

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

Date of decision: 28.01.2020

IN THE MATTER OF:

+ **CRL.M.C. 3665/2018 and CRL.M.A. 28516/2018 (stay)**

DHIRENDER SHARMA Petitioner
Through: Mr. Arun Sharma, Advocate

Versus

THE STATE (GOVT. OF NCT OF DELHI)& ANR
..... Respondents
Through: Mr. Mukesh Kumar, APP for State
Mr. Vipin Chaudhary, Advocate for respondent
No.2

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J (ORAL)

1. The present petition is directed against the order dated 28.05.2018 passed by the Special Judge, Tis Hazari Courts, Delhi in CR No.58/2018 wherein the revision petition filed by the petitioner was dismissed on the ground of limitation as well as on merits.
2. Learned counsel for the petitioner submitted that the present petition relates to the proceeding under Section 138 of Negotiable Instruments Act. The trial court, on 03.05.2017, framed notice under Section 251 Cr.P.C. against the petitioner to which he pleaded not guilty and claimed trial and took the defence that the cheques in question were given as blank signed security cheques which were not returned despite repeated demands.

3. Learned counsel for the petitioner submitted that in the present case, the petitioner had appeared for the first time before the learned M.M. on 03.05.2017, when notice under Section 145(2) N.I. Act was framed against him and an opportunity to file application under Section 145(2) N.I. Act was granted. It was directed that the same be filed before the next date of hearing i.e. 11.08.2017.

4. However, on 11.08.2017, an application for exemption from personal appearance on behalf of the petitioner was moved. The Metropolitan Magistrate granted last opportunity to file the application under Section 145(2) N.I. Act, subject to costs of Rs.2,000/- and the matter was adjourned to 13.10.2017.

5. It has been stated that in the meanwhile, the concerned trial court was abolished and the case was transferred to the court of another Metropolitan Magistrate. On 13.10.2017, on account of a strike call given by District Court Bar Association, the petitioner's counsel could not appear before the court. The trial court, noting that the requisite application under Section 145(2) N.I. Act was not filed, closed the petitioner's right to cross-examine the complainant's witness. NBWs were also issued against him. It has been stated that the petitioner was not aware that the trial court had been abolished and the matter was transferred to a new court. On the very same day, the petitioner appeared before the concerned court in the post lunch session and the NBWs were recalled but the order closing his right to cross-examine the complainant's witness was not recalled.

6. On the next date of hearing i.e. 11.01.2018, an application under Section 145(2) N.I. Act was filed however, the same was declined on the

ground that the right to move an application under Section 145(2) NI Act was already closed on 13.10.2017.

7. Learned counsel for the petitioner has prayed that one opportunity be given to the petitioner to cross-examine the complainant's witness. On the other hand, learned counsel for the respondent has opposed the present petition.

8. 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.

9. 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.”

10. 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.”

11. Looking into the mandate of Section 145(2) NI Act as encapsulated in Mandvi Cooperative Bank Limited (supra) and Indian Bank Association (supra) and the facts and circumstances of this case, I

am of the view that the trial court ought to have allowed the petitioner's application filed under Section 145(2) N.I. Act.

12. Looking into the facts and circumstances of the case, the impugned order is set aside and the present petition is allowed, subject to payment of costs of Rs.10,000/- by the petitioner out of which Rs.5,000/- shall be paid to the complainant and Rs.5,000/- shall be deposited with the "*Delhi High Court Legal Services Committee*" within a period of two weeks from the passing of the order.

13. The petitioner's application under Section 145(2) N.I. Act filed on 11.01.2018 is allowed. The trial court shall grant the petitioner an opportunity to cross-examine the complainant or any other witness examined by him on one date only unless in the opinion of the court one more date is required for completion of the cross-examination. Learned counsel for the petitioner undertakes not to take any adjournment in this regard.

14. With the above observations, the present petition is disposed of along with the pending application.

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

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 28, 2020

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