Seema Chopra vs Poonam Sshgal Cc No.3752/2010 on 24 November, 2011

IN THE COURT OF SH. RAKESH KUMAR SINGH:
METROPOLITAN MEGISTRATE (NI ACT)-1, CENTRAL:
ROOM NO.-42, TIS HAZARI COURT COMPLEX, DELHI

24.11.2011

Seema Chopra vs Poonam Sshgal CC No.3752/2010

ORDER

It is proposed to dispose off the application filed by the accused u/s 145(2) NI Act.

On facts:

2. On the following grounds, the accused claimed a right of cross examination:

It is the contention of the accused that the instant cheques were extorted from the husband of the accused in the following circumstances:

At one point of time, husband of the accused had taken a loan of Rs.15 lakhs from the father and brother (Manmohan Batra & Sanjay Batra) of the complainant and repaid (in April 2006) the said loan(toal Rs. 21 Lakhs including interest).

However, the said Manmohan Batra & Sanjay Batra started threatening the husband of the accused and extorted some money(Rs. 4 Lakhs) and again extorted Rs.28 Lakhs.

Again in May 2007, the siad Manmohan Batra & Sanjay Batra alongwith four other persons threatened the husband of the accused and demanded Rs.28.1 Crores through cheques.

As the husband of the accused was not having cheques Seema Chopra vs Poonam Sshgal CC No.3752/2010 1 leaves, the accused had to sign some blank cheques including the cheques in question.

2.1. A bare perusal of the above said ground goes to show that the same has nothing to do with the complainant. The entire story revolves around father & brother of the complainant and husband of the accused. There is no allegation against the complainant. In my considered view, on the basis of above ground, complainant can not be recalled for his cross examination.

2.2. However, ld. counsel for the accused has heavily relied upon a complaint lodged by the husband of the accused. It therefore deserves a detailed discussion.

2.3. Before proceeding any further, it would be appropriate to state the version of the complainant:

> Vipin Chopra i.e. Husband of the complainant is in construction business and knew accused through her husband;
>
> Accused allured the complainant to provide financial assistance for her commercial activity i.e. developing a Mall at Chandigarh.
>
> Complainant started giving money to the accused. Accused executed a loan agreement/undertaking on 24.03.2004 on a stamp paper which was purchased by her in her own name.
>
> Complainant advanced total loan (Rs. 1,50,000/- upto June 2005 and Rs. 1,40,000/- upto May 2006). Both the payments were not made at one go but were made in installments.
>
> The rate of interest was 18% p.a. Accused also acknowledged to have received Rs.1,50,000/- upto June 2005 by her undertaking dated 30.06.2005.
>
> Accused further acknowledged to have received Rs.1,40,000/- upto May 2006 by her undertaking dated 29.05.2006.
>
> Accused after much persuation in February 2007 negotiated the entire liability at Rs.
>
> Seema Chopra vs Poonam Sshgal CC No.3752/2010 2 4,50,00,000/- (Principal + Interest + damages for loss suffered) and agreed to return the amount of the complainant and for that purpose issued the instant two Post Dated Cheques.
>
> 2.4. Now, the complaint (with the crime branch) filed by the husband of the accused may be dealt with:
>
> The said complaint was filed on 14.10.2008.
>
> The said complaint was filed by Tanuj K Sahgal (not by Poonam Sahgal).
>
> The said complaint was converted into FIR on 17.01.2009.
>
> Allegation was made against Manmohan Batra & Sanjay Batra and other persons (there was no mention of the Seema Chopra or her husband Vipin Copra).
>
> Story given by Mr. Tanuj in the said FIR may be summarized as under:

In the year 2004-05, when he taken a loan of Rs.15 lakhs from M & S, he executed some promotes and also signed some blank papers and also given some blank cheques.

M & S extorted Rs.4 lakhs after the repayment of the loan(alongwiht interest);

In May 2006, M & S alongwith two other persons demanded protection money of Rs.10 crores, however at that point of time accused given them Rs.28 lakhs through demand drafts.

In May 2007, M & S alongwith four other persons demanded more money and since accused was not having any cash, he given them some cheques. They however forced his wife to sign two cheques. In total seven cheques were issued (all the cheques were having names, amount and date).

In April 2008, M & S alongwith four other persons again demanded more money. He given the same by three banker's Seema Chopra vs Poonam Sshgal CC No.3752/2010 3 cheques.

