

**Pankaj Vs. Santosh and Another**

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**Court :** Mumbai Aurangabad

**Decided On :** Aug-18-2016

**Judge :** V.K. Jadhav

**Appeal No. :** Criminal Writ Petition No. 1523 of 2015

**Appellant :** Pankaj

**Respondent :** Santosh and Another

**Judgement :**

Oral Judgment:

1. Rule. Rule returnable forthwith. By consent of learned counsel for respective parties, heard finally.
2. Being aggrieved by the order passed by learned J.M.F.C. Court No.3, Rahuri, district Ahmednagar, below Exh.27 in S.T.C. No.196 of 2013, the original complainant has preferred this writ petition.
3. Brief facts, giving rise to the present writ petition are as follows:-

The petitioner-original complainant has filed complaint which is registered as S.T.C. No.196 of 2013 before the learned J.M.F.C. Rahuri against the respondent accused for having committed offence punishable under Section 138 of Negotiable Instruments Act. On appearance of respondent-original accused, in due course,

the petitioner-original complainant has filed his affidavit of evidence and on 16.5.2015 filed an application Exh.27 seeking permission to lead secondary evidence in respect of the cheque, which is subject matter of the complaint, on the ground that the petitioner-original complainant lost the said cheque at the time of repairing of his hardware shop. The respondent-accused has strongly resisted the said application. The learned Magistrate, by its impugned order dated 23.9.2015, rejected the said application. Hence, this writ petition.

4. Learned counsel for the petitioner submits that at the time of filing of complaint, the petitioner-original complainant has placed original cheque before the Assistant Superintendent of the Court. The said Office Superintendent has passed an endorsement about verification of original cheque on the copy of cheque submitted alongwith the complaint. Thus, the existence of original cheque is not disputed. Even after dishonour of cheque, when the petitioner-original complainant has issued demand notice to the respondent-accused, the respondent has not bothered to reply the said notice.

The respondent at any time before the court has not disputed issuance of said cheque. Thus, the petitioner has proved existence and issuance of said cheque in his favour by the respondent-original accused. The petitioner had specifically mentioned in his application Exh.27 that while repairing of his hardware shop was going on, the said cheque was lost. The petitioner original complainant has requested the court that verified copy of the said cheque be accepted in evidence by granting permission to the petitioner to lead secondary evidence in this regard. While opposing the said application Exh.27, the respondent had not denied the existence and issuance of the said cheque. Application Exh.27 is opposed only for the sake of opposition. Even though the petitioner original complainant has filed an affidavit of evidence on 19.7.2014 and on that date as well as on 25.8.2014 and 10.11.2014, the case was adjourned at the instance of the accused. Thereafter, on next two dates, case was adjourned on account of ill health of the complainant and thereafter on 16.5.2015 the petitioner original complainant has filed application Exh.27 seeking permission to lead secondary evidence in respect of cheque, which has been lost while repairing his hardware shop. Learned counsel submits that the original complainant has complied with the provisions of Section 65(c) of

the Evidence Act and the learned Magistrate ought to have allowed the said application.

5. Learned counsel for the respondent-original accused submits that the petitioner-original complainant has not complied with the mandatory provisions of Section 65(c) of the Evidence Act. The petitioner original complainant has not filed his affidavit in support of the contents in his application Exh.27. As per the condition laid down in clause (c) of the Section 65 of Evidence Act, for any other reason, if original has been destroyed or lost, the permission can be granted to lead secondary evidence. However, such permission cannot be granted if the original has been destroyed or lost out of default or neglect on the part of party, who is seeking permission to lead secondary evidence. In the case in hand, the petitioner original complainant even has not filed any complaint in the police station about the said cheque, which has been lost while repairing hardware shop. At the time of filing of affidavit of examination in chief, the petitioner original complainant was having in his possession the original cheque and the same reflects from the contents of affidavit, however, he has not filed original cheque on record. It is part of record that the petitioner original complainant has not produced the said cheque within reasonable time before the court, as contemplated under Section 65(e) of the Evidence Act. Learned counsel submits that the Magistrate, has therefore, rightly rejected the application Exh.27 and no interference is required in the said order.

6. Learned counsel for the respondent, in support of his submissions, places reliance on following judgments:-

I) J. Yashoda vs. K. Shobha Rani, reported in (2007) 5 SCC 730;

II) Om Health Centres Pvt. Ltd. and Anr. vs. Ratanshi Premji Charitable Trust and Ors, reported in 2015 (3) Mah.L.J. 954

III) Rajendra Prasad Bansal vs. Mukesh Kumar Jain, decided by Madhya Pradesh High Court on 11.09.2012 in writ petition No.4364 of 2012.

7. I have also heard learned A.P.P. for the respondent-State.

8. It is a part of record that, at the time of filing of complaint before the Court, the petitioner original complainant has placed before the Assistant Superintendent of the Court, the original cheque and accordingly the Assistant Superintendent of the court has passed endorsement on the copy of said cheque as verified as per the original. Furthermore, after dishonour of said cheque, the petitioner original complainant has issued demand notice to the respondent-original accused, who has not bothered to reply the same. Even before the court, the respondent original accused has not denied issuance of said cheque in favour of petitioner-original complainant. Thus, the very existence and issuance of said cheque is proved by the petitioner original complainant beyond doubt.

9. So far as the contents in application Exh.27 are concerned, the petitioner original complainant has specifically stated in the said application that he lost the said cheque when the work of repairing of his hardware shop was going on. It is not the case that the theft has been committed in the shop of petitioner. Had there been any theft in his shop, the petitioner would have filed the complaint in the concerned police station. There is no question of filing any complaint before the police when the cheque is lost while repairs of hardware shop was going on. It is also a matter of record that even after filing of affidavit of examination in chief before the trial court, for one reason or another, at the instance of the respondent-accused, the said case was adjourned. It is true that, in the application Exh.27, the petitioner has not given specific date as to when he lost the said cheque. However, it appears from the record that said affidavit of evidence came to be filed before the court on 19.7.2014 and application Exh.27 was filed before the trial court on 16.5.2015 i.e. after 10 months from the date of filing of said affidavit of evidence.

10. Since the existence and issuance of said cheque is not disputed by the respondent-original accused, I do not think that the petitioner original complainant would be getting any benefit by filing application Exh.27 seeking permission to lead secondary evidence in respect of cheque which is subject matter of his case. Furthermore, in the bank record, there can always be an entry of cheque deposited with the bank for encashment and intimation given to the customer about dishonour of said cheque. In the given set of circumstances, I do not think

that there is no compliance of mandatory provisions of section 65(c) of the Evidence Act. In view of the above discussion, I proceed to pass the following order:-

## **ORDER**

I. Writ petition is hereby allowed.

II. The order dated 23.9.2015 passed by the learned J.M.F.C. Court No.3, Rahuri, district Ahmednagar below Exh.27 in S.T.C. No.196 of 2013 is hereby quashed and set aside.

III. Application Exh.27 is hereby allowed in terms of its prayer clauses.

IV. Writ petition is accordingly disposed of. Rule is made absolute in the above terms.

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