Esha

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 5 OF 2024

Narayan Shivdas Kadam, son of Shivdas Kadam, 35 years of age, Resident of H. No. 544/A, Near Sai Baba Temple, opp. Fisheries Jetty, Penha De France, Malim, Betim, Bardez, Goa. ... Petitioner

Versus

M/S Shriram Transport Finance Co. Ltd., A Limited Company incorporated under the Indian Companies Act, 1956 having its Registered Office at 3rd floor, Mookambika complex, No. 4, Lady Desika road, Mylapore, Chennai - 600004, Tamil Nadu and having its branch office at 412, 4th floor, Gera Imperium, Patto Plaza, Panaji – Goa. Represented herein by its duly constituted Attorney Ms. Jaimala Gaunekar, d/o Mr. Mangaldas Gaunekar, aged 27 years, r/o Deugi wado, Charao, Tiswadi - Goa. ... Respondent

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Mr. Vibhav R. Amonkar with Mr. Siddhant R. Shetye, Advocates for the Petitioner.

Mr. Vithal Naik, Advocate for the Respondent.

CORAM: **BHARAT P. DESHPANDE, J.**

RESERVED ON: **6th FEBRUARY 2024**

PRONOUNCED ON: **26th FEBRUARY 2024**

JUDGMENT:

1. Rule. Rule made returnable forthwith.

2. Heard the parties with consent for final disposal at the admission stage.

3. In the present Petition filed under Section 482 of Cr.P.C and Articles 226 and 227 of the Constitution of India, the Petitioner who is an Accused, in a matter pending before the learned Magistrate for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act, for short), is challenging the rejection of his Application filed under Section 145(2) of the N.I. Act by the learned Magistrate.

4. Heard Mr. Vibhav Amonkar for the Petitioner and Mr. Vithal Naik for the Respondent.

5. Mr. Amonkar would submit that the impugned order shows non-application of mind and denial of an opportunity to cross-examine the Complainant by disclosing specific defence in the Application. He submits that the learned Magistrate committed a jurisdictional error, thereby denying the valuable right of the Petitioner to cross-examine the Complainant and misconstrued the law laid down by the Apex Court as well as by this Court. Accordingly, he submits that the Application disclosing the grounds of defence need not elaborate on each and every ground for defence.

He submits that the procedure requires the Accused to disclose the grounds of his defence which the Petitioner has disclosed. He submits that however, without considering the mandate that once such Application is filed, disclosing specific defence, the Magistrate shall grant such Application by summoning the Complainant, show that impugn order needs interference.

6. Mr. Amonkar placed reliance on the following decisions:

(i) Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakore, (2010) 3 SCC 83;

(ii) Meters and Instruments Pvt. Ltd. Vs. Kanchan Mehta, AIR 2017 SC 4594;

(iii) Rakesh Singh Vs. Anil Madanmohan Gulati, (Criminal Writ Petition No.35 of 2023 decided on 09.05.2023);

(iv) Jose Carmo Medard Fernandes Vs. Babu Sheikh (Criminal Writ Petition No.31 of 2023 decided on 28.08.2023);

(v) Shantal Kamat Vs. Milind Ladu Kerkar, (Criminal Writ Petition No.227 of 2023 (F) decided on 11.10.2023);

(vi) K. Narsimulu Vs. Naguesh C. Dandi, (Criminal Writ Petition No.634 of 2023 (F) decided on 18.10.2023) and

(vii) Gautami Govind Naik Vs. Bori Urban Cooperative Credit Society, (Criminal Writ Petition No.676 of 2023 (F) decided on 06.11.2023).

7. Mr. Naik appearing for the Respondent would submit that the Application filed by the Accused for permission to cross-examine the Complainant must set out the specific defence and not only the moonshine defence. It is submitted that the Accused has to satisfy the Court that it is a probable defence. He submits that the Application filed by the Petitioner is vague and is only an attempt to bye-pass and prolong the procedure. He submits that the learned Magistrate has rightly rejected the Application as so-called grounds, on which, the Petitioner is claiming or raising defence are only phrases, which are normally used while arguing the matter.

