

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 95 OF 2023**

Mr. Amit Surajpal Bhardwaj, aged about 45 years, Indian National, s/o Surajpal Bhawadwaj, r/o. Harbans Vihar Bldg. No. M-3, Nr. Shree Sai Baba Temple, Kadamba ... Petitioner
Highway Rd. Chimbhel, Tiswadi – Goa.

V e r s u s

Mr. Amit Ratnakar Tari, s/o. Ratnakar Tari, aged about 39 years, Indian National, Businessman, r/o. H. No. 115, Nr. Gajantlaxmi Temple, Deulwada, Volvoi, ...Respondent
Ponda, Goa.

Mr. Neelesh Takkekar, Advocate for the Petitioner.

Mr. Chaitanya Padgaonkar, Advocate with Ms. V. Mahato,
Advocate for the Respondent.

CORAM: PRAKASH D. NAIK, J
DATED: 9th OCTOBER 2023

ORDER

1. The Petitioner preferred an application before the Court of learned Judicial Magistrate, First Class, 'C' Court at Ponda, in Criminal case no. 550/OA/NIA/2018/C under Section 145(2) of the Negotiable Instruments Act, 1881, (*N.I. Act*, for short), for summoning the Complainant for the purpose of cross-examination. The said application was rejected by the learned Magistrate vide Order dated 01.07.2023, which is under challenge in this Petition.

2. The Respondent filed a complaint under Section 138 of N. I. Act before the Court of learned Judicial Magistrate, First Class. The Complainant has alleged that the accused represented him that he is doing work of building boats. The accused entered into oral contract with the Complainant and agreed to construct boat and obtained permission from the concerned authorities. The complainant paid an amount of Rs. 2,70,000/- to the accused vide cheques. The accused did not perform his work. Towards part payment of refund, the accused gave a cheque dated 10.03.2018 for an amount of Rs.1,00,000/-. When presented, the said cheque was dishonoured with remarks "*payment stopped by drawer*" vide intimation dated 14.06.2018. The Complainant issued demand notice dated 12.07.2018 calling upon the accused to make the payment. The accused received the notice but did not reply. The amount was not paid. Complaint was filed on 28.08.2018 under Section 138 of the N.I. Act. Process was issued. The Complainant filed affidavit of evidence on 28.08.2018.

3. The Petitioner-accused filed an application under Section 145(2) of the N.I. Act on 17.12.2022 for the purpose of cross-examination of the Complainant. The application was opposed by the Complainant by filing reply dated 13.03.2023. The application was rejected.

4. Learned Advocate for the Petitioner submitted that requisite pleadings were made in the application preferred by the Petitioner under Section 145(2) of the N.I. Act. The learned Magistrate has rejected the application on the ground which is not tenable in law. The accused cannot be deprived of his right to cross-examine the Complainant. The averments in the application were sufficient to summon the Complainant for cross-examination. The learned Magistrate has rejected the application on the ground that the accused failed to reply to the legal notice issued to him and since the Complainant has produced the statement of account which shows that the accused received the amount. The impugned Order is beyond the scope of Section 145(2) of N.I. Act. Reliance is placed on the decision of this Court in the case of **Rakesh Singh vs. Anil Madanmohan Gulati & anr.**¹

5. Learned Advocate for the Respondent-Complainant submitted that the Apex Court has issued guidelines in several decisions to conclude the proceedings under Section 138 of the N.I. Act expeditiously. The procedure to dispose off such proceedings expeditiously has been laid down in various decisions of the Apex Court. The learned Magistrate had issued process against the accused. The summons could not be executed upon him. Ultimately, it was served in 2019. Warrants were issued against the accused.

¹ 2023 SCC OnLine Bom 1037

Defence of the accused is that he did not receive any amount. In that context, the learned Magistrate had observed that the Complainant has produced the statement of account which shows that the accused received the amount. The accused had no defence of not receiving any amount from the Complainant. He cannot plead that amount is not received by him. The demand notice was not replied by the accused.

6. Learned Advocate for the Respondent has relied upon the decision of this Court in the case of **Apolonius Francisco Luis vs. Sahajanand Investments Pvt. Ltd.**² and another decision of this Court in the case of **Rukmakar @Bharat Tulshidas Naik vs. Santosh Shaba Gaonkar & anr.**³

7. The Petitioner-accused filed an application under Section 145(2) of the N.I. Act and stated that the complaint was filed without cause of action. The accused has not received any demand notice. There was no contract between the Complainant and the accused for building boat. The accused never issued the present cheque to the Complainant in discharge of any legal liability. The accused denied the contents of cheque and his signature. The accused has not

² MANU/MH/3426/2022

³ WPCR No. 35 of 2019 decided on 05.04.2019

received any amount from the Complainant towards building of boat.
The documents are manipulated by the Complainant.

