IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 691 OF 2021

Manidhari Stainless Wires Pvt. Ltd. And Ors. …Petitioners
Versus
M/s. Mercury Metal Industries And Anr. ...Respondents

….

Mr. Kunal Kumbhat a/w Ms. Hemangi Mehta i/by Ms. Sunanda Kumbhat, Advocate for the Petitioner.

Mr. Ashok M. Bhatia, Advocate for the Respondent No.1.

Mr. Arfan Sait, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.
Date : 19th AUGUST, 2022.

PER COURT:

1. The petitioners have challenged order dated 14th October, 2019 and 2nd May, 2016 passed by Metropolitan Magistrate 14th Court at Girgaon, Mumbai in C.C. No.1036/SS/2019.

2. The petitioners are prosecuted for the offence under Section 138 of Negotiable Instruments Act. The respondent No.1 is the complainant.

3. According to complainant accused Nos.2 and 3 are directors of accused No.1 and are incharge and responsible for the conduct of the business of accused No.1- company and looking after its day to day affairs. The accused approached the complainant as they were in need of funds for their business and requested for temporary financial accommodation for a short period of time. The

complainant believed the representation of the accused and arranged the funds and an amount of Rs.4,50,00,000/-(Four Crores Fifty Lakhs) was availed by the accused on various occasions. The amount of Rs.2,00,00,000/-(Two Crores) were parted to accused No.1 on 20th June, 2012 and amount of Rs.2,50,00,000/- (Two Crores Fifty Lakhs) were transferred to accused No.1 on 4th July, 2012. The accused Nos.2 and 3 have acknowledged and have personally admitted the liability for an amount of Rs.4,50,00,000/- (Four Crores Fifty Lakhs) by executing two bills of exchange dated 4th July, 2012 of an amount of Rs.2,50,00,000/- (Two Crores Fifty Lakhs) and dated 20th June, 2012 of an amount of Rs.2,00,00,000/- (Two Crores) which is due and payable by the accused. Rs.95,00,000/- (Ninty Five Lakhs) was received on various occasions. viz. on 18th September, 2012 amount of Rs.70,00,000 was transferred from the account of accused to the account of complainant. On 2nd November, 2012 and 6th November, 2012 amount of Rs.10,00,000/-(Ten Lakhs) and Rs.15,00,000/-(Fifteen Lakhs) respectfully was transferred from the account of accused to the account of complainant. Accused did not make any further payment. After much persuasion, in discharge of legal liability as repayment of remaining amount of Rs.3,55,00,000/-(Three Crores Fifty Five Lakhs), accused No.3 signed 35 cheques of Rs.10,00,000

(Ten Lakhs) each and one cheque was Rs.5,00,000/-(Five Lakhs) in favour of the complainant. It was assured that cheques would be honoured. The cheques were presented for encasement on 18th January, 2016 which were dishonored for reason "Account closed." Notice dated 1st February, 2016 was sent by Advocate for the complainant to the accused. The notice sent to Accused No.1 at the office address at Hyderabad returned back with a remark "Left" on 6th February, 2016. The notice sent to accused at the office address at V.P. Road returned with a remark "Refused". The notice sent to the office address at Grant Road returned with a remark "door closed." The accused did not reply to notice and failed to make payment. Payment was not made. Complaint was filed.

4. The complaint was filed on 19th March, 2016. Alongwith complaint affidavit in evidence, list of documents, verification statement were produced. On 2nd May, 2016 verification statement was recorded. List of documents exhibited, letter of authority, bill of exchange, cheques, demand notice, postal receipts, return envelopes were given exhibit numbers. Process was issued on 2nd May, 2016.

