

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 480 OF 2020

Sudhakar S/o Tejrav Jadhav,
Age : 50 Years, Occ. Service,
R/o. Plot No.RH-29, House No.13,
Bajaj Nagar, MIDC Area,
Waluj, Aurangabad.

... Petitioner

Versus

Kalyan S/o Dadarav Kasture,
Age : 50 Years, Occ. Service,
R/o. Plot No.556, CIDCO, Waluj
Mahanagar-1, Aurangabad.

... Respondent

...

Advocate for the Petitioner : Mr. S.S. Panale

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CORAM : SURENDRA P. TAVADE, J.

DATE : 17.08.2021

JUDGMENT :-

Rule. Rule made returnable forthwith with consent of the learned counsel for the parties.

2. The petitioner challenging the order passed below Exh. 42 in Summery Criminal Case No. 6732 of 2017 by the learned Judicial Magistrate First Class, Aurangabad. It is contended that the respondent has filed complaint under Section 138 of the

Negotiable Instrument Act against the present petitioner wherein, the respondent led his evidence. Thereafter, petitioner filed affidavit of evidence. The respondent moved an application praying that the affidavit filed by the petitioner be discarded and the petitioner be directed to lead oral evidence. The said application below Exh. 42 was allowed by the learned Judicial Magistrate First Class, Aurangabad, which is impugned in the present petition. It is contended that the trial Court has observed that in view of Section 145(2) of the Negotiable Instrument Act, the Court has discretionary powers to direct petitioner to lead oral evidence instead of filing affidavit.

3. It is contended that in view of the ratio laid down by the Apex Court in the case of ***Indian Bank Association Vs. Union of India in Writ Petition (Civil) No. 18 of 2013***, the order of trial Court is not sustainable. On the other hand, the learned counsel for the respondent submits that as per the provisions of Section 145(2) the trial Court can direct the petitioner to lead oral evidence instead of filing affidavit of evidence. He also submits that the order of trial Court is correct and legal and there is no need to interfere in the same.

4. Heard the learned counsel for the parties. Perused the provisions of Section 145 (1) & (2) of the Negotiable Instrument

Act which read as under :-

145. Evidence on affidavit. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, 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. "

5. Perused the ratio laid down in the case of Indian Bank Association Vs. Union of India cited (supra). The Apex Court has given direction to the various High Courts and all Criminal Courts all over the country as under :-

"(1) 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.

(2) 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. 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 un-served, immediate follow up action be taken.

(3) Court may indicate in the summon 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, Court may pass appropriate orders at the earliest.

(4) 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 Cr.P.C. 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 re-calling a witness for cross-examination.”

(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 Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court. “

6. The Apex Court has in clear terms directed that the concerned Court must ensure that the examination-in-chief, cross-examinations and re-examination of the complainant must be conducted within three months of assigning the case. The Court has option of accepting affidavits of witnesses, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court.

7. So it can be said that the Court can direct the accused to lead his evidence by way of affidavit. Therefore, the impugned order passed by the Trial Court directing petitioner to lead oral evidence is required to be set-aside. The petitioner has already filed his affidavit of evidence, which should be considered by the trial Court and direct the complainant to cross-examine the petitioner. Therefore, in view of ratio laid down in Indian Bank petition is hereby required to be allowed. Hence, I pass the following order.

ORDER

- (i) The order passed below Exh.42 in Summary Criminal Case No. 6732 of 2017 dated 06.01.2020 by the learned Judicial Magistrate First Class, Aurangabad is hereby set-aside.
- (ii) The learned Judicial Magistrate is directed to take resume of cross-examination of the petitioner and dispose of the case as early as possible.

Rule is made absolute.

(SURENDRA P. TAVADE)
JUDGE

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