In July 2008(or some time thereafter), he was asked to execute several documents in respect of several properties and car etc. During all the said period, he was terrified and was under constant fear of life. Even on 18.09.2008 he was threatened.

2.5. What is missing? Link the last date of threat(18.09.2008) to the date of compliant(14.10.2008) i.e. a duration of 26 days. Contrast this 26 days with the total duration of threat (2004-2008) i.e. almost more than 4 years. A person under threat for almost more than four years became so bold within 26 days that he lodged a complaint about several crime.

Be that as it may. This Court need not to go into the allegations and counter allegations made by the husband of the accused and father & brother of the complainant in several cases pending between them.

2.6. Suffice it would be to say that the cheques in the present case are dated 18.05.2007 and 23.05.2007 and were dishonoured on 03.07.2007 i.e. much prior to the filing of compliant by the husband of the accused. It may also be noted that legal demand notice was duly served upon the accused which she has accpted.

2.7. What is the explanation of the accused for loan agreement/undertakings?

Prima facie, nothing.

It may be noted that the plea (u/s-251 r/w 263(g) CrPC) of accused was recorded through her counsel. But in the said plea, Loan agreement/undertakings have not been controverted.

Even in the application filed u/s-145(2) NI Act, Loan agreement/undertakings have not been controverted.

Seema Chopra vs Poonam Sshgal CC No.3752/2010 4 However, in the arguments, ld. counsel for the accused initially accepted that signature appearing on Loan agreement/undertakings are of the accused but the same were taken forcefully by the father and brother of the complainant. For this purpose, ld. counsel for the accused drawn the attention of this Court towards some sentence in the middle of running page-12 of the said application & documents (it may be noted that the said page pertains to purported true and typed copy of FIR lodged by the husband of the accused).

Ld. counsel for the accused read the said portion to emphasize that blank signed papers were given to the father & brother of the complainant.

When the ld. counsel completed his reading of the said portion, the Court and the ld. counsel for the complainant pointed to him that the said portion only pertains to the blank papers signed by the husband of the accused and not by the accused herself.

Faced with such situation, ld. counsel for the accused submitted that he is not accepting the signatures of the accused on Loan agreement/undertakings.

2.8. In my considered view, ld. counsel for the accused was not having any explanation for Loan agreement/undertakings signed by the accused.

There is no reason why the accused could not have controverted the said Loan agreement/undertakings when she was (through her counsel) controverting the issuance of cheques.

It may be that a person inadvertently failed to provide any explanation at one point of time. But if one fails to provide any explanation at several times, it has to go against that person. In the present case, no explanation was given at the time of recording of plea, in the application filed u/s-145(2) NI Act and also in the arguments. Such failure can not be justified.

2.9. So far as the denial of the issuance of cheques are concerned, the same is clearly marvelous.

It may be noted that in the plea, a defence was taken that cheques were only signed by the Seema Chopra vs Poonam Sshgal CC No.3752/2010 5 accused but other columns of the cheques were not filled in by her.

However, In the complaint filed by the husband of the accused he stated the issuance of seven cheques including the impugned cheques. He further stated the names, amount and dates of all the cheques. He clearly stated that he was forced to issue cheques in favour of the named persons whereas he was not even knowing them.

If the husband of the accused was forced to issue the impugned cheques with names, date and amount, then it would be futile for the accused to claim that she only signed the cheques.

Accused if wants to prove this fact may prove the same by calling her husband into defence evidence. There is no allegation against the complainant that she filled the cheques or obtained the cheques by force. It is now for the accused to displace the burden.

