CC No. 18218/2016
Zahir Ahmed vs. Mohd. Mustkim & Ors.
PS Patel Nagar

The matter has been taken up for pronouncement of order by way of video conferencing (CISCO Webex Meetings) on account of lockdown due to COVID-19. The counsel was already intimated by Ahlmad/ Asst. Ahlmad regarding the date and time of pronouncement of order.

01.06.2020

Present: Sh. Mohar Singh (enrol. no. D856/1993), Learned Counsel for the complainant through video conferencing

The matter is fixed for order on summoning of the accused persons.

The complaint has filed the present complaint under section 200 Cr.P.C alleging that his brother-in-law Mustkim, during his employment with the complainant, had stolen cheques from his showroom and handed over to accused Manoj Walia and Tannu Aggarwal after forging his signatures in order to cheat him and extort money from him. The complainant was given liberty to lead pre-summoning evidence. The complainant examined himself as CW-1, Mohd. Sharfuddin as CW-2, Ikramuddin as CW-3 and handwriting expert Sh. B. N. Srivastava as CW-4. Pre-summoning evidence was closed vide order dated 05.06.2017.

CW-1/ complainant Zahir Ahmad has deposed in his pre-summoning evidence that he was doing business of stitching & selling of clothes and was having own trade mark. In the year 2003,

he opened an office in Karol Bagh. Mustkim was employed with him since 2000. On opening of office in Karol Bagh, Mustkim offered to look after that showroom. Accordingly, he assigned the work of Karol Bagh to Mustkim. Thereafter, Mustkim brought his family and started residing in Baljeet Nagar on rent. During that period, he was pre-occupied with a trademark case pending before the Hon'ble High Court. Taking undue advantage of the same, Mustkim first removed number of clothes and sold the same without billing and grabbed the entire sale proceeds. Mustkim also took personal loan from number of persons and impersonated to be his partner. As and when the lenders visited him, he had shown complainant's office to them and used to tell them that he was a partner. In that manner Mustkim grabbed around Rs. 7-8 lacs. His business was ruined and ultimately he had to close down the same. When he inquired from Mustkim about the affair of the business, he pretended to bring back the money lost but he ran away from Delhi to his in-laws house at Village Man Koshi in Bihar.

CW-1 has further deposed that in the meanwhile, he discovered that Mustkim had removed his cheque book and had issued cheques from his cheque book by forging his signatures to Manoj Walia and Tanu Aggarwal. He tried to search Mustkim but no result. Manoj Walia had taken cheque no. 836597 & 836596 of Rs. 50,000/- and Rs. 1,00,000/- respectively with his forged signature in connivance with Mustkim. He never issued the cheques to Manoj Walia or Tanu Aggarwal. He had been falsely prosecuted for the

offence punishable U/s. 138 NI Act regarding the cheques. After cheating him, Mustkim absconded from Delhi. He tried his best to locate Mustkim but could not succeed. Mustkim, Manoj Walia and Ms. Tanu Aggarwal had misused his cheques with intent to cheat him and extort money from him. On 07.02.2009 he made a complaint to SHO PS Patel Nagar with copy to CP, ACP, DCP & Ors. and the same is Mark A.

CW-1 has further deposed that on 31.01.2011, Mustkim made statement in his own handwriting and executed an affidavit in presence of Mohd. Ikramuddin and Mohd. Sharfudin and gave copy of his passport. The affidavit of Mustkim is Ex. CW-1/A and statement is Ex.CW-1/B. Mustkim admitted that he had committed the crime against him.

CW-2 Mohd. Sharfuddin and CW-3 Ikramuddin have deposed that during year 2000 to 2007, they were employed with Zahir Ahmad and Mustkim, brother-in-law of Zahir Ahmad also used to work. Mustkim was habitual of developing relations with customers of Zahir Ahmad and in absence of Zahir Ahmad, Mustkim used to impersonate himself as the partner in the business. Later they came to know that Mustkim borrowed huge amount from number of persons and that he had stolen cheque book of Zahir Ahmad.

CW-2 and CW-3 have also deposed that on 31.01.2011, Mustkim made statement in his handwriting (already Ex. CW-1/B) and executed an affidavit (already Ex. CW-1/A). Mustkim also gave a copy of passport which is Mark C.

CW-4 Sh. B. N. Srivastava has deposed that he compared signatures of Zahir Ahmad on the two disputed cheques with the signatures of Zahir hamad on the complaint dated 05.09.2010 and vakalatnama of the same day. The signatures on the two disputed cheques have not been written by writer of comparative signatures. His report is Ex.CW-4/1.

