



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

CRIMINAL WRIT PETITION NO. 1880 OF 2023

Dnyaneshwar s/o Suryabhan Khadke ... **Petitioner**
Age 46 years, Occu: Labour & Agri.
R/o Panegaon Tq. Newasa
Dist. Ahmednagar

VERSUS

1. Arjun s/o Rangnath Shinde
Age 54 years, Occu: Agri.
R/o Mandegavhan Tq. Newasa
Dist. Ahmednagar

2. The State of Maharashtra ... **Respondents**

Mr. K. N. Shermale, Advocate for the Petitioner,
Mr. Manoj A. Dond, Advocate for Respondent No.1
Ms. A. S. Deshmukh, APP for the Respondent No.2-State

CORAM : Y. G. KHOBRADE, J.

RESERVED ON : 21.01.2025

PRONOUNCED ON: 28.01.2025

JUDGMENT:-

1. **Rule.** Rule made returnable forthwith. Heard the matter finally at the stage of admission with the consent of both the parties.
2. By the present Petition under Articles 226 and 227 read with Section 482 of Code of Criminal Procedure, 1973 (for brevity hereinafter to be referred as Cr.PC.), the Petitioner takes exception to the order dated 28.11.2023 passed by the learned Sessions Judge, Ahmednagar in Cri.

Misc. Application No. 214 of 2023, thereby rejected the prayer of the present petitioner/original accused for transfer of complaint bearing SCC No. 571 of 2019 from the file of learned 2nd Joint Civil Judge Junior Division & Judicial Magistrate First Class, Newasa, and directed the Petitioner to pay the cost of Rs. 2,000/- to the present respondent/original complainant.

3. Having regard to the submissions canvassed on behalf of both the sides, I have gone through the Petition Paper Book. It is not in dispute that the complainant instituted a complaint bearing Summary Criminal Case No. 571 of 2019 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "*NI Act*") and it is pending on the file of learned Judicial Magistrate First Class, Newasa.

4. The present petitioner is the original accused and the present respondent No. 1 is the complainant in Complaint bearing SCC No. 571 of 2019. (For the sake of brevity, parties to the present petition hereinafter be referred in their original capacity as "*complainant*" and "*accused*").

5. On compliance of mandatory provisions of Section 202 Cr.PC., on 14.02.2020, the learned trial Court passed the order and issued process against the accused for the offence punishable under section 138 of the NI Act. The Respondent-1/ complainant filed evidence affidavit on

15.03.2022 and further examination in chief was recorded and documents are exhibited. On 17.03.2023, the learned Judicial Magistrate First Class passed the order of “No Cross Examination”. Thereafter, the matter was fixed on 27.04.2023 for further consideration. On 27.04.2023, the accused was absent, however, his counsel filed an Application under Section 45 of the Evidence Act, 1872 and prayed for referring the cheque in question to the handwriting expert because there is alteration in the cheque amount. Thereafter, the learned JMFC adjourned the trial on 21.07.2023, but the accused remained absent.

Thereafter, the complainant filed Exh. 51, an application for issuance of non bailable warrant against the accused. Accordingly, on 21.07.2023, the learned JMFC issued the non-bailable warrant against the accused. Therefore, the Petitioner filed Cri. Writ Petition No. 1455 of 2023 for setting aside the order of issuance of non bailable warrant passed below Exh.51. On 19.10.2023, this Court passed an order in said Petition and directed the trial Court not to take the petitioner in custody in connection with the crime in question for the period of one month and the Petitioner was directed to appear before the learned Magistrate on the next date of hearing i.e. on 08.11.2023. So also, the trial court was directed to conduct the trial of complainant bearing SCC No. 571 of 2019 as expeditiously as possible.

4. On 08.11.2023, the petitioner approached before the JMFC and filed Exh.53 an application for cancellation of NBW, which came to be allowed.

6. The learned counsel appearing for the present petitioner/accused canvassed that, the Petitioner instituted Criminal M.A. No. 214 of 2023, before the learned Sessions Judge, Ahmednagar, and prayed for the transfer of complaint bearing SCC No. 571 of 2019 (*Arjun Rangnath Shinde Vs. Dnyaneshwar Suryabhan Khadke*) from the Court of 2nd Joint Civil Judge Junior Division & Judicial Magistrate First Class, Newasa, to any other Court. However, on 28.11.2023, the learned Sessions Judge passed the impugned order, declining the petitioner's request for the transfer of the proceeding and imposed cost of Rs.2000/- upon him.

7. The learned counsel appearing for the petitioner/accused canvassed that, the impugned order passed by the learned Sessions Court is in violation of principles of equity, good conscience and natural justice. Further, impugned order lacks application of judicious mind because, as per Roznama, the accused filed Exh. 47, an Application for referring the disputed cheque to a handwriting expert under section 45 of the Evidence Act. However, the learned trial court without deciding said application posted the matter for recording statement of the petitioner/accused under section 313 Cr.PC. Therefore, the petitioner apprehended about not

receiving substantial justice and fair trial. However, the learned Sessions Court failed to consider the provisions of law and facts before passing the impugned order dated 28.11.2023, hence, it is illegal and bad in law.

