

S.No.130

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-39484 of 2019 (O&M)

Date of Decision:17.09.2019

D.S. MohiPetitioner

Vs.

P.S. MidhaRespondent

CORAM:- HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present:- Mr. Raman K. Sharma, Advocate
for the petitioner.

Rajbir Sehrawat, J.(Oral)

The present petition has been filed under Section 482 Cr.P.C for quashing of order dated 02.09.2019 passed by Additional Sessions Judge, Mohali; whereby the Criminal Revision No.184 of 2019, filed by the petitioner; in complaint No.33 dated 16.01.2015, was declined only on the ground of maintainability.

The facts giving rise to the present petition are that the petitioner filed a complaint under Section 138 of NI Act impleading the respondent as an accused; for the default of three cheques for an amount totaling Rs.1.75 crores. The petitioner led his evidence before the trial Court. Although earlier, the respondent, somehow, was not appearing before the trial Court, however, later on, he got an order of anticipatory bail and then appeared before the trial Court; to face further proceedings in accordance with law. However, while taking the evidence of the complainant, undisputedly, no opportunity of cross-examination was granted to the respondent. After the notice was served upon the respondent, he moved an application under Section 145(2) of NI Act; praying for permission to cross-examine the complainant. That application

was allowed by the trial Court. However, the complainant/ petitioner felt aggrieved of the said order passed by the trial Court. Therefore, the petitioner had preferred revision petition before the Court of Additional Sessions Judge, Mohali. However, the revisional Court has dismissed the revision filed by the petitioner; as being not maintainable. It is against this order that the present petition has been filed by the petitioner/ complainant.

While relying upon the judgment of this Court rendered in **2016 (2) RCR (Criminal) 684 – Uppal Credit and Investment Pvt. Ltd. v. Ashwani Kumar**, counsel for the petitioner has submitted that order of the trial Court permitting or denying examination of witness is not an interlocutory order. Accordingly, in that case, this Court had relegated the complainant, whose application under Section 311 Cr.P.C had been declined, to the remedy of revision. It is further submitted that in the present case, the order passed by the trial Court, dealing with the application under Section 145 of NI Act is an intermediary order; and not the interlocutory order. The revision against all the intermediary order is not barred by Section 397 Cr.P.C. Therefore, the revision petition filed by the petitioner should have been entertained by the revisional Court; and the same should have been decided on merits. Hence, the order passed by the revisional Court is perverse.

It is further contended by the counsel for the petitioner that immediately on service of notice of accusation, the accused should have, in the first instance, disclosed his defence and only then he could have been permitted to cross-examine the complainant. Unless he first discloses his defence, the accused has no right to cross-examine the complainant. The

counsel has placed reliance upon judgment of Supreme Court in case of **2014(2) RCR (Criminal) 598 – Indian Bank Association and others v. Union of India and others**, and judgment of Delhi High Court in **2010(4) RCR (Criminal) 124 – Rajesh Agarwal v. State and another**.

Having heard the learned counsel for the petitioner and perused the case file, this Court does not find substance in the argument of the learned counsel for the petitioner.

A perusal of the order passed by the revisional Court shows that the revisional Court has relied upon the analogy of revision against an order passed upon an application under Section 311 Cr.P.C. Since the order passed under Section 311 Cr.P.C has been held to be interlocutory order, therefore, the revisional Court has believed that the order permitting cross-examination to an accused was an interlocutory order. Hence, the revision against such an order is not maintainable. However, in the present case, the application which was allowed by the trial Court was not under Section 311 Cr.P.C but it was under Section 145(2) of Negotiable Instruments Act. So, the reasoning given by revisional Court may not be entirely correct.

Section 145 of Negotiable Instruments Act is a special procedure for trial of the offences under Negotiable Instrument Act. To expedite the matter, the special procedure has been prescribed under this Section. Therefore, to cut the delays in the trial only, it has been provided that the evidence of the complainant may be taken on affidavits also and after such evidence is taken by the Court, then if the accused moves an application for permission to cross-examine the complainant, the accused should be granted permission to cross examine the complainant. In the

present case, the accused/ respondent has been granted such permission to cross-examine the complainant. Hence, the present petition has been filed.

