(Girja Shankar Goswami vs. Keshavdas Shilpkar)

18.08.2017

Shri J.P. Mishra with Shri Manoj Kumar Dwivedi, Counsel for the applicant.

Shri D.K. Pathak, Counsel for the respondent.

Heard finally.

This application under Section 482 of Cr.P.C. has been filed against the order dated 17-4-2017 passed by J.M.F.C., Gwalior in Criminal Case No. 357/2016 by which the application filed by the respondent under Section 45 of Evidence has been allowed as well as the prayer made by the respondent to summon the bank employee with record has been allowed.

The necessary facts for the disposal of the present application in short are that the applicant/complainant has filed a criminal complaint under Section 138 of Negotiable Instruments Act, 1881 (In Short NIA,1881) on the allegation that the respondent was in need of money for the marriage of his daughter, therefore on 4-6-2014, he had taken an amount of Rs. 1,05,000 from the applicant. In the month of September 2015, when the applicant demanded his money back, the respondent gave a cheque on 28-9-2015. The relevant allegation made in the complaint is as under :

> ''यह कि परिवादी द्वारा माह सितम्बर 2015 मे जब आरोपी से उक्त राशि की मांग की तो आरोपी के द्वारा दिनांक 28.9.2015 को चैक क्रमांक 952843 पंजाब नेशनल बैंक शाखा भगवापुरा, दतिया, का खाता क्रमांक 1279000100078855 दिनांक 28.9. 2015 का **अपने हाथ से भरकर** अपने हस्ताक्षर कर अदायगी का पूर्ण आश्वासन देते हुये परिवादी को परिवादी के निवास स्थान शिव कालोनी गली नम्बर 5 गुढा लश्कर ग्वालियर मे प्रदाय किया गया था।''

It appears that although the respondent admitted his signatures on the cheque, but denied that the other

entries are in his handwriting. The contention of the respondent was that the cheuqe in question was stolen and accordingly he had lodged a police complaint and had also given an information to the concerning bank.

The respondent filed an application under Section 45 of Evidence Act, for sending the cheque to a handwriting expert to find out that whether the entries in the cheque in question are in the handwriting of the respondent/accused or not?

The application was opposed by the applicant, however, the Trial Court by order dated 17-4-2017, allowed the application. By the same order, the employee of the bank was also allowed to be summoned along with the bank record to show that the respondent had informed the bank about the theft of the cheque.

Challenging the order of the Trial Court, it is submitted by the Counsel for the applicant, that when the drawer of the cheque had not denied his signatures on the cheque in question, then there is no reason to send the cheque to the handwriting expert, to verify the other entries on the cheque. To buttress his contention, the Counsel for the applicant has relied upon the orders passed in the case of **Sunita Dubey Vs. Hukum Singh Ahirwar** passed in **Cr.R. No. 56&59/2014, Ramdas Vs. Sher Ahmad** passed in **M.Cr.C. No. 738/2017, A.R. Banerjee Vs. State and another** passed in **Crl.M.C. 3742/2013 (Delhi H.C.).**

Per contra, it is submitted by the Counsel for the respondent that it is the fundamental right of the respondent/accused to take every possible defence. The

defence of the respondent/accused is that his signed blank cheque was stolen and police complaint was made as well as an information was also given to the bank and in view of the specific averment made by the applicant in the notice sent under Section 138 of NIA, 1881 as well as in the complaint filed by him, that the other entries on the cheque are also in the handwriting of the respondent, therefore, it is necessary for the respondent, to get the cheque in question checked from a handwriting expert to verify that whether entries are in his handwriting or not?

Heard, the learned Counsel for the parties.

The submission of the Counsel for the applicant is that since, the respondent/accused has not denied his signatures on the cheque in question, therefore, there is no need to send the cheque in question to the handwriting expert for verifying the other entries on the cheuqe.

This Court in the case of **Ramdas (Supra)** has held as under :

> "In the present case, it is not disputed that the applicant had signed the cheque in question. Section 20 of the NI Act makes it clear that the instrument may be wholly blank or incomplete in any particular and in either case, the holder has the authority to make or complete the instrument as a negotiable one. The authority implied by a signature to a blank instrument is so wide that the party so signing is bound to a holder in due course even though the holder was authorised to fill for a certain amount. Section 20 of the Act declares that inchoate instruments are also valid and legally enforceable. In the case of a signed blank cheque, the drawer gives authority to the drawee to fill up the

> agreed liability.
> Thus, in the present case also, it is clear that the applicant has not denied his signatures on the cheque in question. His only stand that the other entries are not in his handwriting. Thus, in view of the provisions of Section 20 of the Negotiable Instruments Act, 1881, it is not necessary to send the cheque to the hand writing expert to verify that whether the remaining entries are in the hand-writing of the applicant/accused or not?"

