

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 178 of 2020

with

CRAN 1 of 2020 (Old No. CRAN 285 of 2020)

with

CRAN 4 of 2023

Pralay Choudhury

Vs

The State of West Bengal & Anr.

For the Petitioner

: Mr. Satadru Lahiri,
Mr. Md. Musharraf Hossain,
Mr. Sardar Azam.

For the State

: None.

Heard on

: 01.05.2023

Judgment on

: 07.06.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated 19th March, 2019 passed by the Learned Judicial Magistrate, Bidhannagar, North 24 Parganas in connection with Complaint Case No. C-687 of 2016 under Section 138 of the Negotiable Instruments Act, 1881, thereby rejecting the Petitioners' prayer for obtaining an opinion of the handwriting expert in respect of the impugned cheque.

2. The prosecution case as alleged is to the effect that :-

The Accused/Petitioner in order to discharge his liability in part issued an A/C Payee Cheque, bearing Cheque No. 111313 dated 30.09.2013, drawn on State Bank of Hyderabad, Brabourne Road Branch, Kolkata for an amount of Rs. 3,10,000/-. The Complainant deposited the same with his banker within its validity period but the same was returned with an endorsement 'Funds Insufficient'. Thereafter, the Complainant on 20th December, 2013 sent the demand notice by Registered post with A/D to the Accused/Petitioner, thereby demanding the amount covered by the dishonoured cheque to be paid within 15 days from the date of receipt of the notice. The Accused/Petitioner even after receipt of the notice failed and/or neglected to pay the demanded amount and thereby committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

3. On receipt of the petition of complaint, the Learned Additional Chief Metropolitan Magistrate, Calcutta was pleased to take cognizance of the offence and was further pleased to transfer the case to the Learned Metropolitan Magistrate, 20th Court, Calcutta for further enquiry, trial and disposal of the same.
4. In course of trial of the instant case, the Complainant/Opposite Party in order to prove its case adduced himself as a witness and exhibited number of documents in support of his case. That in course of cross examination of the Complainant/Opposite Party, specific question has been put to him regarding palpable alteration as it appeared from the impugned Cheque, which he denied.
5. While adducing evidence on behalf of the Complainant /Opposite Party especially upon exhibiting the impugned cheque and by manipulating dates, validity of the same has been extended. Under such circumstances, the Accused/Petitioner preferred an application before the Learned Magistrate, thereby praying for examination and opinion of the handwriting experts in respect of the impugned cheque.
6. That the Learned Magistrate upon hearing the Learned Advocates appearing for both the parties as well as upon perusing the materials on record in a mechanical manner, vide an order dated 19th March, 2019, was pleased to reject the application preferred by the Accused/Petitioner, with an observation that the application preferred by the Accused/Petitioner is a premature one and the Accused/ Petitioner

cannot supersede a stage to facilitate his prayer. The Accused/Petitioner states that the instant case is pending at the stage of his examination under Section 313 of Code of Criminal Procedure, 1973 and next date is fixed on 17th January, 2020.

7. It is submitted that the Learned Magistrate while passing the impugned order did not take into consideration that the issue for which the Accused/Petitioner preferred the application for examination and opinion of handwriting experts in respect of the impugned cheque, is the very genesis of the instant case. The issue not only pertains to forming defence of the Accused/Petitioner for rebutting the Complainant's case but also for ensuring true and proper administration of justice in connection with the instant case. It is needless to mention that while dealing with this kind of application/issues, the discretion available to the Learned Magistrate is a judicial discretion and the same has to be exercised in a most judicious manner, which has been denied of in the instant case. The learned Magistrate while passing the impugned order failed to appreciate that judicial discretion/obligation available to him cannot be mortgaged to the whims and caprice of eschewing litigants on the plea that the subject application is a premature one. It would not only deny free and fair trial of the Accused in connection with the said criminal proceeding but also amounts to failure of administration of justice. The reason assigned by the Learned Magistrate while rejecting the prayer of the Accused/Petitioner is based on erroneous principles of

law and as such the same is liable to be set aside. The observation of the Learned Magistrate that the subject application is a premature one, is suffering from vices of manifest error, blatant fallacious interpretation of well-settled principles of law and the same is also contrary to the materials or record.

8. **Mr. Satadru Lahiri, learned counsel for the petitioner** has submitted that the Learned Magistrate erred in law and fact without appreciating the settled principles of law that the Accused/Petitioner cannot be convicted without an opportunity being given to him to present his evidence and if it is denied to him, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove his innocence. Adducing evidence in support of the defence is a valuable right and denial of the right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed.
9. It is further submitted that the impugned order is otherwise bad in law and as such the same is liable to be set aside.
10. **In spite of due service there is no representation on behalf of the opposite party.**
11. The order challenged in revision is as follows:-

C. Case No. 687 of 2016

Dated 19.03.19

Today is fixed for passing of order in connection with an application filed by the accused/petitioner vide dated 28.05.18.

