CASE NO.:
Appeal (crl.) 1293 of 2006

PETITIONER:
Mrs. Kalyani Baskar

RESPONDENT:
Mrs. M. S. Sampoornam

DATE OF JUDGMENT: 11/12/2006

BENCH:
G. P. Mathur & Lokeshwar Singh Panta

JUDGMENT:
J U D G M E N T
[Arising out of S.L.P. (Crl.) No. 2639 OF 2004]

Lokeshwar Singh Panta, J.

Leave granted.

This appeal by special leave, directed against the order dated 10.2.2004 of the High Court of Judicature at Madras, involves a question with regard to the scope of the powers of the Magistrate under Section 243 of the Code of Criminal Procedure, 1973 [hereinafter referred to as 'Cr.P.C.']. It arises out of these circumstances.

A complaint has been preferred by Mrs. M. S. Sampoornam, complainant-respondent herein, against Mrs. Kalyani Baskar, appellant herein, and her husband for the offence under Section 138 of the Negotiable Instruments Act, 1881 [for short "the Act"] before the Judicial Magistrate, Tambaram, Chennai, alleging that the appellant along with her husband jointly signed and issued a cheque No. 037296 for discharging their liability. On presentation of the said cheque, it was dishonoured for 'insufficient funds'. Though the notice was served upon both the accused persons yet no reply has been sent by them. Thereafter, observing all the formalities as contemplated under the Act, the complainant-respondent had preferred C.C. No. 439/1998 on the file of the Judicial Magistrate, Tambaram, Chennai, against the appellant and her husband. The accused appeared before the Magistrate and filed an application under Section 245 of Cr.P.C. raising inter alia preliminary objections that:- (1) the accused has not signed the cheque nor issued it to the complainant-respondent; (2) the cheque, in question, was drawn from the individual account of the accused and therefore, as alleged by the complainant, the accused and her husband could not have jointly signed and issued the cheque; (3) the signature on the cheque may be sent for expert opinion to ascertain bona fide of the same; and (4) neither the appellant nor her husband owe any debt to the respondent.

The Judicial Magistrate dismissed the said application on the ground that the genuineness of the signature could be questioned only at the time of trial of the complaint. Thereafter, the trial was commenced and the evidence of the respondent was recorded. The banker of the appellant during the cross-examination deposed that he has not verified the signature before returning the cheque, in question, as dishonoured. In these circumstances, during the trial of the case the appellant preferred an application under Section 243

of Cr.P.C., requesting the Magistrate to send the cheque in question for expert opinion to ascertain the correctness and genuineness of the appellant's signature appearing thereon. The Magistrate, however, dismissed the application on the ground that it was not mandatory that every disputed document or signature has to be sent to an Expert for opinion, that the original document filed in the court cannot be sent out for any reason and that every document filed before the court should be safe till the disposal of the litigation.

Feeling aggrieved by this order, the appellant preferred a Criminal Revision Case No. 335 of 2002 under Section 397 read with Section 401 of Cr. P.C in the High Court of Judicature at Madras. The Revision Petition came to be dismissed by the impugned order. Hence, this appeal by the appellant.

We have heard Shri V. Krishnamurthy, learned counsel appearing for the appellant-accused and Shri S.G.K. Kumar, learned counsel appearing for the respondent and examined the material on record.

Learned counsel for the appellant contended that the High Court has failed to appreciate the legal position that no offence can be established against the appellant by the respondent unless the respondent proves on record that the cheque, in question, bears the signature of the appellant. According to the learned counsel, the appellant cannot be debarred from entering upon her defence and produce her evidence without deciding the genuineness of the signature on the cheque, in question and the dismissal of the application by the Magistrate has caused miscarriage of justice to the appellant.

On the other hand, the learned counsel appearing on behalf of the respondent contended that the Magistrate has exercised his jurisdiction judiciously as the application filed by the appellant was with the sole object to protract the trial. He submitted that the High Court has recorded a well-reasoned order in dismissing the revision petition filed by the appellant and this Court in exercise of its jurisdiction under Article 136 of the Constitution of India should not lightly interfere with the said order.

We have given our anxious and thoughtful consideration to the respective contentions of the learned counsel for the parties.

It is not in dispute that the appellant at the initial stage of her appearance before the Magistrate had filed an application under Section 245 Cr.P.C. in which she had categorically denied her signature on the cheque and its delivery to the respondent besides raising other preliminary objections in opposition to the complaint filed by the respondent under Section 138 of the Act. From the record, it appears that the said application was dismissed by the Magistrate on the ground that the genuineness of the signature can be questioned only at the time of trial. The appellant accepted the correctness of the said order of the Magistrate. During the trial, the respondent was examined as P.W. 1 on 22.09.1999 and PW-3, the officer of the Bank, was examined on 22.11.2000. It is thereafter that the appellant had filed the application under Section 243 Cr.P.C. praying to send the cheque, in question, for ascertaining the bona fide and genuineness of her signature appended thereon. The Trial Magistrate as well as the High Court have observed that Section 243 Cr.P.C. deals with summoning of defence witnesses and cause any document or thing to be produced through him. But in the present case, the accused has filed a petition without naming any person as witness or anything to be summoned which is to be sent for hand-writing expert for

examination.

To appreciate the reasoning recorded by the High Court in its impugned order, it is useful to refer to the provisions of Section 243 of Cr.P.C., which reads as under:-

"243. Evidence for defence.\027(1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(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.

(3) The Magistrate may, before summoning any witness on an application under sub-section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court."

Section 243 (2) is clear that a Magistrate holding an inquiry under the Cr.P.C. 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 hand-writing 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 hand-writing 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 courts should be jealous

in seeing that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the petitioner has filed application under Section 243 Cr.P.C. without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2) Cr.P.C. refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case requests for sending the cheque, in question, for the opinion of the hand-writing expert after the respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable.

For all the foregoing reasons, we allow this appeal and set aside the order of the High Court dated 10.02.2004 passed in Criminal Revision Case No.335 of 2002 by which the order dated 15.11.2001 of the Judicial Magistrate made in Crl. M. P. No.341 of 2001 in C.C. No. 439 of 1998 dismissing the application of the appellant under Section 243 Cr.P.C. was affirmed. Accordingly, Crl. M. P. No.341 of 2001 in C.C. No.439 of 1998 on the file of the Judicial Magistrate, Tambaram, Chennai, shall stand allowed. The learned Magistrate shall take appropriate steps for obtaining the report of handwriting expert on the point whether the signature in the cheque is that of the accused and shall proceed with the trial of the case in accordance with law. Since the case is very old, further proceedings shall be taken with utmost expedition.

We make it clear that any observation made in this order shall not be construed as an expression of opinion on the merits of the case and the same shall be decided by the Magistrate on its own merit.