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THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 02.01.2012

Pronounced on: 11.01.2012

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CRL.M.C. NO. 3089/2011

M/S. SUKHDATA CHITS PVT. LTD. & ORS.

..... Petitioner

Through: Mr. Diwan
Advocate

Singh Chauhan,

Versus

SHRI RAJENDER PRASAD GUPTA

..... Respondent

Through:

WITH

CRL.M.C. NO. 3090/2011

PREM KUMAR ARYA

.....Petitioner

Through: Mr. Diwan
Advocate

Singh Chauhan,

Versus

SHRI RAJENDER PRASAD GUPTA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. Present petitions have been filed under Article 227 of the Constitution of India read with Section 482 Cr. P.C. against impugned order dated 27.07.2011 passed by learned ASJ in Crl. Revision No.

66/2011 and order dated 07.02.2011 of the learned MM in Complaint Case No. 883/A/2010 under section 138 of Negotiable Instrument Act (hereinafter referred to as 'the Act').

2. In his complaint filed by the respondent Rajendra Prasad Gupta under section 138 of the Act, it was alleged that the petitioners/accused, who is one of the Directors of M/s. Sukhdata Chits Pvt. Ltd., having its registered office at D-14/140, Sector-8, Rohini, Delhi-110 085, had issued a cheque of Rs. 50,000/- in favour of the respondent towards discharge of its liability, which cheque got dishonoured on presentation with remarks "funds insufficient".

3. It is averred by the respondent/complainant that petitioners were informed about the fate of the cheque and requested to honour it, but they refused to do so. Consequently, legal notice dated 28.01.2010 was sent to the petitioners through registered AD post which was duly served on them. However, inspite of the service of the legal notice upon the petitioners, they did not make any payment to the respondent/complainant. Thereupon, a complaint was filed by the respondent in the Court of learned MM and summons were served upon the petitioners. Complainant adduced his evidence by way of affidavit.

4. An application was filed by the accused/petitioners under Section 145(2) of the N.I.Act for cross examination of the respondent which came to be disposed by MM vide order dated 7.2.2011. The learned MM permitted cross examination of the complainant confined to Para 4 & 6 of the application and held that the rest of the paras of the application were legal or within the personal knowledge of the accused/petitioners under

section 106 of Indian Evidence Act and hence do not require any cross examination. The said order was challenged by the petitioners in revision in the court of learned ASJ, who upheld the order of the M.M. The above mentioned orders of the MM and the learned ASJ are challenged by way of the present petitions.

5. I have heard learned counsel for the petitioners and the respondent.

6. The only legal issue that arises for consideration is as to whether the petitioners/accused were not entitled to cross examine the complainant as regard to the entire facts contained in the affidavit of evidence of the complainant or their (petitioners') right of such a cross examination of the witness of the affidavit was limited to certain facts or their defences. The submission of the learned counsel for the petitioners was that the learned MM as also the learned Revision Court erred in limiting the right of the petitioners/accused to cross examine the complainant only to the facts stated in Para 4 and 6 of his applications. In other words, the submission was that the petitioners were prejudiced in case they were not allowed to cross examine the complainant as regard to the contents of the affidavit of evidence and were confined to their defences or limited facts. On the other hand, the submission of the learned counsel for the respondent was that the nature of the proceedings under Section 138 being of summary trial, there was certain presumptions, which arise against the petitioners under Section 139 of the Act and so, the right of cross examination of the complainant by the petitioners was confined to his defences or in any case to the limited facts.

7. Before adverting to the submission of the parties, it would be pertinent to consider the ideology behind the provisions provided in the Act in cases of dishonouring of cheque. Section 138 was enacted in public interest. Its objective is to “enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in certain cases while at the same time providing ‘adequate safeguards’ to prevent harassment of honest drawers. As the evil practice of issuing cheques in settlement of liabilities without there being adequate amount in the accounts became rampant, the Union Parliament thought it fit to curb the same effectively by enacting a stringent law while at the same time taking care to safeguard the interests of honest drawers: **B. Mohan Krishna v. Union of India** 1996 Cr.L.J. 638 (Andh. Pra.) (D.B.). In case of **K.N. Beena vs. Maniyappan**, 2001 Cr.L.J. 4745(SC), it has been held that under section 139 of the Act the Court has to presume, in a complaint under section 138 of the Act, that the cheque has been issued for a debt or liability. There is presumption in favour of the complainant that the cheque is towards the discharge of the debt or liability and it is for the applicant to prove the contrary and to rebut this presumption. This can be rebutted by the applicant by evidence only. **Shailesh Kumar Aggarwal Vs. State of U.P.** 2000 Cr.L.J. 2921 (All.)

8. Section 143, 144, 145 and 147 of the Act expressly depart from and override the Criminal Procedure Code. Section 143 provides the complaints under Section 138 of the Act to be tried in the summary manner except where the Magistrate felt that the sentence of imprisonment for a term exceeding one year may have to be passed or that for any other

reason, it is undesirable to try the case summarily. Number of such type of cases would be relatively smaller and insignificant. The fact remains is that Section 143 mandates, in general, to follow the summary trial procedure in such cases as far as possible. Section 145 of the Act, which is the subject of the interpretation in the present cases reads thus:

“145. Evidence on affidavit.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974.) the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.]”

