

(2010) 06 MAD CK 0009

In the Madras High Court

Case No : Criminal Revision Case No"s. 744 to 747 of 2003 and Criminal M.P. No"s. 4543 to 4546 of 2003

Sivanandha Steel Ltd., R.P. Krishnamurthi, Executive Director
and P. Venkatesan, Managing Director both of Sivanandha
Steels Ltd.

APPELLANT

Vs

Upasana Finance Ltd.

RESPONDENT

Date of Decision : 10-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 243, 243(2), 313
Evidence Act, 1872 — Section 45, 73
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2010) 1 LW(Cri) 1165 : (2011) 1 RCR(Criminal) 86

Hon'ble Judges : K.N. Basha, J

Bench : Single Bench

Advocate : C.S. Dhanasekaran, for the Appellant; S. Venkatesan, for the Respondent

Final Decision : Allowed

Judgement

K.N. Basha, J.—In view of the fact that the complainant as well as the accused, viz., the Petitioners are one and the same in all these cases

and the question involved in these matters coupled with the impugned orders are also based on one and the same reason, this Court heard all these

matters together and disposed of by means of this common order.

2. The revision Petitioners, who have been arrayed as A1 to A3, have come forward with these revision petitions challenging the orders passed by

the learned XXIII Metropolitan Magistrate, Saidapet, Chennai, dismissing the petitions filed u/s 243(2) Code of Criminal Procedure read with

Section 45 of the Indian Evidence Act seeking for the relief of sending the original cheques as well as the defence document, Ex.D.3, and the

signature of the second accused contained in the statement recorded u/s 313 Code of Criminal Procedure and the acknowledgment card marked

as Ex.P.8, for getting expert opinion as the second accused disputing his signature in the original cheques.

3. Mr. C.S. Dhanasekaran, learned Counsel for the Petitioners, would submit that the Petitioners are facing trial for the alleged offence u/s 138 of

the Negotiable Instruments Act. It is submitted that the trial had already commenced and the examination of witnesses are over. It is submitted that

the Petitioners have examined the defence witnesses on 23.04.2003 and at that time, the present petitions were filed for seeking the relief of

sending the original cheques for expert opinion by comparing the signature of A2 contained in the original cheques along with defence document,

Ex.D.3, and the signature of the second accused contained in the statement recorded u/s 313 Code of Criminal Procedure and the

acknowledgment card marked as Ex.P.8.

4. It is contended that without assigning any valid reasons, the learned Magistrate dismissed the petitions only on the ground that the examination of

witnesses including the defence witnesses was over and the case was at the stage of arguments and delivering judgment. It is contended that the

learned Magistrate erred in holding that the Court itself can compare the signature of the accused as per Section 73 of the Indian Evidence Act.

The learned Counsel for the Petitioners would submit that even in the cross-examination of P.W.1, questions were put to P.W.1 to the effect of

denying the signature of A2 contained in the cheque. It is contended that the Petitioners filed the petitions to send the cheques for expert opinion at

the right stage, i.e., after questioning u/s 313 Code of Criminal Procedure as it is the burden of the accused to rebut the presumption contemplated

u/s 139 of the Negotiable Instruments Act. It is contended that the passport of A2 containing his signature was also shown to P.W.1 and P.W.1

has also admitted the signature of A2 in the passport. It is contended that a suggestion was also put to P.W.1 that the signature found in the

cheques differs from the signature found in the passport. Therefore, it is submitted no prejudice would be caused to the complainant in the event of

sending the cheques for expert opinion and the learned Magistrate could have given reasonable opportunity for the Petitioners to rebut the

presumption contemplated u/s 139 of the Negotiable Instruments Act. Therefore, it is submitted that the impugned orders are liable to be set aside.

5. Per contra, learned Counsel for the Respondent would submit that there is no illegality in the impugned orders passed by the learned Magistrate.

It is contended that the learned Magistrate has assigned the reasons to the effect that the petitions to send the cheques for expert opinion were filed

only at the stage of defence arguments and the signatures found in the cheques as well as other documents relied on by the defence could be

compared by the court itself. Therefore, it is contended that the learned Magistrate has assigned valid reasons and the Petitioners have not made

out any ground warranting the interference of this Court in the impugned orders.

6. I have given my careful consideration to the rival contentions put forward by either side and also perused the impugned orders and other

materials available on record.

7. It is seen that in these cases the examination of complainant's witnesses is over including the cross-examination and the cases are at the defence

stage for arguments. It is pertinent to note that from the perusal of the evidence of P.W.1, the defence has put a suggestion denying and disputing

the signature of A2 alleged to have been contained in the cheques and P.W.1 has admitted the signature of A2 in the passport. Therefore, the

Petitioners rightly filed the petitions at this stage seeking the relief of sending the original cheques for comparison of the signatures of A2 found in

other documents including his signature contained in the statement recorded u/s 313 Code of Criminal Procedure and the passport.

