

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 1231 OF 2022

Yatendra Gupta

...Petitioner

Versus

The State of Maharashtra and Anr.

...Respondents

....

Mr. Ninad Muzumdar, Advocate for the Petitioner.

Mr. Jatin P. Shah a/w Ms. Snehankita M. Munj, Mr. Tushar B. Patel
and Ms. Shraddha Kamble, Advocate for the Respondent No.2.

Mr. A.R. Patil, APP for the Respondent - State.

CORAM : PRAKASH D. NAIK, J.

DATE : 19th AUGUST, 2022.

P.C.

1. The Petitioner is aggrieved by the Roznama/Order dated 8th February, 2022 passed by learned Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai in C.C. No.2425 of 2020 exhibiting documents.

2. The Petitioner is prosecuted for an offence under Section 138 of Negotiable Instruments Act, 1881 (for short "N.I. Act). The Respondent No.2 is the complainant. It is alleged that the complainant is a company incorporated under the Companies Act, 2013. The Accused No.1 is propriety concern and Accused No.2 is proprietor of Accused No.1 is who is responsible for day-to-day affairs and management of Accuses No.1. The Accused No.2 had approached the complainant company and placed order for goods. Pursuant to that the complainant sold and delivered goods to the

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Accused. The Accused no.1 was liable to pay a sum of Rs.70,85,098/-(Rupees Seventy Lakh Eighty Five Thousand Ninety Eight) to the complainant. The Accused No.2 signed and issued four cheques for a total sum of Rs.70,85,098/-(Rupees Seventy Lakh Eighty Five Thousand Ninety Eight) in favour of complainant company in discharge of aforesaid liability. The cheques were returned dishonoured for want of funds in the bank account of Accused No.1. Legal notice dated 8th August, 2019 was issued to the Accused by the complainant company. The Accused requested that no action be initiated against them as intend to pay the legal dues within short period. On 9th September, 2019 the Accused paid Rs.2,78,008/-(Rupees Two Lakh Seventy Eight Thousand Eight) to complainant. The balance amount sum of Rs.68,07,090/-(Rupees Sixty Eight Lakh Seven Thousand Ninety) was due and payable to the complainant. The Accused No.2 signed seven cheques being proprietor of Accused No.1 in favour of complainant company for a sum of Rs.68,07,090/-(Rupees Sixty Eight Lakh Seven Thousand Ninety). The cheques were presented by the complainant with their banker and the same were dishonoured due to insufficiency of funds vide Return Memo dated 4th February, 2020. Notice was sent to the Accused and complaint was filed. Process was issued against the Accused for an offence under Section 138 of N.I. Act.

3. The proceedings were listed before the trial Court on 8th February, 2022. The Advocate for the complainant was present in the Court. The Roznama dated 8th February, 2022 indicate that Accused was absent. The Advocate for the Petitioner and Accused were present. Documents were Exhibited. The documents were Authority Letter (Exh.20), Letter of Board Meeting (Exh.21), Invoice (Exh.22), Letter (Exh.23), E way Bill (Exh.24), Letter (Exh.25), Statement of Account (Exh.26), Letter (Exh.27), Cheques (Exh.28 Colly.), Memo (Exh.29 Colly.), Notice (Exh.30), Postal Receipt (Exh.31 Colly.). The case was adjourned for cross-examination.

4. Learned Advocate for the Petitioner submitted that the Order dated 8th February, 2022 is bad in law. The Order dated 8th February, 2022 does not comply provisions of Section 294 of Cr.PC. The Order was passed without application of mind and without assigning any reasons. Before exhibiting documents it was necessary for the Court to call upon the Accused to admit or deny the documents submitted and relied upon by the complainant. The Accused are required to be heard on the point of objections to exhibiting the documents. The Accused was not called upon to admit or deny documents and no opportunity was given to the Accused to put forth their objections to exhibiting their documents. The principle of natural justice is not followed Grave prejudice is caused to the accused. The procedure

under Section 294 is not mere formality. The Advocate for the Accused had requested for an adjournment. However, the Court proceeded to pass the impugned order. The Accused disputes his signatures on the cheque and it was necessary that such dispute was brought on record at the stage of Section 294 of Cr.PC.

