

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

913 CRIMINAL WRIT PETITION NO.848 OF 2022

DINESH DILIP MALU
VERSUS
OMPRAKASH SAGARMAL SABOO

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Advocate for Petitioner : Mr. Vakil Laharimanohar D.

Advocate for Respondent : Mr. Bhandari Anand P.

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CORAM : SHRIKANT D. KULKARNI, J.

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Reserved on : August 11, 2022

Pronounced on : August 23, 2022.

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ORDER :-

1. The petitioner has challenged the common order passed by the learned Judicial Magistrate First Class, Aurangabad below Exhibit-76 and 77 in SCC No.5349 of 2016 thereby rejecting his prayer for permission to lead further defence evidence and forward the cheque in dispute to the Hand Writing Expert for opinion, which is upheld by the Additional Sessions Judge, Aurangabad in Criminal Revision Application No.94 of 2022.

2. The petitioner is facing prosecution for the offence punishable under section 138 of the Negotiable Instruments Act, 1881 (hereinafter called as 'the said

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Act' for the sake of convenience). He has applied to the learned Magistrate vide exhibit 76 and sought permission to lead further defence evidence by setting aside the evidence close order. He further applied to the learned Magistrate to forward the cheque in dispute to the hand writing expert for opinion in view of specific defence raised by the petitioner that cheque in dispute signed by him but blank was lost alongwith important documents and he has given instructions to his banker to 'stop payment'.

3. Learned Magistrate was pleased to reject both the applications by common order dated 9.3.2022. That order was challenged by the petitioner before the Additional Sessions Judge, Aurangabad vide criminal revision application no.94 of 2022. The learned Additional Sessions Judge, Aurangabad was pleased to dismiss the criminal revision application vide judgment and order dated 9.6.2022.

4. In the above premise, the petitioner has challenged the orders passed by the Courts below.

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5. Heard Mr. L.D.Vakil, learned counsel for the petitioner and Mr. Bhandari, learned counsel for the respondent.

6. Mr. Vakil, learned counsel for the petitioner vehemently submitted that, it is right of the petitioner/accused to have a fair trial. It is for the petitioner/accused to lead defence evidence in view of his defence and the Court has no role to play in that respect. It is the defence of the petitioner since beginning that cheque in dispute was lost, which was blank but signed by him and it is misused by the respondent. He has instructed his banker to stop payment. Accordingly, the payment stop order was passed by the Banker. He submitted that, it is the defence of the petitioner that certain words filled on the cheque in dispute have been subsequently added by way of alteration. As such, it is very much necessary to refer the cheque in dispute to the hand writing expert for opinion. Learned Magistrate as well as the Additional Sessions Judge, Aurangahad did not consider this aspect in a proper perspective and turned down the
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prayer made by the petitioner. It has caused injustice to the petitioner. The right of the petitioner to defend his case is indirectly denied by the impugned orders.

7. He submitted that, in view of the specific defence raised by the petitioner, an opportunity must be granted to the petitioner to adduce evidence by way of rebuttal. As the law places burden on the petitioner/accused, he must be given an opportunity to discharge it. An accused has a right to fair trial. He has a right to defend as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India. Both the Courts below have committed an error in rejecting the prayer of the petitioner/accused, thereby right of the petitioner to defend his case is affected. He, therefore, urged to allow the petition and quash and set aside the impugned orders passed by both the Courts below.

8. Mr. Vakil, learned counsel for the petitioner relied on following stock of citations in support of his submissions :-

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- i. T. Nagappa Vs. Y R Murlidhar reported in (2008) 5 Supreme Court Cases 633.**
- ii. G.Someshwar Rao Vs. Samineni Nageshwar Rao and another reported in (2009) 14 SCC 677.**
- iii. Kalyani Bhaskar Vs. M.S. Sampooram reported in (2007) 2 SCC 258.**
- iv. Criminal Application No.52 of 2010 of this Bench (Sau. Sonal W/o Arvind Khadar Vs. The State of Maharashtra and ors.)**
- v. Mohan Lal Agrawal Vs. Rudmal Agrawal reported in 2021 SCC Online Ch.2531.**
- vi. A. Vijayarani Vs. Karuppan Reported in 2015 SCC online Mad 14108.**
- vii. Akshayraj Singh Vs. Chakshi Futuristic Technologies (P) Ltd. reported in 2019 SCC online MP 50.**
- viii. Balasaheb B Kolhe Vs. Jagdish T Mandlik reported in 2015 (2) Mh.L.J. 56.**