In order to appreciate the submissions made by the Counsel for the applicant, it would be apposite to consider Section 20 of NIA, 1881 which reads as under :

> "**20. Inchoate stamped instruments**. —Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount:
>
> Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

However, it is not the case of the complainant, that the applicant had given an incomplete Negotiable Instrument. A specific allegation has been made by the

complainant/applicant in the complaint that the other entries were also filled by the respondent/accused, and this allegation assumes importance. In the complaint, it was specifically mentioned by the applicant that the respondent after filling the entries in the cheque, after signing the same, assured the complainant that the cheque will be encashed. The words "अपने हाथ से भरकर" are of importance. Once, the applicant/complainant has claimed that the cheque was filled by the respondent in his presence, then the respondent/complainant can always claim that the other entries are not in his handwriting, and therefore, under this circumstance, Section 20 of NIA, 1881 would not come to the rescue of the applicant/complainant.

It is well established principle of law that every accused has a fundamental right to take his defence.

The Supreme Court in the case of **G. Someshwar Rao Vs. Samineni Nageshwar Rao** reported in **(2009)14 SCC 677** has held as under :

> "**10.** Indisputably, an accused is entitled to a fair trial which is a part of his fundamental right as guaranteed under Article 21 of the Constitution of India. The concept, however, cannot be put to a straitjacket formula. A court of law will have to consider each application filed by an accused praying for comparison of his signature on a disputed document with his admitted signature on its own merits. No hard-and-fast rule can be laid down therefor.
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> **11.** Section 243 of the Code of Criminal Procedure, 1973 provides for grant of an opportunity to the defendant to lead evidence in his defence as also to file a

written statement, sub-section (2) whereof reads as under:

"243. *Evidence for defence*.—(1) * * *

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice."

The right of an accused under sub-section (2) of Section 243 of the Code of Criminal Procedure, 1973 is, thus, not an absolute one. He cannot take recourse thereto for the purpose of delaying the proceedings. An application filed by an accused must be for subserving the cause of justice and not for subverting the same. In *Kalyani Baskar [(2007) 2 SCC 258]* this Court held as under: (SCC p. 262, para 12)

"*12*. Section 243(2) is clear that a Magistrate holding an inquiry under CrPC in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert because even in

adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or 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 handwriting 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 if 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 the courts should be jealous in seeing that there is no breach of them."

12. *Kalyani Baskar [(2007) 2 SCC 258]* has been followed by this Court in *T. Nagappa [(2008) 5 SCC 633]* opining: (SCC p. 636, para 8)

"*8*. An accused has a right to fair trial. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India. The right to defend oneself and for that purpose to adduce evidence is recognised by Parliament in terms of sub-section (2) of Section 243 of the Code of Criminal Procedure…."

Thus, where the complainant/applicant has claimed

that the accused/respondent, after filling the cheque in his hand-writing, signed the cheque, then under that circumstance, the accused/respondent is well within his right to get the other entries of the cheque, verified from the handwriting expert.

It is the case of the respondent/accused that his cheque was stolen and he had also given an information to the bank. The respondent/accused, had therefore, prayed that an employee from the bank along with the record be summoned. As already held that the accused is entitled for "fair trial" and "fair trial" includes full opportunity of defence. The burden to prove that the cheque was stolen is on the accused and therefore, the prayer made by the accused/respondent to summon the employee of the bank along with the record of the bank, cannot be said to be illusive or made with an intention to delay the proceedings.

Accordingly, this Court is of the considered opinion, that the Trial Court did not commit any mistake by allowing the application filed under Section 45 of Evidence and also permitting the respondent to summon the bank employee along with the bank record. Hence, the order dated 17-4-2017 passed by the J.M.F.C. Gwalior in Criminal Case No. 357/2016 is affirmed.

The interim order dated 19-5-2017 passed by this Court also stands vacated.

The application fails and is hereby **dismissed.**

(G.S. Ahluwalia)
Judge

(alok)