



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

915 CRIMINAL WRIT PETITION NO. 1869 OF 2023

Sagar Venkatesh Diwan
Age : 56 years, Occ : Service,
R/o Tup Bazar, Opp. Satyanarayan
Printing Press, Nandurbar,
Tq. & Dist. Nandurbar

..PETITIONER

-VERSUS-

Gautam Buddha Birhade
Age : 53 years, Occ : Private Writer,
R/o Patonda, Tq. & Dist. Nandurbar.

..RESPONDENT

....
Advocate for the Petitioner : Mr. Syed G. R.
Advocate for Respondent : Mr. Tungar Hrishikesh V.

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CORAM : SANJAY A. DESHMUKH, J.
DATED : 7th MARCH, 2024.

JUDGMENT :-

1. The petitioner has challenged the order passed by the learned Judicial Magistrate, First Class, Nandurabar in S.T.C.C. No.528 of 2013 at Exhibit-60 dated 30.01.2018 and at Exhibit-113 dated 27.11.2023.

2. The respondent has filed criminal proceeding under section 138 of the Negotiable Instruments Act bearing S.T.C.C. No.528 of 2013 against this petitioner, which is pending before the learned

Judicial Magistrate, First Class, Nandurbar.

3. The grounds of objections of this petition are that the earlier application at Exhibit-60 was moved by the petitioner for sending the disputed cheque to handwriting/signature expert as he has disputed his signature over it. While rejecting the application, it was held by the trial Court that the petitioner failed to cross-examine the complainant/respondent and reply to the statutory notice was not given. It was lastly held that the accused failed to show sufficient grounds for referring disputed cheque to the handwriting expert. The trial Court lastly rejected the application by holding that the application appears to be filed at premature stage.

4. Thereafter, no cross examination order was set aside and the petitioner was allowed to cross-examine the complainant. Thereafter, the application at Exhibit-113 was moved for sending disputed cheque to the handwriting/signature expert for opinion. The learned trial Court after considering say filed by the respondent held that earlier application at Exhibit-60 was filed. It was rejected. That order was not challenged. Therefore, the application for the same relief is not maintainable and the application was rejected.

5. The learned advocate for the petitioner submitted that the reasons given by the trial Court are not legal and correct. Even the trial Court has not gone through the reasons given by predecessor in title while passing the order at Exhibit-60. The trial Court did not take

cognizance of the fact that no cross order was passed which was set aside and the complainant/respondent was cross-examined. In view of the reasons in the order at Exhibit-60, the trial Court ought to have allowed the application taking cognizance of the subsequent events.

6. The learned advocate for the petitioner is relying upon the law laid down by Bombay High Court in the case of ***Saheb Khan Noor Khan Pathan Vs. State of Maharashtra and another, in Criminal Application No.2667 of 2006, dated 10.10.2006.*** The para no.4 of the said judgment reads as under :-

“4. It appears that in the reply notice itself the present applicant had disputed that he had issued any cheque to the Respondent No.2. He denied his signature even during the evidence and in fact, he examined the Bank Manager as a defence witness to prove that the signature of the disputed cheque was not his signature. However, Bank Manager admitted that the disputed signature appears to be similar to the specimen signature. The learned Magistrate came to the conclusion that the Bank Manager is also an expert in comparison of signatures and therefore, his evidence is acceptable and it is not necessary to refer the document to the handwriting expert. Even though the Bank Manager is by training and practice experienced to compare the signatures, still he cannot be called as handwriting expert with necessary expertise. In the present matter huge amount of Rs.70,000/- is involved. The applicant appears to be small shop keeper. Taking into consideration the stake, I find that it will be in the interest of justice to allow the application and to refer the document to handwriting expert. Mr. Shinde learned counsel for Respondent No.2 relied upon ***Inderchand S/o Lakhichand Khivsar v. Gokul S/o Pitamber Patil and***

another, 2006(5) Maharashtra Law Journal 61 : (2006(6) AIR Bom R 1051) in support of his contention that the disputed document cannot be referred to handwriting expert. The said authority is not applicable to the present case. In that case there was no dispute about the signature at any stage and only at late stage to protract the litigation, the application was made to refer the document to the expert. In the present case the genuineness of the signature on the document was disputed since beginning, in fact even before filing of the complaint itself and that is why at the stage Respondent No.2 himself wanted the disputed document to be referred to handwriting expert. The matter is not very old. The complaint is filed in September 2004 only. The necessary application was moved by the applicant on 15-09-2005 i.e. within few days after the Respondent No.2 had not pressed his own application dated 18-7-2005. Therefore, it can not be said that the attempt is being made to protract the litigation.”

7. In the case of **T. Nagappa Vs. Y.R. Muralidhar** reported in **2008(6) Mh.L.J. 515**, the Hon’ble Supreme Court has laid down the law as under :-

“7. When a contention has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised under Section 118(a) or 139 of the said Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places the burden on the accused, he must be given an opportunity to discharge it.

