

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**  
**R/SPECIAL CRIMINAL APPLICATION NO. 11178 of 2021**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MS. JUSTICE GITA GOPI**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

SHASHIKANT SHAMALDAS PATEL  
 Versus  
 STATE OF GUJARAT

Appearance:

MR PADMRAJ K JADEJA(2095) for the Applicant(s) No. 1  
 MR HARSH M KHEMKA(7880) for the Respondent(s) No. 2  
 MR PRANAV TRIVEDI, ADDL. PUBLIC PROSECUTOR for the Respondent(s) No. 1

**CORAM: HONOURABLE MS. JUSTICE GITA GOPI**

Date : 24/06/2022  
**ORAL JUDGMENT**

1. The petitioner is an accused in Criminal Case No.87 of 2019 filed by the respondent No.2 before the Court of learned J.M.F.C., Gandhinagar under Section 138 of the Negotiable Instruments Act, 1881 (for short, “the NI Act”). The petitioner seeks to challenge the order passed by the learned 3<sup>rd</sup> Addl. Sessions Judge, Gandhinagar in Criminal Revision Application

No.29 of 2021 whereby, the revisional Court rejected the application of the petitioner wherein he had made a prayer for sending the cheque to F.S.L. for opinion of the Hand-writing Expert and forensic science opinion qua the ageing and writing on the cheque.

2. Learned advocate Mr. Jadeja submitted that the rejection of the application has led to the denial of opportunity of defence and fair trial. Mr. Jadeja stated that the petitioner accused was duped by his friend in collusion with the complainant of complaint filed under Section 138 of the NI Act. The petitioner submits that the complainant had alleged that the petitioner became his friend through one Amratbhai Gopalbhai Patel and under the friendship, the present petitioner had demanded an amount of Rs.10 Lacs, which, he had assured to return within a year. Since he had failed to return the money that was lent by the complainant to the present petitioner, the petitioner gave him a cheque dated 25.10.2018 and informed him to deposit the same day so that he would get his money so noted in the cheque. On deposit of the cheque, it got returned with the endorsement of "Account closed" and therefore, the complainant issued Notice to the petitioner and lodged the complaint.

3. Mr. Jadeja submitted that the petitioner denied the charge and therefore, the trial Court proceeded to adjudicate

the matter. During the course of trial, the petitioner gave an application Exhibit-32 for Hand-writing expert's opinion qua the ageing of ink and writing on the cheque as well as opinion of Hand-writing expert to avail the benefit of defence.

4. Mr. Jadeja submitted that from the very beginning, it was the case of the petitioner that the cheque was obtained by his partner Amratbhai Gopalbhai Patel, who was in need of money and he wanted to show the cheque for the purpose of security to the complainant, who was in the business of lending money. He stated that it was the specific case of the petitioner that cheque was given to his Ex-partner and thus, the cheque was not for any existing debt or liability. He stated that grievance was raised before the trial Court by moving application Exhibit-32 in Criminal Case No.87 of 2019 but the trial Court rejected the same vide order dated 12.06.2019. Aggrieved by the same, Criminal Misc. Application No.56 of 2019 was moved before the Sessions Court, Gandhinagar and the Sessions Court allowed the revision application on 26.09.2019 and set aside the order and remanded the matter to decide application Exhibit-32 afresh in accordance with law. Upon adjudicating application Exhibit-32, Mr. Jadeja stated that the trial Court, without assigning any reasons, decided the application Exhibit-32 on 04.03.2021. Aggrieved by the order, Criminal Revision Application No.29 of 2021 was filed before the Sessions Court, which came to be dismissed on 23.08.2021.

5. Mr. Jadeja submits that the accused has the right to defend himself and in the process of raising a bonafide and probable defence, he had filed the application. According to the petitioner, the cheque was signed in the year 2011 and if such a defence of the accused is supported by the opinion of the expert, then it would certainly shift the burden from the accused to the complainant. He submitted that the proposition of law under Section 138 of the NI Act, which is to be read along with presumption under Sections 139 and 118 of the NI Act requires rebuttal evidence and therefore, he stated that fair opportunity ought to have been granted by both the Courts below.

6. In support of his arguments, Mr. Jadeja relied upon the following judgments:

- (a) T. Nagappa v. Y.R. Murlidhar reported in AIR 2008 SC 2010.
- (b) Kalyani Baskar v. M.S. Sampooram reported in 2007 (2) SCC 258.
- (c) A. Sivagnana Pandian v. M. Ravichandran reported in 2011 Cri. L.J. 4152.

7. Mr. Jadeja further stated that the petitioner had raised the grievance before the Dehgam Police Station by lodging a

complaint under Sections 406, 420, 506(2) and 114 of IPC by making respondent No.2 and his partner – Amratbhai Gopalbhai Patel as accused wherein, the said complaint culminated into proceedings under Sections 107 and 115 of Cr.P.C. Mr. Jadeja stated that the statement of Amratbhai Gopalbhai Patel and the complainant, present respondent No.2, was recorded by the police, which also supports the fact that cheque was given by the petitioner to Amratbhai Gopalbhai Patel in the year 2011.

