

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Criminal Writ Petition No. 1089 of 2022

1. Ritika Industries
N-11, L Sector Plot No.31,
Hudco, Aurangabad.
2. Rajendra Kondiba Wankhede
Age 40 years, Occ. Business,
R/o. N-11, L Sector Plot No.31,
Hudco, Aurangabad.
3. Pallavi Rajendra Wankhede
Age 40 years, Occ. Business,
R/o. N-11, L Sector Plot No.31,
Hudco, Aurangabad.

...Petitioners

Versus

1. The State of Maharashtra,
Copy to be served upon Public Prosecutor,
High Court of Judicature of Bombay,
Bench at Aurangabad.
2. Ameeth Bhagwantrao Sude,
Age : 43 years, Occ: Business,
R/o 72, Vyankatesh Nagar,
Jalna Road, Aurangabad.

...Respondents

Advocate for Petitioners : Mr. Sohail Subhedar h/f
Mr. N. S. Ghanekar

APP for State/Respondent No.1 : Mr. Y. G. Gujrati
Advocate for Respondent No.2 : Mr. Swapnil S. Patil

CORAM : KISHORE C. SANT, J.
RESERVED ON : 1st DECEMBER, 2022.
PRONOUNCED ON : 24th JANUARY, 2023.

JUDGMENT :

1. A short question involved in this petition is as to whether to call the income tax officer as a witness on an application filed by the present petitioners/ original accused in a proceeding under Section 138 of the Negotiable Instruments Act.

2. The petitioners are facing a trial for an offence punishable under Section 138 of the N.I. Act. The complainant/respondent no.2 filed a complaint against the petitioners in the Court of Chief Judicial Magistrate, Aurangabad, which is presently pending in the Court of learned Judicial Magistrate First Class, Aurangabad. In the complaint, it is alleged that the accused took hand loan of Rs.12,50,000/- from the complainant as they had good relations. The accused also executed a promissory note dated 21.03.2016. Towards repayment of the hand loan, the accused issued

a cheque dated 28.06.2017 for an amount of Rs.12,50,000/-. On presentation, the cheque was dishonoured and therefore a notice was sent demanding an amount. Since in spite of notice, no amount was paid, the complainant filed a complaint.

3. The complainant examined himself in support of his case. The petitioner no.2 filed an application in the Court of the learned JMFC, Aurangabad, below Exhibit 80-D under Section 91 of the Code of Criminal Procedure (Cr.P.C. for short) praying for issuance of summons to Officer from Income Tax Department, Aurangabad to bring on record the documents in respect of Income Tax Return, balance sheet etc. of the complainant from 2016 to 2021. He suspects the genuineness and authenticity of those documents and particularly about the balance-sheet and other supporting documents. In view of that, it was prayed to issue witness summons to the Income Tax Authority alongwith record. The learned JMFC by order 08.12.2021 rejected the application for the reason that the

complaint was for the recording of statement of the accused under Section 313 of the Cr.P.C. The accused thereafter can lead his evidence at the appropriate stage as the accused has ample opportunity to adduce and to produce his defense evidence after recording of the statement. The petitioners challenged the order by filing Writ Petition No. 100/2022. The petitioners sought permission to withdraw the said petition with liberty to apply a fresh, when his turn to lead evidence in defense would be there.

4. The statement of the accused under Section 313 came to be recorded on 11.03.2022. After recording of a statement, he filed an application below Exhibit - 92/D on 28.03.2022. He again mentioned in the application that the documents produced on record by the complainant in his evidence appeared to be suspicious and specifically his balance-sheet and other supporting documents creates a doubt and therefore it is necessary to issue witness summons to the Income Tax Authority and to call him with record

in respect of the complaint. The learned trial Judge rejected the application by considering the scope under Section 91 of Cr.P.C., the nature of complaint and observed that this complaint is not for deciding authenticity of any documents. It is further observed that under the N.I. Act, it is the complainant who has to prove his case and thereafter the onus shifts on the accused to rebut the presumption by preponderance of probability only and rejected the application.

5. It is vehemently argued by the learned Advocate for the petitioners mainly on the ground that only the Income Tax Authority can be confronted on the documents produced on record by the complainant in support of his case. A specific ground is taken that the documents produced by the complainant on record are fabricated. Genuineness of the documents goes to the root of the matter as the entire case of the complainant and the accused is based upon these documents. It is the main document going to decide ultimate fate of the complaint. He submits that

unless some person from the Income Tax Department is examined, it would not be possible for the Court to arrive at any conclusion in respect of the documents produced on record. The learned Advocate further submits that the learned trial Court has failed to exercise the jurisdiction vested in it in proper manner and has rejected the application. The observations of the learned trial Judge that the trial is not for deciding the authenticity is perverse as it is not the question of deciding the genuineness of the documents, but certainly it is necessary for the purpose of deciding the complaint. Thus the Court has practically denied and opportunity to the petitioner to prove his case.

