

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

CRIMINAL WRIT PETITION NO.1447 OF 2021

Prabhakar S/o Tulshiram Pawar,
Age-70 years, Occu:Pensioner and Agri.,
R/o-Torna Niwas, Sharda Nagar,
Behind COCSIT College, Latur,
Tq. & Dist-Latur

...PETITIONER

VERSUS

1) Digamber S/o Balaji Pawar,
Age-42 years, Occu:Business,
R/o-Hadolti, R/o-Hadolti,
Tq-ahmedpur, Dist-Latur,

2) The State of Maharashtra

...RESPONDENTS

...
Mr.Fayaz K. Patel Advocate for Petitioner.
Mr.Jayant R. Patil Advocate for Respondent No.1.
Mr.S.P. Deshmukh, A.P.P. for Respondent No.2 - State.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 9th JUNE, 2022

ORDER :

1. Present Petition has been filed by invoking the constitutional powers of this Court under Article 227 of the Constitution of India as well as the inherent powers under

Section 482 of the Code of Criminal Procedure by the original accused to challenge the Judgment and order passed in Criminal Revision Petition No.4 of 2021 by the learned Additional Sessions Judge, Ahmedpur, District-Latur dated 17th November 2021, thereby confirming the order passed by the learned Judicial Magistrate First Class, Ahmedpur, District-Latur in S.T.C. No.1 of 2021 dated 23rd February 2021 thereby issuing process against petitioner vide Section 204 of the Code of Criminal Procedure in respect of offence punishable under Section 138 of the Negotiable Instruments Act.

2. Heard learned Advocate Mr. Patel appearing for the petitioner, learned Advocate Mr. Patil appearing for respondent No.1 and learned APP Mr. Deshmukh appearing for respondent No.2 – State.

3. It has been vehemently submitted on behalf of the petitioner that the respondent – complainant has given a false story and contended that the disputed cheque has been issued by the present petitioner and it was in fact the hand-loan. The cheque has been issued by M/s. Rajni Petroleum, which is a proprietary concern and proprietor is one Nilam Prabhakar Pawar who is daughter of the petitioner and his son – Nilesh Prabhakar

Pawar is the power of attorney of the proprietor who is looking after the business. The account stands in the name of the said proprietary concern, which can be demonstrated from the letter issued by the concerned bank dated 18th January 2021, letter of appointment dated 27th September 2016 and the other communication from the Indian Oil Corporation Limited. The copy of irrevocable power of attorney executed by Nilam, daughter of petitioner in favour of Nilesh, son of the petitioner has also been produced and the disputed cheque is signed by Nilesh and not by the petitioner. The petitioner had even replied to the statutory notice which was issued by the complainant and copy of the same has been made available, dated 1st December 2020. All these facts were suppressed by the complainant and a wrong order has been issued by the learned Magistrate. The learned revisional Court has also not taken into consideration those documents and therefore the present Writ Petition has been filed.

4. Learned Advocate for the petitioner relied on the decision in ***Alka Khandu Avhad vs. Amar Syamprasad Mishra and others, AIR 2021 SC 1616***, wherein it has been held that, when the criminal complaint against the appellant for the offence punishable under Section 138 read with 141 of the Negotiable

Instruments Act can be said to be abuse of process of law, then it cannot be allowed to be sustained. Further reliance has been placed on the decision in ***Aparna A. Shah vs. Sheth Developers Pvt. Ltd. and others, AIR 2013 SC 3210***. In this case the cheque was issued by husband of the appellant from the joint account. The wife had not signed the cheque and therefore, it was held that the proceedings cannot lie against her. Further reliance has been placed on the decision in ***P.J. Agro Tech Limited and others vs. Water Base Limited, AIR 2010 SC 2596***, wherein it was held that the Courts shall exercise their power judiciously and reliefs granted by them shall be logical and tenable within framework of law. It is submitted that in order to attract provisions of Section 138 of the Negotiable Instruments Act, cheque which was dishonoured, had to be drawn by the person on account maintained by him with Bank and in this case the said account cannot be said to be an account maintained by the petitioner in his name. Learned counsel for the petitioner has further relied on the decision in ***Asim @ Munnu @ Asif Abdulkarim Solanki vs. the State of Gujarat (Criminal Appeal No.184 of 2020, decided on 28th January 2020)***, wherein it is held that by virtue of Section 391 of the Code of Criminal Procedure, additional evidence can be

permitted to be adduced by the party. Learned Advocate for the appellant, therefore, submitted that by allowing those documents to be produced on record, the impugned order of issuing process should be set aside.

5. Learned Advocate for respondent No.1 supported the reasons given by the revisional Court as well as the learned Judicial Magistrate First Class and submitted that at this stage the record that stands, would show that the cheque is issued by the present petitioner and he will have to prove that it is not his account.

6. At the time of issuance of process, the Magistrate is required to take into consideration the contents of the complaint, verification and the documents on record. There is no question of considering any document of the accused at that stage, because till that stage there is no appearance of the accused. Section 391 of the Code of Criminal Procedure will not be applicable here as that stage is not yet reached and that Section is applicable when there is an appeal. It cannot be invoked when the revision is filed under Section 397 of the Code of Criminal Procedure. At the most, when the powers of the Sessions Judge as well as High Court under Section 397 of the Code of Criminal Procedure are

same, then by considering provisions of Section 401 and 403 of the Code of Criminal Procedure, some documents can be allowed to be produced, but that is also having rider because disputed facts cannot be considered even at the stage of revision under Section 397 of the Code of Criminal Procedure as the disputed facts will have to be proved by adducing proper evidence. In this case also the accused has filed Writ Petition under Article 227 of the Constitution of India. The disputed facts cannot be considered even under Article 227 of the Constitution of India and / or under Section 482 of the Code of Criminal Procedure. The parties should adduce evidence at the appropriate stage and then only those disputed facts can be considered. In certain situations, that too in exceptional circumstances, this rule can be moulded for admitted documents or public documents and not beyond that. Here, in whose name the account stands, what was the contract between the Indian Oil Corporation Limited and the owner of Rajni Petroleum etc. are depending on documents, which will have to be proved by the accused.

7. In the present case, what was before the learned Magistrate as per the pleadings, was that accused has maintained an account by claiming that he is the proprietor of Rajni Petroleum, Hadolti. Even pleadings says that in presence of

the complainant and his witnesses the accused has issued the said cheque under his own handwriting and signature. Further fact is that the Bank of Maharashtra on which the cheque was drawn, has dishonoured the said cheque on the ground of "payment stopped by the drawer", and not on the ground that specimen signature does not match or the person who signed the disputed cheque is not having any account with the Bank. Therefore, the petitioner is at liberty to lead evidence when his turn will come. But till then, the order of issuance of process cannot be set aside on the grounds raised by the petitioner. It cannot be said that proceeding ahead with the matter will be an abuse of process of law till the fact is proved and therefore, no case is made out for the interference by this Court and the Writ Petition deserves to be dismissed.

8. Accordingly, the Writ Petition stands dismissed.

[SMT. VIBHA KANKANWADI , J.]