

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 31 OF 2023**

Jose Carmo Medard Fernandes	... Petitioner
<i>Versus</i>	
Babu Sheikh	...Respondent

Mr. Ravi Gawas, Advocate *for the Petitioner.*

Mr. V. Braganza, Advocate *with Mr. Sagar Rivankar,*
Advocate for the Respondent.

CORAM: PRAKASH D. NAIK, J
DATED: 28th AUGUST 2023

ORAL ORDER

1. Heard learned Counsel Mr. Gawas for the Petitioner and learned Counsel Mr. Braganza for the Respondent.
2. The Petitioner is facing prosecution for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ('N.I. Act', for short). The Respondent has initiated the proceedings vide Criminal Case No. OA/72/NIA/2022/D pending before the Court of learned Judicial Magistrate First Class (JMFC) at Vasco.
3. The Complainant has alleged that at the request of the Petitioner-Accused, he had advanced an amount of Rs. 10 Lakhs as a financial help to the Accused which was paid by cheque dated 05.10.2021 drawn on State Bank of India. Agreement dated

05.10.2021 was executed between the parties which was notarized. The Accused issued cheque dated 15.12.2021 for Rs.10 Lakhs drawn on Kotak Mahindra Bank, Margao branch, towards the repayment of money advanced to Accused while executing Agreement of loan. The Complainant deposited the said cheque with his banker, which was dishonoured with remarks '*Drawers signature differs*'. Demand notice was issued by the Complainant but no payment was made. Complaint was filed on 19.03.2022.

4. Pursuant to issuance of process against the Accused, he appeared before the Trial Court. Affidavit of examination in chief of the Complainant was taken on record. The Petitioner-Accused preferred an application under Section 145(2) of the N.I. Act seeking leave to cross examine the Complainant. The application was opposed by the Complainant vide reply dated 05.12.2022.

5. Vide Order dated 03.01.2023, the learned JMFC rejected the said application.

6. Learned Advocate for the Petitioner submitted that the impugned Order is contrary to law. The learned Magistrate committed an error and failed to appreciate that the reasons stated by the Petitioner in the application were well founded. The Petitioner has taken specific ground in the application that the cheque was

obtained by using force and on that aspect, the cross examination is required to find out the truth. It is submitted that the cheque referred to in the loan Agreement was dated 05.11.2021 but the complaint and the document show that the cheque which is dishonoured is dated 15.11.2012. The Petitioner may be permitted to cross examine the Complainant to enable him to defend himself in the proceedings.

7. Learned Advocate for the Petitioner has relied upon the Order dated 09.05.2023 passed by this Court in WPCR Nos. 34 and 35 of 2023 in the case of **Rakesh Singh vs. Anil Madanmohan Gulati & anr.** and another decision of the High Court of Himachal Pradesh in the case of **Jagdeep Singh vs. Ramesh Singh** decided on 28.11.2019.

8. Learned Advocate for the Respondent submitted that there is no infirmity in the impugned Order. No ground was made out in the application for calling upon the Complainant for the purpose of cross examination. The complaint specifically mentions the cheque. The ground about the alleged discrepancy with regard to the cheque in the Agreement was not pleaded in the application under Section 145(2) of NI Act before the Trial Court. The grounds pleaded in the application are afterthought. The Accused failed to mention about his specific

defence. The impugned Order passed by the Trial Court is well reasoned and no interference is called for.

9. The Petitioner in his application under Section 145(2) of the NI Act, had contended that there exists no legally enforceable debt to be paid by the Accused to the Complainant and the cheque was taken under coercion and taking undue advantage of the ill health of the Accused. The Complainant in no manner whatsoever could carry the cheque bearing the contents mentioned by the Complainant. The application was opposed on the ground that the Accused has not mentioned specific ground for granting the application. This signature on the cheque is not disputed by the Accused.

10. The learned Magistrate observed that the application is filed in casual manner and it does not set out on which point the Accused wishes to cross examine the Complainant. Relying upon the decision in the case of **Meter and Instruments Private Limited & anr. vs. Kanchan Mehta**¹ and the decision of Delhi High Court in the case of **Rajesh Aggarwal vs. State & anr.**², the application was rejected. Reference is also made to the Orders passed by this Court in WPCR No. 35 of 2019 decided on 05.04.2019 in the case of **Rukmakar alias Bharat Tulshidas Naik vs. Santosh Shaba**

¹ 2018(1) SCC (Cri) 477

² 2010(4) RCR (Cri) 124

Gaonkar and order passed by this Court in the case of **Paresh Bandekar vs. Rajaram D. Satardekar**³.

11. Learned Counsel for the Petitioner has relied upon the decisions as stated herein above. This Court in the case of **Rakesh Singh vs. Anil Madanmohan Gulati & anr.** (supra) has referred to several decisions and held that the Accused cannot be deprived of right to cross examine the Complainant unless there are extraordinary circumstances. In the decision of High Court of Himachal Pradesh, in the case of **Jagdeep Singh vs. Ramesh Singh** (supra) similar issue was considered and it was observed that Section 145(2) of NI Act nowhere talks about assigning reasons in the application for recall/re-examination of a witness meaning thereby, it is obligatory to recall Complainant or its witnesses if an application is made in that behalf. Rejecting the application of the Accused for examination-cross examination of the Complainant, is against the provisions of Section 145(2) of NI Act.

12. In the impugned Order, the learned Magistrate has observed that the application does not set out on what point the Accused wishes to cross examine the Complainant. The Court is under the misconception that the Accused has to come out with the details as to on what point he requires to cross examine the Complainant. That is

³ 2021 SCC OnLine Bom 254

not the ambit and scope of Section 145(2) of the NI Act. The Accused has a right of a fair trial. He cannot be deprived of the right to defend himself.

13. Considering these circumstances, the impugned order is required to be set aside and the Petitioner-Accused has to be permitted to cross examine the Complainant. Hence, the following order :

ORDER

(i) Criminal Writ Petition No. 31 of 2023 is allowed.

(ii) The impugned Order dated 03.01.2023 passed by the JMFC 'D' Court, Vasco, Goa, below Exhibit D-23 in Criminal Case No. OA/72/NIA/2022/D, is set aside and the application preferred by the Petitioner under Section 145(2) of the NI Act is allowed and is permitted to cross-examine the Complainant.

(iii) Petition stands disposed of.

PRAKASH D. NAIK, J