IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition No.1825 of 2025

Pramod Kakaso Khalate … Petitioner.
V/s.
Manganga Co-op. Sugar Factory Ltd. & anr.… Respondents.

Mr. Pawan Mali a/w. Mr. Prashant Hagave	Advocate for the Petitioner.
Mr. Gaurav Kalekar h/f. Mr. Shardul Diwan i/b. Pushpanjali Kalebag	Advocate for Respondent No.1.
Mr. H.J. Dedhia	APP for the State.

LATA SUNIL PANJWANI
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Date: 2025.08.02 16:49:00 +0530

CORAM : S.M. MODAK, J

DATE : 23rd July 2025.

P.C. :

Heard learned Advocate Mali for the Petitioner/Accused and learned Advocate for Respondent No.1/original Complainant.

2. The only issue arising in this petition is "*whether the learned Judicial Magistrate, Atpadi was right in marking the documents as an exhibit by observing that it is only the ministerial work which has to be done by the concerned Clerk.*" This was done by the Court of

JMFC, Atpadi in a prosecution for an offence punishable under Section 138 of Negotiable Instrument Act. Learned trial Judge marked the Complainant's documents as exhibits by passing an order on 21st December 2024. This was done on Complainant's application. According to Mr. Mali this is erroneous interpretation of the provisions of Evidence Act and **learned Judge has failed to consider two aspects:-**

(i) The learned Judge has not satisfied himself whether there are sufficient averments in the affidavit and on the basis of which it can be said that those documents can be marked as an exhibit.

(ii) Initially when the affidavit of evidence was filed on 20th January 2018, at that time, the Complainant's representative Mr. Burade has not entered in to witness box and without the same the learned Judge has marked those documents as an exhibit.

3. He heavily places reliance on observations in ***Geeta Marine Services v/s. State and anr.***[1] and more specifically Para Nos.13 and 17. As against this, the learned Advocate for Respondents relies

1 2009(2) Mh.L.J.

upon the observations in case of ***Indian Bank Association and ors. v/s. Union of India and ors.***[2] and more specifically the observations in Para No.16. The Hon'ble Supreme Court observed once the affidavit was filed along with the complaint, there is no need again to file an affidavit. This affidavit can be considered as an affidavit given by way of evidence and such Complainant can be called for examination only under Section 145(2) of the Negotiable Instrument Act.

4. **Mr. Mali raised the following contentions and invited my attention to the following documents:**

(i) The affidavit dated 20th January 2018 of one Mr. Borade who is a representative of the Complainant. **It is true on this affidavit further examination-in-chief is not recorded.** It is also true at that time the **documents were not marked as exhibits.** The Petitioner has not cross-examined the witness and the cross was closed on 13th July 2019. It was closed on account of absence of the Petitioner.

(ii) The application filed by the accused for <u>setting aside '*closing of evidence* *pursis*'</u> and re-calling the witness for

2 Writ Petition (CIVIL) No.18 of 2013 SC dt. 21.4.14

examination.

(iii) The reply filed on behalf of the Petitioner Mr. Mali emphasized on objection taken in the reply "*if the application is allowed, it will amount to filling up the lacunas and it will cause prejudice*."

(iv) **The order dated 21st December 2024 passed by the learned Magistrate. The order is as follows**:

(a) The learned Magistrate rejected the request for fresh examination.

(b) However, the documents were marked as Exhibit.

(v) Evidence close pursis given on behalf of the Petitioner on 18th December 2019. Its copy is tendered and taken on record.

5. If we consider the events that took place before the trial Court, what gathers is **at a particular stage**, the Complainant has adopted a particular approach and the accused also behaved in a particular way (not cross-examined the Complainant witness). **At a subsequent stage**, the accused has decided to close the evidence by quoting a reason that Complainant has not proved their case. It is undisputed

fact that the trial Court has recorded statement of the Petitioner under Section 313 of Cr.P.C. **After the above events**, Complainant has woke up and filed the present application for recalling and the impugned order came to be passed. It is true that the Petitioner-accused was required to give an application for setting aside 'no cross order' against him and it is also allowed. According to Mr. Mali, his client was compelled to file an application because there is no stay granted by this Court.

