

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 107 OF 2023

Gautami Govind Naik ... Petitioner
Versus
TheBori Urban Coop Credit Society Ltd. Rep ...Respondent
by Haren A. S. Borkar

Mr. Siddhant Shetye, Advocate for the Petitioner.

Ms. Shaizeen Shaikh, Advocate for the Respondent.

CORAM: PRAKASH D. NAIK, J
DATED: 6th NOVEMBER 2023

ORAL ORDER

1. The Petitioner is prosecuted for offence under Section 138 of the Negotiable Instruments Act, 1881, vide Criminal complaint filed in Criminal Case no. 455/OA/2021/B before the Court of learned Judicial Magistrate First Class, at Ponda. The complaint is filed by the Respondent. The case of the Complainant is that the Complainant received a cheque dated 11.08.2021 for an amount of Rs.3,00,000/-. The cheque was dishonoured with remarks “*funds insufficient*”. Demand notice was sent to the accused. Since the payment was not received, the complaint was filed.

2. Pursuant to the order taking cognizance of the complaint, affidavit of evidence was filed by the Complainant.

3. The Petitioner filed an application under Section 145(2) of the N. I. Act, taking permission to cross examine the Complainant. The application was opposed by the Respondent by filing reply. The learned Magistrate vide Order dated 08.08.2023, rejected the application below Exhibit D-21.

4. Learned Advocate for the Petitioner submitted that the impugned Order is contrary to law. The Order is beyond the scope of Section 145 of the N. I. Act. Grounds were set up in the application in support of the prayer for seeking leave to cross-examine the Complainant. The learned Magistrate, however, rejected the application and one of the ground is that the accused is required to set out his grounds of defence and that the accused has not urged sufficient grounds whereby the Complainant is required to cross-examine. The accused is trying to delay the matter. It is submitted that the learned Magistrate has failed to take into consideration the grounds urged in the application. It was sufficient to grant leave to the Petitioner to cross-examine the Complainant. Reliance is placed on the decision of this Court in the case of **K. Narsimula vs. Nagesh C. Dandi**¹

5. Learned Advocate for the Respondent-Complainant submitted that the learned Magistrate has passed a well reasoned order which

¹ WPCR No. 634/2023/(F) decided on 18.10.2023.

does not require interference. The application preferred by the Petitioner was vague. No proper grounds were set up. There is no reason to set aside the impugned Order. The accused had issued the cheque. She is the signatory to the cheque. Grounds were not sufficient to invoke Section 145(2) of the N. I. Act.

6. It is apparent that the learned Magistrate has proceeded on the basis that the accused is required to set up his grounds for defence for the purpose of cross-examination. Section 145(2) of N. I. Act stipulates that the accused can make an application for recalling the Complainant for the purpose of cross examination.

7. In the case of **Rakesh Singh vs. Anil Madanmohan Gulati & anr.**², 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

² 2023 SCC OnLine Bom 1037

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**³, has not at all diluted the proposition laid down in **Mandvi Co-op Bank Ltd. vs. Nimesh B. Thakore**⁴, 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.

8. 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 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.

3 (2018) 1 SCC 560

4 (2010) 3 SCC 83

9. 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.

10. 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.

11. Hence, the impugned Order is required to be set aside.

ORDER

(i) Criminal Writ Petition no. 107 of 2023 is allowed.

(ii) The impugned Order dated 08.08.2023 passed by the learned J.M.F.C., 'B' Court, Ponda in Criminal case no. 455/OA/NIA/2021/B 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 Petitioner shall cross-examine the Complainant on the next date of hearing or any other date the trial Court deem fit and proper.

(v) Criminal Writ Petition is disposed off.

PRAKASH D. NAIK, J

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