9. Mr. Bhandari, learned counsel for the respondent did not dispute the legal position canvassed by Mr. Vakil, learned counsel for the petitioner. He submitted that, there cannot be any dispute about the legal position regarding the right of the accused to have a fair trial. He submitted that, the conduct of the petitioner/accused needs to be considered. He

submitted that private complaint under section 138 of the said Act came to be filed against the petitioner/accused in the Judicial Magistrate First Class, Court on 5.7.2016. According to the object of the said Act, case of dishonour of cheque shall be disposed off within six months. He submitted that respondent/complainant is fighting with this litigation since more than 5 years. He invited my attention to the order passed by the learned Magistrate and pointed out as to how the petitioner/accused has delayed the trial by one way or the other. He submitted that, the applications moved by the petitioner were not bonafide and Courts below have rightly rejected the prayer made by the petitioner by reasoned order. He, therefore, urged to dismiss the petition.

10. There cannot be any two opinions about the right of an accused to have a fair trial. The accused has a right to defend himself as a part of his human as well as 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

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Parliament in terms of sub-section (2) of Section 243 of the Criminal Procedure Code. When a defence is raised on behalf of the accused that 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 the evidence in rebuttal thereof. As the law places burden on the accused, he must be given an opportunity to discharge his burden. Even though, Mr. Vakil, learned counsel for the petitioner has placed his reliance on stock of citations, the decision of the Apex Court in case of **T. Nagappa Vs. Y R Murlidhar** (supra), would suffice the purpose to decide this petition.

11. In case of T. Nagappa, the Apex Court has held in paragraph no.9 about the defence evidence and right of the accused to defend, which reads thus :-

“9. What should be the nature of evidence is not a matter which should be left only to the discretion of the Court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of [Section 243](#) of the Code is bonafide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses etc. If permitted to do

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so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protracting the trial or summon witnesses whose evidence would not be at all relevant.”

12. The Apex Court has also considered its earlier decision in case of **Kalyani Baskar Vs. M S Sampooranam** reported in (2007) SCC 258, wherein it is “held that right of fair trial to the accused cannot be denied. Fair trial includes fair and proper opportunities allowed by law to prove the innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of the procedure designed to ensure justice should be scrupulously followed and the Courts should be jealous in seeing that there is no breach of them”

13. Why I have given the above said factual aspects of various stages of the trial of a dishonour of cheque with dates, reason is, to find out whether the applications given by the petitioner/accused before the learned Magistrate vide exhibit 76 and 77 are bonafide and

secondly, whether that prayer is relevant in order to have a just decision of the case.

14. In **Kalyani Bhaskar Vs. M.S. Sampooranam** (supra), the Apex Court has held in paragraph no.12 as under :-

“12. [Section 243](#) (2) is clear that a Magistrate holding an inquiry under the [Cr.P.C.](#) in respect of an offence triable by him does not exceed his powers under [Section 243\(2\)](#) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a hand-writing expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the hand-writing expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. 'Fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the petitioner has filed application under [Section 243](#) Cr.P.C. without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, [Section 243\(2\)](#) Cr.P.C. refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case requests for sending the cheque, in question, for the opinion of the hand-writing expert after the respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable.”

15. It is, therefore, clear in view of the decision in case of **Kalyani Bhaskar Vs. M.S. Sampooranam** (supra), it is discretion of the Magistrate to consider whether object of the accused is vexation or delaying the criminal proceedings. Accordingly, learned Magistrate has observed that the petitioner/accused is delaying the criminal proceedings by recording sound reasons.

16. Before going to the merits of the petition, it is necessary to place on record the events, relevant dates and the manner in which trial is going on before the learned Magistrate, Aurangabad.

Sr.No.	Events	Dates
i	Date of filing complaint under section 138 of the NI Act Vide SCC No.5349 of 2016.	5.7.2016
ii	Date of issuance of cheque.	7.6.2016
iii	Date of demand notice.	17.6.2016
iv	Examination-in-chief affidavit submitted by the complainant.	19.08.2017
v	Cross examination of the complainant concluded.	20.12.2017
vi	Examination of accused under section 313 of Cr.P.C.	20.3.2019
vii	Examination-in-chief on affidavit filed on behalf of the petitioner/accused.	22.4.2019
viii	Further, examination-in-chief of	27.6.2019

