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**(2023) 03 CHH CK 0005**

**Chhattisgarh High Court**

**Case No:** Criminal Miscellaneous Petition No. 455, 460 Of 2023

Ashish Didwaniya

APPELLANT

Vs

Suman Devi Agrawal

RESPONDENT

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**Date of Decision:** March 1, 2023

**Acts Referred:**

- Code Of Criminal Procedure, 1973 - Section 243, 243(2)
- Indian Penal Code, 1860 - Section
- Negotiable Instrument Act, 1881 - Section 20, 56, 138, 139

**Hon'ble Judges:** Deepak Kumar Tiwari, J

**Bench:** Single Bench

**Advocate:** Manoj Paranjpe, S. Tiwari, Shobhit Mishra

**Final Decision:** Allowed

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### **Judgement**

1. The aforesaid CrMPs are being disposed of by this common order, as the petitioner/accused is same in both the cases.

2. The petitioner is challenging the order dated 7.2.2023 passed by the 12th Additional Sessions Judge, Raipur in Criminal Revision No.26/2023 &

27/2023 affirming the order dated 31st December, 2022 passed by the JMFC, Raipur, arising out of Criminal Complaint Case No.2150/2018 &

2151/2018 respectively, whereby the application preferred by the petitioner/accused under Section 243 (2) of the CrPC for adducing the defence

evidence by examining the forensic expert was disallowed.

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3. Facts of the case are that the respondent/complainant has filed a complaint case against the petitioner under Section 138 of the Negotiable

Instrument Act, 1881 for a cheque dated 1.2.2018 amounting to Rs.20 lakhs and after examination of the defence evidence on 31st December, 2022,

an application under Section 243 (2) of the CrPC was filed on the same day for sending the questioned cheque for forensic test, as the dates and

particulars mentioned in the questioned cheque was different and date of the cheque was not properly recorded and the blank cheque was misused.

The accused/petitioner has taken a specific defence that part payment of Rs.2,98,250/- has already been made and only Rs.17,01,750/- remained to be paid.

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4. In Criminal Complaint Case No.2151/2018, the respondent has filed a complaint case for a cheque dated 01.02.2018 amounting to Rs.15 lakhs and

the petitioner has taken a specific defence that the cheque was given for the purpose of security of loan amount of Rs.15 lakhs in the month of

December, 2016, though part payment of Rs.31,000/- was made and balance of Rs.14,69,000/- remained to be paid.

5. Learned counsel for the petitioner would submit that the petitioner is willing to pay the balance amount, however, the complainant is not ready to

accept the same and has misused the cheque of Rs.20 lakhs & Rs.15 lakhs, which was given as security in the year 2016. To rebut the presumption

as to the date on the questioned cheque, there is no legally enforceable debt or liability of Rs.20 lakhs & Rs.15 lakhs exists. Hence it is important to

examine the expert's evidence, as the date mentioned in the questioned cheque is not properly recorded. The application preferred by the

petitioner was dismissed by the trial Court and the revisional Court in a mechanical manner without examining the scope of Section 243 (2) of the

CrPC, and affirmed the said order. Reliance is placed in the matter of T. Nagappa Vs. Y.R. Muralidhar {(2008) 5 SCC 633}. Attention of the Court

has been drawn towards paras-9 to 11 which reads thus:-

“9. 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 protract the trial or summon witnesses whose evidence would not be at

all relevant.

10. 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.

11. The issue now almost stands concluded by a decision of this Court in *Kalyani Baskar v. M.S. Sampooram* [(2007) 2 SCC 258] (in

which one of us, L.S. Pant, 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 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.

6. Further, reliance is placed in the matter of Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel & Another {(2023) 1 SCC 578} and

paras-33 & 34.2 have been referred which read thus:-

“33. Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the

cheque or in a note appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance

amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse

to the provisions of Section 138. Thus, when a part- payment of the debt is made after the cheque was drawn but before the cheque is

encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment

without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be

attracted since the cheque does not represent a legally enforceable debt at the time of encashment.

34.2. If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed

upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque.

7. Learned counsel for the petitioner would further place reliance on the judgment in the matter of Shyam Manohar Saxena Vs. Central Bureau of

Investigation and Others {2019 SCC Online Del 8961} wherein scope of Section 243 CrPC has been examined and following was observed at paras-

26 & 28:-

“26. Under Section 243 Cr.P.C. it is obligatory on the part of the Trial Court to issue process when the accused seeks summoning of any

witness or production of any document in his defence. The only ground on which such an application can be refused is if the same was

vexatious, delayed or would defeat the ends of justice.

