

Maria S.

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.94 OF 2023**

Mayur Zalmi, son of Mr Hanumant Jalmi, age 38 years, Service, Indian National, residing at Opposite Ajay Super Market, Flat No.S/2, Mervyn Apts., Morod, Mapusa, Bardez, North Goa, 403 507.

... Petitioner

Versus

1. Armstrong Builders And Developers, through its Proprietor Mr Savio D'Cunha, son of late Mr Joaquim D'Cunha, aged 57 years, business, resident of Flat No.G-1, Ground Floor, Evergreen Apartments, Shetye Vaddo, Duler, Mapusa, Bardez, Goa.

2. State of Goa, as represented by, The Public Prosecutor, High Court Building, Porvorim, Bardez, Goa.

...Respondents

Mr Pravin C. Naik, Advocate for the Petitioner.

Mr Dhaval D. Zaveri, Advocate for the Respondent.

**CORAM:
DATED :**

**PRAKASH D. NAIK, J
10th OCTOBER 2023**

ORDER:

1. The petitioner is aggrieved by order dated 14.08.2023 passed by learned JMFC, Mapusa 'E' Court rejecting the

application preferred by the petitioner under Section 145(2) of the Negotiable Instruments Act seeking permission to cross-examine the complainant.

2. The respondent has filed a complaint under Section 138 of the Negotiable Instruments Act against the petitioner alleging that the accused had received a sum of Rs.2,00,000/- from the complainant. Agreement was executed with complainant on 07.11.2016. The amount of Rs.2,00,000/- was to be returned by the accused within 6 months. The accused then requested for additional amount of Rs.1,00,000/- which was parted to him by the complainant. The accused then demanded Rs.2,00,000/- which was given to him by cash. Thus, accused received a total sum of Rs.5,00,000/- from the complainant. The accused issued cheque dated 26.12.2017 for an amount of Rs.5,00,000/-. Cheque was dishonoured with remark "*payment stopped by drawer*". The demand notice was issued. The accused did not make payment, hence, complaint was filed.

3. The complainant filed affidavit of evidence. The petitioner filed an application under Section 145(2) of Negotiable Instruments Act on 17.07.2023. The accused contended that there does not exist legally enforceable debt. The accused did not receive notice from the complainant. The signature on the AD Card is not of the accused. The accused did not issue cheque dated 26.12.2017 for Rs.5,00,000/-. The accused has a good case on merits. The complainant endorsed say on application by stating that no specific reason was mentioned in the application,

therefore, the application be dismissed and matter be placed for 313 Statement.

4. Learned Magistrate vide order dated 14.08.2023 rejected the application preferred by the petitioner under Section 145(2) of Negotiable Instruments Act. While rejecting the said application it was observed that the application has been filed in a casual manner without disclosing evidence. It does not set out on what point the accused wishes to cross-examine the complainant.

5. Learned advocate for the petitioner submitted that the petitioner had pleaded the grounds for seeking permission to cross-examine complainant in the application under Section 145(2) of Negotiable Instruments Act. The accused has a right to cross-examine the complainant. Once the complainant files affidavit of evidence, the complainant can be recalled for the purpose of cross-examination on application preferred by the accused. Reliance is placed on the decision of Supreme Court in the case of ***Mandvi Cooperative Bank Ltd., v/s. Nimesh B. Thakore*¹**.

6. Learned advocate for the respondent submitted that the complaint was filed in the year 2018. The application under Section 145(2) of the Negotiable Instruments Act was filed after three years. The accused is delaying the trial. The defence is vague. The presumption is in favour of the complainant. The

¹ AIR 2010 SC 1402

demand notice was not replied. Application was preferred in a casual manner. The course open to the drawer where he claims not to have received the notice sent by post, but received copy of the complaint with summons is to make payment of the cheque amount within 15 days of the receipt of summons and submit to the court that the complaint be rejected.

7. Learned advocate for respondent has relied on the decision in the case of ***C.C. Alavi Haji v/s. Palapetty Muhammed And Another***². It is submitted that the decision of this Court in the case of ***Rakesh Singh v/s. Anil Madanmohan Gulati & Anr***³ can be distinguished on facts of the present case. The accused therein had denied the case set out by the complainant in the application under Section 145(2) of Negotiable Instruments Act.

8. The petitioner preferred application under Section 145(2) and pleaded grounds reflected therein. The application is rejected on the ground referred to hereinabove.

9. 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

² (2007) 6 SCC 555

³ 2023 SCC OnLine Bom 1037

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***⁴ (supra), the Supreme Court has not at all diluted the proposition laid down in ***Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore*** (supra), 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.

10. 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,

4 (2018) 1 SCC 560

the Complainant or any of his witnesses can only be subjected to cross-examination as to the facts stated in the affidavit.

11. 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.

12. 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.

13. The petition must succeed. The petitioner will have to be given opportunity to cross-examine complainant.

ORDER

(i) Criminal Writ Petition No. 94 of 2023 is allowed.

(ii) Impugned order dated 14.08.2023 passed by the learned JMFC at Mapusa 'E' Court rejecting the application at Exhibit D-35 is set aside.

(iii) The petitioner is permitted to cross-examine the complainant in accordance with Section 145(2) of the Negotiable Instruments Act.

(iv) The petitioner shall proceed with cross-examination of complainant without causing delay in the trial.

(vi) Criminal Writ Petition stands disposed of.

(PRAKASH D. NAIK, J.