

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

970 CRIMINAL WRIT PETITION NO.277 OF 2023

SANJAY DASHARATH JADHAV
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Petitioner : Mr. Estling S. Murge
APP for Respondent – State : Mr. S.N. Morampalle

...
CORAM : R. M. JOSHI, J.
DATE : AUGUST 1, 2023

PER COURT :

. The petitioner is challenging order dated 04.02.2023 passed by Judicial Magistrate First Class, Tuljapur below Exh.54 in S.C.C. No. 129 of 2019.

2. The petitioner is the original complainant in proceedings related to the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'N.I. Act'). It is the contention of the petitioner that he examined himself and also led evidence of two other witnesses. According to him, during the course of his examination-in-chief, envelope containing mandatory notice issued to respondent - accused was exhibited, however inadvertently the said envelope was not opened and notice issued to the accused

could not be exhibited.

3. The learned counsel for the petitioner states that after the completion of evidence it was realized that the said inadvertent error has been committed and hence application Exh.54 came to be filed for the purpose of proving the said notice. The learned Trial Court has dismissed the said application by passing impugned order.

4. Though duly served and ample opportunities afforded to make submissions, none appeared for respondent no.2 - accused.

5. The learned counsel for the petitioner has relied upon the judgment of the Hon'ble Apex Court in the case of **P Chhaganlal Daga vs. M. Sanjay Shaw (2003) 11 SCC 486**. The Hon'ble Apex Court in the said judgment after considering the power of the Court under Section 311 of Code of Criminal Procedure has held that '*for the purpose of just decision of the case party must be allowed to invoke such provision*'. In the said case, postal receipt which was not produced at the time of the recording of the evidence was also allowed to be placed on record and proved. As against this, in the instant case, the document which is sought to be produced is already

placed on record before the Trial Court. There could not have been any deliberate act by the petitioner / complainant by not getting the said notice exhibited, but only by getting the envelope containing the notice exhibited from the Trial Court. This can occur only out of inadvertence on the part of the complainant and his counsel. Moreover the document concerned is absolutely essential for just decision of case, as it is part of mandatory compliances required to be done before filing a valid complaint u/Sec. 138 of the Negotiable Instruments Act. In such circumstances, the view taken by the learned Trial Court of not recalling of the complainant is not sustainable. In view of above, following order is passed.

ORDER

- (i) Petition stands allowed.
- (ii) Application Exh.54 filed in Summary Criminal Case No.129 of 2019 is allowed.

[R. M. JOSHI]
JUDGE