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	the petitioner/ accused before the Court.	
ix	Cross examination of the petitioner / accused commenced and concluded.	22.7.2019
x	Defence witness no.1 examination by the petitioner	18.9.2019
xi	Adjournment taken by the petitioner to adduce further defence evidence.	29.10.2021, 21.11.2021, 13.12.2021 and 18.12.2021
xii	The learned Judicial Magistrate First Class, Passed the order of closure on defence evidence.	18.12.2021
xiii	The application for setting aside the evidence defence closure the order passed by the Judicial Magistrate First Class.	21.2.2022.
xiv	Application for direction to send the cheque in dispute to hand writing expert for opinion	21.2.2022
xv	Common order below exhibit 76 and 77 passed by the Judicial Magistrate First Class, Court no.12, Aurangabad whereby both the applications came to be rejected.	9.3.2022
xvi	Criminal revision application no.94 of 2022 filed by the petitioner / accused.	24.3.2022
xvii	Criminal revision application no.94 of 2022 decided by the Additional Sessions Judge, Aurangabad vide judgment and order.	9.6.2022

17. The above scenario regarding trial of a case of dishonour of cheque has taken birth on 5.7.2016. It is mandate of section 143 (3) of the said Act that, the trial shall be conducted as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of filing of the complaint. The right of fair trial to accused does not mean that he may be allowed to protract the litigation for couple of years under the guise of right of defence. Other side of the coin also needs to be seen equally and right of the prosecuting party, who has knocked doors of the Court, he must get justice by concluding the trial as per mandate of section 143 (3) of the said Act. Above scenario regarding factual aspect, stages and dates in the trial, unerringly point out that it is non else but the the petitioner/accused is responsible in protracting the litigation. He has put hurdles in the trial at various stages and resulted in delay which is nothing but an attempt to frustrate object of the said Act. It is not permissible.

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18. In case of **T. Nagappa Vs. Y R Murlidhar**, it is held by the Apex Court that while granting permission to the accused to lead defence evidence by way of fair trial, he should not be allowed to unnecessarily protract the trial or summon the witnesses whose evidence would not be at all relevant.

19. As pointed out earlier, the proceedings of a case of dishonour of cheque is dragged for more than six years approximately. If the petitioner really wanted to forward the cheque in dispute for hand writing expert's opinion, he could have filed an application immediately after examining his defence witness or after short interval. The evidence of defence witness was recorded on 18.9.2019 and thereafter, the petitioner went on taking adjournments on 29.10.2021, 21.11.2021, 13.12.2021 and 18.12.2021. The petitioner even did not make any attempt to move such application for forwarding the cheque in dispute to the hand writing expert and ultimately, the learned Magistrate was constrained to pass the order to close defence evidence on 18.12.2021.

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20. The applications vide exhibit 76 and 77 came to be filed on 21.2.2022 after lapse of two months. If this factual aspect is taken into consideration, it is difficult to accept that the applications moved on behalf of the petitioner's vide exhibit 76 and 77 were bonafide, it was one more attempt made by the petitioner to prolong the trial by taking undue advantage of the provisions. Learned Magistrate has rightly considered this aspect more particularly in the impugned order paragraph no.12. In the above scenario, it is very much clear that more than sufficient opportunities were given to the petitioner to lead his defence evidence. There was no denial of opportunity. It is rightly observed by the learned Magistrate that the petitioner/accused cannot be allowed to harass the complainant under the guise of fair trial for the accused. I fully endorse the view taken by the learned Magistrate in this regard.

21. Now coming to another aspect whether it is really necessary to forward the cheque in dispute to the hand writing expert for opinion. The learned Magistrate has also recorded the reasons to that effect in paragraph

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nos.10 and 11. The petitioner/accused while facing the cross-examination in paragraph no.8 has candidly admitted that signature and amount on the cheque are written by him. In view of candid admission given by the petitioner, there is no propriety to forward the cheque in dispute to the hand writing expert for opinion mere for the sake of petitioner. It is nothing but one more attempt to delay the proceedings.

22. Mr. Vakil, learned counsel for the petitioner invited my attention to the impugned judgment rendered by the Additional Sessions Judge, Aurangabad in Criminal Revision Application No.94 of 2022 and pointed out that the observations made by the learned Additional Sessions Judge in paragraph no.7 regarding necessity of admitted hand writing, natural hand writing and specimen hand writing. It is true that observations to that effect made by the Additional Sessions Judge in paragraph no.7 of the impugned judgment are not in tune with the provisions of law, however, end result is important. The learned Additional Sessions Judge, Aurangaabad has also
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upheld the order passed by the Magistrate while dismissing the revision.

23. Having regard to the above reasons and discussion, it is very much clear that there is no merit in the petition. The petition is liable to be dismissed by imposing certain costs in order to prevent such abuse of process of law

O R D E R

- i. Writ petition stands dismissed.
- ii. The petitioner/accused shall pay costs of Rs.10,000/- (Rs. Ten Thousand) to the respondent/original complainant within a period of two weeks from today without fail.
- iii. Writ Petition is accordingly disposed off.

(SHRIKANT D. KULKARNI, J.)

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