Since the revision petition filed by the present petitioner has been dismissed by the lower court only on the ground of maintainability and the petitioner has submitted before this Court that the order passed by the trial court was not interlocutory order, rather it was an intermediate order and, therefore, revision petition was maintainable under Section 397 Cr.P.C., hence, it is appropriate to have reference to the relevant provisions of law regarding the revision by a superior court. Section 397 Cr.P.C., which provides for a revision is as under:-

“397. Calling for records to exercise powers of revision:

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. Explanation.- All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub- section and of section 398.

(2) The powers of revision conferred by sub- section (1) shall

not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.”

The perusal of the bare provision shows that although the superior court has the power of revision against the order passed by the court below, however, a specific embargo has been created on this power of such superior court by section 379(2), if the order passed by the court below happens to be an ‘interlocutory order’. Hence the essential question is as to what is the ‘interlocutory order’ and secondly, whether the order passed by the trial court in the present case, is an interlocutory order or not.

The term ‘interlocutory order’ has been widely used in the legal systems throughout the world. However, a precise definition of the word ‘interlocutory order’ has remained elusive so far. Initially, an ‘interlocutory order’ was seen in contrast to the ‘final order’. It was considered that if an order passed by the court has the effect of culminating or terminating the proceeding; then it was a ‘final order’ and if the order was passed during the proceedings only to facilitate the culmination of the proceedings of the case, then it was an ‘interlocutory order’. However, the complexities of the legal situations do not brook such a simplistic definition of the term. Therefore, with the passage of time and development of the jurisprudential concepts; meaning of the term ‘interlocutory order’ has been restricted and has been fairly crystallized through judicial precedents. Such crystallized meaning of the word ‘interlocutory order’ goes beyond the extremes of ‘Black-and-

White', rather, it is seen on the lowest end of a Scale of 'Black-and-White', which is interspersed with 'Grays'. Hence it has been held that an order passed during the pendency of the proceedings is not necessarily the pure 'interlocutory order'. An order passed during the pendency of the proceedings, although, may not finally terminate the proceedings as such, and therefore, it may not be the 'final order', however, such an order, though passed during the pendency of the proceedings, may finally determine some or the other right of the respective parties. In such a situation, the order is not purely procedural, though passed during the pendency of the proceedings. Hence such an order would not be an 'Interlocutory Order'; against which the revision is prohibited. Therefore such an order shall be revisable by the superior court. This position has been amply clarified by the Hon'ble Supreme Court in case of **Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551**, where in para No. 12 the Supreme Court has approvingly quoted the Halsbury's Laws of England as under:-

12. Ordinarily and generally the expression "interlocutory order" has been understood and taken to mean as a converse of the term "final order". In volume 22 of the third edition of Halsbury's Laws of England at p. 742, however, it has been stated in para 1606:

"... a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required."

In para 1607 it is said:

“In general a judgment or order which determines the principal matter in question is termed ‘final’.”

In para 1608 at pp. 744 and 745 we find the words:

“An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declaration of right already given in the final judgment, are to be worked out, is termed ‘interlocutory’. An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.”

Still further, the same judgment, in para No. 13, has also clarified that any monolithic definition or meaning of the term ‘interlocutory order’ is neither possible nor desirable. It has to be seen with the reference to the impact of such order upon the respective rights of the parties. If the order finally decides right of a party then; such an order, though passed during the pendency of the proceedings, and therefore may be designated as an ‘Intermediate Order’, however the same shall be taken as a final order to the limited extent to which it decides the said right, and therefore the same shall be taken as revisable order. Para 13 of the said judgment is reproduced herein below:-

13. In S. Kuppuswami Rao v. King [AIR 1949 FC 1 :1947 FCR 180] Kania, C.J. delivering the judgment of the Court has

referred to some English decisions at pp. 185 and 186. Lord Esher, M.R. said in *Salaman v. Warner* [(1891) 1 QB 734] :

“If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.”