5. According to petitioners, their Advocate was served with copy of affidavit in lieu of examination in chief and compilation of

documents on 11th July, 2018. The application was adjourned for say of the accused on documents submitted by complainant. The Advocate took inspection of original documents on 24th August, 2018, when it came to the knowledge of the Advocate for petitioners that the complainant has filed the affidavit in lieu of examination in chief and compilation of documents on 19th March, 2016. On 2nd May, 2016, the Court was pleased to mark the documents at serial No.1 as Exhibit-7, serial No.3 as Exhibit-8, Colly; serial No.4 as Exhibit-9, serial No.5 as Exhibit-10, serial No.6 as Exhibit-11, serial No.7 as Exhibit-12 and, serial No.7 as Exhibit-12 and serial No.8 as Exhibit-13 Colly. The accused were not given opportunity to object exhibiting of documents. The said documents were marked prior to appearance of accused. The documents at serial Nos. 1, 3, 4 and 5 were documents to which the witness is not signatory and required averments were not made in affidavit in evidence. The document at serial No.6 is an office copy which falls under the category of secondary evidence and no averment have been made in the affidavit of evidence to that effect. The petitioners preferred application Exhibit-26 on 24th September, 2018 and prayed that those documents may be De-exhibited. The complainant filed say and opposed the application on the ground that there is no provision in law to De-exhibit the documents once they are marked as Exhibit. If the accused wanted to object the exhibiting of documents they should have filed their objection at the time when the documents were tendered and were marked as Exhibits. The application is filed to delay the proceedings. The learned Magistrate by order dated 14th October, 2019 rejected the said application. While rejecting the said application it was observed that the complainant has filed affidavit of evidence on 19th March, 2016 alongwith the list of documents. Plea of the accused was recorded on 9th October, 2017, which shows that the documents are exhibited prior to appearance of the accused. These are the proceedings under Section 138 of the Negotiable Instruments Act. As per Section 145 (1) of the said Act, the complainant may lead evidence by an affidavit and that can be read in evidence. As per Section 145 (2) of the said Act on application of the prosecution or the accused summons to the person giving evidence on affidavit can be issued as to the facts contained therein. On perusal of evidence by the affidavit it appears that deponent has made sufficient averments in respect to documents at serial Nos. 1, 3, 4, 5 and 6. The documents at Serial No.1, 3, 4 and 5 are authority letter, bill of exchange, cheques and bank return memo respectively. These documents are not signed by the deponent. All these documents are relevant. The complainant tendered in evidence and also averred in the evidence about proof of contents of these documents. The document at Serial No. 6 is the office copy of the demand notice which is signed by Advocate of complainant. Though it is alleged to be office copy but it is signed by Advocate. As per evidence of the complainant original is sent to the accused. Office copy is the copy made at the time of the original copy and it is kept with the Advocate for the complainant as office copy. Therefore, in this case secondary evidence of this aspect is not required. The accused had not started with cross-examination. The accused has every opportunity to cross-examine the complainant and on all these documents. The Court did not find any substance in the contention of accused for De-exhibiting documents, as the documents are sufficiently averred in the evidence and they are proved in accordance with the provision of Indian Evidence Act.

6. Learned Advocate for the petitioners submitted as follows:-

i. Learned Magistrate has committed an error in rejecting the application for De-Exhibiting of documents.

ii. The order dated 14th October, 2019 is contrary to law.

iii. The documents were exhibited before appearance of the accused which is not permissible in law.

iv. No opportunity of objecting the documents was given to the accused.

v. The documents were marked prior to issuance of summons to accused.

vi. The order marking documents filed by the respondents was passed in mechanical manner without scrutinizing the evidence produced by complainant. The only means of production of documents under criminal procedure code is provided under Section 294 of the code.

vii. Learned Magistrate failed to appreciate that the petitioners/original accused were not served with the summons of the complaint at the time when documents were marked.

viii. Prior to marking of documents it is essential to consider whether the complainant has proved the said documents. The order was passed mechanically it is contrary to provisions of law. It is valuable right of the accused to oppose and object the marking of documents as Exhibits.

ix. Learned advocate for the petitioners has relied upon the decision in the case of *Peacock Industries Ltd. & ors. Vs. Budhrani Finance Ltd. & ors. 2006 (2) Bom. C.R.(Cri.) 368.*

