

T. NAGAPPA

A

v.

Y.R. MURALIDHAR

(Criminal Appeal No. 707 of 2008)

APRIL 24, 2008

(S.B. SINHA AND LOKESHWAR SINGH PANTA, JJ)

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Code of Criminal Procedure, 1973:

s. 243 – Evidence for defence – Case u/s 138 of Negotiable Instruments Act – Accused filing an application seeking reference of cheque in question for examination of age of his signature by Forensic Laboratory raising a defence that cheque was misused – HELD: Right of accused to defend himself is recognized under Article 21 of the Constitution of India and s.243(2) of the Code – Court must determine whether application is bona fide or not – On facts, application was bona fide – Orders of Judicial Magistrate and High Court rejecting application set aside – Constitution of India, 1950 – Article 21 – Negotiable Instruments Act, 1881 – ss.20 and 138.

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Negotiable Instruments Act, 1881:

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s. 20 – Inchoate instruments – Application of accused facing trial u/s 138, seeking the cheque to be referred to Forensic Laboratory to examine age of his signature – Rejected by Judicial Magistrate and High Court – HELD: u/s 20 only a right has been created in the holder of the cheque subject to conditions mentioned therein – When a defence has been raised that complainant has misused the cheque, even in a case where presumption can be raised u/ss 118(a) or 139 of the Act, an opportunity must be granted to accused to adduce evidence in rebuttal – Code of Criminal Procedure, 1973 – s.243.

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Practice and Procedure:

Non-mentioning or wrong mentioning of provision in

A *application – HELD: Would not be of any relevance if court has jurisdiction to pass the order – Code of Criminal Procedure, 1973 – s.243.*

B The appellant, in defence of the proceeding pending against him u/s 138 of the Negotiable Instruments Act, 1881, filed an application before the Judicial Magistrate that the cheque in question be referred for examination by the Director of Forensic Science Laboratory in order to determine the age of his signature. The application was mentioned to have been filed u/s 293 instead of s.243 of the Code of Criminal Procedure, 1973. It was the case of the appellant that the respondent had obtained a signed cheque from him in the year 1999 as a security for a hand loan which was paid back, and thereafter the complainant misused the cheque. The Magistrate as also the High Court, relying on s.20 of the Act, rejected the application. Aggrieved, the applicant filed the instant appeal.

Allowing the appeal, the Court

E HELD: 1.1 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 recognized by the Parliament in terms of sub-section (2) of Section 243 of the Code of Criminal Procedure, 1973. The court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. [para 7-8] [964-C, D; 965-A, B]

G 1.2 In the instant case, the trial Court as also the High Court rejected the application only having regard to the provisions of Section 20 of the Negotiable Instruments Act, 1881. Under s.20 of the Act, only a prima facie right H has been created in the holder of the cheque subject to

the conditions mentioned therein, *inter alia*, that the application filed by the applicant is *bona fide*. Thereby only a *prima facie* authority is granted, *inter alia*, to complete an incomplete negotiable instrument. When a defence has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised under Section 118(a) or 139 of the Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places the burden on the accused, he must be given an opportunity to discharge it. In the instant case, the application filed by the appellant was *bona fide*. [para 6-7 and 9] [963-D, H; 964-A, C; 965-E]

2. Wrong mentioning of s.293 in place of s.243 of the Code would not matter much. It is a well settled principle of law that non-mentioning or wrong mentioning of provision of law would not be of any relevance, if the Court had the requisite jurisdiction to pass an order. [para 11] [966-F, G]

Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.) (2007) 2 SCC 258 – relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 707 of 2008.

From the final Judgment and Order dated 24.01.2007 of the High Court of Karnataka at Bangalore in Criminal Petition No. 108 of 2007.

S.B. Sanyal, Rajesh Mahale for the Appellant.

Kiran Suri, S.J. Amith and Aparna Bhat for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Appellant is facing criminal charges before the Court of XV Additional Chief Metropolitan Magistrate, Bangalore in C.C. No.6835 of 2005 purported to be under Section 138 of the

