
(2015) 03 BOM CK 0185

In the Bombay High Court

Case No : Criminal Writ Petition No. 3457 of 2012

Sushil Kumar Saxena

APPELLANT

Vs

Mohammad Sami Ahmed and Others

RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 145, 145(1), 145(2)

Citation : (2015) 03 BOM CK 0185

Hon'ble Judges : M.L. Tahaliyani, J

Bench : Single Bench

Advocate : S.K. Shinde and Sagar V. Kasar i/b H.H. Nagi and Assoc., for the Appellant; Pankaj Thatte and Sacheta Joshi, Advocates for the Respondent

Final Decision : Dismissed

Judgement

M.L. Tahaliyani, J.—Admitted. Respondents waive service. By consent of the parties taken up forthwith for final hearing.

2. Heard Mr. Shinde, learned counsel for the petitioner and Mr. Thatte, learned counsel for respondent No. 1.

3. The petitioner is the accused in Criminal Case No. 2361/SS/2011, pending in the Court of Metropolitan Magistrate, 48th Court, Andheri, Mumbai, is facing trial for the offence punishable u/s 138 of Negotiable Instruments Act, at the instance of respondent No. 1 Mohammed Sami Ahmed. The petitioner had made application vide Exhibit-17 before the learned Magistrate challenging the jurisdiction of the Magistrate to try the said case. It was submitted that the petitioner was resident of U.P., and that the cheque was drawn on ICICI Bank, Noida Branch. Therefore, the Court having territorial jurisdiction over Noida Branch, will have jurisdiction to try the case pending against the petitioner. It may be noted here that the impugned order was passed before the Judgment of the Hon'ble Supreme Court in the matter of Dashrath Rathod, was pronounced. The learned Magistrate, therefore, on the basis of material available before him

and the cases cited before him, came to the conclusion that Andheri Metropolitan Magistrate's Court had jurisdiction to try and decide the case. This order was challenged before the Sessions Court by way of revision application. Revision application was dismissed and, therefore, the present writ petition has been filed.

4. During the pendency of the present writ petition, the Hon''ble Supreme Court has given judgment in the matter of Dashrath Rupsingh Rathod Vs. State of Maharashtra, (2014) AIRSCW 4798 : (2014) 3 BC 513 : (2014) 9 SCALE 97 : (2014) 9 SCC 129 , in which it is stated that the place where the cheque has been dishonoured only will have jurisdiction to try and decide the case u/s 138 of the Negotiable Instruments Act. However, an exception was made by the Hon''ble Supreme Court in respect of cases which had reached the stage of Section 145(2) of Negotiable Instruments Act. It was directed that such cases would be tried and decided by the Magistrate before whom the cases are pending.

5. The learned counsel Mr. Shinde has submitted that the present case has not reached the stage of Section 145(2) of Negotiable Instruments Act. It is admitted position that the affidavit of evidence of respondent No. 1 was filed on 10th of February, 2012 and that the application was made on 10th of July, 2012 and was decided on 13th of July, 2012. It is, therefore, obvious that the application challenging the jurisdiction was made after filing of affidavit of evidence by the respondent No. 1.

6. The question which arises for determination is as to whether the cases in which affidavit of evidence has been filed can be said to be the cases where the stage u/s 145(2) of Negotiable Instruments Act has reached. To answer the said question, it may be necessary to go through Section 145(2) of Negotiable Instruments Act, which runs as under:

"S.145. Evidence on affidavit.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (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."

7. The bare perusal of Section 145(1) and (2) of Negotiable Instruments Act, makes it clear that the evidence of the complainant can be given on affidavit and that it can be read in evidence. Sub-section (2) of Section 145 of Negotiable Instruments Act, empowers the Court to summon and examine any person giving his evidence on affidavit and examine him as to the facts contained therein. It is thus clear that basically the evidence of the complainant has to be recorded on affidavit and that the Court has discretion to call any such person, whose affidavit has been given and examine him as to the facts contained in the affidavit. Therefore, in my opinion, since the affidavit is filed by respondent No. 1 and it is taken on record, the stage u/s 145(2) has reached. It is at this stage

that the Magistrate has to decide, if the application is made either by the prosecution or the accused, as to whether the person whose affidavit is given, shall be called to be examined as to the facts contained in the affidavit. It is thus clear that the Magistrate can exercise the discretion only on the application made either by the prosecution or by the accused. We cannot say that since no such application has been made, the stage has not reached. The stage of Section 145(2) has already reached and as soon as the Magistrate receives any application under sub-Section (2), either from the prosecution or from the accused, he may exercise his discretion to summon and examine the person who has given the affidavit. Therefore, I do not agree with the learned counsel Mr. Shinde that the stage of Section 145(2) has not reached. In view therefore, the proceedings pending before the Magistrate will have to be heard and decided by the same Magistrate.

8. The present petition stands dismissed.

9. The learned counsel Mr. Shinde prays for stay on the operation of this Order for a period of six weeks, as the petitioner intends to move the Hon''ble Supreme Court. The learned counsel for respondent No. 1 has objection for stay. However, in view of the fact that the issue in question has involved many cases of similar nature pending in the courts, it is just and proper that the petitioner is given opportunity to move the Hon''ble Supreme Court. Therefore, the operation of this order shall remain stayed for a period of six weeks.