

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL WRIT PETITION NO. 42 OF 2023

PETITIONER : Sunil S/o. Vasant Rao Deshmukh, Aged about 52 years, Occupation : Business, R/o. Durga Chowk, Akola, Tah. and District – Akola.

//VERSUS//

RESPONDENTS : 1. Sanjay S/o. Laxmikant Patil, Aged: Adult, Occu. Business.

Amendment carried out as
per Court's Order dt.
15.03.2023 i.e. deleted
Respondent No.2

2. Babita W/o. Sanjay Patil, Aged : Adult,
Occu. Business. **(Deleted)**

Both R/o. Plot No.235, Hanuman
Nagar, Nagpur, Tq. and District –
Nagpur.

Mr. A.P. Tathod, Advocate for the Petitioner.

Mr. Amol Hunge, Advocate for Respondent No.1.

CORAM : G. A. SANAP, J.

DATED : 12th APRIL, 2023.

ORAL JUDGMENT

Rule. Rule made returnable forthwith. The petition is heard finally by consent of the learned advocates for the parties.

02] In this criminal writ petition challenge is to the order dated 26th December, 2022 passed by the learned Judicial Magistrate First Class, Court No.2, Akot, whereby the learned Magistrate rejected the application at Exh.144 made by the petitioner, seeking permission to examine the witness from the bank.

03] The parties will be referred by their nomenclature in the complaint filed before the Trial Court. The complaint filed by the complainant under Section 138 of the Negotiable Instruments Act, 1881, is pending before the learned Judicial Magistrate First Class, Akot. In the said complaint, the arguments of the parties are over. However, after completion of the arguments, the learned advocate for the complainant realised that the evidence of the witness from the bank would be necessary, to place on record the reason for not putting the seal on the cheque return memo. Therefore, the learned advocate for the complainant made an application at Exh.144 and prayed that the complainant be allowed to examine the witness from the bank.

04] The accused filed reply and opposed the application. It was contended by the accused that this belated application has

been made to fill up the lacuna. It was also contended that this application is nothing but one more attempt on the part of the complainant to delay the trial of the complaint. The learned Magistrate after hearing the parties, for the reasons recorded in his order dated 26th December, 2022, rejected the said application. The complainant is, therefore, before this Court.

05] I have heard Mr. A.P. Tathod, learned advocate for the complainant and Mr. Amol Hunge, learned advocate for the accused. Perused the record and proceedings.

06] Learned advocate for the complainant submitted that the cheque return memo with other documents has been admitted in evidence. It is at Exh.96. Learned advocate submitted that on the cheque return memo, there is signature of the bank official, however, the seal is not there. Learned advocate submitted that in order to remove this ambiguity, the prayer was made to allow the complainant to examine the witness from the bank. Learned advocate further submitted that the question of prejudice to the accused would not arise in this case inasmuch as the accused has not disputed the fact of dishonour of the cheque. Learned advocate pointed out that the cheque was dishonoured on the ground,

“payment stopped by the drawer”. Learned advocate, therefore, submitted that the arguments advanced on behalf of the accused that the complainant is trying to delay the trial of his complaint, is not at all acceptable.

07] Learned advocate for the accused submitted that the application made was nothing but an attempt to fill up the lacuna in the evidence of the complainant. Learned advocate submitted that no case is made out in terms of Section 311 of the Code of Criminal Procedure, 1973 (Cr.PC), to grant an opportunity to the complainant to examine the witness from the bank. Learned advocate in short supported the order passed by the learned Magistrate. Learned advocate, in support of his submission, placed reliance on a decision in the case of *Amrut Dayaram Shinde Vs. Bhikan Dhudkoo Patil [AIR Online 2019 Bom 1744]*. In this case, the Single Bench of the Bombay High Court, Bench at Aurangabad has held that if there is material on record to show that the witness is sought to be examined to fill up the lacuna at the belated stage, such attempt has to be nipped in the bud. It is held that the application, with such an intention, is required to be rejected.

08] In my view, the facts of the case are required to be considered in totality, to appreciate the bonafides of the party

concerned as well as the likely prejudice to the opponent. In this case, the issuance of cheque is not in dispute. It is the defence of the accused that the cheque was issued as a security and the said cheque was misused by the complainant. It is pertinent to note that there is no dispute about the dishonour of the cheque and the ground for dishonour. It is, therefore, apparent on the face of record that this fact is literally admitted. The admitted fact is not required to be proved. The question of prejudice or likely prejudice to the accused has to be addressed in the above background. In my view, if this question is considered in the backdrop of the facts, it would show that the exercise of discretion to grant the prayer would not result into any prejudice to the accused.

09] It is, therefore, necessary to ensure whether there was a need and necessity to examine the witness. The cheque return memo with the reason for dishonour of cheque has been given exhibit number. The Court has admitted the said document in evidence. There was no objection to admit the said document in evidence on behalf of the accused. The accused has adduced his evidence. It is seen that the cheque return memo was signed by the concerned official of the bank. There is no seal of the bank on the said cheque return memo. It is to be noted that in view of the fact

that this aspect has not been disputed by the accused, the learned Magistrate ought to have adopted a holistic approach. The ground of delay put-forth, in my view, will not be available to the accused. The complainant, who is fighting this matter in respect of the cheque for Rs.17,50,000/-, cannot even think of delaying his matter for a moment. Similarly, in the fact situation the defence of filling up the lacuna sought to be raised on behalf of the accused, cannot be said to be justifiable.

10] The cheque return memo is on record. It does not bear the seal of the bank. It only bears the signature of the bank official. Such an intimation has to be given by a memo with the seal of the bank and the signature of the concerned official. The said memo has been given exhibit number. In fact, it was the duty of the Court to ensure that the document was proved in all respects. It is, therefore, seen that the first mistake was on the part of the Court in admitting such a document in evidence. If the Court had not admitted the document with this procedural error, then the same would have put the complainant on guard and the complainant would have examined the witness. So, the Court without bothering about the relevant evidence, exhibited the said document. The accused did not raise the objection for the same. In this case,

therefore, it cannot be said that there is any attempt to fill up the lacuna. The witness from the bank, if allowed to be examined, will not put the seal on the document. He will come and explain the circumstances for such a lapse on the part of the bank.

11] In the facts and circumstances, in my view, the learned Magistrate was not right in rejecting the application. If the application had been allowed, by this time, the matter would have been decided on merits. The provisions of Section 311 of the Cr.PC, in my view, are therefore required to be applied in a case where its application is necessary. In this case, for just decision of the case, the examination of the witness from the bank would be necessary. In the facts and circumstances, therefore, the order passed by the learned Magistrate is required to be set aside. The petition deserves to be allowed.

12] Accordingly, the petition is **allowed**. The impugned order dated 26th December, 2022 passed by the learned Judicial Magistrate First Class, Court No.2, Akot in S.C.C. No.598/2009 is set aside. The application at Exh.144 is allowed. The complainant shall ensure that the evidence of the witness from the bank is recorded at the earliest.

13] Rule is made absolute in above terms. The petition is disposed of.

(G. A. SANAP, J.)

Vijay