

VRJ

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

WRIT PETITION NO.592 OF 2023

Vineet Vitthal Patkar ... Petitioner
V/s.
Janardhan Laxman Fale & Anr. ... Respondents

**WITH
WRIT PETITION NO.391 OF 2023**

Vineet Vitthal Patkar ... Petitioner
V/s.
Arun Tatu Ghude & Anr. ... Respondents

**WITH
WRIT PETITION NO.591 OF 2023**

Vineet Vitthal Patkar ... Petitioner
V/s.
Balaji Shivajirao Gadge & Anr. ... Respondents

Mr. Sumedh S. Modak for the petitioner.

Mr. Sandeep Mishra for the respondent No.1.

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

CORAM : AMIT BORKAR, J.

DATED : APRIL 19, 2023

P.C.:

1. Two views of judgments of equal strength of Apex Court have given rise to the filing of present writ petitions; according to the petitioner, one view supports the plea of the petitioner to send

a disputed cheque to a handwriting expert; however, another judgment of Bench of equal strength takes contrary view stating that in case signature on the cheque is admitted, sending the cheque to handwriting expert is not necessary.

2. Bare facts essential for the adjudicating issue involved are as under:

The respondent is the original complainant. The petitioner is the original accused. Respondent No.1 filed a criminal complaint under section 138 of the Negotiable Instruments Act, 1881, alleging dishonour of cheque. Undisputedly, the petitioner (accused) admits the signature on the cheque.

3. During the pendency of the complaint, the accused filed an application to send a disputed cheque to a handwriting expert to ascertain whether the contents of the cheque, apart from the signature, had been written by the accused. The Magistrate by the impugned order rejected the application relying on the judgment of this Court reported in 2010 (6) LJSOFT (URC) 28 in the case of **Deepkkumar S/o Dwarkadas Agrawal vs Ashokkumar S/o Brijmohan Dalmiya & Another**. The Magistrate held that since the accused has not disputed his signature on the cheque, the author of other contents of the cheque is of no consequence. Aggrieved thereby, the petitioner accused has filed present petitions.

4. Mr. Modak, learned advocate for the petitioner relying on the judgment in the case of **T. Nagappa vs. Y.R. Muralidhar**, reported in (2008) 5 SCC 633, submitted that whenever contention has

been raised that the complainant has misused the cheque, despite the presumption under section 118(a) or 139 of the Act, opportunity must be granted to the accused for adducing evidence in rebuttal thereof as the law places a burden on the accused to discharge the burden.

5. Per contra, Mr. Sandeep Mishra, learned advocate for respondent No.1, relying on the recent judgment of the Apex Court in the case of **Oriental Bank of Commerce vs Prabodh Kumar Tewari** reported in (2022) LiveLaw (SC) 714, submitted that once the signature on the cheque is admitted by the accused, the question as to who has filled up details in the cheque would be immaterial. The presumption arising from the cheque's signing cannot be rebutted merely by the handwriting expert's report. Said exercise is not relevant for raising defence whether the cheque was issued to discharge the legally recoverable liability.

6. Faced with the contrary views of judgments of equal strength, Mr. Modak, learned advocate for the petitioner relied on the Full Bench judgment of this Court in the case of **Kamleshkumar Ishwardas Patel vs Union of India And Others**, reported in 1994 (2) MhLJ 1669 and **Gaur Pratibha vs State of Maharashtra** reported in (2019) 4 Bom CR 100. He submitted that the Full Bench of this Court has held that when the High Court is confronted with contrary decisions of the Supreme Court emanating from Benches of co-equal strength, it is not necessary to follow the decision later in point of time but must follow the one which in its view better in point of time. Accordingly, the Division

Bench of this Court in the case of **Gaur Pratibha** followed the Full Bench in the case of **Kamleshkumar**, holding that the High Court may follow one which, in its view, is better in point of time.

7. I have given anxious consideration to the submissions made on behalf of both sides. There is no serious dispute about the factual matrix. The petition arises from proceedings under section 138 of the Negotiable Instruments Act 1881. The cheque has been signed by the accused. The accused disputes his authorship over other contents of the cheque. In such a factual matrix, the question which requires adjudication is which judgment of the Apex Court would apply in the facts of the case.