It would be pertinent to note that on the date of the filing of such application the case record was fixed for recording examination of accused under Section 313 CrPC.

Even the accused /petitioner admits such stage of proceeding in his application.

He craved for sending the cheque in question i.e 111313 dtd 30.09.2013 drawn on State Bank of Hyderabad, Brabourn Rd. Branch, being tampered one at the stipulated place of inscription of date in the impugned cheque for the opinion of handwriting expert.

There is no written objection filed by the complainant in this case, however, the Ld. Counsel for the complainant had raised vehement objection against the prayer.

The Ld. Counsel for the accused / petitioner relied upon one celebrated judgment authored by Hon'ble Apex Court of India in Kalyani Bhaskar Vs. M.S. Sampooram.

Perused the petition under the light of cited judgment and also the case record.

In KALYANI BHASKAR VS. MRS, M.S.S SAMPOORNAM [2006(9) Supreme 823] - It has been observed that :-

"..... Section 243 (2) is clear 243(2) is clear that a Magistrate holding an inquiry under the Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a hand-writing expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the hand-writing expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. 'Fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable

right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed and courts should be jealous in seeing that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the petitioner has filed application under Section 243 Cr.P.C., without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2) Cr.P.C. refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case requests for sending the cheque, in question, for the opinion of the hand –writing expert after the respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the objects of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable. For all the foregoing reasons, we allow this appeal and set aside the order of the High Court dated 10.02.2004 passed in Criminal Revision Case No. 335 of 2002 by which the order dated 15.11.2001 of the Judicial Magistrate made in Crl. M.P. No. 341 of 2001 in C.C. No. 439 of 1998 dismissing the application of the appellant under Section 243 Cr. P.C. was affirmed. Accordingly, Crl. M.P. No. 341 of 2001 in C.C. No. 439 of 1998 on the file of the Judicial Magistrate, Tambaram, Chennai, shall stand allowed. The learned Magistrate shall take appropriate steps for obtaining the report of handwriting expert of handwriting expert on the point whether the signature in the cheque is that of the accused and shall proceed with the trial of the case in accordance with law.”

It would be worthy to reproduce the Section 243 of Cr.P.C. at this juncture of discussion.

243. Evidence for defence.

(1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record. (2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such, process unless he considers that such

application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing: Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice. (3) The Magistrate may, before summoning any witness on an application under sub-section (2) require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court.

Thus it is crystal clear that the appropriate stage to exercise the power under sec. 243 (2) of Code arrives only after the accused enters into his defence vide sec. 243 of Cr.P.C. only after the completion of evidence for prosecution.

There is no quandary about the finding that the evidence for prosecution has already been completed. Yet there is a stage for examination of the accused which remained suspended qua the petition dtd. 28.05.18 and then again on 10.07.18 due to resolution passed by Local Bar Association. On 03.10.18 the Ld. Counsel for the accused files a petition under Sec. 317 Cr.P.C. and on 18.12.18 the P.O. was on leave.

The petitioner/accused cannot supersede a stage to facilitate his prayer.

Accordingly the prayer made out in the petition dtd. 28.05.18 stands refused at this stage being premature and thus misconceived.

The record be fixed for examination of accused under Section 313 Cr.P.C.

The accused is at liberty to raise the instant petition only after he enters his defence after the 313 stage.

Fix 24.04.2019 for examination of the accused u/s 313 Cr.P.C.

D/C by me.

**Sd./-
J. M. Bidhannagar**

12. In addition to the judgment relied upon in the said order, the petitioner also relied upon the judgment of the Supreme Court in ***T. Nagappa Vs. Y.R. Muralidhar (2008)5 SCC 633.***
13. From the said order dated 19.03.2019 it is evident that the Magistrate has gone to the extreme length of rejecting an application which was essential for 'fair' trial.
14. Considering the observation of the Magistrate that it was not the proper stage, as it was the stage of examination of the accused under Section 313 Cr.P.C., the Magistrate outright rejected the application, thereby creating a sense of apprehension in the accused that he would not get a 'fair trial'.
15. **A Court speaks through its action** and more so through its judgments and orders, which is the platform for communication between all the stakeholders. This should above all create a sense of confidence in the system. Time and again the courts have been sensitized to conduct the proceedings in such a manner so that it creates belief in the litigants that 'fair trial' is ensured.
16. **As the petition has been rejected, on the ground of not being filed at the proper stage, the accused has to again make an application, even when the application could have been kept pending, to dispose of the same at an appropriate stage.**

17. **From the copy of the cheque in question at annexure 'B', it prima facie appears that the month in the date column has been tampered with.**
18. **According CRR 178 of 2020 is disposed of** directing the Learned Judicial Magistrate, Bidhannagar, North 24 Parganas, to ensure that the accused/petitioner is given a "fair trial" by being given the opportunity permitted by law to the relief entitled.
19. No order as to costs.
20. All connected Applications stand disposed of.
21. Interim order if any stands vacated.
22. Let a copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.
23. Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)