7. Learned advocate for the respondent/complainant submitted that there is no infirmity in the impugned order dated 14th October, 2019. The proceedings are delayed by the accused. Process was issued on 2nd May, 2016. The accused preferred an application for De-Exhibiting of documents. Reply was filed by the complainant. Application was rejected. Revision application was preferred before the Court of Sessions which has been dismissed on 10th February, 2020. The present petition was preferred by the petitioners. It was admitted with interim orders on 23rd March, 2021. The complainant filed Special Leave Petition before the Hon'ble Supreme Court. Vide order dated 22nd April, 2022 the Apex Court did not interfere with interim order passed by this Court. However, considering the fact that the complaint was filed in the year 2016, this Court was requested to take up this petition for disposal at the earliest and preferably within three months from the receipt of order. The Special Leave Petition was dismissed on aforesaid order.

8. Mr. Bhatia further submitted that, the accused had sufficient opportunity to cross-examine the complainant. There is no provision of De-Exhibiting of documents. Merely because documents are exhibited its contents are not proved. He relied upon the following decisions.

i. Indian Bank Association & Ors. Vs. Union of India & Ors. AIR 2014 Supreme Court 2528.

ii. Geeta Marine Services Pvt. Ltd. & Anr. Vs. State & Anr. 2009 CRI. L. J. 910.

iii. Radheshyam Garg Vs. Naresh Kumar Gupta, AIR 2010 SC 3210.

iv. M/s. Mandvi Co-operative Bank Ltd. Vs. Nimesh B. Thakore 2010 (1) Bankers' Journal 289.

9. The complaint is filed for an offence under Section 138 of the Negotiable Instruments Act on 19th March, 2016. Alongwith complaint affidavit in evidence was submitted before the Court. On 2nd May, 2016, verification statement of complainant was recorded. List of documents is exhibited. Exhibit numbers were given to letter of authority, bill of exchange, cheques, memo, demand notice, postal receipts and return envelopes. The said Roznama also refers to the fact that process is issued against accused under Section 138 of Negotiable Instruments Act. One of the grievance of the petitioners is that even before the process was issued the documents were marked as Exhibits. It is pertinent to note that, the process was issued on the same day i.e. 2nd May, 2016. List of documents was Exhibited and documents were given Exhibit numbers. It cannot be inferred that before the process was

issued the documents were marked or Exhibited in evidence as order issuing process was passed on the same day i.e. 2nd May, 2016. The affidavit of evidence refers to all the documents relied upon by the complainant as a part of the affidavit. These are the same documents referred to hereinabove. The petitioners have admitted that copy of affidavit in lieu of examination in chief and compilation of documents was provided to Advocate for accused on 11th July, 2018. The case was adjourned for say of accused on documents submitted by complainant. According to petitioners before their appearance, documents were marked as Exhibit. It is pertinent to note that, affidavit and compilation of documents were provided to accused. The compilation of documents consists of same documents referred in affidavit in evidence and given Exhibit numbers on 2nd May, 2016. The case was adjourned for filling say, which would mean the accused were permitted to deal with the documents. The accused preferred application for De-exhibiting documents. The affidavit in evidence provides details about documents relied upon by complainant. The trial Court considered the objections of accused and by assigning reasons regarding relevance of documents rejected application of petitioners/accused by order dated 14th October, 2019. The cross-examination is not conducted. The accused have opportunity of cross-examination on genuineness of the documents. The learned Magistrate has rejected the application by assigning reasons. The accused filed revision application Although it is stated in the petition that revision application was rejected by Sessions Court on 10th February, 2020, on the ground that it is not maintainable, copy of order is not part of this petition.