28. Further, the Trial Court has clearly erred in holding that it is within the discretion of the court, under Section 243 Cr.P.C. to decline

such an application. On the contrary, as per section 243 Cr.P.C., it is obligatory on the part of the Trial Court to issue process, unless, it

for the reasons to be recorded, holds that the application is vexatious, delayed or defeats the ends of justice.

8. Lastly, learned counsel for the petitioner submits that the trial Court has not assigned any reason as stipulated under Section 243 (2) of the CrPC

and the application under Section 243 (2) of the CrPC can be refused if the same was vexatious or would defeat the ends of justice. Only on the basis

that the cheque was signed by the petitioner/accused, rejection of application is not proper. Learned counsel prays to quash the impugned order and

allow the petition.

9. On the other hand, learned counsel for the respondent/complainant would support the impugned order on submission that there is no purpose to call

or adduce evidence of the handwriting expert, as there is presumption under Section 139 of the Negotiable Instruments Act, that the drawer handing

over the cheque signed by him is liable unless it is proved by adducing evidence at trial that the cheque was not issued in discharge of debt or liability.

He would place reliance on the judgment in the matter of Oriental Bank of Commerce Vs. Prabodh Kumar Tewari {2022 SCC OnLine SC 1089}. In

the said case, the judgment rendered by 3 Judge Bench of the Supreme Court in the matter of Kalamani Tex and Another Vs. P. Balasubramanian

{(2021) 5 SCC 283} was referred and in para-16, the following was observed:-

“16. A drawer who signs a cheque and hands it over to the payee, is presumed to be liable unless the drawer adduces evidence to rebut

the presumption that the cheque has been issued towards payment of a debt or in discharge of a liability. The presumption arises under

Section 139.

10. Replying the aforesaid submission, learned counsel for the petitioner submits that the judgment in the matter of Oriental Bank of Commerce

(Supra) is distinguishable on facts, as in the instant case, the cheque was not given as part payment, but it was given as security of cheque and there is

categorical defence put forth by the petitioner/accused that the date on the questioned cheque was misused, as the cheque was given to the

complainant in the year 2016 and the same was presented before the bank after mentioning the date as 1.2.2018.

11. Heard learned counsel for the parties at length and perused the documents annexed with the petition with utmost circumspection.

12. Admittedly, when the contention is raised that the complainant has misused the cheque in the year 2018, which was given in the year 2016, so an

opportunity must be afforded to the accused to adduce evidence in rebuttal thereof, as the law casts burden on the accused that he must be given an

opportunity to discharge it. In the matter of T. Nagappa (Supra), the Hon'ble Supreme Court has categorically observed that if the accused is

denied to adduce proper defence evidence, then there is no fair trial. Fair trial includes fair and proper opportunities allowed by law to prove

innocence.

13. Considering the facts and circumstances of the case, this Court is of the considered view that the petitioner has been able to successfully make out

a case that evidence of handwriting expert is necessary for just decision of the case to examine the questioned cheque, and both the Courts below

without examining the principles and object as envisaged under Section 243 (2) of the CrPC rejected the said application, which is not proper.

14. In the result, the impugned orders are hereby set aside and the petitioner's application is hereby allowed. The trial Court is directed to allow at-

least one opportunity to the petitioner/accused for adducing the expert evidence within a reasonable time. The petitioner shall take appropriate steps so

that the sample of the questioned cheque be taken by the expert within 7 days from the date of receipt of a copy of this order. The entire exercise of

examination and cross-examination of handwriting expert including the defence evidence must be completed within the outer limit of 45 days

thereafter. Report of the handwriting expert shall be filed within 15 days from the date of receipt of sample. It is made clear that normally no further

time should be granted to the defence for such purpose. It is also made clear that the whole expenditure of examination of handwriting expert shall be

borne by the accused/petitioner, and the respondent/complainant be also given an opportunity to cross-examine the handwriting expert.

15. Resultantly, both the Petitions are allowed.

16. Before parting with the case, this Court expects from the parties considering their relationship, particularly considering the fact that in one of the

case concerning the cheque of Rs.20 lakhs, the petitioner is willing to pay an amount of Rs.17,01,750/- and in the other case concerning the amount of

Rs.15 lakhs, the petitioner is ready to pay Rs.14,69,000/-, therefore, they may resolve their issues through Mediation. The complainant may initiate

proceeding before the trial Court and in the event of such proceeding being initiated, the petitioner is also expected to settle the issue with better offer

of negotiation.