8. The learned Magistrate rejected the application under Section 145(2) of N. I. Act by observing that the accused failed to reply to the legal notice issued to him and also since Complainant produced the statement of account, which shows that the accused received the amount.

9. The accused is facing prosecution under the Negotiable Instruments Act. The accused is required to rebut the presumption under Section 139 of the N. I. Act. Production of statement of account by the accused does not establish the guilt of the accused at this stage. The document has to be adduced in evidence and proved. The accused has an opportunity to cross examine the Complainant on such documents.

10. In the case of **Apolonius Francisco Luis vs. Sahajanand Investments Pvt. Ltd.** (supra), this Court had observed that considering that the proceedings under Section 138 of N. I. Act are summary in nature, the principle laid down in decision of Supreme Court in **Meters and Instruments Private Limited & anr. vs. Kanchan Mehta**⁴, that if the accused wants to contest the case, a

⁴ (2018) 1 SCC 560

specific defence needs to be disclosed by him, has not been met in application in question.

11. In the case of **Rukmakar @ Bharat Tulshidas Naik vs. Santosh Shaba Gaonkar & anr.** (supra), it was observed that accused had opportunities to set out his defence. He did not send reply to notice, grounds were not set out in application seeking leave to cross-examine Complainant and could not disclose such grounds during the course of hearing of the application and in answer to the question, which may be posed by Magistrate. Hence, liberty to cross-examine cannot be granted.

12. In the case of **Rakesh Singh vs. Anil Madanmohan Gulati & anr.** (supra), this Court has dealt with the issue relating to application under Section 145(2) of the N. I. Act. Reference was made to several decisions of the Apex Court as well as this Court. It was observed that it may be that the accused has an opportunity to lead defence evidence and rebut presumption, if any. However, that does not mean that the valuable right of the accused to cross-examine the Complainant which he is entitled under Section 145(2) of the N.I. Act, can be lightly brushed aside. It was also observed that the accused has a right to fair trial. Once it is recognised that the accused has absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross-examination, the

applicant cannot be deprived of such a right. The Supreme Court in **Meters and Instruments Private Limited & anr. vs. Kanchan Mehta** (supra), has not at all diluted the proposition laid down in **Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore**⁵, that the accused is fully protected and under sub-section (2) of Section 145 of the N. I. Act, he has absolute and unqualified right to have the Complainant and any or all of his witnesses summoned for cross-examination. The Supreme Court has not curtailed the right of the accused to have the Complainant summoned for cross-examination.

13. In the case of **Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore** (supra), the Supreme Court had considered the scope of Section 145 of the N. I. Act. It was observed that the accused is fully protected as under sub -section (2) of Section 145, he has absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross examination. The affidavit of the person summoned is in nature of examination in chief, hence on being summoned on the application made by the accused, the deponent of the affidavit, the Complainant or any of his witnesses can only be subjected to cross-examination as to the facts stated in the affidavit.

⁵ (2010) 3 SCC 83

14. In **Meters and Instruments Private Limited & anr. vs. Kanchan Mehta** (supra), the Supreme Court was considering the issue as regards the rejection of the prayer by the High Court for compounding offence under Section 138 of N. I. Act on payment of cheque amount. How proceedings can be regulated, where the accused is willing to deposit the cheque amount and whether proceedings can be closed. In the context of issues under consideration, it was observed that the accused who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage.

15. In the light of observation of Supreme Court in the case of **Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore** (supra), the accused is protected under Section 145(2) of N. I. Act to have Complainant and his witnesses cross-examined.

16. The learned Magistrate ought not to have rejected the application on the grounds stipulated in the impugned Order dated 01.07.2023. Hence, the Petition succeeds. The impugned Order deserves to be set aside.

ORDER

(i) Criminal Writ Petition no. 95 of 2023 is allowed.

(ii) The impugned Order dated 01.07.2023 passed by the learned J.M.F.C., 'C' Court, Ponda in Criminal case no. 550/OA/NIA/2018/C rejecting the application preferred by the Petitioner under Section 145(2) of the N.I. Act, is set aside.

(iii) The application under Section 145(2) of the N. I. Act preferred by the Petitioner is allowed and the Advocate for the Petitioner is permitted to cross-examine the Complainant without further delaying the proceedings.

(iv) The trial is expedited.

(v) The Petitioner shall cross-examine the Complainant on the next date of hearing or any other date the trial Court deem fit and proper.

(vi) Criminal Writ Petition is disposed off.

PRAKASH D. NAIK, J

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