2.10. In Rajesh Agarwal vs State decided on 28.07.2010, Hon'ble High Court of Delhi has observed that:

> "9. An argument is raised that the accused, under Article 21 of Constitution of India, has a right of silence in a criminal trial and therefore he cannot be forced to disclose his defence. This argument is misconceived in view of Section 106 of Indian Evidence Act. Since an offence under section 138 of Negotiable Instrument Act is technical in nature and defence which an accused can take are inbuilt, like the cheque was given without consideration, the accused was not Director at that time, accused was a sleeping partner or a sleeping Director, cheque was given as a security etc. etc., the onus of proving these defences is on the accused alone, in view of section 106 of Evidence Act. Since the mandate of Legislature is trial of such cases in a summary manner, the evidence already given by the complainant by way of affidavit is sufficient proof of the offence and this evidence is not required to be given again in terms of section 145(1) of N.I. Act and has to be read during the trial. The witnesses i.e. the complainant or other witnesses can be recalled only when accused makes an application and this application must disclose the reason why accused wants to recall the witnesses and on what point witness is to be cross examined. One must not forget that the offence under section 138 of N.I. Act is not of the kind of offence as in IPC where the State prosecutes a person for offence against the society. The offence under section 138 of N.I. Act is an offence in the personal nature of the complainant and it is an offence made under N.I. Act so that the trust in Seema Chopra vs Poonam Sshgal CC No.3752/2010 6 commercial transactions is not destroyed because of the dishonour of cheques. When it is within the special knowledge of the accused as to why he is not to face trial under section 138 N.I. Act, he alone has to take the plea of defence and burden cannot be shifted to complainant. There is no presumption that even if an accused fails to bring out his defence, he is still to be considered innocent. If an accused has a defence against dishonour of the cheque in question, it is he alone who knows the defence and responsibility of spelling out this defence to the court and then proving this defences is on the accused. I, therefore, consider that the proper procedure to be followed by MM is that soon after summoning, the accused must be asked to disclose his defence & his plea should be recorded. Where an accused takes no defence and simply says "I am innocent", there is no reason for the MM to recall the complainant or witnesses during summary trial and the evidence already given by the complainant has to be considered sufficient and the trial court can ask the accused to lead his evidence in defence on the plea of innocence as the evidence of the complainant is already there. In a summary trial, a complainant or his witness cannot be recalled in the court for cross examination only for the sake of pleasure. Once the complainant has brought forward his case by giving his affidavit about the issuance of cheque, dishonour of cheque, issuance of demand notice etc., he can be cross

> examined only if the accused makes an application to the court as to on what point he wants to cross examine the witness (es) and then only the court shall recall the witness by recording reasons thereto."

One may say that Section-106 Evidence Act does not relive the prosecution from its preliminary duty. True.

In State Of West Bengal versus Mir Mohammad Umar: 2000SCC(Cr) 1516 it has been held as follows:-

> "36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows : "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference."

Seema Chopra vs Poonam Sshgal CC No.3752/2010 7 In cheque bounce cases, however, the complainant has to prove the following facts(apart from legal notice and dishonour):

> (i) There is a legally enforceable debt.
>
> (ii) The drawer of the cheque issued the cheque to satisfy part or whole of the debt.
>
> (iii) The cheque so issued has been returned due to insufficiency of funds.

Last fact is not in dispute in the present case. So far as first two facts are concerned, the same are matter of mandatory presumptions of law. Earlier in Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54 held that only second fact is covered under the presumptions available u/s-139 NI Act. However, recently a three judges bench of the Hon'ble Supreme Court in Rangappa Vs. S. Mohan decided (2010) 11 SCC 441 has considered the dictum of Krishna Janardhan Bhat(supra), and overruled the view so far as existence of liability is concerned, by observing therein that:

> "In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. "

In Rangappa(supra), the case of the accused was that of a lost cheque. However initially, the High Court dealing with matter had held that:

> '6. Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the N.I. Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption. What is required to be established by the accused in order to rebut the presumption is different from each case under given circumstances. But the fact remains that a mere plausible explanation is not expected from the accused and it must be more than a plausible explanation by way of rebuttal evidence. In other words, the defence Seema Chopra vs Poonam Sshgal CC No.3752/2010 8 raised by way of rebuttal evidence must be probable and capable of being accepted by the Court. The defence raised by the accused was that a blank cheque was lost by him, which was made use of by the complainant. Unless this barrier is crossed by the accused, the other defence raised by him whether the cheque was issued towards the hand loan or towards the amount spent by the complainant need not be considered. ...' The judgment of conviction upon the above basis recorded by the Hon'ble High Court was finally upheld by the Hon'ble Supreme Court in Rangappa (supra).
>
> Clearly, once signature is accepted by the accused, necessary ingredients become established by the mandatory presumptions of law. Complainant has (at the time of acceptance of signature by the accused) established the foundational facts and is now relived from its priliminary duty. Now Section-106 Evidence Act can be made applicable.
>
> 2.11. The factum of forced issuance of cheques is in the special knowledge of the accused. She should prove such facts.
>
> 3. Ld. counsel for the accused has contended that once accused states that cheque was issued under pressure, the burden lies on the complainant to prove otherwise under proviso appended to Section-118(g) NI Act.

In my considered view, the contention proceeds on certain misconceptions.

