

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

CRIMINAL WRIT PETITION NO.1084 OF 2023

Jubin Shah

.... Petitioner

versus

The State of Maharashtra & Anr.

.... Respondents

.....

- Mr. Prasanna Bhangale, Advocate for Petitioner.
- Mr. Arfan Sait, APP for the State/Respondent No.1.
- Mr. Jehangir Khajotia, Advocate for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 01st DECEMBER, 2023

P.C. :

1. The Petitioner is the original accused in C.C. No.2496/SS/2013 before the learned Additional Chief Metropolitan Magistrate, 7th Court, Dadar, Mumbai. The complaint is filed by the Respondent No.2 herein for dishonour of the cheque dated 29/01/2013 for Rs.10 lakhs drawn on Thane Bharat Sahakari Bank Ltd., Ghatkopar (West) Branch. According to the complainant, the cheque was dishonoured with a memo dated 29/04/2023 with the remark as 'Funds insufficient'. Based on

these allegations, after following the due procedure, the complaint was lodged on 06/07/2013. The trial is still not over. At present, the stage of the trial is that, the written arguments of the both the parties are already tendered and it is kept for final arguments to be advanced by both the parties. At this belated stage, the Respondent No.2 preferred an application at Ex.82 for permission to examine the bank witness for proving the fact regarding the dishonour of the subject cheque. The learned Magistrate vide his impugned order dated 27/02/2023 allowed the application and therefore the Petitioner has challenged that order in the present Petition.

2. Heard Mr. Prasanna Bhangale, learned counsel for the Petitioner, Mr. Jehangir Khajotia, learned counsel for the Respondent No.2 and Mr. Arfan Sait, learned APP for the State.
3. Learned counsel for the Petitioner submitted that the Respondent No.2, though is the complainant himself, he is prolonging the trial and is preferring various applications for

recalling himself and filing application for calling a bank officer at different stages. This conduct of the Respondent No.2 has caused serious prejudice to the Petitioner. He submitted that the Petitioner has raised a specific objection in his written argument that the memo of dishonour of the cheque did not bear the seal of the bank and hence it is not a valid memo u/s 146 of the N.I. Act. After this particular issue was raised in his written argument, to fill up the lacuna, the Respondent No.2 has preferred this application, which was allowed. He submitted that the approach of the learned Magistrate was not correct and looking at the past conduct and also looking at the attempt to fill up the lacuna, this application should not have been allowed.

4. Learned counsel invited my attention to the order passed by this Court (Coram : Prakash D. Naik, J.), dated 24/08/2022 in Writ Petition No.6257 of 2021 whereby the Respondent No.2's attempt for permission to file additional documents was rejected. He submitted that this Court has made observations regarding the conduct of the Respondent No.2. He

further submitted that the same observations may be applied at this stage also and therefore the impugned order is required to be set aside.

5. Learned counsel for Respondent No.2 submitted that the examination of the bank officer would be in the interest of justice. The learned Magistrate has exercised his jurisdiction in the interest of justice and therefore the order need not be interfered with. He submitted that the Respondent No.2 has no intention to prolong the matter as ultimately he would be benefited if the matter is decided at the earliest. He submitted that the order be passed for making the trial time bound. He makes a positive statement that the Respondent No.2 shall not recall any witness and he shall not examine any other witness except one bank officer to prove the cheque dishonour memo and to show insufficiency of funds on that particular date of dishonour of the cheque by producing record only for that purpose. He also states that he will not recall himself or will not examine any other witness for any other purpose. He will not

introduce any other new evidence for any other purpose. The statement is recorded and accepted.

6. I have considered these submissions. It is true that this Court in Criminal Writ Petition No.6257 of 2021 vide order dated 24/08/2022 has observed that the complaint is pending since 2013. The record indicates that the complainant has been prolonging the proceeding. Initially the application was preferred for filing additional documents. Thereafter the application was preferred for recalling of the complainant on 09/10/2017. That application was allowed. Two years thereafter another application was preferred for recalling of the complainant on 16/12/2019 as he wanted to prove some documents. That application was not pressed. After that, one more application was preferred on 06/02/2021 for permission to file additional evidence to prove his case beyond reasonable doubt. The learned Magistrate permitted the complainant to examine himself to prove those documents. That order was challenged in the Criminal Writ Petition No.6257 of 2021. The

Writ Petition was allowed and the order was set aside. It was observed that the powers u/s 311 of Cr.P.C. cannot be used to fill up lacuna in the prosecution evidence and that no case was made out to exercise powers u/s 311 of Cr.P.C.

