

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 124 OF 2023

Ms. Patricia Reiter, Daughter of Mr. Walter Reiter, aged about 43 years, having Passport No. U3784545, Native of 829, Ocean Park, Blvd 3, Santa Monica, CA90405/612, Montana Avenue APT B, Santa Monica, CA90403, Presently residing at Assagao Envy, Apartment No. 002, Block F, Near Assagao Union High School, Assagao, Mapusa-Goa, 403 507.

.... Petitioner.

versus

Mr. Somnath Sharad Mandrekar, son of late Shri Sharad Mandrekar, aged about 46 years, married, in business, Indian National and R/o H. No. 28, Askawada, Mandrem, Pernem-Goa.

....Respondent.

Mr Sahil Deshprabhu, Advocate for the petitioner.

Mr Deepak Gaonkar, Mr Amey Salgaonkar, Mr Shubham Khorjuvekar, Advocate for the respondent.

CORAM: BHARAT P. DESHPANDE, J

DATED: 12th December, 2023

ORAL JUDGMENT:

1. Heard Mr Deshprabhu, learned counsel for the petitioner and Mr Gaonkar, learned counsel for the respondent.
2. Rule. Rule is made returnable forthwith.
3. Matter is taken up for final disposal at the admission stage itself with the consent of the learned counsel for the parties.

4. The issue involved in the present petition is in connection with rejection of the application filed by the petitioner seeking leave to file written statement under Section 313(5) of Cr.P.C.

5. Petitioner is an accused in a case filed by the respondent/complainant for offence punishable under Section 138 of the Negotiable Instruments Act 1884 (“NI Act” for short).

6. After examination of the complainant, matter was posted for recording statement of petitioner/accused under Section 313 (1)(b) of Cr.P.C. While answering such questions put to her, petitioner wished her desire to file written statement which is mentioned in answer to question no.12. Since the matter was fixed for defence evidence, petitioner had to file an application for leave to file written statement.

7. By the impugned order dated 7.7.2023, learned Magistrate rejected said application on two counts. Firstly, it is claimed that petitioner by filing frivolous application, is trying to delay the matter, which is already under direction of this Court to be decided in a time bound manner. Second ground of rejection is that there is no cross examination of evidence of the complainant and that there is no defence raised by the petitioner and since the matter is fixed for defence evidence, there is substantial compliance of the provision of Section 313 (5) of Cr.P.C.

8. Mr Deshprabhu for the petitioner strongly contended that

valuable right of the petitioner to file written statement in her defence has been taken away by the trial Court on the grounds which are found to be perverse. He submits that while answering question no. 12, petitioner specifically stated that she wants to file written statement and this answer has been recorded by the trial Court. Instead of giving an opportunity to the petitioner to file written statement, matter was directly posted for defence evidence. Petitioner had to file an application seeking leave to file written statement however, the same has been rejected on the grounds which are mentioned therein and as discussed above.

9. Mr Deshprabhu, submits that petitioner is having valuable right to file written statement and though there is a discretion, same has to be exercised judiciously. He submits that the petitioner was defending the matter and had no point of time tried to delay the matter. He further submits that petitioner/accused mentioned that she want to file written statement and the same is recorded as answer to question no.12, Magistrate ought to have fixed the matter for filing written statement. He submits that unless the written statement is filed disclosing the defence, the evidence which petitioner will be allowed to lead will be without any proper pleadings. He further submits that proceedings under Section 138 of NI Act are quasi criminal and quasi civil and thus right of the petitioner has been taken away without sufficient reason. Mr Deshprabhu placed

reliance on the decision of learned Single Judge of this Court at the principal seat in ***Daffodil Projects Pvt. Ltd. Vs Deccan Water Treatment Pvt. Ltd. And anr. in Criminal Writ Petition No. 3508 of 2022 decided on 28.9.2022.***

10. Per contra, Mr Gaonkar appearing for the respondent would submit that there is absolutely no defence as petitioner fail to cross examine the complainant/respondent, however, learned Magistrate by allowing the petitioner to lead defence evidence specifically complied with the provisions of Section 313 of Cr.P.C. He submits that sub section 5 of Section 313 of Cr.P.C. gives a discretion to the trial Court and such discretion has been exercised by learned Magistrate which need not require any interference in the present petition.

11. Mr Gaonkar placed reliance in the case of ***Raj Kumar Vs State (NCT of Delhi), 2023 SCC Online SC 609.***

12. Rival contentions fall for the determination are:-

13. Petitioner is an accused in the proceedings filed by respondent for the offence punishable under Section 138 of NI Act. Proceedings were initiated after compliance of provisions of Section 138 of NI Act by giving notice. Learned Magistrate after issuing process, allowed the complainant to file affidavit in evidence and thereafter matter was fixed for recording statement of the accused under Section 313 of

Cr.P.C.