Section-118(g) NI Act reads as under:

> (g) that holder is a holder in due course - that the holder of a negotiable instrument is a holder in due course; provided that, where the instrument has been obtained from its lawful owner, or form any person in lawful custody thereof, by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

The presumption is that the holder is a "holder in due course". However, this section does not Seema Chopra vs Poonam Sshgal CC No.3752/2010 9 provide for any presumption with regard to the "holder" itself. It does not say who will be the "holder".

It appears that the term "holder" appearing in this provision has been used in its general sense and not to mean the "holder" defined in Section-8 NI Act. Reason is simple. A "holder" as defined in Section-8 NI Act has every right on the instrument. He need not to prove that he is the "holder in due course". Expressions "holder" and "holder in due course" have been defined under different provisions of the Act and have different rights.

If a "holder" as defined in Section-8 NI Act has every right on the instrument, he need not to prove that he is the "holder in due course". If this is the position then the presumption available under Section-118(g) has to be read in different context.

It is certain that "holder" appearing in this provision has been used in its general sense i.e. who is in the physical possession of the instrument. For such contingencies, a presumption has been raised that he is a "holder in due course", so that he can claim the benefit of such "holder in due course".

This concept also justifies the necessity of proviso appended thereto. If the said possession appears to be obtained by means of an offence, the burden lies on the said holder to establish that he is "holder in due course".

As per Section-8 NI Act, the "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Name in the impugned cheques is of the complainant and until the contrary is proved her entitlement to recover the amount can not be disputed and therefore she has to be treated as the "holder" of the said cheques. There is no need to go into the question of "holder in due course".

Even sans above discussion, it has to be established that the case of the accused comes under the said proviso. A complainant can not be asked to establish the fact that her case does not fall under the said proviso. It is like Section-105 Evidence Act wherein burden to establish the general or special Seema Chopra vs Poonam Sshgal CC No.3752/2010 10 exception lies upon the accused and not upon the complainant. For that section, the prosecution is required to establish the commission of offence and then accused is required to establish the exception. Similarly, here, the complainant is required to establish that the cheuqes are in her name and the accused is required to establish the proviso appended to Section-118(g) NI Act.

It has to be noted that presumptions under Section-139 NI Act is entirely in favour of the complainant. More so when complainant has also relied upon loan agreement/undertakings signed by the accused and accused has failed to dispute such loan agreement/undertakings.

If we give a contrary interpretation to the proviso appended to Section-118(g), every complainant has to prove his case despite Section-139 NI Act and several judgments of Hon'ble Supreme Court on Mandatory presumptions of law.

3.1. It is not as if opportunity is not available with the accused to establish the factum of forced issuance of cheques or to rebut the mandatory presumptions of law. Accused can definitely do so in her defence.

4. Apart from the above, a mere denial of consideration is not sufficient. In Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal, (1993) 3 SCC 35 (Para. 12) it has been held that:

> "Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbably or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies.
>
> Seema Chopra vs Poonam Sshgal CC No.3752/2010 11 In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that it did not exist."

4.1. Clearly, a mere explanation of the accused can not be accepted. It is settled that complainant can not be recalled merely for pleasure (vide Rajesh Aggarwal Vs. State decided on 28.07.2010 Hon'ble High Court of Delhi) and opportunity to cross examine the complainant can only be given if the defence requires such cross examination.

Hon'ble High Court of Delhi in Boby Kapoor Vs. M/s City Finance decided on 02.02.2011 has observed that:

> "A case under Section-138 of NI Act is a summary trial proceeding. The right of cross-examination is given to the accused only if the accused discloses his defence at the time of taking notice and the Court considers that in order to meet the defence, cross-examination of witness was necessary. In the present case, the defence taken by the accused was that the cheque was a forged document. He had not taken the defence that he had not taken the loan and the loan agreement was not executed."

4.2. For the offence under Section-138 NI Act, it is not the complainant who has to establish the liability but it is for the accused to rebut the reverse onus. Contention of the accused that complainant has not filed on record any sale tax documents or has not mentioned the details of delivery of goods can not be accepted. Mandatory presumptions of law arising under Section-118 & 139 NI Act are in favour Seema Chopra vs Poonam Sshgal CC No.3752/2010 12 of the complainant. Even the mandatory presumption also extends to the existence of legally enforceable debt or liability.

4.3. In my considered view, accused can not claim the right of cross examination on the basis of grounds raised in the application.

