

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.946 OF 2021

HK Builders and Developers

... **PETITIONER**

VERSUS

Bharat Marble

... **RESPONDENT**

.....
Mr. S.S. Bora, Advocate for petitioner
Mr. Saeed S. Shaikh, Advocate for respondent
.....

CORAM : R. G. AVACHAT, J.

DATE : 7th JANUARY, 2022

ORDER :

The challenge in this writ petition is to the order passed by learned 2nd Jt. Civil Judge, Junior Division, Aurangabad on application Exh.42 in S.C.C. No.7050/2017. By the impugned order, the application moved by the petitioner herein (accused in the case) for recall of the complainant (respondent herein) for further cross-examination came to be rejected.

2. It is the case under Section 138 of the Negotiable Instruments Act. The petitioner herein is stated to have issued a cheque towards discharge of his liability, particularly for the payment of amount due towards purchases of tiles. The respondent/ complainant deals in building materials. Issuance of the cheque is not a fact in dispute. According to the petitioner, the respondent/ complainant admitted in his cross-examination that the cheque was issued towards security. The respondent/ complainant did not place on record any documentary evidence to show the petitioner to have had purchased goods (tiles) on credit. With a view to bring on record those details, the application Exh.42 was moved for recall of the complainant for further cross-examination. The blame is put on the earlier Advocate of the petitioner, who did not put the relevant questions in this regard.

3. The trial Court rejected the application on the ground that evidence of the complainant was over. The petitioner was given sufficient opportunity to cross-examine the complainant and his witnesses. Even statement under Section 313 of the Code of Criminal Procedure has been recorded. The petitioner/ accused has led defence evidence

as well. Allowing such an application may amount to giving an opportunity to fill up lacuna. It will be prejudicial to the complainant. It would be an endless litigation.

4. Learned counsel for the respondent/ complainant reiterated the reasons given by the trial Court for rejection of the application. He also relied on the judgment of this Court in case of **Kavita w/o Satish Agrawal Vs. Mahesh Nagari Sahakari Patsanstha Maryadit, Sangamner through Rajendra Sudhakar Renguntala [Writ Petition No.1045/2017, Decided on 1/9/2017]**.

5. Considered the submissions advanced. Perused the impugned order. Jurisdiction under Section 311 of the Code of Criminal Procedure is discretionary. It appears that, the respondent/ complainant admitted the cheque to have been issued as a security. It is his case in the complaint and in examination-in-chief as well that, the petitioner/ accused had purchased tiles on credit. The cheque was, therefore, issued towards outstanding amount. Admittedly, the complainant did not place on record documents evidencing transaction of sale of goods between him and the petitioner herein. The blame is put on the Advocate of the petitioner/

accused. It is also true that, recording of the evidence of the complainant and the defence as well has been over. However, in view of the fact stated hereinabove i.e. so called admission given by the complainant and non-production of the documents in proof of business transaction between the two, this Court is inclined to allow this Writ Petition. Needless to mention, the trial Court shall decide the case uninfluenced by the observations made herein.

6. In view of the above, the petition is allowed in terms of the following order :

ORDER

- (i) The writ petition is allowed.
- (ii) The order impugned herein is hereby set aside.
- (iii) The application Exh.42 is allowed subject to costs of Rs.25,000/- (Rupees twenty five thousand).
- (iv) Payment of cost is condition precedent.
- (v) The questions in further cross-examination shall be restricted to the subject covered by the application Exh.42. The questions to which the respondent/ complainant had already been subjected to in the

cross-examination shall not be allowed.

- (vi) The trial Court would do well to decide the case on its own merits, within a period of six months from the date of receipt of this order.

**(R. G. AVACHAT)
JUDGE**

fmp/-