10. In the case of *Peacock Industries Ltd. & ors. Vs. Budhrani Finance Ltd. & ors.* (supra) this Court referred to decisions of Hon’ble Supreme Court in the case of R.V.E. Venkatachala Gounder V/s Arulmigu Viswesaraswami and V.P. Temple, AIR 2003 S.C. 4548 and Bipin Shantilal Panchal V/s. State of Gujrat, AIR 2001 S.C. 1158. In the matter under consideration it was observed that, application for De-exhibiting certain documents, was filed after five months, after filling of the affidavit in examination in chief and marking all the documents as exhibits by the Magistrate. The cross-examination of the witness has not began. It is possible in that case to the Court to consider the objections a fresh and if they are directed towards the mode of proof being irregular or insufficient, the Court may De-exhibit those documents and mark them for identification. In that eventuality if the complainant files an application under Section 145 (2), the Magistrate must consider

such application in the light of the observations in that Judgment before directing the accused to cross-examine the witness. In so far as the documents of which an admissibility only is in dispute those documents need not be De-exhibited and the issue of their adminissibility be kept open to be addressed at the stage of arguments and to be decided in the final Judgment. This Court issued guidelines / directions for the trial Courts while dealing with complaint under Section 138 of Negotiable Instruments Act. Guideline No. L mentions that the complainant should as far as possible file copies of all relevant and necessary documents with the complaint duly attested/endorsed by him or his Advocate as true copies and keep originals ready for perusal of the Court at the stage of verification and issue of process. As per guideline 'M' the Court must call upon the accused or his pleader as provided under Section 294 of Code, to admit or deny the genuineness of documents, other than the documents which have presumptive value in law. That would help the complainant to know which of the documents he would have to prove by adopting such mode, as may be advised, during his own or his witnesses examination-in-chief on affidavit. The procedure under Section 294 should be followed before the complainant files his affidavit under Section 145 (1) of the Act. As per Guideline No. (P), the complainant should file his affidavit in lieu of examination-in-chief with all the documents to be exhibited in the Court. The Affidavit should be in the form, as if he is giving oral evidence in the Court, proving all the documents objected to by the accused and it should not be, in any case, in the form of written argument and avoid reproduction of the complaint as it is. The Court on the very date shall see that the copy of affidavit with all proposed exhibits is served on the accused and grant time if prayed, to enable the accused to read it and raise an objection, if any, regarding admissibility of documents or any item of evidence. On the adjourned date, the accused should place his written objection, if any, on record which the Magistrate should make note of and mark the objected documents. Other than the documents which have presumptive value in law tentatively as exhibits, as observed in Bipin Panchal's case or marked it for identification, where the objection is regarding mode of proof, alleging the same to be irregular or insufficient to be decided at the stage of final Judgment. If the objection is oral, raised in the course of recording of oral examination in chief, the Court should note the objected item of the evidence or the document and mark it tentatively as exhibit or for identification, as the case may be to be decided at the stage of final Judgment and direct the accused to cross-examine the witness without prejudice to such objection. As per guideline (q) if the objection is with regard to the mode of proof in respect of any of the documents, (other than the documents which have presumptive value in law) alleging the same to be irregular or insufficient the Court should allow the complainant on his application made under sub-Section(2) of Section 145, before his cross-examination begins, to lead further evidence by stepping into witness box to cure the defect and adopt such mode as would be regular and sufficient. The cases where the complainant does not make application under Section 145(2), the Court should mark it for identification and defer the decision on such objection to be decided at the stage of final Judgment.

