

Kiran Ghuge

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.2218 OF 2021

Vijay Pukhraj Jain ...Petitioner
V/s.
Kishor Keshav Manjarekar & Anr. ...Respondents

Mr. Manish N Jain a/w Ms. Ritu G Gahlot i/b S.M. Jain
Associates for Petitioners.

Mr. A.D. Kamkhedkar, APP for the State.

CORAM : AMIT BORKAR, J.

DATE : OCTOBER 4, 2022

P.C.:

1. By this writ petition under Article 227 of the Constitution of India, the petitioner is challenging order dated 11th February 2021 rejecting request of the petitioner to sent the disputed cheque to the handwriting expert.

2. The complaint arises out of section 138 of the Negotiable Instruments Act, 1881. According to the petitioner, he had granted friendly loan to the accused on execution of promissory note. Two post-dated cheques were issued by the accused in favour of the petitioner. On 19th March 2013, the petitioner deposited cheques with the bank which were returned with remarks "Funds Insufficient/Signature Differ". On 4th April, 2013 petitioner issued statutory notice which returned unserved with a postal remark "intimted". The petitioner, therefore, filed a complaint. After the

closure of evidence of the parties, the petitioner filed an application for sending disputed cheque, vakalatnama and PR Bond for getting expert opinion on the signatures which has been rejected by the impugned order.

3. This Court on 2nd August 2022 issued notice for final disposal stating that even if none appears for the respondent, petition shall be disposed of finally at the stage of admission. Board remark shows that notice of present petition has been served on respondent no.1 neither respondent no.1 nor his advocate is present and, therefore, the petition is disposed of on merits.

4. On perusal of the impugned order, it appears that the learned Magistrate rejected the application only on the ground that the evidence of the complainant has already been closed. It is stated that since the inception of trial, the complainant was aware about remark of “signatures differ” and, therefore, at this stage it is not possible to send the documents for the report of handwriting expert.

5. It needs to be noted that one Mr. Sachin Rathod was examined by the accused who in his cross-examination admitted that he cannot tell that the signature on the cheques in question was signed by the accused or any other person. Based on the said admission, the petitioner filed application. The cross-examination was conducted on 6th August 2019 and the application was filed on 9th September 2019.

6. It is well settled principle of law that the Magistrate, while exercising power under section 311 of the Code of Criminal

Procedure, can allow to recall of witness or permit evidence which is necessary for effective adjudication of issue involved. In the facts of the present case, from the cross-examination of the bank's witness, it appears that the complainant has justifiable reasons for filing such application.

7. The rules of procedure are to meet the ends of justice. The substantive rights of the parties cannot be taken away by hyper-technical approach. In the facts of the case, I am satisfied that the report of handwriting expert is necessary for just decision in the matter. In that view of the matter I, pass the following order :

- (i) The impugned order dated 11th February, 2022 passed by Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai in Case No. 33/SS/2017 below Exhibit 75 is quashed and set aside.
- (ii) The application below Exhibit 75 in Case No. 33/SS/2017 is allowed .

8. Rule is made absolute in above terms. No costs.

(AMIT BORKAR, J.)