

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 35 OF 2019

Rukmakar @ Bharat Tulshidas Naik ... Petitioner

Versus

Santosh Shaba Gaonkar & anr. ... Respondents

Mr. Rohan P. Desai, Advocate for the Petitioner.

Mr. A. Halarnkar, Advocate for the Respondent No.1.

Coram:- C. V. BHADANG, J.

Date:- 5th April 2019

P.C.

By this petition, the petitioner/accused is challenging the order dated 10.01.2019 passed by the learned Magistrate in Criminal Case No.259/OA/NIA/2018/C by which an application (exhibit 12) filed by the petitioner seeking leave to cross examine the first respondent-complainant, has been dismissed.

2. The first respondent has filed a complaint against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, (Act, for short) in respect of dishonour of a cheque dated 31.01.2018, drawn by the petitioner on his account with Syndicate Bank, Pale Branch for a sum of ₹2,64,375/-. Prior to the institution of the complaint, the first respondent had issued a statutory notice to the

petitioner on 13.02.2018. Indisputably, the petitioner failed to comply with the said notice and has even failed to issue any reply to the said notice.

3. Before the learned Magistrate, the petitioner filed an application, exhibit 12, seeking leave to cross examine the complainant. The application is conspicuously silent as to the probable defence of the petitioner and the point on which the petitioner intends to cross examine the first respondent.

4. The application was opposed by the first respondent.

5. The learned Magistrate by the impugned order has dismissed the said application.

6. I have heard Mr. Desai, the learned Counsel for the petitioner and Mr. Halarnkar, the learned Counsel for the respondent. Perused record.

7. Mr. Desai, the learned Counsel for the petitioner, apparently faced with a situation where the leave to cross examine the first respondent was sought without setting out any details as to the probable defence and/or the points on which the petitioner intends to cross examine the first

respondent, has submitted that the petitioner may be granted an opportunity to file a fresh application setting out the grounds seeking the cross examination of the first respondent and thereafter the Trial Court can decide the said aspect afresh.

8. The learned Counsel for the first respondent has opposed the same. It is submitted that the petitioner has not even issued a reply to the statutory notice and, thus, there is no defence which the petitioner can now point out on the basis of which the permission to cross examine can be granted.

9. I have given my anxious consideration to the rival circumstances and the submissions made. As has been noticed by the learned Magistrate, in normal circumstances, a party is not required to seek leave to cross examine the witness of an adversary. However, the present matter is governed by the law laid down by the Hon'ble Supreme Court in the case of **Indian Bank Association & Ors. vs. Union of India & Ors. 2014 (5) SCC 590** which has been reiterated in a recent decision of the Supreme Court in the case of **Meters and Instruments Private Limited & anr. vs. Kanchan Mehta, 2018 (1) SCC (Cri) 477.**

10. In terms of the directions issued in the case of **Indian Bank Association** (supra), after appearance of the accused, the Magistrate should ask him to take notice under Section 251 of Cr.P.C. in order to enable the accused to enter his plea of defence and thereafter fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross examination (see para 23.4 of the judgment in the case of **Indian Bank Association**).

11. In the case of **Meters and Instruments Private Limited** (supra), the Supreme Court has held that if the accused wants to contest the case, he must be required to disclose specific defence for such contest and for this purpose, it is open to the Court to ask specific questions to the accused at that stage.

12. It can thus be seen that the trial of the offence under Section 138 of the Act is a class apart and the Magistrate is required to conduct the trial normally in a summary way and in accordance with the procedure laid down for summary trials and in the light of the directions issued by the Supreme Court in the case of **Indian Bank Association** (supra) and **Meters and Instruments Private Limited** (supra).

13. Coming to the present case, the impugned order, in my considered view, cannot be faulted going by the casual nature in which the application, exhibit 12 was filed and the relief was sought. Perhaps, faced with this difficulty, the learned Counsel for the petitioner has sought liberty to file a fresh application setting out the defence and for a direction to the learned Magistrate to decide it afresh.

14. I have considered this aspect and atleast in the present case, I do not find that any such liberty can be granted. The first point of time when the accused has an opportunity to set out his defence is when he sends a reply to the statutory notice of the complainant. The second such opportunity to set out the grounds is in the application seeking leave to cross examine the complainant. In a given case, the accused can also disclose such grounds during the course of the hearing of the application and in answer to the questions which may be posed by the learned Magistrate as is permissible, (as held in para 20 of the judgment in the case of **Meters and Instruments Private Limited**). On none of these occasions, the petitioner thought it fit to disclose the grounds as to why and on what points he proposes to cross examine the complainant. In the present case, there was a fourth occasion

to set out atleast such skeletal defence in the petition challenging the impugned order. The petition is also silent about such probable defence and/or the grounds on which the petitioner seeks to cross examine the complainant. No such grounds were also referred to during the course of the arguments at bar. Thus, in the present case, I am not inclined to grant liberty to the petitioner to file a fresh application as the possibility of inventing a defence in the given circumstances, cannot be ruled out in this case.

15. Needless to mention, that the petitioner can displace the presumption, if any, arising under Section 118 and 139 of the Act by leading defence evidence, if so advised.

16. For the aforesaid reasons, I am not inclined to entertain the petition which is accordingly dismissed.

C. V. BHADANG, J.

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