14. Mr Gaonkar, has pointed out that respondent had to file petition before this Court vide Criminal Writ Petition No.90/2023 /F changing the impugned order dated 14.12.2022 wherein learned Magistrate allowed the application for cross examination of the complainant and his witness under Section 145(2) of NI Act. This Court while delivering judgment in Criminal Writ Petition No. 90/2023/F dated 28.2.2023 quashed the said order dated 14.12.2022 and thereby dismissed the application filed by the petitioner/accused for cross examination of the complainant.

15. However, this Court has clearly observed in paragraph 9 which reads thus:-

“It is needless to clarify that the accused can rebut the presumption under Section 139 of the Negotiable Instruments Act, 1881 by leading her own evidence, if so advised.”

16. It is therefore clear that even though the petitioner was not allowed to cross examine the complainant, her right to rebut the presumption under Section 139 of NI Act was protected. Such right is available to the petitioner apart from cross examination of the complainant and while answering questions put to her under Section 313(1) (b) of Cr.P.C.

17. ***Raj Kumar*** (supra) is the matter which is totally on different context wherein question was to the effect that the Court fail to take help of the prosecutor and the defence counsel in preparing questions under Section 313 (1) (b) and observed in paragraph 23 as tried to be projected by Mr Gaonkar no where restricts the discretion of the Court either allowing or rejecting the accused in filling written statement immediately after answering questions put to the said accused under clause(b) sub Section 1 of Section 313 of Cr.P.C. Thus ***Raj Kumar*** (supra) is of no help in the present matter.

18. In ***Daffodil Projects Pvt. Ltd*** (supra), learned Single Judge of this Court while dealing with the matter under Section 138 of NI Act, allowed the accused to file written statement after substantial delay, only on the ground that accused is having right to file his written statement in defence.

19. Though discretion is given to the Court/Magistrate, such discretion has to be exercised judiciously. Valuable right is given to the accused to put forth his defence by filing written statement apart from answering the questions put to him under Section 313(1)(b) of Cr.P.C.

20. Purpose of filing such written statement is to give an opportunity to the accused to explain in detail his defence, which sometime is not possible while answering the questions put to him

under Section 313(1)(b) of Cr.P.C. Denial of such opportunity would certainly affect valuable right of the accused.

21. Reasons on which application has been rejected by the Magistrate are therefore considered to be improper. Firstly learned Magistrate observed that there is no cross examination of the complainant and that accused is filing frivolous applications in order to delay the matter. Learned Magistrate further observed that since there is direction from this Court to decide the matter in a time bound manner and therefore accused by filing such application is trying to delay the matter. Mr Deshprabhu submits that roznama produced on record shows that there was no attempt on the part of the petitioner to delay the proceedings. Admittedly, petitioner filed an application before the learned Magistrate permitting her to cross examine the complainant, which was allowed vide order dated 14.12.2022. Respondent challenged the said order before this Court in Criminal Writ Petition No.90/2023/F. While disposing of said petition, learned Magistrate was directed to proceed with the trial as expeditiously as possible. Thus, first ground on which application is rejected is not at all applicable and it is observed that discretion has not been properly exercised. Second ground on which application is rejected is found in paragraph nos.10 and 11 wherein learned Magistrate observed that by giving opportunity to the petitioner to step into the witness box, there is substantial compliance. Such

observations are factually incorrect for the simple reason that provision itself gives right to the accused to file written statement in support of his defence and in compliance of Section 313 of Cr.P.C. Only thereafter stage of defence evidence commence.

22. Since the proceeding under Section 138 of NI Act are quasi civil/quasi criminal, right of the accused to file written statement, if any, cannot be taken away in the manner in which impugned order is passed.

23. Giving opportunity to lead evidence in defence cannot be equated with filing of the written statement and that too in compliance with section 313 of Cr.P.C. Observation in the case of ***Daffodil Projects Pvt. Ltd*** (supra) are squarely applicable to the matter in hand and there is no material to take another view. Accordingly, impugned order dated 7.7.2023 needs interference.

ORDER

(i) Impugned order dated 7.7.2023 is hereby quashed and set aside.

(ii) Application at Exh.51 filed by the petitioner seeking leave to file written statement stands allowed.

(iii) Since the matter is posted on 18.12.2023, petitioner shall submit written statement on that day itself.

(iv) Trial Court thereafter shall proceed with the matter in compliance with the direction of this Court in Criminal Writ Petition No. 90/2023/F

(v) Rule is made absolute in above terms.

(vi) Writ Petition stands disposed of.

BHARAT P. DESHPANDE, J.

VINITA VIKAS
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