11. In the case of *Geeta Marine Services Pvt. Ltd. & Anr. Vs. State & Anr. (Supra)* this Court made reference to decision of the Hon'ble Supreme Court in the case of Bipin Shantilal Panchal V/s. State of Gujrat (Supra) wherein Court issued guidelines regarding proof or admissibility of documents. Reference is also made to decision in the case of R.V.E. Venkatachala Gounder V/s. Aruligu Vishwesaraswami and V.P. Temple (Supra) wherein observations in the case of Roman Cathollic Mission V/s. State of Madras and Anr. AIR 1966 SC 1457 were quoted. This Court observed that, Apex

Court has Categorized the objections raised to the documents into two classes. One is where admissibility of documents in evidence is not in dispute, but it is contended that, the documents is not proved or the proof in support of documents is insufficient. The second category of objection is that the document which is sought to be proved is itself inadmissible in evidence. The Apex Court held that in so far as the first category where dispute is of proof of documents, the object should be taken at the earliest and the objection that the mode adopted for proving the documents is irregular or insufficient cannot be allowed to be raised at any stage subsequent to the marking of documents as exhibit. In so far as the objection that documents is not properly proved, the Apex Court observed that if the said objection is raised at the outset, it enables the Court to apply its mind and pronounce its decision on the question then and there. In the event of finding of the Court on issue of proof of document going against the party tendering the document in evidence, an opportunity of seeking indulgence of the Court for leading further evidence to prove the document adopting proper mode is available. In so far as the second category of objection is concerned, the Apex Court held that even if document is marked as exhibit, an objection simplicitor as to its admissibility is not excluded and is available to be raised at latter stage. This

Court made reference to criminal manual issued by this Court and more particularly paragraphs 33 and 34 of chapter VI. Reference is made to other decisions of Apex Court in the case of Sait Tarajee Khimchand and Others V/s. Yelamarti Satyan Alias Saheya and others (1972) 4 SCC 562, and Narbada Devi Gupta V/s Birendra Kumar Jaiswal and Another (2003) 8 SCC 745. In the aforesaid decisions it was held that, mere marking or an exhibit does not dispense with the proof of the documents. Mere production and marking of a document as exhibit by Court cannot be held to be a due proof of its contents. This Court than concluded that, on plain reading of decision of Apex Court in the case of Bipin Panchal (Supra), it is apparent that, same does not deal with an objection as regards proof of a documents or insufficiency of proof or incorrect mode of proof. The said Judgment deals with objection regarding admissibility of the documents in evidence which is a separate category of objection as distinguished from an objection regarding proof as laid down by the Apex Court in the case of R.V.E. Venkatachala Gounder (Supra). It is true that, the procedure laid down by the Apex Court in the case of Bipin Panchal (Supra) will have to be followed by Courts. However, the said decision is applicable to only one category of objection regarding admissibility of documents in evidence and that decision has no application when an objection is raised to the proof or to irregular/insufficient mode or proof of a document. After filing of affidavit of examination-in-chief and after recording formal examination-in-chief of the concerned witness, an objection raised regarding proof of documents or insufficiency of proof or of adopting incorrect mode of proof, it has to be dealt with immediately by the Magistrate before proceeding with recording of cross-examination. Only in a case where the adjudication involves a decision on complicated questions which require a very detailed adjudication it can be postponed till final hearing. In a case where a document is proved in accordance with Evidence Act but an objection is raised to the admissibility of the said document, as held by Apex Court in the case of Bipin Panchal (Supra), such document can be tentatively marked as an exhibit as objection to the admissibility can be decided at the stage of final hearing as contemplated in the decision of Bipin Panchal (Supra). If objection regarding proof of a document is decided, the complainant or accused who has produced the said documents is put to the notice that the document is not held as proved so that he can seek indulgence from the Court of leading further evidence. This avoids possibility of parties applying at the stage of Judgment for recalling the witness or for leading further evidence for proving a document. Merely, because a document referred to in cross-examination is marked as an exhibit the same does not dispense with the proof of document in accordance with law of evidence.