On legal issue

5. It appears that accused wants to rely upon the expression "shall" appearing in Section-145(2) NI Act to contend that she has a right of cross-examination if she makes an application. Ground for this thinking is that legislature has used expressions "may" and "shall" in the same provision for two different situations and therefore "shall" must be treated as mandatory.

In my considered view, the reasoning itself is misconceived.

Hon'ble Supreme Court in Bachahan Devi & Anr. V. Nagar Nigtam, Gorakhpur & Anr. (2008) 12 SCC 372 has held that:

> "Obviously where the legislature uses two words may and shall in two different parts of the same provision prima facie it would appear that the legislature manifested its intention to make one part directory and another mandatory. But that by itself is not decisive. The power of court to find out whether the provision is directory or mandatory remains unimpaired."

Hon'ble Supreme Court in Ganesh Prasad v. Lakshmi Narayan, AIR 1985 SC 964 has held that:

> "Obviously where the legislature uses two words 'may' and 'shall' in two different parts of the same provision prima facie it would appear that the legislature manifested its intention to make one part directory and another mandatory. But that

by itself is not decisive. The power of the court still to ascertain the real intention of the Legislature by care fully examining the scope of the statute to find out whether the provision is directory or mandatory remains unimpaired even where both the words are used in the same provision."

Seema Chopra vs Poonam Sshgal CC No.3752/2010 13 5.1. Clearly, we can treat the expression "shall" as directory even in the cases where "may" and "shall" are used in the same provision, of course the same can be only done if the circumstances so require.

5.2. I had have an opportunity in other cases to deal with the scope of mandatory nature of Section-145(2) NI Act. It would be beneficial to reproduce the same hereinafter:

"4. However, ld. Counsel for the accused has contended that Section-145(2) NI Act is mandatory in nature and therefore once an application is filed, the opportunity cross examination has to be allowed. Ld. Counsel has relied upon Mandavi Co-op Bank Ltd. Vs Nimesh B Thakore 2010 I AD SC 599, Magma Leasing Ltd. Vs State of West Bengal & Ors III (2008) BC 437, Radhey Shyam Garg vs Naresh Kumar Gupta V (2010) SLT 507.

4.1. Section-145 Negotiable Instruments Act reads as under:

"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."

It is clear that the evidence by way of affidavit given at the stage of pre summoning can be read in evidence in the trial.

4.2. Such witness can not be summoned unless an application is made by the accused (at this stage, there is no necessity to refer the right and discretion of the complainant and the Court).

4.3. It is apt to quote Hon'ble Supreme Court in M/s Mandvi Co-op Bank Ltd vs Nimesh B thakore, (2010) 3 SCC 83:

Seema Chopra vs Poonam Sshgal CC No.3752/2010 14 "What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of section 145(1) and having regard to the object and purpose of the entire scheme of sections 143 to 146."

4.4. Here itself it will be useful to note following objects and reasons with which Section 145 of the N.I.Act has been introduced in the Act:

> "The existing provisions in the Negotiable Instruments Act namely, Sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed in the Courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act."

4.5. Now the question is at what stage an application u/s-145(2) can be made?

4.6. Stages of the proceeding when accused is present:

i. Acquisition explained over to the accused;

ii. Plea of the accused;

iii. Admission denial of the documents of the complainant;

iv. Complainant's evidence;

v. Examination of the accused;

vi. Documents being placed on record by the accused;

vii. Admission denial of the documents of the accused;

viii. Defence evidence;

ix. Arguments;

4.7. No doubt when the accused makes an application, the Court has to summon the witness. However, it does not stand to reason that there can not be any restriction in respect of making of such application. Reason is obvious.

If accused makes an application at the stage when the judgment is to be pronounced, will the Court be powerless to dismiss such application? No one will answer the question in the negative.

4.8. The second question is can such application be made at the time of arguments? No. 4.9. The third question is can such application be made at the stage when the accused is required to lead defence evidence? I am afraid that such application if allowed would defeat the very purpose for which Section-145 has been enacted. Such application has to be dismissed.

4.10. Here it is worthy to note that Affidavit made u/s-145(1) NI Act is a complete evidence not requiring any cross-examination. Such affidavit in my considered view has to be equated with a situation wherein after the examination in chief, cross examination is recorded as 'nill'.