- A Negotiable Instruments Act. He is said to have issued a cheque in favour of the respondent for a sum of Rs.7,50,000/- on 8.10.2004 which on depositing in the Bank was allegedly returned unpaid. A complaint petition was filed by the respondent contending that the appellant had committed an offence under Section 138 of the Negotiable Instruments Act.
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3. On or about 1.8.2006, the appellant filed an application under Section 243 of the Code of Criminal Procedure wrongly mentioned as Section 293 of the Code of Criminal Procedure, 1973 for referring the cheque in question for examination by the Director of Forensic Science Laboratory for determining the age of his signature, contending that the respondent had obtained a signed cheque from him in the year 1999 as a security for a hand loan of Rs.50,000/- which had been paid back, but instead of returning the cheque, the same has been misused by entering a huge amount, which he did not owe to the appellant.
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4. By reason of an order dated 29.11.2006, the learned Magistrate dismissed the said application, opining :

- “Another main contention of the accused is that the cheque was signed in the year 1999 and the writing appearing on the cheque has been filled up in the month of August, October and December 2004. The accused is at liberty to prove the said aspect by leading a cogent evidence. In my opinion, to prove the age of the writing on Exp-2 it is not necessary to send the exp-2 to the handwriting expert. Thus, viewing from any angle, I do not find any good reason to refer the Exp-2 to the handwriting expert as prayed in the petition. Hence I answer the above said point in the negative.”
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- F

5. A revision application filed thereagainst has also been dismissed by the High Court, stating :
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- “It is the case of the accused/petitioner herein that the signed cheque of the accused is misused by the petitioner by filling contents therein after about 5 years. According to the petitioner the cheque is of the year 1999 and the
- H

complainant has filled up the cheque by dating the said as 9.10.2004. Hence to ascertain the age of the cheque, the application came to be filed by the petitioner which is rejected. A

The evidence of DW-2, the Assistant Manager of UCO Bank, Jayanagar Branch, Bangalore coupled with the recital of Ex.D-11 i.e. the register pertaining to issuance of cheque book disclosed that the cheque containing Ex.P-2 (cheque leaf) was issued by the UCO Bank to the accused on 6.5.1997. If it is so, ascertaining the age of the cheque does not arise for consideration. B C

In this matter, the signature on the cheque is admitted. If it is so the petitioner cannot dispute the contents of the cheque in view of the provisions of Section 20 of Negotiable Instruments Act. Hence there is no need to refer the cheque for Hand Writing Expert." D

6. The learned Trial Judge, as also the High Court, in support of their respective orders, have relied upon Section 20 of the Negotiable Instruments Act, which reads as under :

"Section 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 in¹ [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." E F G

By reason of the aforementioned provision only a right has H

A been created in the holder of the cheque subject to the conditions mentioned therein. Thereby only a prima facie authority is granted, inter alia, to complete an incomplete negotiable instrument.

B The provision has a rider, namely, 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 therein.

C 7. When a contention has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised under Section 118(a) or 139 of the said Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places the burden on the accused, he must be given an opportunity to discharge it.

D 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 recognized by the Parliament in terms of sub-section (2) of Section 243 of the Code of Criminal Procedure, which reads as under :

E **“Section 243 - Evidence for defence.— (1) ...**

F (2) If the accused, after he had 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:

G 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.”

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8. What should be the nature of evidence is not a matter which should be left only to the discretion of the Court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protracting the trial or summon witnesses whose evidence would not be at all relevant.

9. The learned Trial Judge as also the High Court rejected the contention of the appellant only having regard to the provisions of Section 20 of the Negotiable Instruments Act. The very fact that by reason thereof, only a prima facie right had been conferred upon the holder of the negotiable instrument and the same being subject to the conditions as noticed hereinbefore, we are of the opinion that the application filed by the appellant was bona fide.

The issue now almost stands concluded by a decision of this Court in *Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.)* [(2007) 2 SCC 258] (in which one of us, L.S. Panta, J., was a member) wherein it was held :

“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 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

A 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
B 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
C 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."

D 10. However, it is not necessary to have any expert opinion
on the question other than the following :

E "Whether the writings appearing in the said cheque on the
front page is written on the same day and time when the
said cheque was signed as "T.Nagappa" on the front page
as well as on the reverse, or in other words, whether the
age of the writing on Ex.P2 on the front page is the same
as that of the signature "T.Nagappa" appearing on the
front as well as on the reverse of the Cheque Ex.P2?"

F 11. Ms. Suri, however, pointed out that the application of
the appellant being one under Section 293 of the Code of criminal
Procedure was rightly rejected. It is now a well settled principle
of law that non-mentioning or wrong mentioning of provision of
law would not be of any relevance, if the Court had the requisite
G jurisdiction to pass an order.

12. For the aforementioned reasons, the impugned
judgment cannot be sustained. It is set aside accordingly with
the aforementioned directions. Appeal is allowed.

H R.P.

Appeal allowed.