7. Those observations show the conduct of the complainant during the entire prosecution. However, the said order was restricted for rejecting the application to file additional evidence which was not relevant to the cheque dishonour memo. Therefore, the said order passed in Writ Petition No.6257 of 2021 was not concerning the subject matter of the present Petition for examination of bank officer to prove the cheque dishonour memo. The case of the Petitioner is that the cheque dishonour memo does not bear the seal of the bank. Therefore, it is not a valid document as per section 146 of the N.I. Act. This is a totally different consideration and it goes to the root of the matter of the dishonour of the cheque. The learned Magistrate in his impugned order allowing the examination of bank officer has observed that the evidence of

the proposed witness is essential for a just decision of the case. He further observed that the fact of the dishonour of the subject cheque was never disputed by the accused. No prejudice would be caused to the accused if the application was allowed. The learned Magistrate also took note of the fact that the matter was pending since 2013 and that the complainant was expected to examine the bank witness at the earliest. The learned Magistrate has observed that the complainant had not acted diligently and has caused delay in making the application. Therefore, the learned Magistrate imposed cost of Rs.2,000/- payable to the District Legal Services Authority, Mumbai.

8. In this background, the scope of section 311 of Cr.P.C. needs to be seen. Section 311 of the Cr.P.C. reads thus :

“311. Power to summon material witness, or examine person present.

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or

recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case.”

9. The main consideration for exercising power u/s 311 of Cr.P.C. is that a person can be examined if the Court considers that his evidence is essential to the just decision of the case.

10. Learned Magistrate has exercised his discretion and has observed that the evidence of bank officer is necessary for the just decision of the case. I cannot find fault with his reasoning because in the case u/s 138 of the Negotiable Instruments Act (for short ‘N.I. Act’), the dishonour of cheque for insufficiency of funds, is the basic ingredient, which the Court will have to consider and the issue will have to be decided accordingly. The judgment is not yet delivered. Though the application for examining a bank officer is made much belatedly, after the objection was raised by the Petitioner in his written argument, the trial is not yet concluded and the reason for dishonour of the cheque goes to the root of the matter. At this stage, the Court

cannot deny an opportunity to the complainant to lead the evidence to prove the basic ingredients of section 138 of the N.I. Act. Therefore, though there is considerable delay and the application is made at a much belated stage, the complainant/Respondent No.2 cannot be denied an opportunity to lead the evidence, in that behalf. It is needless to add that the accused/Petitioner shall have all the opportunity to cross examine that witness and if necessary, to lead his further defence evidence after such bank officer is examined by the Respondent No.2. At the same time, it is also necessary to take note of the statement made by learned counsel for Respondent No.2 before this Court as noted hereinabove. The cost imposed on the Respondent No.2, is also inadequate. The cost is not given to the Petitioner. Learned counsel for the Petitioner is justified in seeking enhanced cost payable to the Petitioner. Therefore, to meet the ends of justice, the cost can be enhanced and can be made payable to the Petitioner.

11. Hence, the following order :

ORDER

- (i) The Respondent No.2 is permitted to examine one bank officer for the purpose of proving the cheque dishonour memo and to prove insufficiency of funds at the relevant time regarding the cheque which is the subject matter in C.C. No.2496/SS/2013 before learned Additional Chief Metropolitan Magistrate, 7th Court, Dadar, Mumbai.
- (ii) The examination of such witness shall be completed within a period of 8 weeks from today.
- (iii) Both the parties shall remain present before the Trial Court on 11/12/2023 and bring this order to the notice of the Court. The Trial Court shall pre-pone the date of hearing.
- (iv) The Respondent No.2 shall pay cost of Rs.30,000/- to the Petitioner before he examines the bank officer in the said trial.
- (v) With these observations the Petition is disposed of.

(SARANG V. KOTWAL, J.)