8. A perusal of the impugned orders reveals that the learned Magistrate dismissed the petitions mainly stating that the petitions were filed at the

defence stage and at the time of arguments and the signatures can be compared by the Court itself. This Court is of the view that it is not safe to

compare the signatures of the accused by the Court itself as the Court cannot play the role of an expert.

9. The Hon'ble Apex Court in State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh

alias Sukha and others, , has held as hereunder:

Court should be slow to compare disputed document with admitted document for comparison although Section 73 empowers the Court to

compare disputed writings with the specimen/admitted documents shown to be genuine. Prudence demands that Court should be extremely slow in

venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard.

10. The Hon''ble Apex Court in *Ajit Savant Majagavi Vs. State of Karnataka*, has held that,

Therefore, despite no legal bar to Judge using his eyes, the Judge should hesitate to base his findings with regard to identity of handwriting solely on

comparison made by himself.

11. Therefore, in view of the settled principle of law laid down by the Hon''ble Apex Court in the decisions cited supra, it is not safe and desirable

for the Court to compare the signature of the accused with the admitted signature on its own and to base its findings and as such, the reason

assigned by the learned Magistrate in dismissing the petitions is unacceptable and unreasonable.

12. Now coming to the next reason assigned by the learned Magistrate to the effect that the Petitioners filed the petitions to send the cheques for

expert opinion at a belated stage, it is to be stated that now the case is pending at the defence stage after questioning the accused u/s 313 Code of

Criminal Procedure It is pertinent to note that the second accused has specifically denied his signature in the cheques. The fact remains even during

the course of cross-examination of P.W.1, question was put by the defence disputing the signature contained in the cheques and P.W.1 admitted in

his cross-examination that A-2's signature contained in his passport. The Petitioners rightly sought for the relief of sending the cheques for expert

opinion for comparing the signature of A-2 contained in the cheque along with the defence document, Ex.D.3, statement recorded u/s 313 Code of

Criminal Procedure, passport and in the acknowledgment card. It is to be borne in mind by this Court that as per Section 139 of the Negotiable

Instruments Act, it is the burden of the accused to rebut the presumption as Section 139 of the Negotiable Instruments Act provides that once the

cheque contains the signature of a particular accused, it has to be presumed to have been issued towards the legally enforceable liability. Such

presumption has necessarily to be rebutted by the accused either by eliciting

cross-examination or by placing reliance on other materials or by preponderance of probabilities. The accused having put the relevant questions during the course of cross-examination and admittedly the case is at the defence stage, the revision Petitioners/ accused have rightly preferred the petitions for sending the disputed cheques for the expert opinion in respect of signatures contained in the said cheques and it cannot be stated that the said petitions have been preferred by the Petitioners at a belated stage.

13. At this juncture, it is relevant to refer to the principle laid down by the Hon"ble Apex Court in Mrs. Kalyani Baskar Vs. Mrs. M.S.

Sampornam, , wherein the Hon"ble Apex Court has held as follows:

Section 243(2) is clear that a Magistrate holding an inquiry under the Code of Criminal Procedure in respect of an offence triable by him does not

exceed his powers u/s 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a hand-writing

expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature of writing with the admitted

writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The Appellant is entitled to rebut the case of

the Respondent and if the document viz. The cheque on which the Respondent has relied upon for initiating criminal proceedings against the

Appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion

of the hand-writing expert has deprived the Appellant of an opportunity of rebutting it. The Appellant cannot be convicted without an opportunity

being given to her to present her evidence and it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by

law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is

essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no

breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the Petitioner has filed application u/s

243 Code of Criminal Procedure without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert

for examination. As noticed above, Section 243(2) Code of Criminal Procedure refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The Appellant in this case requests for sending the cheque, in question, for the opinion of the hand-writing expert after the Respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the Appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable.

14. The above said decision was further relied on by the Hon"ble Apex Court in a later decision in T. Nagappa Vs. Y.R. Muralidhar, .

15. The principle laid down by the Hon"ble Apex Court in the decisions cited supra is squarely applicable to the facts of the instant cases as in

these cases also the Petitioners rightly filed the petitions to send the cheques for expert opinion to compare the signatures of A2 after closing of the

prosecution evidence and after examining the witnesses for defence as per the provision u/s 243(2) Code of Criminal Procedure Therefore, there is

absolutely no illegality in preferring such applications at that stage, viz., at the defence stage.

16. In view of the aforesaid reasons, this Court is constrained to set aside orders dated 24.04.2003 passed by the learned XXIII Metropolitan

Magistrate, Saidapet, Chennai, in CrI. M.P. Nos. 1571, 1568, 1570 & 1569/2003 in C.C. Nos. 6894/1998, 2725, 2730 & 2727/1999. These

petitions are allowed. Consequently, connected miscellaneous petitions are closed.

17. The learned Magistrate is hereby directed to send the disputed cheques along with the above said documents as per the petitions preferred by

the Petitioners within a period of two weeks from the date of receipt of a copy of this order, for getting expert opinion. It is made clear that the

Petitioners shall give their co-operation for speedy disposal of the trial.