8. Mr. Naik placed reliance on the following decisions:

(i) *Rukmakar @ Bharat Tulshidas Naik Vs. Santosh Shaba Gaonkar, (Criminal Writ Petition No.35 of 2019 (F) decided on 05.04.2019);*

(ii) *Paresh Bandekar V/s Rajaram D. Satardekar and Anr., (Criminal Writ Petition No.24 of 2020 decided on 24.02.2021);*

(iii) *Apolonius Francisco Luis Vs. Sahajanand Investments Pvt. Ltd. (Criminal Writ Petition No.838 of 2021 (F) decided on 12.09.2022) and*

(iv) *Payal Malhotra Vs. Sulekh Chand, (Criminal Writ Petition No.1366 of 2023 decided on 29.11.2023 passed by Hon'ble High Court of Delhi at New Delhi).*

9. The rival contentions fall for consideration:

10. The Petitioner is an Accused in a complaint filed under Section 138 of the N.I. Act by the Respondent-Finance Company, in which, the Magistrate has issued a summons on satisfaction that a case is made out for summary trial. The Accused appeared before the learned Magistrate and after explaining the substance of accusation as provided under Section 251 of Cr.P.C., wherein the Petitioner/Accused pleaded not guilty and claimed to be tried, filed an Application under Section 145(2) of the N.I. Act for permission to cross-examine the Complainant.

11. In the said Application filed under Section 145 of the N.I. Act, Petitioner claimed that the Complainant filed an affidavit in evidence along with documents. However, the Petitioner/Accused is desirous of cross-examining the Complainant on the following grounds:

a) Misrepresentation of facts.
b) No legally enforceable debt/ dues.
c) Cheque never issued nor any consideration towards the cheque, misuse of the cheque.
d) Complainant is not a holder in due course of the cheque.

12. This Application was opposed by the Respondent and thereafter, the impugned order was passed by the Trial Court

observing that so-called defence raised by the Petitioner does not explain or give the details of misrepresentation, misuse of cheque etc.

13. The impugned order shows that the learned Magistrate after considering the objections raised by the Complainant observed in paragraph 5 that such an Application is filed in the most casual manner and without disclosing any valid defence. The vague statements cannot be considered a valid defence to grant leave to the Accused to cross-examine the Complainant. The grounds mentioned in the Application have no substance as there is no denial about the loan transaction and hence, there is no question of cross-examining the witness. Thereafter, the learned Trial Court considered various decisions from paragraph 6 onwards and then finally, in paragraph 11 concluded that there is no explanation as to what misrepresentation is done by the Complainant and that the complaint is based on the documents. The ground regarding misuse of the cheque is again not explained in the Application and thus, Application was rejected.

14. At this stage, the language used in Section 145 of the N.I. Act needs to be taken into account as well as the purpose of incorporating Section 143 onwards in the N.I. Act.

15. Section 145 of the N.I. Act reads thus:

> *"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."*

16. The language used in Section 145(2) was discussed by the Apex Court in various decisions. Before adverting to such provisions, it will be important to consider the observations of the Constitution Bench of the Apex Court in the case of **Expeditious Trial of Cases under Section 138 of NI Act, 1881, in Re reported in (2021) 16 SCC 116**. In paragraph 9, the Apex Court observed thus:

> *"9. Section 143 of the Act has been introduced in the year 2002 as a step-in aid for quick disposal of complaints filed under Section 138 of the Act. At this stage, it is necessary to refer to Chapter XXI of the Code which deals with summary trials. In a case tried summarily in which the accused does not plead guilty, it is sufficient for the Magistrate to record the substance of the evidence and deliver a judgment,*

containing a brief statement of reasons for his findings. There is a restriction that the procedure for summary trials under Section 262 is not to be applied for any sentence of imprisonment exceeding three months. However, Sections 262 to 265 of the Code were made applicable "as far as may be" for trial of an offence under Chapter XVII of the Act, notwithstanding anything contained in the Code. It is only in a case where the Magistrate is of the opinion that it may be necessary to sentence the accused for a term exceeding one year that the complaint shall be tried as a summons trial. From the responses of various High Courts, it is clear that the conversion by the trial courts of complaints under Section 138 from summary trial to summons trial is being done mechanically without reasons being recorded. The result of such conversion of complaints under Section 138 from summary trial to summons trial has been contributing to the delay in disposal of the cases. Further, the second proviso to Section 143 mandates that the Magistrate has to record an order spelling out the reasons for such conversion. The object of Section 143 of the Act is quick disposal of the complaints under Section 138 by following the procedure prescribed for summary trial under the Code, to the extent possible. The discretion conferred on the Magistrate by the second proviso to Section 143 is to be exercised with due care and caution, after recording reasons for converting the trial of the complaint from summary trial to summons trial. Otherwise, the purpose for which Section 143 of the Act has been introduced

would be defeated. We accept the suggestions made by the learned Amici Curiae in consultation with the High Courts. The High Courts may issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 from summary trial to summons trial in exercise of power under the second proviso to Section 143 of the Act."