6. The learned Advocate for the petitioners relied upon the following reported judgments.

- i. Kamal Ahmed Mohammed Vakil Ansari & Ors. Vs. The State of Maharashtra, reported in 2014 ALL MR (Cri) 5055.
- ii. T.R. Ajayan Vs. M.Ravindran reported in LAWS(KER) 2008-1-15.

iii. Dagi Ram Pindi Lall Vs. Trilok Chand Jain
reported in LAWS(SC)-1992-2-6

7. In the case of Kamal Ahmed (supra), this Court held that by rejecting the application for issuing summons to the authority, the learned Judge failed to comprehend the correct legal position with respect to the rights of an accused to have documents summoned or produced before the Court for the purpose of defense. Paragraph no.32 of the said judgment reads as below.

"32. In my opinion, the learned Judge failed to comprehend the correct legal position with respect to the rights of an accused to have documents summoned or produced before the Court for the purpose of his defence, and confused the same with the right of the accused to receive the copies of documents as laid down in Section 207 of the Code. When the appellants wanted the documents to be produced on the ground that the same would prove their innocence, or facilitate their defence, that those documents were not relied upon by the prosecution was an irrelevant consideration. The question which the Learned Judge should have addressed himself to was whether the accused would be disentitled from calling for such documents on the ground that

these documents are not relied upon by the prosecution.”

. In paragraph no.33 of the said judgment, this Court further observed that Section 91 of the Code empowers a Court to issue summons to a person to produce before the Court, a document or thing believed to be in possession of such person for the purpose of any inquiry, trial or other proceedings under the Code. This Court considered the case of Dhananjay Kumar Singh Vs. State of Rajasthan, reported in 2006 Cri.L.J. 3873, wherein it was held that Section 172 of the Code does not limit the jurisdiction of the Code under Section 91 of the Code and held that the summons ought to have been issued directing the trial Court to permit the defense to examine officer as witness for defense.

8. In the case of T.R. Ajayan (supra), an application was filed by the complainant for direction to the Assistant Commissioner of Income Tax to produce Income Tax Return (ITR), balance-sheet etc. by the accused

persons and the same was dismissed by the trial Judge. Applications were therefore filed in the Kerala High Court. The Court after considering the various judgments and the provision of Section 138(1)(b) of the Income Tax Act and observed that the finality attached to an order of the Commissioner under Section 138(1)(b) has no relevance to the exercise of powers by a court to summon the production of documents in a case pending before the Court. An embargo contained in Section 138(1)(b) of the Act, has nothing to do with the powers of the Court under Section 91 of the Cr.P.C., even if no public interest is involved. The applications in that case were thus allowed by the High Court.

9. In the case of Dagi Ram Pindi Lall (supra), the Hon'ble Apex Court has considered that a finality that has been attached to an order of the Commissioner under Section 138(1)(b) of the Act is applicable only in cases where applications are made to the Commissioner by a party or any other person for

receiving documents or information. It is held that the power of the Court to summon the production of record is not affected. Thus it is clear that the Income Tax Authorities can be summoned to produce documents on record such as ITR, balance-sheet etc., if felt necessary by the Court.

10. The learned Advocate for respondent no.2 opposed the petition vehemently saying that the learned trial Judge has rightly rejected the application. The complaint is under Section 138 of the N.I. Act and therefore he submits that the petitioner has to prove his defense only by preponderance of probability. He is not required to prove his defense beyond reasonable doubt. He relied upon the judgment in the case of Manish Gopalrao Deshmukh Vs. Anup Niranjana Dodiya in Writ Petition No.13/2019 delivered by this High Court at Nagpur. In paragraph no.6 of the said judgment, it is observed that the power under Section 91 is not expected to be invoked if the documents are in public

domain and certified copies thereof can be obtained and produced on record. In that case, the Court had rejected the application of the accused holding that the application was filed to protract the litigation. In that case, the accused had sought direction to the respondent/complainant to produce on record ITR, account statement even of the family members of the complainant and in that view of the matter, the Court held that the application was clearly to protract litigation. The judgment is therefore not applicable to the present case.

11. Taking into consideration the submissions and the judgments, this Court finds that the accused had right to establish his case and for that purpose he can certainly make a prayer for summoning a witness. It is specific case of the accused that he suspects that the copies of the balance-sheet and the ITR filed by the complainant on record are not genuine. It is for that reason, he has filed an application praying for summons to the proper authority so that the copies of

the documents, which are actually submitted to the authorities would be produced on record. This Court finds that the application ought to have been allowed by the learned trial Judge and while dismissing such application, erred in holding that under Section 91 of the Cr.P.C., the matter was not for deciding authenticity of any document. It was necessary to consider that when the defense wants to examine the officer and wants to rely upon the documents which are submitted by the complainant to the authorities, it was necessary to allow the same considering that the accused has right to prove his case.

12. In view of the aforesaid discussion, this Court finds that a case is made out to call for interference by entertaining a Writ Petition. The Writ Petition is therefore, allowed. The impugned order dated 02.08.2022 passed by the learned JMFC, Court No.11, Aurangabad in S.C.C. No.5471/2017 is set aside. The trial Court shall proceed further with the trial by issuing summons to the Income Tax Authorities as

prayed for in application below Exhibit – 92/D.

13. With this, the Writ Petition is disposed off.

[KISHORE C. SANT, J.]

14. At this stage, a request is made by learned Advocate for respondent no.2 that the trial Court be directed to expedite the matter since the trial is of 2017.

15. In view of the above, the learned trial Court is requested to expedite the trial and to complete it as early as possible preferably within six months from today.

[KISHORE C. SANT, J.]