Arguments were heard on summoning of the accused. Written arguments were also filed on behalf of the complainant.

Learned counsel for the complainant has argued that by way of pre-summoning evidence, the complainant has proved that accused No.1 Mohd. Mustkim had stolen the cheques of the complainant and handed over to accused no.2 and 3 who had misused the cheques and filed false cases under section 138 NI Act against the complainant. It is also argued that the expert opinion proves that the stolen cheques were not signed by the complainant. It is also argued that the contents of the two complaints filed under section 138 NI Act, defence of the complainant, grounds in appeal and reply of the accused no.2 and 3 to the appeals filed by the complainant are identical. The complainant has made out good case for summoning of the accused persons. Therefore, the Court may issue warrants against the accused persons.

This Court has considered the submissions of Learned counsel for the complainant and perused the record.

The complainant has alleged offences punishable under section 384/465/420/406/468/471/120-B IPC.

The complainant has alleged offence of extortion. Section 384 IPC provides punishment for extortion. Section 383 IPC defines 'extortion' as *"Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion."*

In the case, there is nothing to show that any of the accused had put the complainant in fear of injury to him or to any other person. There has been no delivery of any property or valuable security due to that fear. The ingredients of offence punishable under section 384 IPC are not satisfied. **Hence, the accused are not summoned for offence punishable under section 384 IPC.**

The complainant has also alleged offence of cheating punishable under section 420 IPC. Section 420 IPC reads as, *"Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

There is no allegation of inducement of the complainant or delivery of any property by the complainant due to such inducement or false promise/ assurance. **Hence, the material is not**

sufficient to summon the accused persons for offence punishable under section 420 IPC.

The complainant has also alleged offence of criminal breach of trust. Section 406 IPC prescribes punishment for criminal breach of trust. Section 405 defines 'criminal breach of trust' as, *"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".*

The complainant has deposed that accused Mustkim grabbed around 7-8 lakhs by impersonating as his partner and removing number of clothes from his shop. Later, he discovered that Mustkim had also removed his cheque book and issued cheques to Manoj Walia (accused no.2) and Tannu Aggarwal (accused no.3) by forging his signatures.

Perusal of the testimony of the complainant would show that the complainant has not made any specific allegation of entrustment and breach of trust against any of the accused. The complainant has not stated as to how many clothes were stolen from his showroom. The complainant has not brought on record any statement of his accounts and the bill/invoices of the goods which

were allegedly lying in his shop and which were sold by alleged Mustkim without accounting the same. Therefore, it can not be said that any material of the complainant was sold by alleged Mustkim without accounting. The complainant has also not deposed that the custody of his cheque book was with accused Mustkim. There is no evidence of entrustment of any property by the complainant with accused Mustkim. Hence, this Court is of the view that the ingredients of offence of criminal breach of trust are not satisfied. **Therefore, the accused are not summoned for offence punishable under section 406 IPC.**

The complainant has also alleged offence of forgery against accused Mustkim and use of forged document as genuine one by accused No.2 and 3. Section 465 IPC prescribes punishment for offence of forgery. Section 463 IPC defines 'forgery' as, *"Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."* Section 468 IPC prescribes punishment for offence of forgery for purpose of cheating. Section 471 IPC prescribes punishment for use as genuine a forged document or electronic record.

Learned counsel for the complainant has argued that the case of the complainant is consistent that he did not issue the cheques

to Manoj Walia and Tannu Aggarwal and his signatures were forged. It is also argued that the affidavit and letter dated 31.01.2011 executed by accused Mohd. Mustkim has been proved by CW-1 and its execution is also proved by CW-2 and CW-3. Further, the opinion of the handwriting expert also prove that the cheques were not signed by the complainant. Therefore, the material on record is sufficient to summon the accused persons for the alleged offences.

This Court has carefully considered the submissions of Learned counsel for the complainant and perused the material on record.

The complainant has relied upon one affidavit and one letter stated to be written by Mohd. Mustkim in support of the plea that Mustkim had admitted stealing of cheques of the complainant, forging his signatures and handing over the cheques to Manoj Walia and Tannu Aggarwal. The two documents are Ex.CW-1/A and Ex.CW-1/B.

Perusal of record would show that the complainant alongwith the complaint u/s. 200 Cr.P.C. has filed only copy of cheques with the copy of the cheque return memos; copy of the legal notices received and the copy of the complaint filed with the police. The complainant filed the Affidavit dated 31st January 2011 and letter dated 31st January 2011 of accused Mustkim later on.

