant, was blank cheque; yet in view of Section 20 of the Negotiable Instruments Act, the recipient of the cheque gets every right to put the contents. Except the interested words of the accused, there is nothing on record to show that the disputed cheque was signed by him in 2013. The application at Exh.61, is nothing but another attempt to protract the matter.

5. Learned Advocate appearing for the complainant – Respondent No.2 relied on the following authorities, -

i. Prakash Sevantilal Vora Vs. The State of Maharashtra and Anr. - 2011 CRI.L.J. 2207, wherein this Court has observed thus,

" If an application is made for sending the document to the Handwriting Expert particularly in a complaint which is filed under [section 138](#), the Magistrate has to consider the said application and taking into consideration the facts of each case decide as to whether it is a fit case for sending the said document to the Handwriting Expert. Proceedings under [section 138](#) are of a summary nature and the Act itself contemplates that the said trial should be over within a period of six months. There is a tendency on the part of the accused to protract the trial as much as possible. On the one hand, it is true that accused has a right to rebut the presumption which is raised under [section 118](#) and [139](#) of the Negotiable Instruments Act and, for that purpose, a fair opportunity has to be given to him. On the other hand, it is the duty of the Magistrate to ensure that by filing frivolous application, accused does not protract the trial. So far as the State of Maharashtra is concerned and particularly in the City of Mumbai there are about 6 lakhs cases pending in the Courts of Magistrates for the offences punishable under [section 138](#) of the Negotiable Instruments Act and the Handwriting Experts which are available in the City of Mumbai are very few. It is a common knowledge

therefore that, at times, it takes couple of years for Handwriting Expert to give his opinion. Under these circumstances, therefore, the learned Magistrate has to consider whether the application filed by the accused needs to be granted or not, taking into consideration the genuineness of the application and also after taking into consideration individual facts of the case. Merely because the accused has a right of being given fair opportunity, it cannot be said that in each and every case, whenever applications are filed for sending the document to Handwriting Expert, the same should be allowed."

ii. Narayan s/o Purushottam Sarda Vs. Kiran Rameshlal Bhandari - Cri WP 1089/2015 decided on 17.6.2015, wherein this Court has observed thus, -

"5. Section 20 of N.I. Act shows that it is only required to be proved that the accused has signed the cheque. It provides that when accused hands over inchoate cheque, instrument, it needs to be presumed that authority is given to the person receiving cheque to fill the contents of the cheque. Thus, no defence that the contents of the cheque were not filled by the accused is available in view of the Section 20 of the N.I. Act."

6. At the outset, it is to be noted that the case appears to be pending before the learned JMFC since 2015. This is another round of litigation up

to this Court only on the point that disputed cheque should be sent for opinion of Hand-writing expert. Earlier attempt of the petitioner had failed. Now, he wants the cheque Exh.34 to be sent for the opinion of the Hand-writing expert on two counts, viz. 1) In whose hand-writing the contents of the cheque (except his signature) are; and 2) to ascertain the ink of his signature as he has put the defence that he has signed the said cheque Exh.34 in 2013. The complainant has come with a case that there was transaction between him and the accused in 2015 and in discharge of legally enforceable debt or liability, the said disputed cheque Exh.34 was given to him by the accused. As regards the said signature is concerned, definitely, it is not his case that it is not his signature. In other words, the accused is not denying his signature on the cheque Exh.34. It is his only statement that, that signature was made by him in 2013. Perusal of the cross-examination of the complainant taken on behalf of the accused, would show that the complainant has claimed ignorance about the contents of Exhibit-34. There is absolutely no suggestion to the complainant that

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those contents are in the hand-writing of the complainant. In fact, in view of the pronouncements by this Court in the case of Simratmal Hiralal Gandhi Vs. Kedarnath Badrinarayan Bang and Ors. - 2011 (3) Bombay SCR (Cri.) and Narayan s/o Purushottam Sarda Vs. Kiran Rameshlal Bhandari (Cri.WP No. 108/2015 decided on 17th June, 2015), it is very much clear that Section 20 of the Negotiable Instruments Act gives an authority to the person receiving the cheque to fill its contents. Further in recent pronouncement of the Hon'ble Apex Court in the case of Rajeshbhai Muljibhai Patel and Ors. Vs. State of Gujarat and Anr. - (2020) 3 SCC 794, (Cri.Appeal Nos. 251-252/2020 arising out of SLP (Cri.) Nos. 142-143 of 2019, decided on 10.2.2020, wherein it has been observed, "it is also to be pointed out that in terms of Section 45 of the Evidence Act, the opinion of handwriting expert is a relevant piece of evidence; but it is not a conclusive evidence to disprove the opinion of the handwriting expert. That apart, Section 73 of the Evidence Act empowers the court to compare the admitted and disputed writings for the purpose of

