

IN THE HIGH COURT OF BOMBAY AT GOA.

Criminal Writ Petition No.24 of 2020.

PARESH BANDEKAR

.... Petitioner.

VS

RAJARAM D. SATARDEKAR AND ANR. Respondents.

Shri S. Taleigaonkar, Advocate for the petitioner.

Shri G. Nagvenkar, Addl. Public Prosecutor for the respondent no.2.

Coram:- M. S. JAWALKAR, J.

Reserved on:-22nd February, 2021.

Pronounced on:-24th February, 2021.

ORDER

The matter is taken up for final disposal at the stage of admission. In spite of the notice respondent no.1 remained absent.

2. By this petition, the petitioner/complainant challenged the order dated 2.11.2018 allowing the accused/respondent no.1 to cross examine the complainant and the order dated 27.11.2019 passed while dismissing the application for recall at Exh17-D passed by JMFC at Panaji in criminal case no.OA/122/2018/B.

3. Facts of the case is that the accused no.1 had approached the complainant for financial assistance to start his land development project. The complainant being his friend agreed to provide him financial assistance by way of friendly loan and accordingly paid different sum on different dates totalling Rs.45 lakhs for a period of four years.

4. They have also executed loan agreement dated 28.11.2017. The accused in discharge of part of the legal liability issued two cheques for Rs.6 lakhs each. As the cheques were dishonoured the complainant issued statutory notice to the accused dated 23.1.2018. Though the accused received the same, he failed to reply and neglected to comply with the statutory notice and to pay the amount. Therefore, the complaint came to be filed under Section 138 of the Negotiable Instruments Act, 1881.

5. After receiving the summons the accused pleaded not guilty and applied for cross examination on 2.11.2018. It is contention of the petitioner that the accused did not disclose his probable defence and application was filed in utmost causal manner. The learned JMFC, without giving an opportunity to the petitioner and without seeking any say of the complainant, allowed the accused to cross examine the complainant. The petitioner filed an application to recall the order. The trial Court by order dated 27.11.2019 dismissed the application on the ground that the Court had no power to recall the order and that the application is filed after a period of six months.

6. The learned counsel for the petitioner relied on unreported judgment of this Court in the case of Rukmakar @ Bharat

Tulshidas Naik Vs. Santosh Shaba Gaonkar and anr.¹ and Meters and Instruments Private Limited and anr. Vs. Kanchan Mehta².

7. The learned Addl. Public Prosecutor appeared for the State/respondent no.2. None present for the respondent no.1.

8. In Rukmakar @ Bharat Tulshidas Naik(supra), this Court observed as under at paragraphs 9 10 and 11:-

“9. I have given my anxious consideration to the rival circumstances and the submissions made. As has been noticed by the learned Magistrate, in normal circumstances, a party is not required to seek leave to cross examine the witness of an adversary. However, the present matter is governed by the law laid down by the Hon'ble Supreme Court in the case of Indian Bank Association & Ors. vs. Union of India & Ors. 2014 (5) SCC 590 which has been reiterated in a recent decision of the Supreme Court in the case of Meters and Instruments Private Limited & anr. vs. Kanchan Mehta, 2018 (1) SCC (Cri) 477.

10. In terms of the directions issued in the case of Indian Bank Association (supra), after appearance of the accused, the Magistrate should ask him to take notice under Section 251 of Cr.P.C. in order to enable the accused to enter his plea of defence and thereafter fix the case for defence evidence, unless an application is made

¹ Criminal Writ Petition No 35 of 2019.

² 2018(1) SCC (Cri.) 477.

by the accused under Section 145(2) for recalling a witness for cross examination (see para 23.4 of the judgment in the case of Indian Bank Association).”

11. In the case of Meters and Instruments Private Limited (supra), the Supreme Court has held that if the accused wants to contest the case, he must be required to disclose specific defence for such contest and for this purpose, it is open to the Court to ask specific questions to the accused at that stage.”

9. In the present matter also inspite of notice no reply is filed nor notice was complied by the accused. Thus he was having first opportunity to set out his defence. In the normal circumstances, the party is not required to seek leave to cross examine the witness of an advisory. In view of the judgment of the Apex Court, the accused is required to file an application seeking leave to cross examine the complainant. At that juncture the accused is having the second opportunity to set out grounds of his defence. Thirdly even during the arguments on that application and answer to the questions which may be posed by the learned Magistrate which is permissible. But it appears that he has not set out any ground or probable defence. Even in this matter also he failed to file any say and appear in the matter. In view of the citations referred and relied by the petitioner, the

learned JMFC erred in granting the application of the accused to cross examine the complainant without there being any probable defence or any reason in the said application. The learned JMFC, ought to have considered that there was no reply to the statutory notice nor there is any probable defence set out in the application.

10. In such circumstances, application ought to have been rejected. Order passed by the learned JMFC below Exh, 12-D is patently illegal and erroneous and against the law laid down by the Apex Court and hence it is liable to be set aside. Accordingly, order dated 27.11.2019 below Exh.17-D is also required to be set aside. Accordingly, I proceed to pass the following:-

O R D E R

- i. Petition is allowed.
- ii. Orders passed in Criminal Case No. OA/122/2018/B below Exhs. 12-D and 17-D dated 2.11.2018 and 27.11.2019 respectively by the learned JMFC,'B' Court, Panaji are quashed and set aside.

Petition stands disposed of accordingly.

M. S. JAWALKAR, J.