IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.634 OF 2022

Shriram S/o Gema Pawar,
Age-38 years, Occu:Business,
R/o-Uma Mudiraj, Plot No.414, 415,
Bramha Apartment, Ambanagari,
Parbhani.

...PETITIONER

VERSUS

Maya W/o Khandu Gore,
Proprietor of Mahatma Phule
Naaukari SMS Suvidha and Consultancy,
Age-31 years, Occu:Business,
R/o-Flat No.4, Saiban Sundarwadi,
Aurangabad.

...RESPONDENT

...
Mr.Pandurang M. Gaikwad Advocate for Petitioner.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 27th JUNE, 2022

ORDER :

1. Present Writ Petition invokes the constitutional powers of this Court under Article 226 and 227 of the Constitution of India to challenge the order passed by the learned Judicial Magistrate First Class, Aurangabad below Exhibit-67 in S.C.C. No.652 of

2016 dated 24th February 2021 rejecting the application filed by the petitioner accused to summon a witness and then the said order has been confirmed in Criminal Revision Petition No.3 of 2022 dated 22nd March 2022 by learned Additional Sessions Judge, Aurangabad.

2. Heard Mr. Gaikwad, the learned Advocate for the petitioner.

3. It is not even necessary to issue notice to respondent.

4. The learned Advocate appearing for the petitioner has submitted that the complainant – respondent has filed the said case alleging that the petitioner has committed offence under Section 138 of the Negotiable Instruments Act. She has come with the case that the accused was in need of hand-loan of Rs.4,00,000/- and accused is the friend of her husband. She had extended amount of Rs.3,33,000/- to the accused and the accused had agreed to repay the said amount within a year. According to her, accused failed to repay that amount but later on gave disputed cheque for Rs.3,33,000/- dated 19th November 2015 drawn on Axis Bank Limited, Parbhani Branch. According to her, she had deposited the said cheque with her bank i.e. Bank of Maharashtra, Cidco Branch, Aurangabad on 19th November

2015, however it was returned with remark that “funds insufficient”. She had issued legal notice on 14th December 2015 and it was received by the accused on 21st December 2015. As the accused did not comply, she has stated that she has lodged the complaint.

5. It has been further submitted on behalf of the petitioner that after the process was issued, accused appeared, pleaded not guilty and then the witnesses have been examined by the complainant. Statement of the petitioner under Section 313 of the Code of Criminal Procedure has been recorded and thereafter he had entered the witness box. He gave his affidavit in chief and then his cross-examination has been conducted. He had, thereafter examined the witness i.e. his bank official to prove that he has made periodical payments in the account of Khandu Gore. The petitioner has also examined DW-3 Shailesh Hande from IDBI Bank, Parbhani and from his testimony he has proved the account extracts of one Maruti Gore, who is complainant’s brother in law. Thereafter, the petitioner had filed application Exhibit-67 for issuing witness summons to the husband of the complainant and also with the prayer that he be directed to bring documents showing the transaction from 10th June 2014 to 12th March 2015. After taking into consideration the say filed by the

complainant and hearing both sides, the learned Judicial Magistrate First Class has rejected the said application. By rejection of the said application a vital right to prove his defence has been withheld by the learned Magistrate and therefore, the petitioner had challenged the said order in the Revision. However, surprisingly, the learned Additional Sessions Judge, Aurangabad took into account Section 120 and 122 of the Evidence Act. Section 120 of the Evidence Act provides for husband or wife of person under criminal trial shall be the competent witnesses. However Section 122 of the Evidence Act puts restrictions only in respect of communications during marriage. The learned Additional Sessions Judge went wrong in placing reliance on Section 122 of the Evidence Act and holding that since it was a privileged communication, he cannot compel the husband of the complainant to give evidence against wife. The petitioner was contending that in fact the transaction was between him and husband of the complainant and to that extent only as well as the fact to be brought on record was the payments those have been made by the accused to the husband of the complainant, it cannot be said that it was a privileged communication. He relied on the decision in ***Rincy vs. State of Kerala and another, Cri. MC. No.326 of 2015*** by the Hon'ble

