

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.7 OF 2021

Mr. Pundalik Venkatesh Verlekar,
Son of Venkatesh Verlekar,
50 years of age,
Resident of G-1, Block B,
Ground Floor,
Olijoan Henriques Apartment,
Opp. Govt. High School.
Mangor Hill, Vasco Da Gama,
Goa.

.... Petitioner

Versus

Mr. Shankar Lotlikar,
Son of late Damodar Lotlikar,
Age 79 years, married,
Resident of "Shri Damodar",
House No.40/A, Layamati,
Maruti Nagar, Davorlim,
Salcete - Goa.

.... Respondent

Mr. Ravi Gawas, Advocate for the Petitioner.
Mr. S.S. Kakodkar, Advocate for the Respondent.

CORAM : - SMT. M.S. JAWALKAR, J.

Reserved on : 4th August 2021
Pronounced on : 11th August 2021

JUDGMENT :

Heard learned Counsel for the parties.

2. Rule. Rule made returnable forthwith. Learned Counsel appearing for the respondent waives service. By consent and at the request of the learned Counsel appearing for

the parties, petition is taken up for final disposal at the admission stage.

3. For the sake of convenience, hereinafter, the petitioner will be referred as the accused and the respondent will be referred as the complainant.

4. The complaint was lodged by the complainant against the accused for dishonour of the cheque in an amount of ₹9,00,000/- under Section 138 of the NI Act. The total number of 5 cheques were issued by the complainant in discharge of his liability, which were however returned dishonoured and the process had started by filing a complaint under Section 138 of the Act. The accused was directed to deposit an amount of ₹1,80,000/- as an interim compensation. As the amount was not deposited and also inspite of opportunity granted, the cross-examination was closed and matter was adjourned for settlement under Section 313. The accused moved application under Section 311 for recalling of the complainant for cross-examination and setting aside the order dated 16.08.2019 closing the cross-examination of the complainant. That application came to be allowed against which the complainant filed Writ Petition No.253/2019. The said

petition was allowed and this Court held that there are no inherent powers vested in the Judicial Magistrate to recall its own order and also observed that under Section 311 the Court empowered to summon a material witness, or examine a person or recall and re-examine a person who was already examined if it appeared to be essential to the just decision of the Court. Thirdly, there is no reason whatsoever given while allowing application under Section 311 of the Code. In view thereof the impugned order was quashed and set aside.

5. Learned Counsel for the complainant raised preliminary objection to the maintainability of the petition.

6. To the objection raised by learned Counsel for the complainant that the petition is not maintainable and revision is maintainable, learned Counsel for the accused relied on ***Madhu Limaye V/s. State of Maharashtra 1977 4 SCC 551***. He pointed to para 12 of the said judgment which reads as under :

*"12. Ordinarily and generally the expression interlocutory order has been understood and taken to mean as a converse of the term final order. In volume 22 of the third edition of Halsbury's Laws of England at page 742, however, it has been stated in para 1606 :-
"..... a judgment or order may be final for one purpose and interlocutory for another, or final*

as to part and interlocutory as to part. The meaning of two words must therefore be considered separately in relation to the particular purpose for which it is required." In para 1607 it is said :

"In general a judgment or order which determines the principal matter in question is termed "final"."

In para 1608 at pages 744 and 745 we find the words:

"An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed "interlocutory". An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals."

7. It is submitted that in view of Section 397(ii) the powers of revision shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceedings. As the order passed rejecting application for adjournment is an interlocutory order revision will not lie and petition is the remedy available to the petitioner.

8. He also relied on ***Deborah Mary Crasto Leclerc V/s. Patrick Oliver Leclerc 2015 2 Bom CR (Cri) 560***, wherein this Court held that it is well settled that an interlocutory order is not converse of a final order. In other

words, every order which is not final would not necessarily be interlocutory in nature. There may be certain orders which although not final may still not be interlocutory. Any order which substantially or materially affect/decide the rights of the party in relation to material controversy in question cannot be said to be interlocutory. Orders, which are purely incidental, for example, such as granting or refusing adjournments or which are in the nature of steps in aid can be termed as interlocutory so as to bar the revisional jurisdiction.

9. As against this, learned Counsel for complainant submitted that petition is not maintainable but revision would lie. He relied on citation ***Amarnath & Ors. V/s. State of Haryana & Ors. AIR 1977 SC 2185***. He placed reliance on para 6 of the said judgment, which reads as under :

"6. Let us now proceed to interpret the provisions of S. 397 against the historical background of these facts. Sub-section (2) of S. 397 of the 1973 Code may be extracted thus :

"The powers of revision conferred by Sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding."

