
(2013) 10 BOM CK 0241

In the Bombay High Court

Case No : Criminal Writ Petition No. 736 of 2013

Gangadhar Deoram Kadam

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 19-10-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 206

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : R.F. Totla, for the Appellant; P.N. Muley, APP for State and Mr. Rahul Awasarmal, for the Respondent

Final Decision : Allowed

Judgement

Abhay M. Thipsay, J.—Heard Mr. Totla, the learned counsel for the petitioner. Heard Mr. Muley, the learned APP for respondent No. 1. Heard Mr. Awasarmal, the learned counsel for the respondent No. 2. The petitioner is the accused in STC No. 1450/2012, pending before the Judicial Magistrate First Class, Aurangabad. The said case is in respect of an offence punishable u/s. 138 of the Negotiable Instruments Act, and arises on a complaint made by the respondent No. 2, herein. (For the sake of convenience and clarity, the respondent No. 2 shall hereinafter be referred to as "the complainant" and the "petitioner" as "the accused".)

2. The trial is in progress. The evidence of the complainant has been adduced. When the matter was kept for examination of the accused u/s. 313 of the Code of Criminal Procedure, the accused made an application (Exh. 37), contending that, "the contents of the cheque and signature were different" and that, the cheque was a fabricated document. The accused contended that, the signature on the cheque was not his, and that, due to paralysis, the accused was not in a position to write or to sign. Contending so, the accused prayed that the cheque in question be sent to a handwriting expert for examination and opinion about the handwriting and signature thereon. The accused also suggested that the

specimen writings of the complainant and that of the son of the complainant be also taken for the examination, by the expert. The accused offered to pay the expenses of the hand writing expert. This application was opposed by the complainant, saying, primarily, that the signature on the vakalatnama and on the cheque was prima facie of one and the same person and that, the Bank had returned the cheque with the remark "insufficient funds". The complainant prayed for dismissal of the said application.

3. The learned Magistrate, after hearing the parties, took the view that the application was devoid of any merit and rejected the same. The complainant approached the Court of Sessions, challenging the said order passed by the Magistrate, by filing an application for revision, but the revision application came to be dismissed.

4. It is, under these circumstances, that the accused has approached this court by filing the present petition, invoking the Constitutional jurisdiction of this Court.

5. Since the case is in respect of an offence punishable u/s. 138 of the Negotiable Instruments Act, that the cheque has been issued by the accused is a matter which needs to be established during the trial. The accused has taken a specific stand viz:--the signature and handwriting on the cheque is not his and has offered to produce the evidence in support of his such stand. The question, therefore, is Whether the learned Magistrate was justified in not giving an opportunity to the accused to establish what he claims.

6. In my opinion, the answer has to be in the negative.

7. The ground on which the Magistrate refused to send the cheque to handwriting expert for examination and opinion is basically that the claim of the accused appeared to the Magistrate, to be false. This is evident from the order passed by the Magistrate. It appears that the accused, in order to support his claim "that the signature on the cheque was not his", had made a further claim that "he was suffering from paralysis and therefore, was unable to write and sign". That. he was suffering from paralysis and was unable to write and sign was not the main claim of the accused, but it was a claim put forth in support of his claim that the cheque in question did not bear his signature. The Magistrate disbelieved the claim of inability of the accused to write and sign. This was not proper. In order to strengthen a particular contention, a party may put forth a further contention which may not be entirely true, but it is the real contention that needs to be taken into consideration in such cases - which in this case was that the signature on the cheque was not of the accused.

8. What the Magistrate has done is that, he disbelieved the claim of the accused that he is unable to write and sign and based on this disbelief, automatically disbelieved the claim that the signature on the cheque was not his. What the Magistrate overlooked is that, the accused had offered to provide evidence in support of his claim that the signature on the cheque is not his, and the accused could not be prevented from proving a fact in his defence.

9. The defence evidence can be prevented from being given, only if the Court comes to the conclusion that the prayer to adduce the defence evidence is made for the purpose of vexation, delay, or for defeating the ends of justice. Here, no such conclusion has been arrived at by the learned Magistrate.

10. The evidence sought to be offered by the accused was on such a vital point that the fair trial principles required an opportunity to be given to the accused to adduce such evidence. Moreover, in a case, where the statutory presumption runs against an accused, he should be given full opportunity to defend himself.

11. In the revision also, the learned Sessions Judge did not appreciate the contentions of the accused, properly. The substance of the reasoning of the Magistrate as well as the learned Additional Sessions Judge is that, the claim of the accused that the cheque does not bear his signature, is false. It was improper to arrive at such a conclusion when the accused was ready to lead evidence indicating that the cheque was not signed by him. It was absolutely necessary to give the accused an opportunity to have evidence in the nature of opinion of hand writing expert with respect to the signature on the cheque, and then to decide whether or not the cheque was bearing the signature of the accused or not.

12. The order passed by the learned Magistrate and confirmed by the learned Additional Sessions Judge by dismissing the revision, is not proper and legal. Refusing to allow the application would vitiate the trial proceedings.

13. The impugned orders, therefore, need to be set aside.

The petition is allowed.

The impugned orders are set aside.

14. The learned Magistrate shall allow the application (Exh. 37) in terms of the prayer clause 2] thereto.

The Magistrate may, if the complainant and/or his son is/or are willing, obtain their specimen writings and send the same to the Hand Writing Expert for examination in the light of the contentions of the accused. It is made clear that, should the complainant and/or his son be not ready for giving such specimen handwritings the Magistrate shall not insist upon the same, and forward the cheque to the Hand Writing Expert, with the specimen writings/signatures of the accused.

15. The learned Magistrate shall give proper directions to the Expert to ensure that the Report of Hand Writing Examination and Analysis is received by the Magistrate, within a period of TWO MONTHS, from the date on which it is sent.

16. The learned Magistrate shall expedite the trial of the case, and endeavor to dispose it of, within a period of TWO MONTHS from the date of receipt of such report by him.

17. If the accused has not yet been examined u/s 313 of the Code, the Magistrate may do so, and need not wait till the cheque is sent to the Hand Writing Expert and/or, till the report of the Handwriting Expert is received. The petition is allowed in the aforesaid terms. Rule is made absolute accordingly.