
(2015) 01 BOM CK 0007

In the Bombay High Court

Case No : Criminal Writ Petition No. 649 of 2013

Rahul Omprakash Gandhi

APPELLANT

Vs

Pusad Urbhan Co-op. Bank Ltd. and Others

RESPONDENT

Date of Decision : 29-01-2015

Acts Referred:

Evidence Act, 1872 — Section 137, 3

Negotiable Instruments Act, 1881 (NI) — Section 138, 145, 145(2)

Citation : (2015) ALLMR(Cri) 1721

Hon'ble Judges : S.B. Shukre, J.

Bench : Single Bench

Advocate : S.N. Bhattad, for the Appellant; A.P. Kalmegh, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J.—Heard. Rule. Rule returnable forth with. Heard finally by consent.

2. Question involved in this petition relates to territorial jurisdiction of a criminal Court to try an offence punishable under Section 138 of Negotiable Instruments Act (N.I. Act for short) and how the matters already instituted and pending at the stage of recording of evidence are to be dealt with, once it is found that the Court has no jurisdiction to try the case, in view of the law declared in this regard by the Hon"ble Apex Court.

3. It has been submitted by learned counsel for the petitioner that since the drawee bank, which is State Bank of India, Darwha Branch, is situated at Darwha and not at Pusad, Pusad Court will not have jurisdiction to try the case for the offence punishable under Section 138 of Negotiable Instruments Act. He submits that mere issuance of notice from Pusad will not confer any jurisdiction on Pusad Court, as has been clarified by the Hon"ble Apex Court in the case of Dashrath Rupsingh Rathod Vs. State of Maharashtra, and, therefore, the impugned order dated 16.7.2013 passed by Additional Sessions Judge, Pusad, holding that the trial Court has jurisdiction to try the case is illegal.

4. According to learned counsel for respondent no. 1, even though the Hon''ble Apex Court in the case of Dashrath, supra, has clarified the legal position as to territorial jurisdiction of criminal courts in the cases filed under Section 138 of Negotiable Instruments Act, the Hon''ble Apex Court has also observed that the law so clarified would be applicable to pending cases in a selective manner only. He further submits that the Hon''ble Apex Court has, in particular, observed that if recording of evidence has commenced as envisaged in Section 145(2) of N.I. Act the proceeding will continue at that place.

5. Learned APP for respondent no. 2 submits that appropriate order in this case may be passed.

6. So far as territorial jurisdiction of a Court to deal with a case filed under Section 138 of N.I. Act is concerned, the law has been settled by the Hon''ble Apex Court in the case of Dashrath. It is now clear that only that criminal Court will have jurisdiction within whose limits the drawee bank which dishonours the cheque is situated. In the instant case, it is Darwha Branch of the bank which is the drawee bank and, therefore, Pusad Court will not have jurisdiction in the matter. But, the Hon''ble Apex Court has also taken care of the magnitude of the impact of the law so declared by it and has directed that a graded approach should be adopted while dealing with the issue. In paragraph 20 of the judgment, the Hon''ble Apex Court has observed thus :

"Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of complaint cases where proceeding have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other complaints (obviously including those where the accused/respondent has not been properly served) shall be returned to the complainant for filing in the proper Court, in consonance with our exposition of the law. If such complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred."

7. Following the above law, now it will have to be seen whether the criminal proceeding in the instant case which are pending at the stage of recording of evidence should be allowed to continue at Pusad Court or should be directed to be transferred to Darwha Court, as only that proceeding which is pending at the stage of recording of evidence as envisaged in Section 145(2) of N.I. Act, which has been allowed to continue at the same place.

8. According to learned counsel for the petitioner, the relevant stage of the proceeding for its continuance at the same place, which is the stage of recording of evidence, as contemplated under Section 145(2) of N. I. Act has not reached in this case. He submits that the Section 145(2) refers to a stage which arises after the evidence of complainant is over and the accused is called upon to lead evidence, if he so wishes to do so in his defence. He submits that sub-section (1) of Section 145 specifically refers to the evidence of complainant on affidavit and it lays down that evidence of the complainant can be given by him on affidavit. He further submits that sub-section (1) also says that subject to all such exceptions, the affidavit tendered in evidence by the complainant can be read in evidence in any enquiry or trial or other proceeding under the said Act. He invites my attention to the specific word "shall" used by sub-section (2), which casts a mandatory duty on the Court to summon and examine any person giving evidence on affidavit, if an application in that behalf is moved either by the prosecution or the accused. He further submits that when the Parliament has prescribed that the evidence so tendered by the complainant can be read in evidence in any enquiry or trial, it would only mean that by specific provision in sub-section (2), the Parliament intended that some remedy should be made available to a person desirous of summoning as a witness or examining any person giving evidence on affidavit at later stage. He submits that conjoint reading of both the sub-sections of Section 145 would only indicate that Section 145(2) is the stage which arises only after completion of evidence of the complainant. He also submits that this stage has not been reached in the instant case, as evidence of the complainant is yet to be completed as he has been summoned for his cross-examination and, therefore, the proceeding deserves to be transferred to Darwaha Court.

