



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 311 OF 2024

PREMJIT VINODRAO PATHAK

VERSUS

ADITYA BAG PALACE GANDHI PARK, PARBHANI THROUGH ITS
PROPRIETOR VINOD DEVRAO CHAVAN

...
Mr. Pravin N Kalani, Advocate for the Petitioner

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 28th FEBRUARY, 2024

PER COURT :

1. This petition filed under Article 227 of the Constitution of India takes exception to the order dated 22/08/2023 passed by learned Additional Chief Judicial Magistrate, Parbhani, below Exhibit-75 in S.C.C. No.2171/2016.

2. Petitioner is accused in S.C.C. No.2171/2016 filed by respondent under Section 138 of the Negotiable Instrument Act. It is claimed by respondent that for discharging legal liability, petitioner had given cheque of Rs.3,20,000/-, dated 14/09/2016, drawn on HDFC Bank, which came to be dishonoured and hence, complaint is filed. Respondent has filed affidavit of examination-in-chief and he is cross-examined. Thereafter, respondent examined witness No.2 Bank Manager Suresh Bapu Udaygiri. After his evidence is over, application Exhibit-75 is filed by respondent/complainant stating that during cross-examination of witness No.2 accused asked

question about withdrawal of amount from Bank by Omprakash Chavan. Therefore, it is necessary to examine said witness to prove the case of complainant. He, therefore, prayed for permission to examine witness Omprakash Diliprao Chavan. Petitioner opposed the said application contending that application is not tenable in the eye of law as complainant wants to examine witness whose name is not mentioned in the list of witnesses, nor there is any reference of said witness in the complaint. Complainant is trying to fill up the lacuna, which is not permissible in law and hence, the application be rejected.

3. Trial Court has observed that *“Bank statement shows that amount of Rs.3,20,000/- was withdrawn by the Omprakash Chavan. This fact is brought on record during cross examination of complainant. Therefore, it is necessary to clear the fact that, Omprakash had withdrawn amount from Bank. No doubt, name of witness is not mentioned in the complaint, but it is necessary to give opportunity to the complainant. Accused is having every opportunity to cross examine this witness”*. Hence, the application is allowed. This order is impugned in present petition.

4. Heard learned advocate for petitioner.

5. Learned advocate for petitioner strenuously submits that this is nothing but filling up of lacuna. Name of this witness

sought to be examined by respondent, is not there in the witnesses list and his reference is not there in the entire complainant. By relying on decision of learned Single Judge of this Court in ***Criminal Writ Petition No.778/2012 (Mariba s/o Eknath Adhav Vs. Sahebrao Ganpat Torade)***, he submits that this amounts to filling up of lacuna, which is not permissible in law and hence, impugned order is unsustainable.

6. Perusal of documents placed on record reveals that name of witness proposed to be examined is revealed during the cross examination of Bank Manager. On the day on which alleged loan amount was given in cash to petitioner, the said amount was withdrawn by Omprakash Chavan, the person who is sought to be examined by respondent/complainant. Complainant wants to bring this fact on record by examining Omprakash Chavan. Complainant is entitled to lead best possible evidence in support of his case and the said opportunity cannot be denied to him on hyper-technical ground. This Court is of the considered view that examining said witness does not amount to filling up of lacuna. It will not cause any prejudice to petitioner, as petitioner has opportunity to cross-examine that witness.

7. Reliance placed by learned advocate for petitioner in ***Mariba s/o Eknath Adhav*** (supra) is misplaced and misconceived. In that case, witness sought to be examined was claimed to be an

eye witness. Therefore, this Court has observed that, *“If this witness was really an eye witness, then mentioning of the name of this witness should not be missed in the evidence of the complainant”*. This decision is rendered in different facts and does not support the case of petitioner.

8. Trial Court has passed a reasoned order which is not liable to be interfered with in exercise of extraordinary writ jurisdiction. Writ petition being devoid of merit is dismissed.

(NITIN B. SURYAWANSHI, J.)