...(SIC)...But in our judgment such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the one in the 1898 Code. ...(SIC) ...Such cases will be very few and far between. It has been pointed out repeatedly, vide for example, *River Wear Commissioners v. William Adamson* [(1876-77) 2 AC 743] and *R.M.D. Chamarbaugwalla v. Union of India* [AIR 1957 SC 628 : (1957) SCR 930] that although the

words occurring in a particular statute are plain and unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the statute and bring about the real intention of the Legislature. On the one hand, the Legislature kept intact the revisional power of the High Court and, on the other, it put a bar on the exercise of that power in relation to any interlocutory order. In such a situation it appears to us that the real intention of the Legislature was not to equate the expression “interlocutory order” as invariably being converse of the words “final order”. There may be an order passed during the course of a proceeding which may not be final in the sense noticed in Kuppuswami case, but, yet it may not be an ‘interlocutory order’ - pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we think that the bar in sub-section (2) of Section 397 is not meant to be attracted to such kinds of ‘intermediate orders’. They may not be final orders for the purposes of Article 134 of the Constitution, yet it would not be correct to characterize them as merely ‘interlocutory orders’ within the meaning of Section 397(2). It is neither advisable, nor possible, to make a catalogue of orders to demonstrate which kinds of orders would be merely, purely or simply ‘interlocutory’ and which kinds of orders would be ‘final’, and then to prepare an exhaustive list of those types of orders which will fall in between the two. The first two kinds are well known

and can be culled out from many decided cases. We may, however, indicate that the type of the order with which we are concerned in this case, even though it may not be final in one sense, is surely not interlocutory so as to attract the bar of the sub-section(2) of section 397. In our opinion it must be taken to be an order of the type falling in the middle of course.”

Hence it is amply clear that; there is no precise definition of the term interlocutory order; inviting bar created under section 397(2) Cr.P.C., rather; the same has to be determined with reference to the fact whether such an order finally decides some or the other right; of the parties; or either of them. There are provisions of law which confer some right upon the parties; or on either of them; to move the court. In such cases the intermediate order passed by the court would be deciding the rights of the respective parties. There can be certain provisions of law which confer right only upon one of the parties and not upon both the parties. In such situation the intermediate order would not be interlocutory order qua the party whose right has been decided; but it would be interlocutory order qua the other party. Still further, there can be provision of law which does not confer any right upon either of the parties; but confers only discretion upon the court to pass some order, and which can be invoked by the court on its own or on the application of a party. The order passed under such a provision, which cannot be invoked by a party, can also affect the right of a party. In that situation the order shall not be interlocutory qua such a party. Therefore, the fact whether such an order finally decides some right of either of the parties or not; can be determined with reference to the provision of the law under which the same

is passed or with reference to the impact of such an order. Example of this can be found in the order passed under Section 319 Cr.P.C., where both the parties may have right to file revision, depending upon the nature of the order passed by the trial Court. On the contrary, an order passed by the Court under Section 311 Cr.P.C., although invoked on application of a party, is not revisable, as has been held by the Hon'ble Supreme Court in **Sethuraman v. Rajamanickam, (2009) 5 SCC 153**. Still further, example can be found in an order passed by Magistrate under Section 156(3), where none of the parties have any right to file revision against the order of Magistrate, but if the person against whom the order has been passed for registration of the FIR, happens to be a public servant, then he gets a right to file a revision against such an order because of provision contained in Section 197 Cr.P.C., which prohibits taking cognizance of the offence against him by the Magistrate, unless sanction is granted by competent authority, as has been held by this court in **M/s Sujan Multisports Ltd. Vs. State of Haryana and others – CRM-M-12329 of 2018**, decided on 12.03.2019.