12. In the case of *Radheshyam Garg V/s. Naresh Kumar Gupta (supra)* the Hon'ble Supreme Court has observed that Section 145 of Negotiable Instruments Act contains a non-obstante clause. The provisions of code of criminal procedure 1973 are, thus not attracted. The Court, subject to just exceptions, may allow the complainant to give evidence by way of affidavit. Such an evidence by way of affidavit had been made admissible in evidence in any inquiry, trial or other proceedings under the code. Whereas sub-Section (1) of Section 145 uses the term 'may' Sub-Section (2) there of uses the term 'shall'. The first part of the above provision must be read with Sub-Section (1) of Section 145. It, therefore, merely, points out to the discretionary power of the Court conferred upon it by reason thereof. There is no justification for arriving at a finding that a witness can again be summoned for his examination in chief in the Court despite affirming affidavit in that behalf. The scope of Section 145 came up for consideration before the Apex Court in *Mandvi Co-operative Bank Ltd. V/s. Nimesh Thakore (supra).* The Apex Court had observed that, Sections 143 to 147

were designed especially to lay down a much simplified procedure for the trial of dishonoured cheque cases with sole object that trial of those cases should follow a course even swifter than a summary trial and once it is seen that even the special procedure failed to effectively and expeditiously handle the vast multitude of cases coming to the Court, the claim of the accused that on being summoned under Section 145(2), the complainant or any of his witnesses whose evidence is given on affidavit must be made depose in examination-in-chief all over again plainly appears to be a demand for meaningless duplication, aimed at delaying trial. Section 145(2) does not indicate that, person giving his evidence on affidavit, on being summoned at the instance of accused must start his deposition. Learned counsel for respondent was relied upon these two decisions, however, the issue involved in these two decisions is not directly connected with issue urged in this petition.

13. In the case of *Indian Bank Association & Ors. Vs. Union of India & Ors.(Supra)* it was observed that legislature had noticed that the introduction of Section 138 to 142 of the Act has not achieved desired results for dealing with dishonored cheques. Hence, Sections 143 to 147 were inserted in the Act vide Negotiable Instruments (Amended) Act, 2002 for speedy disposal

of cases relating to dishonor of cheques through summary trial. However, no uniform practice is seen to be followed by the various Magistrate Courts in the Country, as a result of which, the object and purpose for which the amendments were incorporated, have not been achieved under Section 145 of the Act the complainant can give his evidence by way of affidavit and such affidavit shall be read in evidence in inquiry, trial or other proceedings in the Court, which makes it clear that the complainant is not required to examine himself twice i.e. one after filing the complaint and one after the summoning of accused. Affidavit and the documents filed by the complainant alongwith the complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post-summoning stage. There is no necessity to recall and re-examine the complainant after summoning of accused. Unless the Magistrate passes specific order as to why the complainant is to be recalled. Such order can be is to be passed on application made by accused under Section 145(2) of the Act or *Suo moto* by the Court. The Court issued directions to be followed by Courts in matters under Negotiable Instruments Act. The direction No.1 in the said decision indicates that the Magistrates, 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 documents, if any, are found to be in order, take cognizance and direct issuance of summons.

14. The affidavit in evidence in the present case was filed alongwith the complaint on 19th March, 2016. Probably in view of direction in the case of Indian Bank Association and others V/s Union of India (Supra), the aforesaid mode was adopted. Apparently exhibit numbers were given on 2nd May, 2016. Thereafter, copy of affidavit of evidence was supplied to accused. Court granted time to the accused to file say on documents submitted by complainant. The primary objection is that, documents were marked as exhibits in absence of accused. The trial Court has dealt with all objections urged by accused on application for De-exhibiting documents. On merits about the validity of documents, I do not find any infirmity in the order, passed by learned Magistrate. The complainant was yet to be cross-examined. Even if any issue is urged about admissibility of documents, the Court can deal with it at final stage. There is no ground for De-exhibiting documents. Hence, I pass the following order.

ORDER

i. Writ Petition stands rejected;

ii. Trial is expedited;

iii. The trial Court is requested to conclude the trial within a period of nine months from the date of receipt of this order.

iv. At this stage learned counsel for petitioners seeks extension of stay by four weeks to enable petitioners to take appropriate steps. Since stay was in operation from 23rd March, 2021, the same is extended by four weeks.

(PRAKASH D. NAIK, J.)