

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.391 OF 2023

TARAK AROLKAR	 Petitioner.
VS	
CIRILO ALBERTO ANDRADE DESOUZA.	Respondent.

Mr. Athnain Naik, Advocate for the petitioner.

Ms. Prithvi Bandekar, Advocate for respondent.

CORAM: PRAKASH D NAIK, J

DATED: 14th September 2023

ORAL ORDER

1. Petitioner preferred an application under Section 145(2) of the Negotiable Instruments Act, 1881("NI Act" for short) before the trial Court. The application was rejected by order dated 18.4.2023. Petitioner challenged the said order by preferring this Writ Petition under Section 227 of the Constitution of India. Respondent filed a complaint for offence under Section 138 of the NI Act before the Court of Judicial Magistrate, First Class at Mapusa Goa. Complainant has alleged that accused approached the complainant and requested for friendly loan of Rs.6,00,000/- from the complainant which was provided to him by cash on a condition that he would return the amount within two months. Accused issued a cheque dated 9.3.2021 for an amount of Rs.6,00,000/- to discharge his liability. Cheque was presented by the complainant with his

banker and it was returned dishonoured on 13.4.2021 for the reason “funds insufficient”. Demand notice was sent to the accused on 27.4.2021 which was received by him. Payment was not made. Hence, complaint was filed on 14.7.2021.

2. complainant filed affidavit in evidence on 15.7.2021. Petitioner/accused filed an application under Section 145(2) of NI Act on 3.10.2022 and sought direction from the Court to call upon the complainant and to permit the accused to cross examine him.

3. Learned Magistrate vide order dated 18.4.2023 rejected the application preferred by the petitioner on the ground that no defence is raised by the accused except stating that case is false and that it was not issued towards legally enforceable debt between accused and the complainant. It was also observed that accused has not stated as to how the complainant came into the possession of the said cheque. Learned Magistrate has relied upon several decisions referred to in the impugned order.

4. Learned Counsel for the petitioner submitted that impugned order is bad in law. Petitioner cannot be denied opportunity to cross examining the complainant. Specific defence set out by the petitioner is that cheque has not been issued towards legally enforceable debt, false case has been registered and contents of the complaint and the cheque are disputed. The accused has a right to fair trial. Learned counsel for the petitioner has relied upon decision

in the case of ***Rakesh Singh Vs Anil Madanmohan***¹

5. Learned counsel for the respondent/complainant submitted that accused filed application belatedly. Accused had adopted casual approach. Defence is cryptic. There was no specific defence by the accused. Accused had contended that dispute is purely of civil nature and cheque has not been issued towards legally enforceable debt. Application does not contain any defence of the accused. On 9.9.2022 accused was absent, his advocate was present and the case was adjourned for recording statement under Section 313 of Cr.P.C. Application under Section 145(2) of the NI Act was preferred on 3.10.2022.

6. Learned counsel for the respondent has relied upon following decisions:

*i. Indian Bank Association and others Vs Union of India and others,*²

*ii. Apolonious Francisco Luis Vs Sahajanand Invements Pvt. Ltd.*³

7. The petitioner is facing the prosecution under Section 138 of the NI Act. The petitioner is entitled for fair trial. Petitioner has to rebut the presumption under Section 139 of the NI Act. The petitioner by preferring an application under Section 145(2) of the NI

¹ (2023) 2 AIR Bom R (Cri) 481

² (2014) 5 SCC 590

³ Criminal Writ Petition No. 838 of 2021-F decided on 12.9.2022.

Act has contended that case is false, cheque has not been issued by the accused towards legally enforceable debt and the contents of the complaint and the cheque are disputed by the accused. Accused has good case on merits and entitled to cross examine the complainant. Prejudice would be caused to the accused in case right to cross examination is denied.

8. Learned Magistrate while rejecting the application preferred by the accused has observed that no defence is raised by the accused. Issuance of cheque is not disputed by the accused and he merely claims that it was not issued towards legally enforceable debt. Accused has not explained as to how the complainant came in the possession of the cheque. Learned Magistrate also observed that dispute cannot be termed as civil dispute.

9. In the case of ***Rakesh Singh Vs Anil Madanmohan Gulati and another***(supra) has observed that valuable right of the accused to cross examine the complainant cannot be brushed aside.

10. The Supreme Court in case of ***Indian Bank Association and others Vs. Union of India and others*** (supra) has observed that to achieve the objectives of speedy summary trial in view of amended provisions of NI Act viz. Section 143 to 147 which must have given effect to in letter and spirit.

11. In the case of ***Apolonious Francisco Luis Vs Sahajanand Investment Private Ltd.***(supra), this Court has

refereed to the decision of ***Meters and Instruments Private Limited and another Vs. Kanchan Mehta (2018) 1 SC 560*** and various other decisions and it was observed that accused need to disclose the specific defence.

12. In the case of ***Mandovi Cooperative Bank Limited Vs Nimesh B. Thakore (2010) 3 SCC 83***, it is observed that section 145(2) of NI Act expressly provides that, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witness) can only be subjected to cross examination as to facts stated in the affidavit.

13. The trial Court ought not to have rejected the application preferred by the petitioner/accused. The petitioner could not have been deprived of cross examining the complainant.

14. Impugned order is therefore required to be set aside.

ORDER

- (i) Writ Petition No.391/2023 is allowed.
- (ii) Impugned order dated 18.4.2023 passed by the learned JMFC “A” Court Mapusa in Criminal Case No.OA/186/NIA/2021 is set aside.
- (iii) Application Exh. 22 preferred by the petitioner under Section 145(2) of the NI Act is allowed and the petitioner is permitted to cross examine the complainant in accordance with Section 145(2) of the NI Act.

(iv) Writ Petition stands disposed of.

PRAKASH D. NAIK, J.