

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

+ CRL. M.C. 5439/2018 & CRL. M.A. 34964/2018 (Stay)

Date of Decision: 06.02.2020

IN THE MATTER OF:

ASHISH AGGARWAL

..... Petitioner

Through: Mr. S.C. Singhal, Adv.

versus

SUSHIL KUMAR

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J. (ORAL)

1. The present petition is directed against the order dated 12.07.2018 passed by the Special Judge, SW Dwarka, New Delhi in CT Cases 13878/2017 wherein the application filed by the petitioner under Section 145(2) of N.I. Act was dismissed on the ground that no cross-examination of the complainant was required.

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 31.05.2018, 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 there is no legally enforceable liability as the cheques were not issued towards any debt or liability. Further, it was stated that the cheques were blank bearing signatures of the petitioner. It was further stated that the cheque book was stolen/misplaced in 2016 for which

complaint was made to police station and NCR dated 13.07.2016 was issued by the police. It is thus the stand of the petitioner that the complainant had misused the stolen cheque.

3. Learned counsel for the petitioner submitted that on 31.05.2018, when notice under Section 145(2) N.I. Act was framed against the petitioner, 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., 12.07.2018.

4. However, on 12.07.2018, an application for exemption from personal appearance on behalf of the petitioner was moved. The Metropolitan Magistrate dismissed the application under Section 145(2) N.I. Act on the grounds already mentioned above. On the same day, the complainant's evidence and statement of accused was also dispensed with. The matter was listed for defence evidence on 06.09.2018.

5. Learned counsel for the petitioner has prayed that one opportunity be given to the petitioner to cross-examine the complainant. A perusal of the order sheets in the present case show that the respondent was served and on 13.12.2018, the counsel for the respondent appeared and sought time to file reply. However, on the next date, while recording the statement that no reply is required, the matter was listed for final disposal on the next date. The matter was passed over however, neither the respondent nor his counsel appeared.

6. 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.

7. 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.”

8. 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.”

(emphasis added)

9. 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.

10. 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.

11. The petitioner’s application under Section 145(2) N.I. Act filed on 12.07.2018 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.

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

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

(MANOJ KUMAR OHRI)
JUDGE

FEBRUARY 06, 2020
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