Perusal of the complaint u/s. 200 Cr.P.C. would show that in Para No. 10, the complainant has specifically stated that he tried his best to search the accused No. 1 but his efforts could not gain

any fruitful result. In his pre-summoning evidence also, the complainant has stated that after cheating him, Mustkim absconded from Delhi. He has also stated that he tried his best to locate Mustkim but could not succeed. In the pre summoning evidence as well in the complaint, the complainant has not stated as to when he came in contact with accused Mustkim after Mustkim allegedly absconded from Delhi or how he was able to trace Mustkim or how he managed to bring Mustkim to Court for preparation of Affidavit Ex. CW1/A.

Further, on comparison of the two signatures on the Affidavit Ex. CW1/A as well as on the statement Ex. CW1/B, they do not appear to be similar. The copy of passport of Mustkim would show that he had signed in English, though his signatures on affidavit and letter are in vernacular (Hindi). On perusal of signatures on affidavit and letter, it can be seen that the signatures do not appear to be similar and both documents are signed with different pen.

It is an admitted fact that alleged Manoj Walia and Tannu Aggarwal had filed separate cases under section 138 N. I. Act on the basis of alleged forged cheques. It is also admitted that in both cases under 138 NI Act filed by Manoj Walia and Tannu Aggarwal, the complainant has been convicted by the Ld. MM. It is also admitted that the appeals filed by the complainant against the judgments of conviction and order on sentence of Ld. MM have been dismissed by the Ld ASJ vide judgment dated 3rd March 2011. The Affidavit and letter were allegedly executed by Md Mustkim on 31st January 2011 and since then, the same were in the possession of the complainant.

There is no explanation of the complainant as to why he did not move an application before the Ld Appellate Court to lead additional evidence under section 391 Cr.P.C. to prove his defence that his cheques were stolen and his signatures were forged. All these circumstances create doubt over alleged execution of Affidavit and letter dated 31st January 2011 by Md Mustkim Alam.

The complainant has also relied upon the expert opinion to prima facie prove that his signatures on the cheques were forged. The expert opinion report has been proved as Ex. CW-4/A.

The expert had taken photograph of the signatures of the complainant on the cheques which are alleged to be forged and compared it with signatures on the present complaint under section 200 Cr.PC. The complaint was signed in 2010 but the cheques were signed in 2007.

It is settled that an expert or Court can compare the disputed signature with that of the admitted signature but such disputed signature can be compared only with admitted signatures which were contemporaneous. There may be some difference in the signature of a person by lapse of time. I rely upon the judgment of Hon'ble Madras High Court in the matter of **Central Bank Of India vs Antony Hardware Mart on 14 December, 2005**A.S.No.834 of 1989 and A.S.No.569 of 1989.

It is also settled that an expert is not a witness of fact and his evidence is of an advisory character. It is also settled that the evidence of hand writing expert is merely suggestive. Expert's

evidence as to handwriting is opinion evidence and it can rarely take the place of substantive evidence. In ***Magan Bihari Lal Vs. State of Punjab (AIR 1977 SC 1091)***, while dealing with evidence of a handwriting expert, this Court opined:-

> ***"It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of precendential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration.*** *This rule has been universally acted upon and it has almost become a rule of law. It was held by this Court in Ram Chandra v. State(1) that it is unsafe to treat expert hand- writing opinion as sufficient basis for conviction, but it may be relied upon when supported by other items of internal and external evidence. This Court again pointed out in Ishwari Prasad v. Md. Isa(2) that* ***expert evidence of hand- writing can never be conclusive because it is, after all, opinion evidence,*** *and this view was reiterated in Shashi Kumar v. Subosh Kumar (3) where it was pointed out by this Court that* ***expert's evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence*** *and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear_ direct evidence or by Circumstantial evidence. This Court had again occasion to consider the evidentiary value of expert opinion in regard to handwriting in Fakhruddin v. State(4) and it uttered a note of caution pointing out that it would be risky to found a conviction solely on the evidence of a handwriting expert and before acting upon such evidence. the court must always try to see whether it is corroborated by other evidence, direct or circumstantial. It is interesting to note that the same view is also echoed in the judgments of English and American courts. Vide*

> *Gurney v. Langlands(5) and Matter of Alfred (1) AIR 1957 SC 381. (2) AIR 1963 SC 1728 (3) AIR 1964 SC 529 (4) AIR1967 SC 1326 (5) 1822, 5B & Qld 330 Fogter's Will(1). The Supreme Court of Michigan pointed out in the last mentioned case: Every one knows how very unsafe it is to rely upon any one's opinion concerning the nice- ties of penmanship--Opinions are necessarily evil" and may be valuable, but at best this kind of evidence, vii". We need not subscribe to the extreme view expressed by the Supreme Court of Michigan, but* ***there can be no doubt that this type of evidence being opinion evidence, is by its very nature, weak and infirm and cannot of itself form and the basis for a conviction."*** *(emphasis supplied)*