4.11. It may be noted that the term "evidence" as defined in Section 3 of the Indian Evidence Act 1872 means and includes (i) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry and

(ii) all documents produced for the inspection of the Court, The former is called "oral evidence" and the later "documentary evidence". The essential characteristics of a statement of a person to be considered evidence "as per the definition of the term is that (i) it must have been permitted or required to be made before it by a Court legally competent to so permit or require it to be made before it and (ii) such statement must have been made in relation to matters of fact under enquiry i.e., in other words, in the course of judicial proceedings. It therefore, necessarily follows that once the statement of a witness has been permitted or required to be made before it by a Court having jurisdiction to so permit or Seema Chopra vs Poonam Sshgal CC No.3752/2010 16 require the statement to be made in the course of a judicial proceeding pending before it, the statement made shall not lose its character of being "evidence" in such judicial proceedings and may be used for the adjudication of the rights and liabilities of the parties to and determination of the dispute in such judicial proceedings, unless mandated otherwise by the order of the Court or by the words of the statute.

4.12. This view can further be fortified by making a reference to Rule-4, Order-18 CPC:

> Rule-4 of Order-18, CPC reads as under:
>
> "4. Recording of evidence.-(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit."

The term used for affidavit is examination in chief. The cross examination has to follow as a matter of course. Whereas, u/s-145, the expression used is 'evidence' and cross examination does not follow as a matter of course.

If the Parliament has used two different phrases for the similar matters in two different enactments, the differential intention must be recognized.

4.13. If by making merely an application, accused can cross examine the witness, the question to be asked is what was the necessity to introduce a different mode? A person giving evidence on affidavit in a civil suit has to be cross examined as a matter of course, Seema Chopra vs Poonam Sshgal CC No.3752/2010 17 what prohibited the Parliament from employing the same course to a person giving evidence on affidavit in a criminal trial that too when a person requires more protection in a criminal trial than in the civil trial?

4.14. The controversy may be discussed from another angle. Section-145(2) does not make any mention of the number of applications which an accused can make. Can the accused claim a right to make 'N' number of applications? Will the Court be powerless to reject such claim?

I consider that the Court is not powerless. Accused can not make any such claim. Such applications if made have to be dismissed.

4.15. Above discussion can show that though the Court has to summon the witness if an application is made u/s-145(2), the Court is not powerless to dismiss such applications in certain circumstances.

If the Court has power to dismiss an application made u/s-145(2), a fortiori, the Court has to have the power to decide the genuineness and necessity of such application.

4.16. Above discussion goes to show that in a special trial for the offence punishable under Section-138 NI Act, accused can not claim a right of cross-examination of the complainant's witness."

4.17. It is clear from the above discussion and the judgments of the Hon'ble High Court of Delhi (cited above) that accused can not claim an indefeasible right to cross examine a witness who has given his evidence by way of affidavit (only for the offence punishable under Section-138 NI Act and not in general criminal trial). Such witness can only be summoned when the accused shows sufficient justification for the cross examination of the witness. If contention of the ld. Counsel for the accused is accepted, the purpose for which section-143 & 145 NI Act have been enacted would be defeated.

Discussion on judgments cited by accused:

5. Hon'ble Supreme Court in Mandavi Co-op. Bank Ltd. Vs Nimesh B. Thakore, AIR 2010 SC 1402 was dealing with the issue whether the accused was having any right to ask the witness (who was summoned in pursuance of the application made under section-145(2) NI Act) to again appear in the witness box for recording his oral Seema Chopra vs Poonam Sshgal CC No.3752/2010 18 examination-in-chief? This is clear from questions which their Lordships had considered:

> "On the basis of the grievances made and reliefs prayed for in those petitions the High Court framed the following two questions as arising for its consideration:
>
> (A) Whether sub-section (2) of section 145 of the Negotiable Instruments Act, 1881, (for short, "the Act") confers an unfettered right on the complainant and the accused to apply to the court seeking direction to give oral examination-in-chief of a person giving evidence on affidavit, even in respect of the facts stated therein and that if such a right is exercised, whether the court is obliged to examine such a person in spite of the mandate of section 145(1) of the Act?
>
> (B) Whether the provisions of section 145 of the Act, as amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, (for short "the amending Act of 2002") are applicable to the complaints under section 138 of the Act pending on the date on which the amendment came into force? In other words, do the amended provisions of section 145(1) and (2) of the Act operate retrospectively?"

