

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 9th December, 2014
Date of Decision: 14th January, 2015

+ CRL. M.C. 4958/2014

HARPREET SINGH

..... Petitioner

Through: Mr. Maninder Singh, Mr. Serman
Rawat, Ms. Aekta Vats, Mr. Jagmeet
Kandhawa & Mr. Dinhar Takiar,
Advocates.

versus

STATE (GOVT. OF NCT OF DELHI) & ANR. Respondents

Through: Mr. Shiv Sapra & Ms. Amoha Sharma,
Advocates for R-2.
Mr. Karan Singh, APP for the State.

CORAM:

HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By way of these petitions filed under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), the petitioner assails order dated 26.09.2014 passed by learned Metropolitan Magistrate-02 (South), Saket Courts, New Delhi.

2. The concise facts of the case are that respondent No.2/complainant filed a complaint under Section 138 of Negotiable Instruments Act (hereinafter referred to as 'NI Act') against the petitioner (accused in original complaint) for the offence under Section 138 of NI Act on the allegations, *inter alia*, that respondent No.2 is a

company incorporated under the Companies Act having its registered office at D-1, Soami Nagar, (South) New Delhi-110017 and is engaged in the business of manufacturing of disposable medical devices and delivering high quality standards. The petitioner is the proprietor of M/s. BJS Pharmaceuticals. He approached respondent No.2 at its registered office at New Delhi for being appointed as the Consignee Agent and respondent No.2 after detailed discussions and negotiation agreed to the same and appointed the petitioner as the Consignee Agent and a written agreement enumerating various terms and conditions was entered into with the accused at New Delhi wherein it was clearly mentioned that in case of any dispute courts at Delhi will have jurisdiction. As per the order placed upon by the petitioner, respondent No.2 supplied goods to the petitioner against Form-F vide various invoices and as per the statement of accounts maintained by respondent No.2 during the course of business. The total outstanding liability against the petitioner including liability towards Form-F, which the petitioner failed to supply to respondent No.2 was Rs.2,43,33,924/- (Rupees Two crores forty three lakhs thirty three thousand nine hundred and twenty four) as on 31.10.2010. The petitioner also failed to provide Form-F for the goods supplied to the petitioner without payment of Sales Tax, thereby making itself liable to pay the penalty imposed upon respondent No.2 by the competent authorities and in lieu thereof the accused agreed to compensate respondent No.2 the amount imposed as penalty. In discharge of his liability, the petitioner issued a cheque bearing No.631703 for a sum of Rs.2,37,37,556/- (Rupees Two crores thirty seven lakhs thirty seven thousand five hundred fifty six)

drawn on State Bank of Patiala, Saban Bazar, Ludhiana. On presentation the said cheque was dishonoured with the remark 'Effects Not Cleared/ Present Again' vide returning memo dated 02.12.2010. The petitioner requested respondent No.2 to present the said cheque again which on presentation to ICICI Bank, New Delhi was dishonoured again with the remarks 'Payment stopped by Drawer' vide returning memo dated 20.12.2010. Despite statutory notice dated 30.12.2010, the petitioner failed to make the payment of the cheque amount.

3. Vide order dated 09.03.2011; learned trial court took cognizance for the offence under Section 138 of NI Act and summoned the petitioner. Notice under Section 251 of Cr.P.C. was served on the petitioner on 29.05.2014 and the petitioner sought time for moving application under Section 145(2) of NI Act. On 26.09.2014, it was submitted on behalf of petitioner that the complaint is liable to be returned for filing the same in the Court having appropriate jurisdiction, in view of the judgment of Hon'ble Supreme Court in '**Dashrath Rupsingh Rathod vs. State of Maharashtra and Another**', 2014 (9) *Supreme Court Cases* 129. The trial court observed that the matter is listed for moving application under Section 145(2) of NI Act, no application was filed on behalf of petitioner and, therefore, declined the request made by the petitioner vide impugned order dated 26.09.2014.

4. Feeling aggrieved by the said order the petitioner has preferred the present petition.

5. Learned counsel for the petitioner submits that the cheque in question is drawn on State Bank of Patiala, Saban Bazar, Ludhiana and Courts at Delhi have no territorial jurisdiction to entertain and try the complaint in terms of judgment of Hon'ble Supreme Court of India in in '**Dashrath Rupsingh Rathod's** case (supra). He further submitted that the complaint has not reached the stage of Section 145(2) of NI Act and the same is liable to be returned.

6. *Per contra*, learned counsel for respondent No.2 urged that notice under Section 251 of Cr.P.C. was served on 29.05.2014 and the petitioner sought time for moving application under Section 145(2) of NI Act, but no application under Section 145(2) of NI Act was filed despite adjournment and, therefore, the proceedings have gone beyond the stage of Section 145(2) of the NI Act.

7. I have bestowed my thoughtful consideration to the submissions made by the learned counsels for both the parties and have also perused the material on record.

