

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

**CRIMINAL WRIT PETITION NO. 5285 OF 2018
WITH
CRIMINAL WRIT PETITION NO. 5286 OF 2018**

Shri. Prakash Vyankat Dhakane

Petitioner

Versus

The State of Maharashtra & Ors.

Respondents.

Mr. Rahul S. Kadam for Applicant.

Mr. Sanjeev P. Kadam a/w Mayur G. Sanap, Ms. Varsha Thorat i/by
Ramdas H. Patil for Respondents.

Mr. A. R. Patil APP for respondent/State.

Digitally signed
by
DNYANESHWAR
ASHOK ETHAPE
Date: 2023.06.05
09:48:46 +0530

CORAM : PRAKASH D. NAIK, J.

DATE : 19th July 2022

PC :

1. Criminal Writ Petition No.5285 of 2018 relates to the proceedings in S.T.C. No. 332 of 2011 pending before the Court of learned Judicial Magistrate First Class, Indapur District Pune. The complaint was filed by Respondent No.2 for an offence under Section 138 of the Negotiable Instruments Act. The complainant has alleged that, the Petitioner was appointed for the work of transportation of sugarcane crop. The amount of Rs.3,25,000/- was deposited in Petitioner's bank account. The work was not completed. The Respondent No.2 asked the Petitioner to refund the amount. The Petitioner issued cheque of Rs.3,25,000/- in favour of Respondent

No.2. The cheque was dishonoured due to insufficient balance. Demand notice was issued. Complaint was filed for offence under Section 138 of the Negotiable Instruments Act.

2. Criminal Writ Petition No. 2586 of 2018 relates to proceedings in S.T.C. No.333 of 2011 pending before the Court of learned Judicial Magistrate First Class, Indapur District Pune. Complaint was filed by Respondent No.2 alleging that, the Petitioner was appointed for the work of transportation of sugarcane crop. The amount of Rs.6,00,000/- was deposited in Petitioner's bank account. The Petitioner did not complete the work. The Respondent No.2 was asked to refund the amount. The Petitioner gave cheque of Rs.4,25,000/- in favour of Respondent No.2. Cheque was dishonoured due to insufficient fund. Demand notice was sent by Respondent No.2. Complaint was filed for offence under Section 138 of the Negotiable Instruments Act.

3. Process was issued against the accused in both the complaints. The Respondent No.2 filed affidavit of evidence below exhibit-26 and exhibit-27 respectively. Respondent No.2 filed an application below exhibit-74 in S.T.C. No.332 of 2011 and contended that, the evidence affidavit in S.T.C. No. 333 of 2011 was inadvertently filed in S.T.C. No. 332 of 2011. The details of cheque transaction in STC No.132 of 2011 have been wrongly reproduced in S.T.C. No.333 of 2011. The

details of S.T.C. No. 333 of 2011 are referred to in the affidavit filed in S.T.C. No. 332 of 2011. Hence, it was prayed that, affidavit may be allowed to be withdrawn with permission to replace it with correct affidavit.

4. The Petitioner opposed the said application by filing reply. Learned Magistrate vide order dated 23rd November 2017 allowed the said application. The Petitioner challenging the order dated 23rd November 2017 by preferring Criminal Revision Application Nos.12 of 2018 and 13 of 2018. Vide separate orders dated 9th October 2018, the Criminal Revision Applications were rejected.

5. Learned Advocate for the Petitioner in both the Petitions submitted that, the orders passed by the learned Magistrate and learned Sessions Court are contrary to law. After filing affidavit of evidence, there was no occasion to replace it. Once the evidence affidavit becomes part of records, it cannot be altered or substituted. The affidavit was exhibited and further examination-in-chief was recorded. The documents were exhibited. The trial Court has erroneously granted permission to the complainant to withdraw the said affidavit.