8. Per contra, learned counsel appearing for respondent No.1/complainant submits that, the accused is attempting to delay the matter on ground or another. The petitioner/accused remained absent on numerous occasions. Therefore, the learned trial court repeatedly issued warrants to secure his presence. Not only this, but the complainant filed evidence affidavit and deposed further to prove the documents. The learned trial Court granted ample opportunities to the petitioner to cross examine the complainant but for considerable period, the petitioner failed to cross examine the complainant. Therefore, the respondent was compelled to file the application for issuance of non bailable warrant against the petitioner. Ultimately, the learned trial Court passed the order and issued non bailable warrant against the petitioner/accused, which has been subsequently recalled. Further, matter was placed before the Lok Adalat to explore the possibility of settlement, but no settlement was arrived at.

9. On face of record, it appears that, on 17.03.2023, the counsel of the petitioner/accused prayed for grant of personal exemption of the petitioner/accused and adjournment. Accordingly, the exemption was

granted, but the adjournment was rejected. The complainant entered into witness box and led further evidence. Further, on 27.04.2023, the petitioner/accused was remained absent and his counsel obtained exemption for his personal appearance. Thereafter, the petitioner filed Exh. 47 application for referring the cheque in question to the Handwriting Expert for obtaining opinion under Section 45 of the Evidence Act. On 21.07.2023, the accused was again absent, therefore, warrant was issued against him but it was subsequently cancelled. The respondent/complainant undergone cross examination conducted on behalf of the petition/accused. The Respondent filed Pursis and closed his evidence. Thereafter, matter was posted for recording of statement of the accused under section 313 of Cr.PC.

10. Needless to say that, neither the Petitioner/Accused has entered into witness box nor he examined any other witnesses. As per the procedure contemplated under Code of Cri. P. C., the Accused having right to lead defence evidence and can examine any other witness to prove his defence after statement of the Accused is recorded u/s 313 of Cri. P. C. However, the Petitioner/accused filed application Exh. 47 seeking expert's opinion on the figure "0" (Zero) written on the cheque on ground that one "0" (zero) is smaller than others, without leading defence evidence. Further, the petitioner/accused has not given reply to the mandatory

notice u/s 138 of NI Act, which was served upon him and no such defence taken at any time before. However, the petitioner first time taking such defence. It is well settled principles of law that, the Court machinery cannot be used for collecting evidence for the parties, however, by the filing Exh. 47, the petitioner sought to collect expert's evidence by using Court machinery, which is not permissible. Therefore, the submission canvassed on behalf of the petitioner/accused not acceptable to my judicial conscience.

11. During cross-examination, suggestion was given to the respondent/complainant that one of the zeros on the cheque appeared smaller than the other. Except this, nothing is brought on record to show that the respondent/ complainant overwritten the word or added word. Therefore, the contention of the petitioner/complainant that Exh. 47 application filed by him was not decided by the learned trial court and directly proceeded to record statement of the accused under Section 313 Cr. P. C., does not appear justifiable. Since the petitioner/accused raised an objection about figure "0" (zero) appearing on the cheque, hence, the burden lies on the petitioner/accused to prove his defence with cogent evidence after recording statement under section 313 of the Cr.P.C. of the petitioner/accused.

12. In the case in hand, the petitioner filed Criminal M.A. No. 214 of

2013 under section 408 of CrPC. and prayed for transfer of trial of complaint bearing SCC No. 571 of 2019 from the file of learned 2nd Joint Civil Judge Junior Division & Judicial Magistrate First Class, Newasa to any other Court on ground that, non bailable warrant was issued against him and he was threatened that, if he gives trouble to the Presiding Officer, he would be detained in Jail.

13. On 28.11.2023, the learned Sessions Court, Ahmednagar passed the impugned order and observed in paragraph Nos. 10 and 11 of the impugned judgment as under:

“10] The contention in the transfer application that he remained absent on only one date and therefore, the NBW was issued by the learned Magistrate and thereafter the complainant abruptly gave affidavit of examination-in-chief and on the same day adduced all documents in evidence and the case was immediately posted for statement of accused under Section 313 of Code of Criminal Procedure, is contrary to the record as stated hereinbefore. At the cost of repetition, it is to be stated that the affidavit of examination-in-chief was filed on 15.03.2022. On the next date on 29.04.2022 warrant was issued as the accused was absent and he did not pay the amount of 20% of the cheque as ordered by the Court. It was adjourned to 16.06.2022. Meanwhile, the accused through his present learned advocate appeared on 17.05.2022, got the case taken on board and got the warrant cancelled. Instead of taking such recourse on the next occasion, the accused directly filed writ petition. In view of the cancellation of warrant on 17.05.2022, there is no merit in the submission of the learned defence advocate that the learned Magistrate was not likely to cancel the warrant

and therefore, the accused had to file the writ petition.

11] After getting the warrant cancelled on 17.05.2022, the accused took adjournment on the next date. On the further next date his adjournment application was granted as last chance. on 5th date of the adjournment subsequent to that, the further adjournment was rejected on 17.03.2023 and the documents produced by the complainant were taken in evidence. The matter was adjourned for cross examination. On the next date, the accused moved application at Exh.47 for calling opinion of the Handwriting Expert. The contention of the learned advocate Shri Shaikh for the accused that the stage for examination of accused under Section 313 of Code of Criminal Procedure has not reached, is incorrect.”

14. With the above observation, the learned Session Court held that, the allegations made by the respondent/accused are not substantial, hence, rejected the application for transfer of the proceeding, which does not appear to be perverse, illegal and bad in law. Therefore, the Criminal Writ Petition deserves to be dismissed. Accordingly, it is dismissed. Rule discharged.

15. Resultantly, earlier interim order passed on 21.12.2023 and 05.01.2024 shall stand vacated.

(Y. G. KHOBRAGADE, J.)

JPChavan