17. The Apex Court in paragraph 20 further observed thus:

"20. Section 143 of the Act mandates that the provisions of summary trial of the Code shall apply "as far as may be" to trials of complaints under Section 138. Section 258 of the Code empowers the Magistrate to stop the proceedings at any stage for reasons to be recorded in writing and pronounce a judgment of acquittal in any summons case instituted otherwise than upon complaint. Section 258 of the Code is not applicable to a summons case instituted on a complaint. Therefore, Section 258 cannot come into play in respect of the complaints filed under Section 138 of the Act. The judgment of this Court in Meters & Instruments [Meters & Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560] insofar as it conferred power on the trial court to discharge an accused is not good law. Support taken from the words "as far as may be" in Section 143 of the Act is inappropriate. The words "as far as may be" in Section 143 are used only in respect of applicability of Sections 262 to 265 of the Code and the summary procedure to be followed for trials under Chapter

> *XVII. Conferring power on the court by reading certain words into provisions is impermissible. A Judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation [J. Frankfurter, Of Law and Men: Papers and Addresses of Felix Frankfurter.]. The Judge's duty is to interpret and apply the law, not to change it to meet the Judge's idea of what justice requires [Duport Steels Ltd. v. Sirs, (1980) 1 WLR 142]. The court cannot add words to a statute or read words into it which are not there [Union of India v. Deoki Nandan Aggarwal, 1992 Supp (1) SCC 323].”*

18. In the case of **Mandvi Cooperative Bank Ltd.** (supra), the Apex Court was considering the provisions of Section 145 of the N.I. Act qua the affidavit in evidence filed by the Complainant, in a summary trial. Since, Section 143 of the N.I. Act introduced by the amendment starts with a non-obstante clause thereby specifically providing that notwithstanding anything in the Code of Criminal Procedure, 1973, all offences under this Chapter shall be tried by the Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 of the Code shall, as far as may be, apply to such trials. The proviso to Section 143 of the N.I. Act further contemplates that in case of any conviction in a summary

trial under this Section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and a fine exceeding five thousand rupees. However, it further provides that when at the commencement of, or in the course of, a summary trial under this Section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, shall record an order to that effect and thereafter, recall any witness who may have been examined and proceed to hear or re-hear the case in the manner provided by the said Code. Thus, the mandate is that all cases under the said Chapter of the N.I. Act, shall as far as may be tried summarily.

19. Summary trial is provided under Chapter XXI of the Cr.P.C., which starts from Sections 260 to 265. Section 262 deals with the procedure for summary trial wherein it is provided that all the trials under this Chapter, shall proceed as per the procedure specified in this Code for the trial of summons case except as hereinafter mentioned. Section 263 deals with records in summary trials whereas Section 264 speaks about judgment in cases tried summarily. Thus, normally when a case is tried summarily, the record that the Magistrate is required to maintain under Section 263 is the case number, the date of the commission of the offence,

the date of the report of the complaint, the name of the complainant, the name and residence of the accused; the offence complained of and the offence proved, the plea of the Accused and examination, if any, the finding and the sentence or the final order. When the provisions of Sections 262 to 265 of the Code apply to summary trial as provided under Section 143 of the N.I. Act, the procedure as laid down therein needs to be followed and the purpose is for expeditious disposal of those matters.

20. In the case of **Mandvi Cooperative Bank Ltd.** (supra) after considering the object and reasons of the provisions, by which, Sections 143 to 147 of the N.I. Act were incorporated, the Apex Court considered such powers and observed that the provisions of Sections 143 to 147 expressly depart from and override the provisions of the Code of Criminal Procedure, which deals with criminal trials. The provisions of Section 146 similarly depart from the principles of the Evidence Act. Section 143 makes it possible for the complaints under Section 138 of the N.I. Act to be tried in the summary manner, except, for the relatively small number of cases where the Magistrate feels that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily.

21. The Apex Court further observed that the procedure adopted under Section 143 subject to the qualification "as far as possible" uses sufficient flexibility so as not to affect the quick flow of the trial process. Section 145 with its non-obstante clause, makes it possible for the evidence of the Complainant to be taken in the absence of the Accused. However, the affidavit of the Complainant and/or its witnesses may be read in evidence "subject to all just exceptions".