8. The learned advocate for the petitioner lastly prayed to set aside the impugned orders and direct to the trial Court to send the

cheque for ascertaining truthfulness of signature of the petitioner over it to the handwriting expert.

9. The learned advocate for the respondent submitted that when earlier order was passed and it was not challenged, therefore, subsequent application for the same relief cannot be filed. He further submitted that notice reply was also not given and in the cross-examination also handwriting and signature is not denied. The application is, therefore, liable to be rejected. The FIR was not lodged about the alleged theft of disputed cheque of this petitioner, therefore, there is no substance in the Writ Petition and contentions raised by the petitioner in this regard. He is relying upon the authority in the case of ***L.C. Goyal Vs. Suresh Joshi*** reported in ***LAWS (SC) 1999***

3 5. Para 5 of the said judgment reads as under :-

5. The circumstances established in the present case speak for themselves and candidly point out towards the misconduct committed by the appellant. When the established circumstantial evidence is so patent that it leads to only one conclusion that the signature on Ext. C-4 was not forged; there was no need for an opinion of a hand writing expert. We are, therefore, satisfied that the established circumstantial evidence as well as the documentary evidence in the present case show that the allegations of the complainant were well substantiated and in such circumstances of the case, the Bar Council of India was justified in declining to summon a hand-writing expert for finding out the genuineness of the signature on Ext. C-4.”

10. The learned advocate for the respondent is also relying upon the

law laid down in the case of ***Sunil Bhanudas Birle Vs. Usman Noorkhan Pathan*** reported in ***LAWS (BOM) 2011 3 230***. Para 5 of the said judgment reads as under :-

“5. In my view the application moved by the respondent No.1 is nothing but an abuse of process of law and an attempt to protract the trial. It was expected that this defence should have been taken by respondent-accused at the time, the legal notice was served on him and then he could have established the said defence by way of cross examination of the complainant or by leading defence evidence. In absence of any such defence, taken in reply to the notice, now respondent No.1 cannot take this stand.”

11. The learned advocate for the respondent is relying upon the law laid down in the case of ***Mohammad Hussain Vs. Chemax Tanners Pvt. Ltd.***, reported in ***LAWS (MAD) 2015 7 205*** and more specifically in para no.7, which reads as under :-

“7. The address in the passport would have clearly indicated it. Even that basic step has not been done in this case. Therefore, the first presumption is statutory notice is duly served. When the statutory notice has been served, it is the duty cast on him to give reply putting forth his defence. The non – reply in this case which would be very fatal one.”

12. Nobody will dispute the ratio and guidelines laid down in the above cited precental law by both sides. It is well settled that the facts of each case are decisive.

13. In the case in hand, it is admitted that the earlier application

at Exhibit-60 was rejected and that order was not challenged. However, while passing an order below Exhibit-113, the learned trial Court ought to have read last few lines of para 6 of the order passed at Exhibit-60 that the petitioner failed to cross-examine the complainant, and therefore, the application was rejected. Now cross-examination is permitted and it is conducted. This is change in circumstance. Further it was held that "considering the stage of the case, I found no reason to refer the disputed cheque as the application filed by accused appears to be at the premature stage." These two reasons are not considered by the trial Court while passing order below Exhibit-113.

14. The jurisprudence of writing of judgment and order is that the relevant and justifiable reasons are mandatory and must be given. Further it is part of judicial discipline that the Court succeeding to the earlier Court has to follow and consider the order passed by the earlier Court in the same proceeding. Thus, the trial Court did not consider that earlier application was held to be filed at premature stage. The petitioner took care of filing of the application at the earliest which was rejected. It means it was not necessary for the petitioner to proceed further against the said order by filing Writ Petition against it. He can wait for proper and legal stage. Thus the impugned order is not legal and correct. It deserves to be set aside. It is necessary to direct the trial Court to decide an application at

Exhibit-113 afresh, in view of the earlier and subsequent events happened after passing of the order below Exhibit-60 and also it would be proper to direct the trial Court to proceed to pass the fresh order below Exhibit-113.

15. For the reasons discussed above and in the different fact situation, the precedential laws cited supra on behalf of respondent is not helpful to him. Therefore, it is not relied upon.

16. The Writ Petition deserves to be partly allowed in respect of impugned order passed by the trial Court below Exhibit-113 dated 27.11.2023. It is allowed. The impugned order is quashed and set aside. The trial Court is directed to decide the application at Exhibit-113 afresh by giving reasons as discussed in this judgment and more specifically by considering reasons in last para 6 of an order passed at Exhibit-60 in the said proceedings.

17. Writ Petition is disposed of accordingly.

(SANJAY A. DESHMUKH, J.)

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