



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

903 CRIMINAL WRIT PETITION NO. 1593 OF 2024

PARMESHWAR SHIVAJI SWAMI
VERSUS
SHANKAR VITHOBA ILEGAONKAR

...

Mr. Deshpande Gaurav Laxmikant, Advocate for the Petitioner

CORAM : Y. G. KHOBRADE, J.

Dated : 20th December, 2024

PER COURT :-

1. Heard Mr. Deshpande, the learned counsel appearing for the appellant at length.

2. By the present Petition, the Petitioner/original accused in SCC No.2889 of 2016, filed by the present respondent/complainant under section 138 of the Negotiable Instruments Act, put forth prayer clause (B) as under:

"(B) The impugned order below Exh.83, dated 06.07.2024 passed by the learned 2nd Judicial Magistrate First Class, Latur in SCC No.2889/2016 and the order below Exhibit 29 dated 10.10.2018, passed by the learned 6th Additional Chief Judicial Magistrate Latur in SCC No. 2889 of 2016 may kindly be quashed and set aside."

3. The learned counsel appearing for the Petitioner canvassed in vehemence that Respondent/complainant instituted a criminal complaint bearing SCC NO. 2889 of 2016 on 30th September, 2016 against the present Petitioner/accused for the offence punishable under Section 138 of the Negotiable Instruments Act on ground that, Cheque bearing No. 038062 issued by the present Petitioner/accused came to be dishonoured. After service of summons, the Petitioner/accused duly appeared in the matter. The respondent/complainant filed his evidence affidavit at Exh. 13 on 13.11.2018 and undergone cross examination conducted on behalf of the Petitioner accused.

4. The learned counsel for the Petitioner submitted that the complainant has come with a story of guarantee deed/Hamipatra executed between the Respondent/complainant and Petitioner/accused on 30.07.2015, which has been seriously disputed. During cross examination, the Petitioner objected for exhibition of guarantee deed/Hamipatra as it does not bear signature of witnesses and disputed the signatures and scribe on the said documents. According to the learned counsel for the petitioner, by naked eye, if cheque in question and handwriting is compared with the so called handwriting on alleged guarantee deed/

hamipatra is of one and the same person, therefore, to show that the said guarantee deed/Hamipatra is a forged document, the only option left for the Petitioner is to send the said guarantee deed/Hamipatra to handwriting expert.

5. The learned counsel appearing for the Petitioner further canvassed that on 10.10.2018, the learned Trial Court passed the order below Exh. 29 holding that the document which has been exhibited merely establish that it has formally proved but where execution of the document is challenged, it is up to the Court to weigh the evidence laid by the parties, exhibited the document.

6. The learned counsel appearing for the Petitioner submitted that guarantee deed/hamipatra does not bear signature of witnesses and signature of the accused and the said document is in handwriting of the respondent/complainant. The learned counsel invited my attention to the cross examination of Shri Vivekanand Manmat Swami. In para 6 of the cross examination, this witness stated that the handwriting on Exh. 32 is handwriting of respondent/Complainant. The said recital of document was written in his presence. At that time, Jyotiram Zende was present. The recital hamipatra is prepared in his presence. The said witness further admitted that he was not made aware as to why

Shri Zende's signature not appearing. He denied that he was not present when recital of hamipatri Exh. 32 prepared. This witness further denied about preparation of hampiatra under the pretext of Bhisu.

7. According to the learned counsel for the Petitioner, since the petitioner accused denied his handwriting on document Exh. 32, the said document/hamipatra, disputed cheque and the counter slip of disputed cheque are required to be referred to handwriting expert for examination. However on 06.07.2024, the learned Judicial Magistrate First Class passed the impugned order holding that the disputed cheque is returned with endorsement "funds insufficient". The respondent complainant placed on record Bank return memo dated 08.08.2016. The accused intended to rebut such presumption and he required to lead evidence to this effect. Hence, rejected the application for referring the document for examination through handwriting expert.

8. Section 118 of the NI Act provides as under:

“118. Presumptions as to negotiable instruments.—Until contrary is proved, the following presumptions shall be made:

- (a)of consideration; that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;
- (b)as to date; that every negotiable instrument bearing a date was made or drawn on such date;
- (c)as to time of acceptance; that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;
- (d)as to time of transfer; that every transfer of a negotiable instrument was made before its maturity;
- (e)as to order of endorsements; that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;
- (f)as to stamp; that a lost promissory note, bill of exchange or cheque was duly stamped;
- (g)that holder is a holder in due course; that the holder of a negotiable instrument is a holder in due course: Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an SP offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him.

9. In case of **Ajitsinh Chehuji Rathod v. State of Gujarat**, (2024) 4 SCC 453, the Hon'ble Apex Court held that, it is for the accused to rebut such presumptions by leading appropriate defence evidence and the Court cannot be expected to assist the accused to collect evidence on his behalf.

10. It is submitted that after receipt of dishonoured cheque

under the Bank return memo, the petitioner accused duly served with the mandatory notice under section 138 of the Negotiable Instruments Act, however, the accused did not reply the same. The scheme of Section 138 of the Negotiable Instruments Act to issue mandatory notice calling upon the drawer of the cheque is to give sufficient opportunity to rebut or deny is liability and therefore, first time, the defence can be set out by issuing reply to the notice under section 138 of the Negotiable Instruments Act.

11. In case in hand, the petitioner accused has not replied the said notice and has not denied the liability, The record speaks that the complainant examined himself at Exh.17. The Petitioner conducted cross examination of the respondent/complainant. The complainant also cross examined CPW-3 Prabhakar Janardhan Patil, Branch Manager at Exh. 58. The complainant also examined Shri Vivekanand Manmath Swami who is witness to the guarantee deed/hamipatra Exh. 32. The statements of accused are recorded under Section 313 of the Criminal Procedure Code. After recording of the statement of the accused under Section 313 of the Cr.P.C., the present Petitioner has filed application Exh. 83 and prayed for referring the documents- cheque, counter slip, hamipatra Exh-32 to handwriting expert for examination. The

Petitioner accused did not enter into witness box and also not examined any other witnesses to disprove the contents of the hamipatra, counter slip and cheque which is subject matter of the complaint.

12. It is trite settled principles of law that the Court cannot be used as machinery to collect evidence for the parties. The impugned orders dated 06.07.2024 and 10.10.2018 passed by the learned Judicial Magistrate does not appear to be perverse, bad in law and no interference is called at the hands of this Court. Hence, the Petition is summarily dismissed.

(Y. G. KHOBRAGADE, J.)

JPChavan