5. Learned Advocate for the Petitioner has relied upon the following decisions:

i. Mr. Ashish Chandrakant Shah V/s. M/s. Sheth Developers Pvt. Ltd. & Anr. delivered by this Court in Criminal Writ Petition No.1822 of 2010 decided on 24th September, 2010 .

ii. R.V.E. Venkatachala Gounder V/s. Arulmigu Viswesaraswami & V.P., Supreme Court of India in Appeal (civil) 10585 of 1996 on 8th October, 2003.

iii. Geeta Marine Services Pvt. Ltd. and Ors. V/s. State and Ors., delivered by this Court in Criminal Application No.2633 of 2008, decided on 22.09.2008.

iv. Gopal Shankarrao Deshmukh V/s. Jagdamba Nagri Sahakari Patsanstha, delivered by this Court Bench at Nagpur in Criminal Writ Petition No.377 of 2013, decided on 13.12.2013.

6. Learned Advocate for Respondent No.2 submitted that there is no infirmity in the Order dated 8th February, 2022. The trial Court has merely exhibited documents. The scope of Section 145(2) of N.I. Act is required to be considered. The list of documents were submitted alongwith affidavit in examination-in-chief. The object of guidelines issued in the decision of the Hon'ble Supreme Court in the case of *Indian Bank Association & Ors. Vs. Union of India & Ors. AIR 2014 Supreme Court 2528* is required to be considered in letter and spirit.

7. The learned Advocate for Respondent/complainant has relied upon the following decisions:

- i. Mr. Hemendra Rasiklal Ghia V/s. Subodh Mody, 2008(6) ALL MR 352.*
- ii. Indian Bank Association & Ors. Vs. Union of India & Ors. AIR 2014 Supreme Court 2528.*
- iii. Radhey Shyam Garg V/s. Naresh Kumar Gupta, (2009) 13 SCC 201.*
- iv. Mandvi Cooperative Bank Limited V/s. Nimesh B. Thakore, (2010) 2 SCC (Cri).*

8. The subject proceedings were initiated under Section 138 of N.I Act. The Roznama dated 8th February, 2022 reflects that the

Accused was absent but his Advocate was present. The documents such as authority letter, letter of board meeting, E way bill, Statement of Account, Cheques memo, Notice, Postal receipt and other documents were exhibited as Exhibit-20 to 31. The case was adjourned for cross-examination. It also appears that the Advocate for the Petitioner had preferred an application for adjournment. However, the Application does not indicate any objection for exhibiting the documents. The affidavit of examination-in-chief of the complainant with all requisite details was filed in the proceedings. Alongwith affidavit of evidence, all the original documents referred to hereinabove were also placed on record. The learned Magistrate proceeded to exhibit the said documents. The case was adjourned for cross-examination. Apparently the Petitioner had approached this Court by preferring this Petition on 12th March, 2022, when the case was due for cross-examination on 16th March, 2022. I do not find any infirmity Roznama/order dated 8th February, 2022.

9. In the case of *Mr. Ashish Chandrakant Shah V/s. M/s. Sheth Developers Pvt. Ltd. & Ors.* (Supra), this Court had observed that any documents exhibited before the Court, the party which produces the said documents has to prove the said documents in accordance with the provisions of Evidence Act. In the case of *Gopal Shankarrao*

Deshmukh V/s. Jagdamba nagri Sahakari Patsantha (Supra), it was observed by this Court that in the case of criminal trial the documentary evidence tendered on record is required to be exhibited in event of relevant documents being proved in accordance with the provisions contained in the Evidence Act pertaining to the proof of contents of the documents. The documents which are proved in such a manner can only be marked as exhibit as per provisions of criminal manual. In *R.V.E. Venkatachala Gounder V/s. Arulmigu Viswesaraswami & VP.* (Supra), it was observed that, ordinarily objection to the admissibility of evidence should be taken when it is tendered. The objections as to admissibility of documents in evidence may be classified into two classes. (I) An objection that the document which is sought to proved is itself inadmissible in evidence, (ii) Where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as ‘an exhibit’, an objection as to its admissibility is not excluded and is available to be raised even at a later stage. In the later case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode

adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to marking of document as exhibit.

10. 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.

11. 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.

12. 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.

13. In the present case the affidavit-in-evidence was filed by the complainant alongwith list of documents. The Advocate for the Accused was present in the Court. The Court marked the documents as Exhibits. The cross-examination had to be conducted. The Accused will have an opportunity to deal with the said documents. Even in the proceedings before this Court, the Petitioner/Accused could not urge nature of objection to exhibit the documents. I have also noted the nature of documents exhibited by Court. No interference called for in the order dated 8th February, 2022.

14. Hence, I pass the following order.

ORDER

- i. The Criminal Writ Petition No. 1231 of 2022 is rejected and disposed off.

[PRAKASH D. NAIK, J.]