9. Learned counsel for respondent no. 1 submits that the use of the words "any person" in sub-section (2) only indicates that the Parliament also intended summoning of the complainant along some other person or otherwise Parliament would have certainly clarified that intention by using the expression "any other person".

10. In order to appreciate the rival arguments, it would be useful to reproduce Section 145. It reads thus :

"145.Evidence on affidavit.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1972 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

11. Upon a conjoint reading of both the sub-sections of Section 145, I find that learned counsel for respondent no. 1 is right when he submits that sub-section

(2) also refers to a situation when on the application of the prosecution or accused, the complainant can be summoned for deposing before the Court by way of his further evidence in the case. This would be clear from use of the words "on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit". If the Parliament had intended that the complainant cannot take advantage of provision of sub-section (2) of Section 145, the Parliament would have used the words "summon and examine any other person". But, the Parliament has omitted to use the words "any other person" and that is indicative enough of what was on the mind of the Parliament and it is that by sub-section (2) of Section 145 even a complainant has been given a right to enter witness box and depose additional facts on oath. Sub-section (1), no doubt, lays down that if the complainant gives his evidence on affidavit, for all purposes, it is a statement on oath before the Court which is as good as evidence as defined under S. 3 of the Indian Evidence Act, 1872, and can be read in evidence in any enquiry or trial or other proceeding. This is what has been held by the Full Bench of this Court in the case of *Rajesh Bhalchandra Chalke Vs. State of Maharashtra and Emco Dynatorq Pvt. Ltd.*, But it would not mean that unless and until the evidence of the complainant is over, the stage of sub-section (2) of Section 145 does not begin. Sub-section (1) of Section 145 only refers to evidence of the complainant on affidavit and its evidentiary value. It does so by laying down that it is permissible for the complainant to tender his evidence on affidavit and also permissible for the Court, to read it in evidence, subject to all just exceptions. This sub-section does not refer in a specific manner to "examination-in-chief", "cross-examination" and "re-examination" of a witness as contemplated under S. 137 of the Indian Evidence Act, 1872. Since, a complainant giving evidence on affidavit may desire to give further evidence and as truthfulness of his statements on oath before the Court can be tested only by his cross-examination by the other side, provision of sub-section (2) of Section 145 of N.I. Act has been made. Therefore, the argument that the stage of Section 145(2) is reached only after the evidence of the complainant is over, cannot be accepted. Section 145(2) gives equal right to the prosecution as well as to the accused to summon and examine any person including the complainant who has already given evidence on affidavit. It no where lays down that this provision can be availed of only in case of some person other than the complainant. Therefore, I find no merit in the argument of learned counsel for respondent no. 1 in this regard.

12. In the case of *New Delhi Tele Tech Pvt. Ltd. vs. M/s CISCO Systems Capital (India) Pvt. Ltd.*, decided by the learned Single Judge of Delhi High Court on 12.01.2015, same interpretation, as adopted by me, has been placed upon sub-section (2) of Section 145. The relevant observations appear in paragraph 14 of the said judgment. They read as under :

"On a careful reading of the aforesaid provision, it is manifestly clear that the legislature has allowed complainant to give his evidence by way of an affidavit during the course of trial in respect of offence punishable under Section 138 of

the Act by virtue of sub-section (1) of Section 145 of Act. Sub-section (2) of Section 145 of the Act provides that the Magistrate may on the application moved by the accused, summon the complainant for his cross-examination as to the effect contained therein."

13. In the instant case, the evidence of the complainant is yet to be over. The complainant without any dispute has been summoned for his cross-examination by the accused. Therefore, going by the interpretation placed on the provisions of sub-sections (1) and (2) of Section 145 of N.I. Act earlier, I must say, in the instant case, the proceeding has already reached the stage of Section 145(2). That would mean that graded approach, as laid down by the Hon"ble Apex Court in the case of Dashrath, supra, will have to be adopted in this case. Consequently, I find that criminal proceeding in the instant case will have to be allowed to be continued at the same place where it was originally initiated, i.e. at Pusad.

14. In this view of the matter, I find that there are no grounds to make any interference with the order impugned herein. Writ petition deserves to be dismissed and it is accordingly dismissed. However, the contentions of the petitioner on merits of the case are kept open and shall be dealt with appropriately by the trial Court in accordance with law, without being influenced in any manner by the observations made hereinabove. Rule is discharged.