8. In the case of **T. Nagappa**, the proceeding arose from the rejection of the application to send the disputed cheque to a handwriting expert. The Magistrate rejected an application to send it to a handwriting expert. The High Court dismissed the revision application. The Apex Court, therefore, considering the contention raised on behalf of the accused that the complainant misused the cheque, even in a case whether presumption can be raised under section 118(a) or 139 of the Act, held that an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places a burden on the accused that he must be given an opportunity to discharge it. It is held that it is for the accused to prove his defence. The nature of evidence should be left to the discretion of the Court. The relevant considerations for allowing such an application are whether the application is bona fide or the accused intends to bring relevant material on record. Another

consideration is that the accused should not be allowed to unnecessarily protract the trial or summons witnesses whose evidence is not relevant. Based on the aforesaid reason, the Apex Court allowed the appeal.

9. In the case of **Prabodh Kumar Tewari** (supra), the proceedings before the Apex Court arose out of an order passed by the High Court granting permission to the accused, who admitted the signature and handing over of the cheque to the complainant. According to the accused, the signed blank cheque was handed over to the complainant, which was misused and, therefore, an application to send a disputed cheque to a handwriting expert was filed. The Apex Court relying on the judgment in the case of **Bir Singh vs Mukesh Kumar** reported in (2019) 4 SCC 197 and **Kalamani Tex vs P. Balasubramanian** reported in (2021) 5 SCC 283, held that a drawer who signs a cheque and hands it over to the payee is presumed to be liable unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of a debt or in the discharge of a liability. It is held that for such determination fact that the details in the cheque have been filled up not by the drawer but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be rebutted by a report of a handwriting expert even if the details in the cheque have not been filled up by the drawer but by another person. Said course is not relevant to the defence whether the cheque was issued towards payment of a debt or discharge liability.

10. At this stage, it is necessary to cull out relevant observations of the judgment of three judges in the case of **Kalamani Tex** (supra). The proceedings before the Apex Court arose out of the conviction of the accused in proceedings under section 138 of the Negotiable Instruments Act 1881. The Apex court in the context of presumption under section 118 and 139 of the Negotiable Instruments Act, 1881, held that once the signatures of the accused on the cheque is established, then the “reverse onus” clause becomes operative. The onus shifts upon the accused to discharge the presumption imposed upon him. It is held that once the accused admitted his signature on the cheque, the Trial Court ought to have presumed that the cheque was issued as consideration for illegally enforceable debt.

11. In my view, the Apex Court, in the case of **Prabodh Kumar Tewari**, has interpreted the judgment of three judges in the case of **Kalamani Tex** to hold that once a drawer who signs a cheque and hands it over to the payee, it is to be presumed unless the drawer adduces evidence to rebut the presumption that the cheque has been issued towards payment of debt or security. However, after considering three judges' Bench on the point of nature of evidence to be adduced by the accused, the later decision of two judges in the case of **Prabodh Kumar Tewari** (supra) held that the presumption which arises on the signing of a cheque could not be rebutted merely by the report of a handwriting expert and even if details in the cheque having not been filled up by the drawer but by another person, this is not relevant to the defence whether the cheque was issued towards payment of debt or discharge of

liability. Therefore, in my opinion, since the later Bench has interpreted the earlier three judges' Bench decision to hold that once the signature on the cheque is admitted, it is necessary to consider who has authored the rest of the contents of the cheque, in my opinion, the later decision of the Apex Court is binding on this Court. Therefore the course adopted by the Trial Court is in consonance with the later decision of the Apex court in the case of **Prabodh Kumar Tewari** (supra). Therefore, there is no merit in the petitions.

12. The writ petitions are dismissed. No costs.

13. It is made clear that the Trial Court shall not be influenced by the observations made in the judgment as observations are made only for the purpose of adjudicating the issue of sending the cheque to the handwriting expert.

14. The learned advocate for the petitioner requested a stay of the trial to enable the petitioner to challenge this judgment before the Apex court. Hence the proceedings before the Magistrate is stayed for four weeks from today.

(AMIT BORKAR, J.)