6. It is true that filing of an affidavit of examination-in-chief by the Complainant is incorporated by way of amendment in the N.I. Act. In a criminal trial there are very few instances wherein evidence can be given by way of an affidavit. It is also true merely filing an affidavit is not sufficient. If the Complainant wants to rely upon certain documents, they need to be proved as per the ordinary law of evidence. **For proving the document there are two parameters:-**

(i) Whether there is an averment in the affidavit.

(ii) Whether the document produced is an original or photocopy.

7. This Court in the case of ***Geeta Marine*** (supra) has decided the

issue about marking the documents as exhibit. The relevant discussion finds place in Para No.13. **In Para No.15**, the two issues are discussed. One is about proof of document and second is about its admissibility. The observations by the Hon'ble Supreme Court are also referred in Para No.17. **Mr. Mali is right in his submission that there are two kinds of objections about documents**:-

(i) One is about the mode of proof. According to him, this has to be taken at that stage only and not at a subsequent stage.

(ii) Objection as to admissibility. If it is not taken immediately, it can be taken subsequently because the document which is inadmissible, does not become admissible just because the other party has not raised an objection.

8. According to Mr. Mali, due to the conduct of the Complainant (not showing diligence for proving the document when the affidavit was filed in the year 2018) persuaded the Petitioner to take a particular stand. That is to say closing of evidence (but closing cross-examination was due to his absence). According to him when his statement is recorded under Section 313 of Cr.P.C., he has answered to questions and that is how he has opened up his defence and in

such an eventuality if documents are marked as Exhibit, **it will cause serious prejudice to his client.** The observations in case of ***Indian Bank Association*** will not be helpful to the Complainant for the simple reason when the affidavit was filed in the year 2018, they were not diligent in marking the document as an exhibit.

9. If the provisions of **Section 311** of Cr.P.C. are perused, we may find that in two contingencies the Court can recall witness. The **first** part is a discretionary whereas the **second** part is mandatory. It can be resorted when Court finds that the evidence appears to be essential to the just decision of the case. In this case the learned trial Judge has even though marked documents as an exhibit, has refused to recall the Complainant for examination.

10. **To certain extent Mr. Mali is right.** That is to say unless and until the Complainant's witness will enter into witness box, it was not proper for the trial Court to mark them as an exhibit because the marking of an exhibit even if it is done by clerical staff, it has to be preceded by some judicial order. It can be by recording in the evidence or by way of passing separate judicial order. That is how the learned trial Court Judge ought to have asked the Complainant

to enter into witness box. However, when I have read the order, I find learned trial Court Judge is cautious about requirements of law. That is why the learned Judge opined in Para No.6 of the impugned order "*the deponent has specifically inserted all the required material elements to prove the document as per the Rules in affidavit in Para No.7 to 23".* It means the learned judge was satisfied about requirement of proof of the documents. Only fault which is committed by the learned Judge was not putting the Complainant into witness box and then marking the document as an exhibit. The learned judge has also opined that accused has not taken an objection to exhibit the document by remaining present. According to Mr. Mali, as the entering into witness box and marking the document as exhibit was not done simultaneously, there is no question of objecting to the said act.

11. In fact I am not much impressed by these arguments. The matter is pending for the trial and an endevour should be made to give opportunity to both the parties to put forth their case about merits and compliance of the procedure. In that eventuality, I am permitting the Petitioner to take an objection about the proof of

those documents. At the same time, I am permitting the Complainant's witness to enter into witness box. I feel that recalling was in fact necessary to prove the documents. When during trial both the parties are at fault (though not simultaneously but at different stages) and when one party is coming forward to correct the mistake, Court should allow them to rectify if it is necessary for just decision of the case. If it is so, recalling has to be done. I am taking this view also by considering the subsequent development of granting permission to the accused to cross examine the complainant's witness. I am not agreeable to the grievance of the prejudice because I am permitting the accused to raise objection about proof of documents.

12. In view of that following order is passed:-

ORDER

(i) The Court of JMFC, Atpadi to record further examination in chief of the Complainant's witness on oath about the contents of the affidavit.

(ii) The accused-Petitioner is permitted to take objection about the proof of documents and trial Court to decide the same as per the Rules.

(iii) The accused is already permitted to cross-examine the Complainant's witness. Let he cross-examine the Complainant's witness.

13. With aforesaid observations, Writ Petition stands disposed of.

14. It is made clear that this Court has made only those observations which are necessary for deciding the issue of recalling and exhibiting documents. Rest of the issues to be decided by the trial Court.

(S.M. MODAK, J.)