The order in the present case has been passed by the trial Court on an application moved by the respondent- accused under Section 145(2) of Negotiable Instruments Act. Therefore, to assess whether the order passed by the trial Court on such an application is an interlocutory order or not, it is appropriate to have reference to the provision of Section 145 of Negotiable Instruments Act, which is reproduced 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.”

A bare perusal of the above said provision of Section 145(2) of the Negotiable Instruments Act shows that after the evidence of the complainant has been taken, the accused has a choice to seek opportunity to cross-examine the complainant. In case, the evidence of the complainant has been taken on affidavit and/or the accused has not been granted any opportunity to cross-examine the complainant, then on an application moved by the accused, the complainant has to be recalled for cross-examination by such an accused. Recalling of the complainant on application moved under Section 145(2) of Negotiable Instruments Act is mandatory. Once an application is moved by the accused under Section 145(2) of Negotiable Instruments Act, the trial Court is under statutory duty to call the complainant for cross-examination. In case such opportunity is not granted to the accused, then the evidence of the complainant cannot be read against such an accused. Hence, the right of the accused under Section 145(2); to recall the complainant is an absolute right. Therefore, if the trial Court declines an application moved by an accused under Section 145(2), then the same shall not be an interlocutory order qua the accused. However,

if the application moved by the accused under Section 145(2) of Negotiable Instruments Act is allowed by the trial Court, then the complainant has no right to question such an order and qua him, such an order would be only an interlocutory order passed during the proceedings of a trial. Hence, the complainant would not be entitled to challenge the same; by way of filing revision against such an order. Accordingly, it has to be held that the order passed by the trial Court in the present case, allowing the application filed by the respondent/ accused, is only an interlocutory order qua the complainant/ petitioner. Hence, the revision petition filed before Additional Sessions Judge against this order, at the instance of the petitioner, was not maintainable.

Although learned counsel for the petitioner has relied upon the judgment of this Court and the judgments of the Hon'ble Supreme Court mentioned above, however, this Court finds the same to be distinguishable and not applicable in the facts of the present case. This Court does not find any substance in the argument of the learned counsel for the petitioner that unless the accused discloses his defence; immediately on service of the notice of accusation, he cannot be permitted to cross-examine the complainant. On being served with notice of accusation, the accused is required only to plead guilty or to inform the Court that he intends to defend himself by leading evidence. In the present case, the accused/ respondent has duly pleaded before the trial Court that he would lead evidence in defence. It is only thereafter that the application has been moved by him under Section 145(2) of Negotiable Instruments Act. Therefore, this Court does not find even any procedural irregularity; in the procedure adopted by

the trial Court, while, allowing the application under Section 145(2) of Negotiable Instruments Act, moved by the accused.

As observed above, the Court of Additional Sessions Judge, Mohali, has dismissed the revision filed by the petitioner as non-maintainable; by relying upon the analogy of the non-maintainability of the revision petition against the order passed under Section 311 Cr.P.C. But that analogy is not applicable in the present case, because the application allowed by the trial Court was not under Section 311 Cr.P.C., but was under Section 145(2) of Negotiable Instruments Act. However, as observed above, the order passed by the trial Court, in favour of an accused, under Section 145(2) of Negotiable Instruments Act is also an 'interlocutory order', qua the complainant. Therefore, in this case; the revision before the Court of Additional Sessions Judge, Mohali, in any case, was not maintainable. Hence, the revision filed by the petitioner before the Court of Additional Sessions Judge, Mohali has to be held to be non-maintainable.

Accordingly, while not upholding the reasoning given by the Court of Additional Sessions Judge, Mohali, the final result of dismissing the revision petition filed by the present petitioner as non-maintainable is upheld. Accordingly, the present petition is dismissed.

September 17, 2019**(RAJBIR SEHRAWAT)****renu****JUDGE**

Whether Speaking/reasoned

Yes/No

Whether Reportable

Yes/No