22. Considering the submissions of the parties therein, the Apex Court concluded in paragraphs 33 and 34 that there is no need for the Complainant to further depose what he has stated in the affidavit and the affidavit in evidence could be considered as chief examination of the Complainant and the witnesses.

23. In the case of **Meters and Instruments Pvt. Ltd.** (supra), the Apex Court was dealing with the aspect of rejection of compounding of an offence under Section 138 of the N.I. Act. The Apex Court after taking into consideration the earlier decisions wherein certain directions were given, observed in paragraphs 18, 19 and 20 as under:

> *"18. From the above discussion the following aspects emerge:*
> *18.1. Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on the accused in view of presumption under Section 139 but the*

standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under CrPC but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 CrPC will apply and the court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

18.2. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the court.

18.3. Though compounding requires consent of both parties, even in absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

18.4. Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may

have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the court has jurisdiction under Section 357(3) CrPC to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 CrPC. With this approach, prison sentence of more than one year may not be required in all cases.

18.5. Since evidence of the complaint can be given on affidavit, subject to the court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonour of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 CrPC. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

19. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the court is paid by a specified date, the court is entitled to close the proceedings in exercise of its

powers under Section 143 of the Act read with Section 258 CrPC. As already observed, normal rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) CrPC with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

20. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e-mail ID of the accused. If e-mail ID is available with the bank where the accused has an account, such bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant. If the accused complies with such summons and informs the court and the complainant by e-mail, the court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to

such conditions as may be considered appropriate. 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. In case the trial is to proceed, it will be open to the court to explore the possibility of settlement. It will also be open to the court to consider the provisions of plea bargaining. Subject to this, the trial can be on day-to-day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily."

24. The specific observations of the Apex Court in paragraph 20 as quoted above would go to show that the Accused who wants to contest the case, must be required to disclose a specific defence for such contest and it is open for the Court to ask specific questions to the Accused at that stage assuming importance.

25. In paragraph 18 as quoted above, the Apex Court while dealing with the object of Section 138 of the N.I. Act opined that the primary object of this provision is compensatory and the element is with the object of the compensatory element.

26. The learned Single Judge of this Court in **Rakesh Singh** (supra) elaborately discussed all the earlier decisions and observed

that the Accused has an absolute and unqualified right to have the Complainant and his witness summoned for cross-examination. It is observed that it is not necessary for the Court to delve deep into the merits of the defence which is set up by the Accused. It is observed that the purpose of disclosing defence is not to find out whether any details are given or to reject it at the threshold thereby curtailing such rights of the Accused.

27. In the case of **Shantal Kamat** (supra), the learned Single Judge of this Court while deciding the Criminal Writ Petition considered a similar aspect and found that once an Application is made disclosing some defence, the Court is duty-bound to allow the Application for summoning the Complainant for cross-examination.

28. In the case of **Rukmakar @ Bharat Tulshidas Naik** (supra), the learned Single Judge of this Court after considering the decision of the Apex Court in various decisions observed that the Accused who wants to contest must be required to disclose specific defence for such contest.

29. In the case of **Paresh Bandekar** (supra), the learned Single Judge of this Court observed that the Accused after recording his plea must disclose the ground for defence if he wants to contest the matter and such Application cannot be filed after much delay.

30. In the case of **Apolonius Francisco Luis** (supra), the learned Single Judge of this Court found that a cryptic Application under Section 145(2) without disclosing any specific defence cannot be considered as an Application for recalling the witness. The Court must be satisfied that there is a specific defence raised so as to allow summoning the Complainant and the witness for cross-examination.

31. Section 145 of the N.I. Act is an enabling provision for the Complainant to lead the evidence on the affidavit. When the Complainant chooses to give the evidence on affidavit during the course of the inquiry, trial or other proceedings, it cannot be said that such evidence on affidavit will not be allowed during trial or further proceedings. It is a rule of procedure which lays down the manner in which the evidence of the Complainant is to be recorded. It further provides that such evidence of the Complainant and the witnesses may be given on affidavit, but, on an Application made by the Accused, the Court shall summon and examine the person giving evidence on affidavit. Such examination, on allowing an Application under Section 145(2), is in fact not the chief examination of the Complainant and his witnesses since the affidavit in evidence itself is considered as examination in chief. Thus, what is contemplated under Section 145(2) of the N.I. Act is the cross-examination of the Complainant by the Accused who

wants to contest the matter by disclosing the specific defence. However, it has to be kept in mind that such a procedure will not in any manner defeat an indefeasible right of the Accused to contest the matter. When the Accused wants to contest the proceedings, it would certainly mean that all opportunities are available to the Accused including the cross-examination of the Complainant and the witnesses.

