

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

CRIMINAL WRIT PETITION NO. 3798 OF 2018

Salma Mohammedhusain Calcuttawal ...Petitioner

Versus

The State of Maharashtra

M.I.D.C. Police Station And Anr. ...Respondents

....

Mr. Murtuza Najmi a/w Mr. Mustapa Shabbir Shamim i/by Shamim & Co., Advocate for the Petitioner.

None for Respondent No.2.

Mr. A.R. Patil, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.
DATE : 6th JULY, 2022.

PER COURT:

1. The petitioner is the original complainant in C.C. No.6906/SS/2015, filed for an offence under Section 138 of Negotiable Instruments Act.

2. The complaint alleges that the accused was in need of money for development project and approached the complainant and Moiz Calcuttawala and requested them to give him loan of Rs.24,00,000/-. He informed the complainant that the money would be used for development project and assured that he would repay the loan amount of Rs.24,00,000/- within a period of two years along with profit. The complainant issued three cheques of Rs.8,00,000/- each dated 27th September, 2013, 25th September, 2013 and 26th September, 2013 and parted an amount of

Rs.24,00,000/- to the accused. The complainant realized that the project initiated by the accused did not start and requested him to return the amount. The accused issued two cheques dated 26th October, 2015 and one cheque dated 18th September, 2015 for an amount of Rs.8,00,000/- each. All the cheques were deposited by the complainant with her bank. All the cheques were dishonored with remark 'funds insufficient'. Notice was issued to accused. In spite of receiving notice, no payment relating to dishonour of cheques was made. Hence complaint was filed.

3. Process was issued for offence under Section 138 of Negotiable Instruments Act, against the accused. Affidavit of evidence in chief was filed by the complainant on 14th July, 2016. Requisite documents were adduced in evidence. The complainant was cross-examined by the Advocate for the accused on 17th March, 2017. Affidavit in evidence of Moiz Culcuttawal was filed on 5th April, 2017. He was cross-examined at the instance of accused on 29th July, 2017. Statement of the accused was recorded under Section 313 of Cr.P.C. on 14th September, 2017. The accused had examined himself as defence witness No.1. In his affidavit of evidence, it was stated that he do not know complainant. He knows Mr. Moiz Culcuttawala. He advanced loan of Rs.24,00,000/-. At the time of advancing friendly loan of Rs.24,00,000/-,

agreement was executed in favour of Moiz Culcuttawala. Cheques were given in his name. The original document is with Moiz Culcuttawala. The complainant is the mother of Moiz Culcuttawala. No transaction was executed with complainant. The defence witness was cross-examined by complainant's Advocate.

4. The accused filed an application before the trial Court under Section 91 of Cr.P.C. to issue directions to the complainant for production of agreement / MOU purportedly executed in respect of transactions. The complainant opposed the application by filing affidavit-in-reply. The said application is allowed by order dated 12th July, 2018 and the complainant was directed to produce the document of agreement / MOU which was executed by the accused before the transactions.

5. Aggrieved by the said order the petitioner has approached this Court.

6. The respondent No.2 is absent though served.

7. Learned Advocate for the petitioner submitted that the application under Section 91 of Cr.P.C. was not maintainable. The order passed by learned Magistrate issuing directions to the complainant to produce the documents is bad in law. The application preferred by the respondent accused was vague. Except deposition of accused in his defense evidence, there is no material

to establish existence of such document. The application was preferred belatedly. The complainant and CW-2 were cross-examined. During their cross-examination there was no reference of such agreement. The statement of the accused was recorded under Section 313 of Cr.P.C. He did not refer to execution of such agreement between the parties before the transactions.

8. The application preferred by respondent/accused and his evidence does not spell out particulars such as date, place when/where such agreement was execute. The cross-examination of witnesses conducted by defence does not refer to execution of agreement. The application was made belatedly. The learned Magistrate passed the order allowing application mechanically.

9. In the aforesaid circumstances, the impugned order deserves to be set aside.

ORDER

- i. Criminal Writ Petition 3798 of 2018 is allowed.
- ii. Impugned order dated 12th July, 2018 passed by learned Metropolitan Magistrate, 48th Court, Andheri, Mumbai is set aside.

iii. The trial Court shall proceed with the trial expeditiously.

iv. Petition is disposed of.

(PRAKASH D. NAIK, J.)