8. To appreciate the submissions raised by the learned counsel for the petitioner, the relevant provisions of Section 145 of the NI Act are being reiterated here, the said provision reads as under: -

"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. The above provisions make it clear beyond any reasonable doubt that the legislature has allowed the complainant to give his evidence by way of an affidavit during the course of trial for offences punishable under Section 138 of the NI Act by virtue of sub-section (1) of Section 145 of the NI Act. Sub-section (2) of Section 145 of the NI Act provides that the Magistrate may on the application moved by the accused, summon the complainant for his cross-examination as to the effect contained therein.

10. Provisions of Section 145 of the NI Act should be read logically as they seek to attend a productive purpose. The Statement of objects and reasons of the NI Act seek to attain a fast and expeditious trial, a requisite condition for a criminal trial. It is needless to mention here that NI Act is a special legislation and the provisions contained in it have an overriding effect over the provisions contained in a general statute. It therefore, doesn't necessitate the presence of an accused for taking on record the evidence of the complainant. Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 which came into force w.e.f. 06.02.2003 introduced Sections 143 to 147 in the NI Act. According to Section 143, the offence under Section 138 of the NI Act is to be tried summarily which envisages fast and expeditious conclusion of a trial by the trial court. The courts have to be flexible in their approach as the nature of examination in each

case is a different matter which has to be considered differently by the court in different circumstances. However, while adopting this flexible approach, courts have to give due consideration to the provisions of Section 145(1) and to the object and purpose of the entire scheme of Sections 143 to 146 of the NI Act.

11. In '**Indian Bank Association and Ors. vs. UOI & Ors.**', (2014) 5 SCC 590, Hon'ble Supreme Court has laid down the procedure to be followed by subordinate courts dealing with the cases under sections 138 of the Act. The said directions are contained in para 23 of the Judgment which reads as under:-

Directions

"23. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the criminal courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given: -

23.1. The Metropolitan Magistrate/ Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

23.2. The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of the police or the nearby court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow up action be taken.

23.3. The court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the court may pass appropriate orders at the earliest.

23.4 The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for re-calling witness for cross-examination.

23.5 The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses, instead of examining them in court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the court.”

12. The inference that can be drawn from the above is that the apex court in **Indian Bank Association’s** case (supra), observed that unless an application is made by an accused under Section 145(2) of the Act for recalling a witness for cross-examination, after serving notice in terms of Section 251 of Cr.P.C. upon an accused, the Magistrate shall fix the case for defence evidence. It was also observed that the concerned Magistrate must ensure that examination-in-chief, cross-examination and re-examination of the complainant is conducted within three months of assigning the case.

13. There may be three situations when notice in terms of Section 251 of Cr.P.C. is served upon an accused;

- (i) After framing of notice in terms of Section 251 of Cr.P.C. the matter is fixed for DE as no application as envisaged in Section 145(2) of the NI Act is moved by the accused;
- (ii) After framing of notice in terms of Section 251 of Cr.P.C., an application under Section 145(2) of the NI Act is moved by an accused but it is yet to be allowed by a Magistrate; and
- (iii) After serving notice under Section 251 Cr.P.C., the application moved under Section 145(2) of the NI Act by an accused for cross-examination of the complainant, has been allowed by the Magistrate.

14. At this stage, the question that arises is whether the trial would be said to have commenced in all the aforesaid three situations or not. It is only in the third situation when the application under Section 145(2) of the NI Act has been allowed by the Magistrate that the trial would commence within the meaning of Section 145(2) of the NI Act.

15. In the para 22 of the renowned '**Dashrath Rupsingh Rathod's** case (supra) the Apex Court observed that the category of complaint cases where proceedings have gone to the stage of Section 145(2) of the Act or beyond shall be deemed to have been transferred from the Court ordinarily possessing territorial jurisdiction, as clarified therein, to the Court where it is presently pending. Thus, it is only when the cases filed under Section 138 of the NI Act have reached the stage of

Section 145(2) of the NI Act or beyond thereof that these cases shall continue to be dealt with by the Court where it is already pending trial.

16. In the present case, it is not disputed that the notice under Section 251 of Cr.P.C. was served on the petitioner on 29.05.2014 and the petitioner was granted time to move an application under Section 145(2) of NI Act. No application under Section 145(2) of NI Act was filed by the petitioner. The request to cross-examine the complainant in terms of Section 145(2) has not been allowed by the learned trial court. Thus, in my view, it cannot be said that the complaint has reached the stage of Section 145(2) of NI Act or beyond thereof.

17. In the light of the aforesaid discussion, the petition is allowed. Consequently, the impugned dated 26.09.2014 passed by learned Metropolitan Magistrate-02 (South), Saket Courts, New Delhi is set aside. The learned trial court will pass an appropriate order for return of the complaint in accordance with law.

18. Both the parties are directed to appear before the learned trial court on 24.01.2015. A copy of this order be sent to the learned trial court for information and necessary compliance.

Crl. M.A. No.16959/2014

The application is dismissed as infructuous.

**(VED PRAKASH VAISH)
JUDGE**

JANUARY 14th, 2015
hs