Kerala High Court, wherein, in similar situation i.e. prosecution under Section 138 of the Negotiable Instruments Act, permission was sought by the petitioner accused to examine her husband as witness under Section 311 of the Code of Criminal Procedure and the learned Magistrate had posed query regarding examination of the spouse in favour of another spouse considering provisions of Section 120 and 122 of the Evidence Act and the said query was put to the High Court itself. It was then answered that when the wife wants to examine her husband to prove her defence that the cheque in question was handed over in some other transaction and there is no bar under Section 122 of the Evidence Act. Here also it cannot be said that there is any bar. Further Section 122 of the Evidence Act provides that no person shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. It is submitted that the scope of the said provision is different and therefore, the learned Additional Sessions Judge committed an error in not reversing the order below Exhibit-67 passed by the learned Magistrate. The learned Advocate for the petitioner, therefore, prayed for issuance of witness summons as well as stay to the proceedings before the learned Magistrate.

6. At the outset, it is to be noted that in the present case the learned Magistrate had not rejected the application by considering Section 122 of the Evidence Act and therefore, the learned Additional Sessions Judge ought not to have invoked that provision in this case. Further, the interpretation of that provision ought to have been made by the learned Additional Sessions Judge. He has only quoted the Section and it is said that in view of mandatory provision he cannot compel the husband to give evidence against wife. The case before the Hon’ble High Court of Kerala, referred above, was also different, in a sense that the facts were different and the wife wanted to examine husband to support her defence as she was facing trial under Section 138 of the Negotiable Instruments Act. That also cannot be made applicable here. In view of the fact that reasons those were given by the learned Additional Sessions Judge are not convincing, we cannot set aside the said decision in the revision and ask the concerned Court to revisit the revision. What ought to have been considered by the learned Additional

Sessions Judge was, as to whether it was necessary for the accused to call the husband of the complainant.

7. The examination-in-chief of the accused has been produced along with cross-examination. In his examination-in-chief he says that he was having friendly relations with the husband of the complainant. Name of the husband of the complainant is Khandu Gore. Petitioner says that he had deposited amount of Rs.1,77,150/- by 28 transactions in the name of Khandu Baban Gore from his IDBI Bank account, Parbhani branch and he has produced his own account extract. In his examination in chief he accepts that though he was in need of amount of Rs.4,00,000/-, he received amount of Rs.3,33,000/- by way of bank transfer. He has not stated from which bank account he received the amount, but then according to him the transaction was only between him and Khandu and therefore, he says that it was decided that he would return the amount in the bank account number provided by Khandu. In his cross-examination he has admitted that he received the amount of Rs.3,33,000/- from the account of the complainant. He also admits that Maruti Gore is complainant's brother-in-law i.e. Khandu's brother and Maruti Gore has no connection with the transaction in question. He has examined DW-2 Vikas from State

Bank of India, Parbhani branch, who has stated that amount of Rs.1,49,900/- has been deposited on two dates in the account of Khandu. We need not go into the cross-examination of the said person as we are not assessing the evidence. Thereafter, petitioner has examined DW-3 Shailesh from IDBI Bank, Parbhani, who has produced the bank account extract of Maruti Gore also. When he himself had admitted that Maruti Gore has no connection with the transaction, yet upon his application DW-3 Shailesh was also allowed to be examined by the learned Magistrate when the evidence produced by that witness cannot be said to be relevant in view of the admission by the accused himself.

8. It is to be noted that the accused has produced on record the account extracts to support his testimony. It is also to be noted that the learned Magistrate has observed:-

> **"** It seems that the accused want to bring on record some transaction. In such circumstances the documents in respect of the same will suffice the purpose & in my view there is no need to call the witness as prayed.**"**

9. In spite of these observations, the petitioner intends to call

the husband of the complainant. No doubt, in his normal parlance, the accused has right to prove his defence and examine the witnesses of his choice but then this choice is not unfettered. Only relevant documents and evidence is required to be led by a party to support contentions and / or defence. There is no document produced by the petitioner before the trial Court which would indicate that there was such an agreement in existence. It appears to be an oral contract and therefore, it cannot be said that the learned Magistrate should have allowed the said application. The judicial discretion and taking into consideration the relevancy, the trial Court was the best judge to judge the said situation. The judicial discretion has been used properly. The present attempt by the petitioner appears to be an attempt to protract the matter which is pending since 2016. No case is made out to use constitutional powers of this Court either under Article 226 or 227 of the Constitution of India and the Writ Petition deserves to be rejected.

10. Accordingly, the Writ Petition stands rejected.

[SMT. VIBHA KANKANWADI , J.]

asb/JUNE22