

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.6154 OF 2021

Purushottam Mohanlal Vyas, Age 76 years,
Occ.Lawyer, R/o.At B/708, Whispering Heights
Mind Space, Chincholi Bunder Road,
Malad (W), Mumbai-400 064.

Petitioner

versus

1. Abdul Sattar Mehtab Saheb Khoriwale
R/o.Latur.
2. The State of Maharashtra

Respondents

Mr.Prashant Karande i/by Mr.Chandrashekhar Yadav, Advocate for
Petitioner.

Mr.Dattaram Dindikar i/by D.M.Associates, Advocate for Respondent
no.1.

Mr.S.R.Agarkar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 3rd August 2022

PC :

1. The petitioner is the original complainant in C.C No.5699/SS/2018 pending in the Court of learned Metropolitan Magistrate, 43rd Court, Borivali, at Mumbai. The respondent no.1 is the accused in the said complaint.

2. The complainant has alleged that in discharge of liability the accused had issued a cheque bearing No.723282, dated 31st August 2018 for Rs.36.90 lakh. The cheque was deposited by the complainant with his bank and it was returned dishonoured vide memo dated 15th November 2018 with remark 'funds insufficient'.

The complainant issued demand notice dated 19th November 2018. The complaint was filed for offence u/s.138 of Negotiable Instruments ct, 1881 ('N.I.Act' for short).

3. Verification statement of the complainant was recorded on 22nd February 2019. Learned Metropolitan Magistrate, 43rd Court, Borivali, Mumbai, vide order dated 22nd February 2019 issued process against accused for offence u/s.138 of N.I.Act. The affidavit in lieu of examination-in-chief was filed on 28th January 2020.

4. The petitioner-complainant had preferred Criminal Writ Petition No.1152 of 2021 before this Court praying for expeditious hearing of the complaint. Vide order dated 5th March 2021 this Court had directed the Trial Court to expedite hearing of said complaint and to make an endeavour to dispose it off within a period of one year from the date of order. It was also directed that in the interregnum, learned Magistrate shall expeditiously decide the application preferred by petitioner u/s.143-A of N.I.Act.

5. Learned Magistrate vide order dated 30th March 2021 decided the application at Exhibit-6 and the accused was directed to deposit amount of Rs.7.38 lakh i.e. 20% of the disputed cheque before the Court.

6. Pursuant to the affidavit in lieu of examination-in-chief of the complainant, partial cross-examination was recorded on 5th October 2021. The petitioner-complainant filed an application (Exhibit-16) purportedly being application under provisos (a), (b) and (c) to Section 138 and Section 145 of N.I.Act. The said application was

preferred on 22nd October 2021. It was prayed that accused my not be allowed to take cross-examination of the complainant and accused may be allowed to rebut the evidence placed on record by the complainant and the proceedings of the Court may be proceeded with in accordance with law laid down by Hon'ble Supreme Court in the case of **Indian Bank Association Vs. Union of India**¹ and **Suo Motu Writ Petition (Crl) No.2 of 2020** decided on 16th April 2021.

7. The application was opposed by petitioner by filing say dated 22nd October 2021 by stating that application is not maintainable as complainant has affirmed some documents in his complainant and affidavit. The decisions relied upon by the complainant are not squarely applicable to the facts of this case.

8. Learned Magistrate vide order dated 22nd October 2021 rejected said application.

9. The petitioner is aggrieved by order dated 22nd October 2021 passed below Exhibit-16 rejecting aforesaid application of petitioner.

10. Learned counsel for petitioner submitted that impugned order passed by the Magistrate is contrary to law No reason has been assigned by the Magistrate while rejecting the application. After the affidavit of evidence of complainant, he can be cross-examined only on the application of accused. The affidavit in lieu of examination-in-chief was filed by the petitioner on 2nd February 2021. This Court had expedited the proceedings and also directed the Trial Court to decide the application preferred by the complainant u/s.143-A of N.I.Act. Learned Magistrate directed the accused to deposit 20%

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amount of the disputed cheque in the Court. The petitioner had filed an application for recalling interim order for amendment in accordance with Section 143-A(1) of N.I.Act. On 21st July 2021 the amendment was allowed with finding that written submissions of the complainant for passing order dated 30th March 2021 on Exhibit-6 in accordance with provisions of Section 143-A of N.I.Act. The accused were absent. Thereafter accused appeared before the Court and filed application for extension of time to comply the order of interim compensation. On 5th October 2021 the petitioner filed on record earlier four original agreements and cheques given to the petitioner before last agreement and cheque already placed on record in support of complaint on which the cause of action arose before the Court. Learned Magistrate passed order by keeping the matter for cross and the petitioner was asked to step into witness box for cross-examination in contravention of Section 145(2) of N.I.act. The order of learned Magistrate to conduct cross-examination of petitioner was in contravention of Section 145(2) of N.I.Act and also in contravention of direction given by Supreme Court in the aforesaid judgments. The petitioner had stepped into the witness box and was made to face three questions and the case was adjourned at the request of petitioner. The petitioner filed an application stating that he has complied provisos (a), (b) and (c) to Sections 138, 145 and 118 of N.I.Act. Section 143 of N.I.Act provides that Sections 262 to 265 of Cr.PC shall apply for the trial of offences in Chapter-XVII of N.I.Act. The second proviso empowers the Magistrate to convert summary trial to summons trial if the Magistrate is of the opinion that sentence of imprisonment exceeding one year may have to be passed and that the Magistrate will have to record reasons before converting the trial of complaint u/s.138 of the Act from summary