9. Section 145 starts with the non obstante clause meaning thereby that notwithstanding the provisions of the Code of Criminal Procedure, the evidence of the complainant may be given by him on affidavit though taking of evidence by this mode would be subject to all just exceptions, which would mean that anything that was inadmissible in evidence or irrelevant or hearsay would not be taken in evidence though the same may be stated in the affidavit.

10. The provisions of Section 145 came for interpretation before the Hon’ble Supreme Court in a recent judgment titled **M/s. Mandvi Co-Op. Bank Ltd. Vs. Nimesh S. Thakore**, I (2010) SLT 133. Though the controversy before the Supreme Court in the said case was not directly similar to what is in the instant case, but observations which were made and are relevant to the issue involved in the instant case can be reproduced as under:

“What section 145(2) of the Act says is simply this. The court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused the court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of section 145(1) and having regard to the object and purpose of the entire scheme of sections 143 to 146. The scheme of sections 143 to 146 does not in any way affect the judge's powers under section 165 of the Evidence Act. As a matter of fact, section 145(2) expressly provides that the court may, if it thinks fit, summon and examine any person giving evidence on affidavit. But how would the person giving evidence on affidavit be examined, on being summoned to appear before the court on the application made by the prosecution or the accused? The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit. In so far as the prosecution is concerned the occasion to summon any of its witnesses who has given his evidence on affidavit may arise in two ways. The prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for “re-examination”. The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that event the witness may be summoned to appear before the court to cure the defect and to have the document(s) properly proved by following the correct legal mode. This appears to us as the simple answer to the above question and the correct legal position”.

11. As observed by the Hon’ble Supreme Court in the aforesaid case, on being summoned on the application of the petitioner/accused, the deponent of the affidavit could be subjected to the cross examination as to the facts stated in the affidavit. The question as to whether the accused would have the right to cross examine the deponent of affidavit as to the entire facts stated in the affidavit or his right of cross examination was limited to his defences or certain facts did not directly arise before the Supreme Court in the said case. It was however observed that what would be the extent and nature of examination in each case would be a different matter and that has to be reasonably construed in the light of the provision of Section 145(1)

of the Act and having regard to the object and purpose of the entire scheme of Section 143 to 146 of the Act. It has already been seen above that the scheme of Section 143 was that ordinarily, every case under Section 138 of the Act was to be tried as summary trial and the scheme of Section 145 was also to expedite the trial of such cases. The entire scheme of Section 143 to 146 was designed to lay down a much simplified procedure for the trial of dishonoured cheque cases with the sole object that the trial of those cases should follow a course even swifter than a summary trial.

12. With the legislative intent being not only of summary trial, but of swifter and expeditious disposal of dishonoured cheques cases, particularly Section 139 of the Act as also Section 118 of the Evidence Act providing presumption in favour of the complainant that issue of cheque was towards the debt or liability and Section 145 providing that the evidence could be led by the complainant by way of the affidavit, the petitioner/accused could not be said to have unlimited and unbridled right of subjecting the complainant to the usual and routine type of cross examination. If that was so, that would apparently be not only against the scheme and object of the provisions of summary trial, but would be contrary to the provisions of Section 139, 143 and 145 of the Act.

13. Thus it can be said that the phraseology “as to the facts contained therein” in Section 145(2) of the Act cannot be read to mean that the complainant can be subjected to be cross-examination of everything that he has stated on affidavit. If sub section (2) of Section 145 is interpreted to mean that in every case where the accused applies to the court to summon the complainant or his witness who has given evidence on affidavit under

sub section (1) and the court is obliged to summon him to tender oral examination-in-chief or to allow him to be subjected to cross examination as in summons or warrant trial cases, then the object of inserting such provision would be defeated. The Sub-Section (2) of Section 145 cannot be interpreted in a manner that would render Sub-Section (1) thereof or Section 139 & Section 143 redundant.

14. From the above discussion, it can be said that there cannot be any hard and fast rule as to what part of evidence tendered by way of affidavit could be eligible for cross examination. It was to be decided by the Magistrate depending upon the facts and circumstances of each case and also keeping in mind the scheme and objective of the Act, particularly Section 139, 143, 145 of the Act as also Section 106 of the Evidence Act.

15. The affidavits of evidence which have been filed in these cases are not only as regard to the averments of the complaint, but contained detailed facts attributing liability to the petitioners/accused. Some of those facts would not be required to be proved because of Section 139 of the Act as also Section 106 of the Evidence Act. It would also be unjust to say that in all cases, the cross examination would only be confined to the defences of the petitioners/accused. The petitioners would be entitled to cross examination of complainant as is done in the summary trial case, but at the same time, they could not be precluded from putting certain questions which would otherwise be relevant and essential for the just decision of the case. Limiting the right of the petitioners to cross examine only with regard to Para 4 and 6 of complainant's application may cause prejudice to the petitioners.

16. In view of my above discussion, the impugned orders are modified to the extent that the cross examination of the complainant would not remain limited to the contents of Para 4 and 6 of the applications of the complainant, but shall also extend to the facts in addition to their defences, as may be deemed and essential by the learned Magistrate relevant in the facts and circumstances of the case keeping in view the object and scheme of the Act and particularly, provisions of Sections 139, 143 of the Act and Section 106 of Evidence Act.

17. Petitions are disposed accordingly.

M.L. MEHTA, J.

JANUARY 11, 2012

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