5.1. Hon'ble Supreme Court answered the first question in negative holding that:

> ".....Hence, notwithstanding the apparent verbal similarity between section 145(2) of the Act and section 296(2) of the Code, it would be completely wrong to interpret the true scope and meaning of the one in the light of the other. Neither the legislative history of 296(2) nor any decision on that section can persuade us to hold that under section 145(2) of the Act, on being summoned at the instance of the accused the complainant or any of his witnesses should be first made to depose in examination-in-chief before cross-examination. "

I am of the opinion that the above judgment can also not help the accused.

5.2. Radhey Shyam Garg(supra) is again an authority discussing the necessity of oral examination-in chief of any witness giving evidence on affidavit. No question was raised in respect of right of cross examination (pertinently, in that case, cross examination was already over when the appeal was going on in the Hon'ble Supreme Court).

5.3. Reliance placed on the judgment of Hon'ble High Court in Magma Leasing(supra) is clearly misconceived. The question raised therein was whether Seema Chopra vs Poonam Sshgal CC No.3752/2010 19 Section-145 NI Act is having prospective or retrospective effect. Retrospective effect of provision was accepted by the Hon'ble High Court.

5.4. There is no help for the accused in Magma Leasing(supra).

6. Needless to emphasize that a judgment is an authority for what it decides and not for what logically can be deduced therefrom.

It would be a futile exercise to quote several pronouncements on the scope of binding precedents and ratio decidendi.

6.1. In the case of Commissioner of Customs (Fort) vs. Toyota Kirloskar Motor (P) Ltd., (2007) 5 SCC 371, the Supreme Court stated the law relating to precedents and held that a decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. The ratio of a decision must be culled out from the facts involved in a given case and need not be an authority in generality without reference to the reasons, discussions and facts of the case.

6.2. Furthermore, ratio decidendi of a judgment has to be found out only on reading the entire judgment. The ratio of the judgment is what is set out in the judgment itself. Answer to the question necessarily would have to be read in the context what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons or principles, the other part of the judgment must be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment. The reasoning could be deciphered upon reading the judgment in its entirety and then applying these principles to the subsequent cases. (Reference : (i) Union of India vs. Godfrey Philips India Ltd., AIR 1996 SC 806, (ii) Union of India vs. Dhanwanti Devi, (1996) 6 SCC 44, (iii) State of Tripura vs. Tripura Bar Association, AIR 1999 SC 1494 and

(iv) Islamic Academy of Education vs. State of Karnatake, (2003) 6 SCC 697).

6.3. In Bharat Petroleum Corporation Ltd. And another v. N.R.Vairamani and Another, AIR 2004 SC 4778, it was held that:

> "Judgments, even of summit court, are not scriptural absolutes but relative reasoning. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's Seema Chopra vs Poonam Sshgal CC No.3752/2010 20 theorems nor as

provisions of the statute and, that too, torn out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

6.4. The frequently quoted opinion of the House of Lords in Quinn v. Leathem 1901 AC 495 : (1900-3) All ER Rep 1 is that of Lord Halsbury, namely, that "every judgment must be read as applicable to the particular facts proved or assumed to be proved.... The other is that a case is only an authority for what it actually decides". These quotations have been reiterated in Goodyear India Ltd. v. State of Haryana and State of Orissa v. Sudhansu Sekhar Misra . In the latter case, the Court explicitly opined that "a decision on a question which has not been argued cannot be treated as a precedent".

6.5. Clearly, in none of the judgments relied upon by the accused, issue of right of cross examination was raised and decided. The judgments relied upon by the accused can not help him."

6. One more thing may be mentioned here that accused has not made any allegations against the present complainant. Accused has relied upon allegations made by her husband against the father & brother of the complainant (complainant is a married woman and has entirely relied upon her husband as averred in the first paragraph of the complaint).

Accused has not made any explanation regarding loan agreement/undertakings.

7. In such situation, recalling of complainant for cross-examination would amount to recalling for a mere pleasure of the accused and to delay the summary trial. The result of the above discussion is that the application of the accused filed under Section-145(2) NI Act deserves a dismissal. It is accordingly dismissed.

Seema Chopra vs Poonam Sshgal CC No.3752/2010 21

8. Accused may prove her defence otherwise. One more opportunity to the accused to lead her defence evidence. Accused to take all necessary steps in her defence.

9. A copy of this order be placed on the official website of the delhi district courts.

(RAKESH KUM
MM-(Central)-0

Seema Chopra vs Poonam Sshgal CC No.3752/2010