

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4283/2018

PIYUSH PANDURANG PAWAR PETITIONER.

V/s.

MEGHA PRADEEP AGARWAL AND ANR.... RESPONDENTS.

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Mr.Rohan H. Barge, Advocate for the Petitioner.

Mr.Nilesh Wable with Dilip Shinde, Advocates for the respondent.

Mr.R.M.Pethe, APP for the State.

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CORAM : A. M. BADAR, J.

DATE : 14TH JANUARY 2020.

ORAL JUDGMENT:

1. Heard. Rule. Rule is made returnable forthwith.

2. Learned counsel for respondent/original accused vehemently opposed this petition by contending that, the

learned Magistrate has rightly rejected the application for summoning bank witness as trial of the complaint was virtually over and the case was fixed for final argument.

3. I have considered the submissions so advanced and perused the material placed on record.

4. The complaint for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 came to be filed by the Petitioners/original complainant and during the course of trial of that case, the complainant has adduced his evidence and during the course of his evidence, the cheque came to be exhibited as Exhibit 23. After closure of evidence of complainant and after recording of his statement u/s 313 of the Criminal Procedure Code, as the accused has not chosen to enter in his defence, the complaint was fixed for argument and at that time, application under Section 311 of the Criminal Procedure Code came to be moved by the

complainant. It was for summoning the witness from Bank of Baroda for proving cheque return memo.

5. According to the complainant the cheque return memo exhibited as 23, is not bearing signature of the author of that document and therefore, contents of that document can not be held to be true and correct. He, therefore, sought to summon bank witness. Said application came to be rejected by the trial Magistrate by order dated 03/04/2017.

6. Perusal of impugned order shows that the learned trial Magistrate swayed with the argument that such application can not be allowed for filling in the lacuna. The lacuna as understood in law is inherent defect in the case of the prosecution. It can not be equated with the mis-handling of the case by the Advocate or the party. What was expected of the learned trial court was to consider whether examination of Bank witness is necessary for just decision of

case. That aspect is missed by the learned trial Magistrate. For making out offence punishable under Section 138 of the 'Negotiable Instruments Act, 1881' it is necessary to prove that the cheque came to be dishonoured. In that view of the matter, examination of bank witness is essential for making out the offence.

7. In the light of forgoing discussion, the impugned order can not be sustained. Therefore, the order.

ORDER

1. The impugned order below Exhibit 45 in S.C.C.No.324/2014 is quashed and set aside.
2. Application at Exhibit 45 for summoning witness from the Bank of Baroda, Panvel branch moved by the petitioner/complainant is allowed.
3. The trial court is directed to summon the said witness.
4. The petition is accordingly, disposed of.

(A. M. BADAR, J.)