8. Learned advocate Mr. Harsh Khemka for respondent No.2 contended that the Sessions Court while rejecting the revision application has considered the provisions of Sections 20 and 87 of the NI Act, which lays down the presumption that signature is to be believed and therefore, it considered the submissions of the complainant and found no reasons to send the disputed cheque to F.S.L. for Hand-writing expert's opinion. He submitted that the trial Court has observed in the order that the signature is admitted by the accused and the complainant has admitted about his filling up of the body of the cheque and has observed that the ink may be of the manufacturing year but would have been used on the day when it was signed. It is also observed that the disputed cheque was given as security in the year 2011 and the allegation is that the same was misused in 2018. Thus, on the above grounds, it was urged before the trial Court to send the cheque for opinion of



the Hand-writing expert. He, thus, submitted that the revisional Court had found that the grounds on which the revision application was filed was in the nature of proposed defences, which were required to be dealt with by the trial Court while deciding the case finally and the revisional Court, thus, found that any discussion on the issues would create prejudice to both the parties while the Court was pleased to observe that accused has admitted the issuance of cheque and his signature and that the blank cheque was given by him. Further, from the material on record, the revisional Court found that there is no dispute about the amount mentioned in the cheque.

9. Having heard the learned advocates on record, it appears that the petitioner has raised the grievance that the disputed cheque was a blank cheque issued in 2011 and has been misused in 2018. As per the accused, the complainant is not the holder in due course. The cheque was fabricated in the year 2018 and it was not against any legal debts or liabilities. It was also urged that the complainant had no source of income to lend Rs.10 Lacs and thus, there was no enforceable debt. The accused had also filed a complainant under sections 406, 420, 506(2) and 114 of IPC and thereafter, the Chapter Case under Section 107 of Cr.P.C. was filed against the complainant and witness Amratbhai Gopalbhai Patel. It is alleged by the petitioner accused that Amratbhai Gopalbhai

Patel, who was his partner, has given the said cheque in the year 2011 for 2-3 days as the complainant insisted for a blank cheque. It was informed to the petitioner accused that the complainant had torn off the cheque and therefore, the petitioner, on assurance so given, had not proceeded further but thereafter, according to him, the complainant and Amratbhai Gopalbhai Patel in collusion have misused the cheque and filed false complaint under section 138 of the N.I. Act.

10. In *T. Nagappa v. Y.R. Muralidhar* (supra), the Apex Court has observed as under:

*“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. 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 : "[Section 243](#) - Evidence for defence. (1) (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:*

*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."*

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 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."*

11. The decision rendered in *Kalyani Baskar v. M.S. Sampooram* (supra) was followed in the case of *T. Nagappa v. Y.R. Muralidhar* (supra). In the present case, in his complaint filed under Section 138 of the NI Act, the complainant has stated that the accused had given him the disputed cheque with his signature on it and had informed him that if the cheque is deposited on the date so mentioned, he would receive the amount mentioned in the cheque. As per the complainant, after depositing the said cheque on 15.11.2018, the same got returned owing to the account being closed. Thus, after legal notice, the complaint was filed. The facts in

the complaint suggest that the signed cheque was handed over but the facts in the complaint also suggests that he was informed that the complainant would receive the amount so mentioned in the cheque. While it is the case of the complainant that it was a cheque that was signed “in blank” while the facts suggest that the cheque amount was also noted in the cheque, which the complainant has disputed. It is his specific case that the cheque was given in the year 2011 while it was misused in 2018. Since there was no direction to pay the amount so stated to be mentioned in the cheque, the applicant has disputed the age of ink utilized for the signature of the applicant on the cheque and prayed for comparison of the ink used for text on the body of the cheque, alleging that the endorsement was not “in full” on the instrument. However, considering the facts and circumstances of the case and the principle laid down by the Apex Court in T. Nagappa v. Y.R. Muralidhar’s case (supra), the petitioner is required to be granted opportunity for adducing evidence keeping in mind the larger object of fair trial. Hence, the impugned orders passed by the Courts below deserve to be quashed and set aside.

12. For the foregoing reasons, the application is allowed. Both the impugned orders dated 23.08.2021 passed by the learned 3<sup>rd</sup> Additional Sessions Judge, Gandhinagar in Criminal Revision Application No.29 of 2021; and dated 04.03.2021 passed by the learned 5<sup>th</sup> Additional Chief Magistrate,

Gandhinagar below application Exhibit-32 in Criminal Case No.87 of 2019 are quashed and set aside. The trial Court concerned is directed to send the disputed cheque to F.S.L. for opinion of the Hand-writing Expert, as has been prayed for in the application Exhibit-32. All concerned to make sincere efforts to ensure that the trial is concluded as expeditiously as possible. Rule is made absolute.

PRAVIN KARUNAN

(GITA GOPI, J)