In the present case, it is admitted by the complainant that the cheques were dishonoured by the Bank for the reasons of insufficiency of funds and not because of any discrepancy in the signature. The Bank of the complainant did not find any forgery in the signature on the cheques. The admitted handwriting of the complainant used by the expert is of a period when the complainant was aware of the criminal proceedings against him and not of the period prior to that.

The complainant has alleged that accused Mustkim (brother-in-law of the complainant) had stolen the cheques of the complainant and misused it by forging his signature on the cheques. However, it is proved on record that Manoj Wali and Tannu Aggarwal had filed separate cases under section 138 N. I. Act on the basis of alleged forged cheques and in both cases, the complainant has been convicted by the Ld. MM. The observations made by the Ld. MM in

judgment of CC No. 473/10 Manoj Walia vs. Zahir Ahmad are reproduced hereinafter:-

> *"9. I have gone through the evidence lead by the parties as well as the arguments of both the parties, the version of the Mustkim seems to be quite vague and incomplete in the sense that when he was cross examined, first of all he failed to show any documentary proof regarding the job for the period 2000 to 2007. He fail to show that he was working for the accused during the alleged period.* ***It is pertinent to mention that his statement about the alleged forgery by Mustkim in the name of the accused has not been supported by any document whatsoever, nor DW1 was aware about the name of the persons from whom Mustkim had taken loan.*** *Another factor highlighted in his cross examination was that he also did not deny the fact that complainant and accused are having offices just opposite to each other. No handwriting expert was called upon by the accused to disprove his signatures on ExCW1/1.* ***One of the other things which needs to be mentioned is DW1 in his cross examination stated that accused used to sign the cheque book and keep it open. This is a way of indicating that sign on the cheque EXCW1/1 are of the accused only.*** *However, accused nowhere was able to prove that complainant had misused the blank cheques and filled the contents for his ulterior motives.*
> *xxx*
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> *15. Another contention of the accused tendered during final arguments was that loan was for personal benefit of accused, therefore, it should have been given from the personal account and not from the firms account. He further argued that no paper or document or any challan has been placed on record by the complainant to prove his business transactions between the two. This contentions seems to be of a very weak force behind it and further complainant has argued that loan was given*

to the accused for reviving his business and further more it is not essential that cheque should have been given from the personal account of accused only and not from his firm's account." (emphasis supplied)

The complainant has filed appeals against the judgments passed by the Ld. MM and appeals have been dismissed by Ld. Sessions Judge vide judgments dated 03.03.2011. Ld. Appellate Court has made following observations while dismissing the appeal:-

"9. Secondly, so far as the impugned cheque dt. 02.08.07 Ex. CW-1/1 is concerned, it has been signed for Oliv Fashion Wear and ***the signatures of the appellant/accused on the cheque in vernacular Hindi resemble in all characteristic as to writing style, flow and font seen vis a vis the signatures of the appellant/accused on the Vakalatnama in favour of his counsel and the signatures on the A/D cards*** *mentioned above besides the present appeal.xxx*
10. For the matter, the defence of the appellant/accused that the cheque was misused and misappropriated by his brother-in-law Mustkeen does not cut much ice." (emphasis supplied)

The complainant has not filed any second appeal against the judgments of Ld. Appellate Court and the judgments dated 03.03.2011 passed by the Ld. Appellate Court have attained finality.

In view of the above discussion, this Court is of the view that much reliance can not be placed on the expert opinion placed on record. The complainant has failed to show that his signatures on the cheques were forged by any of the accused. **Hence, the accused**

persons can not summoned for offences punishable under section 465/468/471/120-B IPC.

One of the arguments of Learned counsel for the complainant is that Manoj Walia and Tannu Aggarwal had filed complaints under section 138 N.I Act and reply to appeals with identical facts and it shows that all accused had conspired to cheat the complainant and extort money from him.

This Court does not find any substance in the arguments of learned counsel for the complainant as the said fact is not sufficient to establish that the cheques were stolen or the signatures of the complainant on the cheques were forged. The material placed by the complainant is not sufficient to summon the accused for any of the alleged offeces. **Hence, the complaint is dismissed.**

File be consigned to record room after necessary compliance.

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