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Date of decision: 11.12.2019

IN THE MATTER OF:

+ **CRL.M.C. 6061/2019 and Crl.M.A.No.41285/2019 (stay)**

SUNIL AGARWAL

..... Petitioner

Through: Mr.Nishant Das, Mr. Atul Kumar
and Ms. Surabhi Diwan,
Advocates.

Versus

SUNIL GUPTA & ANR

p..... Respondents

Through: Mr.Vijay Kumar Aggarwal,
Mr.Shailesh Pandey, Mr. Shekhar
Pathak and Mr.Deepanshu
Choithani, Advocates.

AND

+ **CRL.M.C. 6065/2019 and Crl.M.A.No.41297/2019 (stay)**

SUNIL AGARWAL

..... Petitioner

Through: Mr.Nishant Das, Mr. Atul Kumar
and Ms. Surabhi Diwan,
Advocates.

Versus

SUNIL GUPTA & ANR

..... Respondents

Through: Mr.Vijay Kumar Aggarwal,
Mr.Shailesh Pandey, Mr. Shekhar
Pathak and Mr.Deepanshu
Choithani, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J (ORAL)

1. The aforesaid petitions arise out of complaints pending between the same parties and impugned order dated 21.10.2019 passed by the Metropolitan Magistrate, Patiala House Courts in the respective complaints being Ct. Cases 34087/2016 and 36871/2016.
2. As the issue as well as the parties are common, both the petitions are heard together and disposed of by this common order.
3. Learned counsel for the petitioner has submitted that the present cases relate to the proceedings under Section 138 of Negotiable Instruments Act. He further submits that in both the complaint cases, the notice under Section 251 Cr.P.C. was framed against the petitioner on 29.08.2019. On the said date, the petitioner was given an opportunity to file application under Section 145(2) N.I. Act and the case was listed for consideration of the application, if so filed and for defence evidence on 21.10.2019. On 21.10.2019, the learned counsel for the petitioners sought one opportunity to file the application under Section 145(2) N.I. Act however, the same was declined on the ground that the case pertained to the year 2015 and the matter was listed for statement of the accused/defence evidence on 23.12.2019.
4. Learned counsel for the respondent, on the other hand, has supported the impugned order and submitted that the petitioner ought to have filed the application on the day of framing of notice.
5. I have heard learned counsels for the parties and gone through the case record.

6. Although in the afore-mentioned cases, the complaints were filed in the year 2015 however, the petitioners/accused could be served only in the year 2019.

7. Section 145(2) Negotiable Instruments Act, 1881 mandates that once an application by the accused is filed, the court is obliged to summon the person who has given evidence on affidavit in terms of Section 145(1) N.I. Act, 1881.

8. In Mandvi Cooperative Bank Limited Vs. Nimesh B. Thakore reported as **(2010) 3 SCC 83**, the Supreme Court held as under:-

“30. Nevertheless, the submissions made on behalf of the parties must be taken note of and properly dealt with. Mr Ranjit Kumar, learned Senior Advocate, appearing for the appellant in appeal arising from SLP (Crl.) No. 4760 of 2006 pointed out that sub-section (2) of Section 145 uses both the words, "may" (with reference to the court) and "shall" (with reference to the prosecution or the accused). It was, therefore, beyond doubt that in the event an application is made by the accused, the court would be obliged to summon the person giving evidence on affidavit in terms of Section 145(1) without having any discretion in the matter. There can be no disagreement with this part of the submission but the question is when the person who has given his evidence on affidavit appears in court, whether it is also open to the accused to insist that before cross-examining him as to the facts stated in the affidavit he must first depose in examination- in-chief and be required to verbally state what is already said in the affidavit.

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34. 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.”

9. In Indian Bank Association and Ors. Vs. Union of India (UOI) and Ors. reported as **(2014) 5 SCC 590**, the Supreme Court held 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 to 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 CrPC 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 recalling a 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 the court. The witnesses to the complaint and the accused must be available for cross-examination as and when there is direction to this effect by the court.

24. We, therefore, direct all the criminal courts in the country dealing with Section 138 cases to follow the abovementioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act. The writ petition is, accordingly, disposed of, as above.”

10. The scope of Section 311 Cr.PC was considered by the Supreme Court in the case of P.Sanjeeva Rao v. State of A.P. reported as **(2012) 7 SCC 56**, wherein it was held as under:-

“20. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar, (2000) 10 SCC 430. The following passage is in this regard apposite:

“6. ...In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.”

(emphasis supplied)

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23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old..... we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

11. Learned counsel for the parties have informed that the statement of the petitioner under Section 313 is not yet recorded. It is seen that the trial court had already granted an opportunity to the complainant to cross-examine the petitioner.

12. Looking into the mandate of Section 145(2) NI Act as encapsulated in Mandvi Cooperative Bank Limited (supra) and Indian

Bank Association (supra), the trial court in the facts and circumstances of the case, ought to have allowed the application filed by the petitioner.

13. Looking into the facts and circumstances of the case, the present petition is allowed subject to payment of costs of Rs.20,000/- by the petitioner in each case. Out of which Rs.10,000/- shall be paid to the complainant and Rs.10,000/- shall be deposited with the “*Delhi High Court Legal Services Committee*” in each case.

14. The petitioner shall approach the trial court, who shall grant the petitioner only one opportunity to cross-examine the complainant on one date only. 4The petitioner will not take any adjournment in this regard.

15. With the above observations, the present petition is disposed of along with the pending applications.

16. Copy of this order be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 11, 2019
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