IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.736 OF 2021

VINOD S/O POONAMCHAND DARDA
VERSUS
SHANKAR S/O DHONDIBA PALKUNTWAR

...
Mr. N. S. Kadarale, Advocate for the applicant.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 17th March, 2021

ORDER :-

. Present application has been filed under Section 482 of the Code of Criminal Procedure and it is also stated that it is under Article 21 and 226 of the Constitution of India for quashing and setting aside the order dated 26.02.2021 passed below Exhibit-53 and 54 in Summary Criminal Case No.200 of 2017 by learned Judicial Magistrate First Class, Umri, Dist. Nanded thereby rejecting those applications filed by present applicant – original accused for sending the disputed documents for handwriting expert’s opinion.

2. Heard learned Advocate Mr. N. S. Kadarale for the applicant.

3. It has been vehemently submitted on behalf of the applicant that the present respondent has filed said complaint alleging that the present applicant has committed offence punishable under Section 138 of the

Negotiable Instruments Act, 1881 (hereinafter referred to as the 'N.I. Act'). Now, the matter is for adducing evidence in defence. It could be seen from the disputed cheque that its contents, date, particulars regarding amount are in different handwriting than the signature of the accused. The defence that is taken by the accused is that he had given the blank cheque to the complainant towards security. Accused intends to place further defence that the said cheque has been misused and, therefore, it is necessary that the admitted signature of the complainant as well as accused and the disputed cheque could be sent for handwriting expert's opinion. This application came to be filed after pursis was filed by the accused regarding his closure of evidence, however, it is necessary in the interest of justice as well as the legal right is available to the accused. Further, when the learned Magistrate rejected the said applications, he failed to consider the admission given by the complainant in his cross-examination. Complainant has stated that accused had written the entire cheque, but accused is disputing it. A vital right has been withheld by the learned Magistrate by rejecting those applications and, therefore, that order deserves to be set aside under the inherent powers of this Court.

4. Reliance has been placed on the decision in ***T. Nagappa Vs. Y. R. Muralidhar, (2008 STPL 11045 SC),*** wherein Hon'ble Apex Court has

held :-

> *" When a contention has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised under Section 118(a) or 139 of the said Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places the burden on the accused, he must be given an opportunity to discharge it.*
>
> *Further an incused has a right to fair trial. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India. The right to defend oneself and for that purpose to adduce evidence is recognized by the Parliament in terms of sub-section (2) of Section 243 of CrPC also."*

5. At the outset, it is to be noted that the evidence of the complainant has been produced on record. Complainant had come with a specific case that he had extended hand loan of Rs.1,06,000/- to the accused and in discharge of that legally enforceable debt or liability, the accused has given the disputed cheque. The said cheque has been dishonoured for the ground "funds insufficient". Thereafter, the legal notice was sent. No reply was given by the accused and then the complaint has been filed. In the cross-examination, the accused has put questions and it has been extracted that accused is his childhood friend. Accused had come to him in February, 2017 to demand the amount. On

that day, complainant had some amount with him and then he had withdrawn the amount from the bank and gave the entire amount to accused. It is stated that he has filed the bank passbook of the complainant on record. He has then stated that accused had written the entire cheque. Thereafter, the defence has been raised that the complainant himself was in financial difficulty and he had kept his immovable property i.e. plot for mortgage with another person. He could not redeem the mortgage in time. Thereafter, he had gone to the said person with amount of Rs.2,00,000/- to redeem the mortgage, however, that person did not receive that amount. It is then stated that, that plot has been sold by the said person to a third person. There appears to be no such defence about giving that cheque as security. Complainant has examined his wife also, who was allegedly present at the time of extending the amount. In his statement under Section 313 of the Code of Criminal Procedure, for the last question, as to what he wants to say about the case, he has stated that the case is false and the cheque has been misused, which was given for security. Details of the transaction for which the cheque was given as a security is not mentioned in the said statement under Section 313 of the Code of Criminal Procedure. Thereafter, it appears that the applications Exhibit-53 and 54 have been given. In fact, prior to these applications, the accused had filed pursis to close evidence and by application Exhibit-53, he has prayed that, that pursis should be cancelled/set aside and he may be given an opportunity to lead evidence. Important point to be noted is that the accused has not led any independent evidence i.e. he has not entered the witness box, nor examined anybody else to prove that there was any other independent transaction or contract in respect of which the blank cheque would have been given. When basic background itself is not led either in the cross-examination of the complainant or his witness or further in his statement under Section 313 of the Code of Criminal Procedure coupled with his own independent evidence, there is no meaning to such applications praying for sending the disputed cheque for the handwriting expert's opinion. The case is pending since 2017 and the applications have been given in February, 2021. It shows that these applications have been filed just to protract the matter. Another aspect that is required to be considered from the available record that the accused is admitting his signature on the disputed cheque. Even in ***T. Nagappa's*** case (Supra), after taking note of Section 20 of the N. I. Act, it has been observed that, "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." Therefore, when that Section is giving a right to the complainant to complete the cheque, even if we accept that it was blank, then there is no need to send it for handwriting expert's opinion. Another fact that is required to be noted from the statement of accused under Section 313 of the Code of Criminal Procedure that he has not specifically denied the handwriting apart from the signature appearing on the disputed cheque to be not in his handwriting. When accused admits his signature on the disputed cheque, then the legal position on this point is also clear that the complainant would get an authority under Section 20 of N. I. Act to complete the incomplete cheque i.e. to write rest of the contents. Apart from the decision in ***T. Nagappa (Supra),*** the legal position on this point has been laid down in ***Bir Singh Vs. Mukesh Kumar, (Criminal Appeal Nos.230-231 of 2019 (@SLP (CRL) Nos.9334-35 of 2018 decided on 6th February, 2019),*** which is as follows :-

> *"37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if*

the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

39. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

40. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt".

6. Therefore, taking into consideration the above said legal position, no case was made out by the applicant to send the disputed cheque for the handwriting expert's opinion. Both the applications have been

rightly rejected by the learned Magistrate. No interference is required under the inherent powers of this Court or by exercising constitutional powers. Application stands rejected.

[SMT. VIBHA KANKANWADI, J.]

scm