6. Learned Advocate for the Petitioner has relied upon the decision in the case of *Digambar Ramchandra Bawaskar Vs. Soma*

*Prabhu Pawar and Ors.*¹

¹ 2018 91) Mh.L.J.169

7. Learned Advocate for Respondent No.2 submitted that, filing of affidavit was inadvertent mistake which was allowed to be rectified by the Court. There is no infirmity in the orders passed by Court. Reliance is placed on the decision in the case of *Gowardhan Das Vs. State of Maharashtra*².

8. The complainant and accused in both the complaints are same. The transaction was similar. Cheques were different. Both the cheques were dishonoured. Two complaints were filed viz. S.T.C. No. 332 of 2011 and S.T.C. No. 333 of 2011. Both the complaints were filed in the same Court. Process was issued for an offence under Section 138 of the Negotiable Instruments Act. The complainant filed pursis with endorsement of 'not press' on the affidavit of evidence. The affidavit of evidence of complainant was filed on 7th February 2014 in both the complaints. Having realized that, there was an inadvertent mistake of filing the incorrect affidavits, the complainant preferred applications in each complaint and contended that, the complainant has filed two complaints in S.T.C. No.332 of 2011 and S.T.C. No.333 of 2011. The affidavit of evidence of S.T.C. No.333 of 2011 has been filed in S.T.C. No. 332 of 2011. This was inadvertent mistake. Hence, permission may be granted to exchange the affidavit in respect to the complaints. In the alternative, the complainant may be permitted to file a fresh affidavit of evidence in respect to the

2 2007 (2) Bom. C.R. (cri.) 826

complaints. The application was opposed by the accused by filing reply. The accused/petitioner filed reply opposing the application preferred by Respondent No.2. learned Magistrate vide order dated 23rd November 2017 allowed the said application by observing that, due to oversight Advocate for complainant filed affidavit of another matter accordingly documents were also exhibited. The Advocate for complainant has not pressed the prior affidavit and seek permission to file new one affidavit. Accused objected. Considering the mistake and in the larger interest of justice, application can be allowed. Due to mistake of Advocate parties cannot suffer and hence the application is allowed with penalty of Rs.500/- be given to accused. The order passed by learned Magistrate was challenged by Petitioner before the Sessions Court by preferring Revision Applications. Learned Sessions Judge dismissing the Revision Applications on the ground that, the impugned orders were interlocutory in nature and Revision Application is not maintainable.

9. There is no infirmity in the impugned order. It is pertinent to note that, on the ground of two identical complaints, the Advocate for Petitioner had presented the affidavits of evidence as stated above which was allowed to be replaced by the learned Magistrate. In the case of *Digambar Ramchandra Bawaskar Vs. Soma Prabhu Pawar and Ors.*(supra) relied upon by learned Advocate for Petitioner it was

observed that, the plaintiff can explain error in affidavit by stepping into witness box to lead further oral examination-in-chief or file an additional affidavit and clarify mistake, if any. Plaintiff cannot be permitted to withdraw affidavit once filed on record. The said decision was delivered in different context and not applicable in the present case.

10. In the case of *Gowardhan Das Vs. State of Maharashtra* (supra) this court had considered the issue relating to application preferred by complainant for returning of documents in the proceedings under Section 138 of the Negotiable Instruments Act. The return memo of two dishonoured cheques were filed wrongly of one complaint in other complaint and vice versa. The application was allowed by Magistrate in the interest of justice and to avoid miscarriage of justice. The Court observed that, return memo were inadvertently filed wrongly in different complaint and the said facts came to notice only at time of proof of dishonour. It is not case that the accused is taken by surprise by allowing withdrawal and refilling of documents and no prejudice is going to be cause by replacement of memo. This Court had held that, the Magistrate has rightly allowed the applications.

11. It is pertinent to note that, in the present case before the cross-examination at the instance of accused had began the complainant

preferred an applications as stated above which was allowed. In these circumstances, no case is made out for interfering the impugned orders.

ORDER

(i) Criminal Writ Petition Nos. 5285 of 2018 and 5286 of 2018 stand dismissed.

(PRAKASH D. NAIK, J.)