

\$~70

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.M.C. 880/2019 and CrI.M.A. No.3508/2019

MAGPPIE INTERNATIONAL LIMITED & ORS Petitioners
Through: Mr.V.V. Manoharan, Advocate

versus

STATE & ANR Respondents
Through: Ms.Aasha Tiwari, APP for State.
Mr.Aman Bakshi, Adv for R-2

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER
% **13.02.2020**

The State is apparently a proforma party, the *lis* being in relation to an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 filed by the respondent No.2.

The petition seeks setting aside of the impugned order dated 6.8.2018 and the order dated 8.10.2018 of the learned Metropolitan Magistrate (SE) Saket in CC No.3421/2017 and seeks directions that the petitioner's application filed under Section 145(2) of the of the Negotiable Instruments Act, 1881, be allowed with the prayer thus made on behalf of the petition to the effect that that the complainant who has been examined be called for the cross-examination to be conducted by the petitioners herein arrayed and summoned as the accused in the said complaint case.

As per the submissions that have been made on behalf of either side and as indicated vide order dated 6.8.2018 of the learned Trial Court, that a notice under Section 251 of the CrPC was given to all

the accused persons to which they pleaded not guilty and claimed trial, the counsel for the accused i.e., the petitioner herein sought time to move an application under Section 145(2) of the Negotiable Instruments Act, 1881, the learned Trial Court observed to the effect that no application had been moved at that time and that it had also gone through the plea of defence of the accused, i.e., the petitioner herein and thus in terms of the verdict of this Court in ***Rajesh Agarwal V. State & Anr.***, 171(2020) DLT 51 took into account the plea of the accused, i.e., the petitioner herein, that it was a fit case for fixing the matter for Defence Evidence and the matter was thus fixed for defence evidence on 8.10.2018. Vide order dated 8.10.2018, the other order which has been impugned by the petitioners herein, the application under Section 145(2) that had been filed by the petitioners herein was taken up with the consent of the parties for disposal and it was observed therein to the effect that in as much as in the plea of defence of the accused i.e., the petitioner herein, the cheques in question were admitted and their liability towards the cheques under the said matter was also admitted to a certain extent, coupled with the guidelines laid down in the verdict ***Rajesh Agarwal V. State & Anr*** (supra), the matter had been fixed for the defence evidence at the stage of filing of the application having already been passed with the learned Trial Court not being seized of any power to review its own order, the application filed by the applicant, i.e., the petitioners herein under Section 145(2) of the Negotiable Instruments Act, 1881, was declined with another opportunity granted to the petitioners herein to lead the defence evidence.

In reply to a specific Court query to either side it is submitted that the matter is still at the stage of defence evidence.

On behalf of the petitioners it has been submitted that in as much as the petitioner had moved the application under Section 145(2) of the Negotiable Instruments Act, 1881, which had even been taken up for consideration vide the proceedings dated 8.10.2018 in view of the filing of the same by the petitioner, in terms of the verdict of the Hon'ble Supreme Court in ***M/s Mandvi Co-operative Bank Lt. V. Nimesh B. Thakore***; criminal appeal arising out of SLP(Crl) No. 3915/2006 vide a verdict dated 11.1.2010 of the Hon'ble Supreme Court with specific reference to the observations in para 21 and 22 which read to the effect:

“21. 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. 4760/2006 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 20 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. Mr. Ranjit Kumar referred to section 137 of the Indian Evidence Act, that defines “examination-in-chief”, “cross-

examination” and “re-examination” and on that basis sought to argue that the word “examine” occurring in section 145(2) must be construed to mean all the three kinds of examination of a witness. This, according to him, coupled with the use of the word “shall” with reference to the application made by the accused made it quite clear that a person giving his evidence on affidavit, on being summoned under section 145(2) at the instance of the accused must begin his deposition with examination-in-chief, before he may be cross-examined by the accused. In this regard he submitted that section 145 did not override the Evidence Act or the Negotiable Instruments Act or any other law except the Code of Criminal Procedure. He further submitted that the plain language of section 145(2) was clear and unambiguous and was capable of only one meaning and, therefore, the provision must be understood in its literal sense and the High Court was in error in resorting to purposive interpretation of the provision. In support of the submission he relied upon decisions of this court in *Dental Council of India vs. Hari Prakash and Ors.*, (2001) 8 SCC 61 and *Nathi Devi vs. Radha Devi*, (2005) 2 SCC 271. Mr. Siddharth Bhatnagar, learned counsel for the appellant in the appeal arising from SLP (Crl.) No. 1106/2007 also joined Mr. Ranjit Kumar in the submission based on literal interpretation. He also submitted that ordinarily the rule of literal construction should not be departed from, particularly when the words of the statute are clear and unambiguous. He relied upon the decision in *Raghunath Rai Bareja vs. Punjab National Bank*, (2007) 2 SCC 230.