forming its own opinion. Based on the sole opinion of the handwriting expert, FIR ought not to have been registered.". Thus, even if there would be difference of handwriting, that does not estop the complainant from contending that the said cheque was issued in discharge of legally enforceable debt or liability. Further, the said difference, if at all, will not *ipso facto* support the defence conclusively that the said cheque was issued in 2013. Another fact to be noted is, in his application the present petitioner has not stated as to what is the latest technology available for ascertaining age of the ink; where it is available and whether it conclusively proves age of the ink. In absence of any such material, merely for the guess work, the cheque need not be sent for opinion regarding age of the ink. In the present case, except the accused himself examining in support of defence; the accused has not examined anybody else to state he had kept those documents in the Income tax file of his brother and thereafter that file had gone to the complainant.

7. The ratio laid down in all the

authorities referred by learned Advocate for the petitioner, cannot be disputed. However, taking into consideration the defence that was taken in each of the cases and supportive material that is produced, the respective Courts had come to the conclusion that case has been made out to send the disputed cheque for opinion of the handwriting expert. In fact, in the case of T.Nagappa Vs. Y.R.Muralidhar – AIR 2008 SC 2010, the Hon'ble Supreme Court has observed,- "By reason of the aforementioned provision only a right has been created in the holder of the cheque subject to the conditions mentioned therein. Thereby only a prima facie authority is granted, *inter alia*, to complete an incomplete negotiable instrument. The provision has a rider, namely, no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid therein."

8. The fact, which we cannot forget that it is the case of the complainant that he has received the said cheque as it is appearing and, therefore, he might have claimed ignorance about hand-writing

in respect of contents of the cheque. That does not mean that he is denying. Further, in fact, it ought to have been extracted from him as to whether that is in his handwriting in specific words. No doubt, this Court as well as the Hon'ble Apex Court held that a fair opportunity for fair trial should be granted to the accused when it comes to sending the cheque for the opinion of the handwriting expert. However, as aforesaid, in the case of Prakash Sevantilal Vora Vs. the State of Maharashtra and Anr. (supra), wherein also, the decision in the case of T.Nagappa's case (supra) was considered, this Court has held that, the said application for referring the disputed cheque to handwriting expert's opinion should be considered by the Magistrate on its own merits. Such application should not be filed just to protract the trial. The material submitted up till now by the petitioner is not sufficient to prompt any Court to send the disputed cheque for the opinion of the handwriting expert.

9. Another fact that is required to be noted is that the accused has stated that in 2013, he had

given 4 to 5 blank cheques to his brother. He has not examined his brother and there is absolutely no explanation either in his statement under Section 313 of Cr.P.C. or in his examination-in-chief as to how he could not notice missing those cheques for a period of two years. Now he has come with a case that after the court's summons was received by him in 2015, he came to know that those cheques have been used by the complainant and then he had met the complainant, who avoided the accused on one or the other pretext. He went to police station to lodge the complaint after he received the summons. Thus, it is for the learned Magistrate before whom the complaint is pending, to accept the said defence or not. This only reiterates that the facts are not such which would prompt the action of referring the cheque to the handwriting expert's opinion.

10. Now, as regards the document at Exh.44 and 45 are concerned, in fact, they are the bank documents. If certain portion of those documents was not received or was not in the copies of those documents supplied to the accused, that does not

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mean that those documents should be sent for handwriting expert's opinion. Those documents are the ledger accounts, taken in electronic form. The bank appears to have given certificate under Section 65(b) of the Indian Evidence Act and that part is only missing in the copies supplied to the accused. In fact, Section 65(b) of the Indian Evidence Act will have to be read along with Section 4 of the Bankers Book Evidence Act. Both the Courts below were correct in their approach while rejecting the application at Exh.61 and the Revision filed respectively.

11. No case is made out for exercise of Constitutional powers of this Court under Article 227 of the Constitution of India to interfere and, therefore, the writ petition is hereby rejected.

(SMT. VIBHA KANKANWADI,J.)

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