trial to summons trial. Section 258 of Cr.PC is not applicable to summons cases instituted on a complaint. Hence Section 258-A cannot come into play in respect of complaint u/s.138 of N.I.Act. The present case falls under summary trial, which empowers the Court to try complaint u/s.138 of N.I.Act summarily. Section 145 of N.I.Act postulates that evidence of complainant given by him on affidavit, may be read as evidence in any inquiry, trial or other proceedings under Cr.PC. In the case of *Suo Motu Writ Petition (Crl) No.2 of 2020* (supra), Hon'ble Supreme Court had issued directions which are required to be complied. The Supreme Court in the other decision in the case of *Indian Bank Association Vs. Union of India* (supra) has laid down that u/s.145 of the N.I.Act, the complainant can give evidence by way of an affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in Court, which makes it clear that complainant is not required to examine himself twice. The affidavit and documents filed by the complainant along with complaint for taking cognizance of the offence, are never to be read in evidence at both the stages i.e. pre-summoning and post-summoning stage. There is no necessity to recall and re-examine the complaint after summoning of accused, unless the Magistrate passes a specific order as to why the the complainant is to be recalled. Such order is to be passed on an application made by accused or u/s.145(2) of the Act suo motu by the Court. The impugned order passed by learned Magistrate is contrary to the aforesaid decisions. Partial cross-examination would not make any difference. The petitioner has filed complaint on affidavit which was verified and affidavit of evidence which was accepted on 2nd February 2021. This Court has issued Circular to the Trial Courts in compliance of the order of Hon'ble Supreme Court in *Suo Motu Writ*

Petition (Cri) No.2 of 2020 titled “*In Re : Expeditious Trial of Cases under Section 138 of Negotiable Instrument Act 1881*”.

11. Learned advocate for respondent no.1 has supported the impugned order. It is submitted that learned Magistrate had referred to the aforesaid decisions of Supreme Court and by assigning reasons rejected the application preferred by petitioner. There is no illegality in the order. The complainant was partly cross-examined. In the facts of this case, question of preferring application, as contended by petitioner, does not arise.

12. Pursuant to filing of complaint, verification was recorded, process was issued. Summons was issued to the accused. Pursuant to the appearance of accused, plea was recorded. The complainant filed affidavit of examination-in-chief on 2nd February 2021. The cross-examination of complainant was recorded on 5th October 2021. The complainant filed an application Exhibit-16 on 22nd October 2021 and contended that accused may not be allowed to conduct cross-examination of complainant and that he may be asked to rebut the evidence placed on record by complainant and proceedings of Court may be proceeded with in accordance with aforesaid decisions of Supreme Court.

13. The contention of petitioner is that the accused was required to file application u/s.145(2) of N.I.Act. The accused cannot be allowed to recall the complainant for cross-examination without filing any application in that regard.

14. Learned Magistrate while passing impugned order has

observed that pursuant to filing the affidavit of examination-in-chief (Exhibit.P-7) on 2nd February 2021, partial cross-examination of complainant was recorded on 5th October 2021. In between there were other applications moved by complainant for securing presence of accused. The complainant had also preferred petition for expediting trial. The High Court had expedited the trial. Thereafter complainant has preferred application Exhibit-16 by relying on the aforesaid decisions of Supreme Court and it is contended that accused has to make an application requesting the Court to permit them to cross-examination. After going through the decision it appears that as per the directions of Hon'ble Supreme Court, the complainant is making his stand through this application but the factual position of present proceeding is that examination-in-chief affidavit was filed by the complainant after issuance of process and recording of plea. The examination-in-chief affidavit and relevant documents were not tendered by complainant while presenting the complaint nor verification statement submitted by complainant, was in the form of affidavit/chief affidavit. It is important to mention that complainant entered the witness box on 5th October 2021. Partial cross-examination was conducted. Thereafter complainant filed an application for carrying out certain corrections in the cross-examination. Complainant is aware that stage of proceeding is for conducting further cross-examination. Complainant is trying to put the horse behind the cart and trying to show that cart is not moving further. Considering the current stage of proceedings and the fact that partial cross-examination of complainant is conducted, the application has been moved at belated stage. With this observation the application was rejected.

15. I do not find any infirmity in the order passed by learned Magistrate. It is apparent that pursuant to filing of the complaint, verification statement was recorded and thereafter process was issued. Plea of the accused was recorded. The complainant tendered his affidavit of examination-in-chief which accepted on 2nd February 2021. The cross-examination was conducted on 5th October 2021. The proceedings were adjourned at the request of complainant. The subject application was preferred on 22nd October 2021. The case was for further cross-examination. The question of making such application for purported recalling of complainant for cross-examination does not arise in the facts of this case. Learned Magistrate has rightly analyzed the factual aspects of matter and has categorically held that stage was for further cross-examination and rightly rejected the application. There is no reason to interfere in the said order. I have perused the decisions referred to by petitioner and directions issued therein. Facts of present case, as narrated hereinabove and which were considered by learned Magistrate, the prayer made by petitioner-complainant vide application-16 was rightly rejected by learned Magistrate. The petition is devoid of merits. Hence deserves to be dismissed.

ORDER

- (i) Writ Petition No.6154 of 2021 is rejected and disposed off.

(PRAKASH D. NAIK, J.)

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