The main question which falls for determination in this appeal is as to, the what is the connotation of the term "interlocutory order" as appearing in sub-

s. (2) of S. 397 which bars any revision of such an order by the High Court. The term "interlocutory order" is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision. Decided cases have laid down that interlocutory orders to be appealable must be those which decide 'the rights and liabilities of the parties concerning a particular aspect. It seems to, us that the term "interlocutory order" in S. 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights, or the liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in S. 397 of the 1973 Code. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under S. 397 (2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be. outside the purview of the revisional jurisdiction of the High Court."

10. In the present matter, the applicant is challenging the order of rejection of his application for grant of time and in consequence thereof closure of cross of PW1. In my considered opinion, the said order is interlocutory in all sense and the petition is very much liable, as revision would not lie under

Section 397(ii) of the Code.

11. Brief facts of the case are as under :

The complainant, herein, filed complaint on 19.09.2018 under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the NI Act') against the accused for dishonour of 5 cheques amounting to ₹9,00,000/-.

12. Roznama placed on record reveals that several adjournments were sought. The dates and conduct of the day, in short, are as under :

Date	Brief reason for adjournment
23/01/19	The complainant filed affidavit in evidence, copy of which was served on the accused. On the same day, the complainant had advanced his arguments on application filed under Section 145(2) of the NI Act. The opportunity was given to the accused and matter was adjourned for arguments in reply on 28.01.2019
28/01/19	As accused sought time, matter was adjourned for filing written arguments on application for interim relief and was posted on 02.02.2019
02/02/19	Accused filed his reply cum written arguments and matter was posted for orders on interim relief on 13.02.2019.
13/02/19	The application for interim relief was granted on 13.02.2019 by which present accused was directed to deposit ₹1,80,000/- to the complainant within 60 days. Matter was then posted on 16.03.2019.
16/03/19	Counsel for accused filed application for exemption which was granted and evidence of PW1 was recorded. Thereafter, it was adjourned

	to 11.04.2019 for cross-examination.
11/04/19	An application for adjournment was endorsed by the Advocate of the complainant. The learned Judge granted time for finalising settlement and cross and posted it on 25.04.2019.
25/04/19	As there was no compliance of order of interim compensation, the complainant moved application and the learned Counsel for accused sought time to file reply and matter was adjourned for reply and cross-examination on 07.05.2019.
07/05/19	Matter was adjourned at the request of the advocate for accused on application by the accused.
09/05/19	It was adjourned. From this roznama it appears that advocate Noronha for accused was sick and supporting medical certificate was also placed on record.
11/06/19	Cross of PW1 was partly recorded and matter was adjourned for further cross-examination on 26.06.2019
26/06/19	Accused was present in person and offered to pay interim amount which advocate for the complainant refused to accept. As it was a cheque matter it was then adjourned to 06.07.2019.
06/07/19	Accused was present. He was directed to procure the DD of the ordered amount. Time was granted on application of accused for the compliance. Matter was then adjourned to 17.07.2019.
17/07/19	On this day, adjournment granted as grandmother of the accused expired.
30/07/19	Warrant came to be issued to Collector for recovery of amount of ₹1,80,000/-. Matter was adjourned on 16.08.2019 and opportunity was given to the accused for cross, if any, "failing which cross would stand closed on next date".
16/08/19	It appears that application for exemption of accused and for adjournment was filed. The request for time was rejected and cross of PW1 stood closed. However, accused was exempted

	for the day.
29/08/19	An application under Section 311 (Exhibit D-67) came to be filed by the counsel for the accused. It appears that then arguments were heard on the said application and it was adjourned for orders.
14/10/19	order came to be passed and matter was adjourned for cross of PW1.
30/10/19	However, it appears that on 30.10.2019, on behalf of Advocate Noronha for accused, application was moved for adjournment due to his personal reason. Matter was adjourned to 10.12.2019.
10/12/19	However, on that day, it was informed that <u>proceedings are stayed by the High Court</u> . Then matter was adjourned to 5 dates as there was stay and further to produce copy on record.

13. Thereafter, since 03.04.2020, the matter was adjourned on various dates in view of the circular in connection with the pandemic. Ultimately, on 11.06.2020 Court received copy of judgment along with writ of Writ Petition No.253 of 2019.

14. This Court held that the order passed by the JMFC recalling the order of closure of evidence is illegal and he has no power under Section 311 to recall his own order. Secondly, recourse to such an application is not to fill up the lacuna but to examine and/or re-examine a witness which estimation of the Court is essential to the just decision of the case. Thirdly, there is no reason whatsoever given while allowing application under Section 311 of the Code. In view thereof, the impugned order

was quashed and set aside.