22. We are completely unable to appreciate the submission. The plea for a literal interpretation of section 145(2) is based on the unfounded assumption that the language of the section clearly says that the person giving his evidence on affidavit, on being summoned at the instance of the accused must start his deposition in court with examination-in-chief. We find nothing in section 145(2) to suggest that. We may also make it clear that

section 137 of the Evidence Act does not define “examine” to mean and include the three kinds of examination of a witness; it simply defines “examination-in-chief”, “cross-examination” and “re-examination”. 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. Any other meaning given to sub-section (2) of section 145, as suggested by Mr. Ranjit Kumar would make the provision of section 145(1) nugatory and would completely defeat the very scheme of trial as designed under sections 143 to 147.”,

(emphasis supplied)

to thus submit to the effect that in terms of Section 145(2) of the Negotiable Instruments Act, 1881, 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 and what would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in the light of the provisions of Section 145(1) and with regard to the object and purpose of the entire scheme of sections 143 to 145 of the Negotiable Instruments Act, 1881.

It is essential to observe that vide paragraph 36 of the verdict of the Hon'ble Supreme Court laid down to the effect that

*“36. In light of the above we have no hesitation in holding that the High Court was in error in taking the view, that on a request made by the accused the Magistrate **may** allow him to tender his evidence on affidavit and consequently, we set aside the direction as contained in sub-paragraph (r) of 33 paragraph 45 of the High Court judgment. The appeal arising from SLP (Crl.) No. 3915/2006 is allowed.”*

(emphasis supplied)

On behalf of the respondent No.2 learned counsel for the respondent No.2 whilst placing reliance on the verdict of this Court in ***Rajesh Agarwal and Ors***(supra) submits to the effect that the separate enactment of the provision of the Negotiable Instruments Act, 1881, it is provided that the summary trial proceedings to be followed for evidence under Section 138 of the Negotiable Instruments Act, 1881 and that no dilatory tactics as sought to be adopted by the accused person inclusive of the petitioners herein can be allowed to be perpetuated with reliance inter alia placed on behalf of the respondent on paragraph 17 of the verdict of ***Rajesh Agarwal & Ors (supra)*** which reads to the effect:

“ 17. The summary trial procedure to be followed for offences u/s 138 N.I. Act would thus be as under:

Step I : On the day complaint is presented, if the complaint is accompanied by affidavit of complainant, the concerned MM shall scrutinize the complaint & documents and if commission of offence is made out, take cognizance & direct issuance of summons of accused, against whom case is made out.

Step II : If the accused appears, the MM shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice u/s 251 Cr. P.C. and enter his plea of defence and fix the case for defence evidence, unless an application is made by an accused under section 145(2) of N.I. Act for recalling a witness for cross examination on plea of defence.

Step III : If there is an application u/s 145(2) of N.I. Act for recalling a witness of complainant, the court shall decide the same, otherwise, it shall proceed to take defence evidence on record and allow cross examination of defence witnesses by complainant.

Step IV : To hear arguments of both sides.

Step V : To pass order/judgment.”

thus submitting in terms of Step II prescribed to therein the application under Section 145(2) of the Negotiable Instruments Act, 1881, for recalling the witness for examination on the plea of defence need necessarily to be filed on the date when the matter is taken up for the framing of the notice under Section 251 Cr.P.C. and is so framed and in as much as in the instant case, the application under Section 145(2) of the Negotiable Instruments Act, 1881, had not been filed by the petitioner on the date when the notice under Section 251 of the Cr.P.C. had been framed, there is no infirmity in the impugned orders of the learned Trial Court dated 6.8.2018 and 8.10.2018.

A further submission is made on behalf of the respondent that the order dated 6.8.2018 had even been assailed by the petitioner in revision and that the petitioner has not chosen to even whisper in relation to such a revision petition having been filed which itself speaks grossly against the conduct of the petitioner. Though the revision petition appears to have been filed against the order dated 6.8.2018 disposed of vide order dated 28.11.2018 in CR No.724/18 in as much as the said aspect of non-grant of the prayer made by the petitioner in terms of Section 145(2) of the Negotiable Instruments Act, 1881, is not subject matter of the said revision petition, the matter has been taken up for consideration.

On a consideration of the submissions that have been made on

behalf of either side, taking into account the factum that the prayer had been made by the petitioner on 6.8.2018 itself that time may be granted to the petitioner to file an application under Section 145(2) of the Negotiable Instruments Act, 1881, coupled with the factum that the said application has been taken up by the learned Trial Court on 8.10.2018 for consideration and disposal, in as much as the said application had been taken up for consideration and disposal in terms of the verdict of Hon'ble Supreme Court in *M/s Mandvi Co-op bank Ltd.* (supra) with the prayer having been made by the petitioner seeking the recalling of the complainant's witness qua which a clarification is put forth on behalf of the petitioners now by the learned counsel for the petitioner to the effect that the person sought to be recalled is only the complainant, in the circumstances, it is considered appropriate, in the interest of justice to grant the prayer made by the petitioner seeking the recalling of the complainant at the stage of 145(2) of the Negotiable Instruments Act, 1881 by grant of one single opportunity to the petitioner for the cross-examination of the complainant on the date to be fixed by the learned Trial Court subject to payment of costs of Rs.10,000/- to the complainant, i.e., the respondent No.2 herein.

The petition is disposed of accordingly.

Copy of the order be given *Dasti*, as prayed.

ANU MALHOTRA, J

FEBRUARY 13, 2020/sv