15. By this petition, the petitioner is challenging order passed by the learned JMFC on 16.08.2019 by which his application for adjournment was rejected and cross of PW1 was closed.

16. Learned Counsel for the accused relied on ***State Bank of India V/s. Km. Chandra Govindji (2000) 7 Supreme 707***, wherein Hon'ble Apex Court held at Para 7 as under :

“In ascertaining whether a party had reasonable opportunity to put forward his case or not, one should not ordinarily go beyond the date on which adjournment is sought for. The earlier adjournments, if any, granted would certainly be for reasonable grounds and that aspect need not be once again examined if on the date on which adjournment is sought for the party concerned has a reasonable ground. The mere fact that in the past adjournments had been sought for would not be of any materiality. If the adjournment had been sought for on flimsy grounds the same would have been rejected. Therefore, in our view, the High Court as well as the learned District Judge and the Rent Controller have all missed the essence of the matter.”

17. As against this, learned Counsel for complainant submitted that the order passed by learned JMFC is perfectly

justified in the facts and circumstances of the case.

18. On perusal of roznama it reveals that the accused and his Counsel sought adjournments on many grounds and even after granting last opportunity did not cross-examine PW1/complainant. He was not diligent in availing his last opportunity and therefore the impugned order warrants no interference.

19. I have considered rival contentions of both the parties. It is true that matter was adjourned on the count of ill health of the advocate of accused as well as due to pandemic situation. It is also a matter of record that accused was directed to deposit Rs.1,80,000/- which he failed to deposit. However, in the present petition the said amount was deposited by Demand Draft in the name of complainant.

20. The learned Counsel Shri Kakodkar for respondent relied on ***Shri Prakash Rao V/s. Shri Pedro Vincent Dias and Ors. 2010 (1) GLR 637***, in support of his contention, that when accused is not diligent to avail his last opportunity there cannot be any remand on this count. The citation relied on by the complainant is differentiable on facts wherein cross-

examination of the complainant was closed and his application for recalling also refused. Instead of challenging the said orders the accused chose to give his own evidence and there were two last opportunities granted and again on third date the accused was seeking adjournment. The learned JMFC passed order of conviction against which appeal was carried out and in revision against the order of appeal the accused was claiming remand, the revision came to be dismissed.

21. As laid down by the Hon'ble Apex Court in ***State Bank Of India*** (supra), one should not ordinarily go beyond the day on which adjournment is sought for. Merely because in the past adjournment has been sought for would not be of any materiality. Because if the adjournment had been sought for on flimsy ground the same would have been rejected.

22. If roznama dated 16.08.2019 is perused the accused was absent. His advocate Noronha was represented through Shri V. Naik. Thus order was passed in the absence of accused as well as his advocate. Exemption was granted to the accused. However application for grant of adjournment was rejected and cross of PW1 was closed. Roznama of previous date shows that there was application filed by Counsel for accused alongwith

medical certificate. On all these dates where adjournment is granted the advocate for accused sought exemption of his appearance. Thus, accused may not be having any idea whether the evidence of PW1 will be closed or even if he is having idea the advocate for accused appears to be not well and was seeking adjournments. However, this fact also cannot be overlooked but accused is not as diligent in pursuing his matter. It also reveals from the roznama that the cross of PW1 had commenced but ultimately it could not be concluded for one or the other reason. Though amount of Rs.1,80,000/- has been deposited in this Court the accused avoided to pay the same since long.

23. However, to grant a fair opportunity to the accused, I am inclined to allow this petition. At the same time, hardship and inconvenience caused to the complainant also cannot be overlooked. He can be compensated by way of costs. In view of this background also it is necessary to expedite the matter. Accordingly, I proceed to pass the following order :

O R D E R

- (i) Criminal Writ Petition is allowed
- (ii) Order dated 16.08.2019 to the extent rejecting adjournment and closing cross of PW1 is hereby quashed and set aside subject to condition that the accused shall pay Rs.10,000/-

as cost to the complainant through Demand Draft within a period of two weeks from today.

(iii) On such payment, parties to appear before the learned Additional Judicial Magistrate First Class, Margao, on 01.09.2021 at 10.00 a.m.

(iv) Petitioner shall conclude cross of PW1 within a period of two weeks, thereafter.

(v) Criminal Case No.389/OA/NIA/2018/II before the Additional Judicial Magistrate First Class at Margao, stands expedited.

SMT. M.S. JAWALKAR, J.

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NITI K

HALDANKAR

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