32. The proceedings under Section 138 of the N.I. Act are special proceedings wherein the Complainant is equipped with a presumption in his favour under Section 139 of the N.I. Act when the signature on the cheque is not denied by the Accused. In such a situation, the reverse burden is on the Accused to disprove such presumption though on preponderance of probabilities. It is also well settled by a catena of decisions that in order to dispel the presumption which arises out of Section 139 of the N.I. Act, the Accused either do so by pointing out the defects, discrepancies and inconsistencies in the case of the Complainant by way of cross-examination of the Complainant and his witnesses. Similarly, the Accused by stepping into the witness box in his defence is also entitled to rebut the presumption under Section 139 of the N.I. Act. Thus, the Accused is entitled to rebut such presumption either by showing that the cheque is not issued for legally recoverable debt

through the cross-examination of the Complainant or by leading evidence.

33. When the Accused desires to contest the matter, it cannot be always said that the Accused is delaying the trial. It is the right of the Accused to defend himself which cannot be taken away lightly. Though the proceedings are required to be conducted summarily and as per Sections 262 to 265 of Cr.P.C. as provided under Section 143 of the N.I. Act, the legislature protects the Accused by way of filing the Application under Section 145(2) of the N.I. Act either to prove his defence by cross-examining the Complainant or to lead his own evidence to rebut the presumption.

34. The main intention of the legislature incorporated under Section 145(2) of the N.I. Act is to grant an opportunity to the Accused, in desirable cases, wherein he shows or demonstrates before the Magistrate that there is a probable defence which he wants to produce before the Court by way of cross-examination of the Complainant. Such opportunity cannot be taken away from the Accused if he satisfies the Magistrate about the probable defence.

35. In the case of **Apolonius Francisco Luis** (supra), the Application filed by the Accused was too cryptic and casual as found in paragraph 5 of the said judgment and therefore, this decision will

not help the Respondent in the present matter. The Accused/Petitioner in his Application under Section 145(2) disclosed the grounds which are already discussed earlier. It is not necessary for the Accused to give various details of his defence for permission to cross-examine the Complainant. The requirement of the law is that there must be some defence raised by the Accused which is considered as probable defence and not a moonshine defence.

36. The learned Magistrate by evaluating such defence raised by the Petitioner, jumped to the conclusion that in the absence of specific particulars of the so-called defence of misrepresentation, misuse of cheque etc., practically closed the opportunity of the Accused to cross-examine the Complainant. Paragraph 3 of the Application filed by the Accused/Petitioner shows that one of the defence is that there is no legally enforceable debt. The second defence is that the Complainant is not the holder of the cheque in due course. Though these are technical defences, it shows that there is some defence raised by the Accused in order to contest the proceedings. Once a ground of defence is disclosed in the Application as observed by the Apex Court in the case of **Meters and Instruments Pvt. Ltd.** (supra) in paragraph 20 quoted above, it is not open for the Magistrate to evaluate such an aspect

and refuse such cross-examination. I am in full agreement with the observations of the learned Single Judge in **Rakesh Singh** (supra) as found in paragraph 21 that there is an absolute and unqualified right to have the Complainant and the witnesses summoned for cross-examination when the Accused shows or discloses a plausible defence. It is not necessary for the learned Magistrate to delve deep into the merits of the defence set up by the Accused.

37. The learned Magistrate even while allowing the cross-examination of the Complainant needs to follow the procedure laid down under the summary trial proceedings and the cross-examination could be conducted by recording only summarily and not each and every word ofthe question asked. The purpose of expeditious trial could be achieved even if the cross-examination of the Complainant is allowed since the Trial Court has to decide the matter summarily.

38. In the present matter, the Application filed by the Petitioner/ Accused under Section 145(2) of the N.I. Act discloses the grounds of his defence. The requirement is to file an Application in writing and as held by the Apex Court, the Accused must disclose specific defence for such a contest. If these two conditions are fulfilled, the power of the concerned Magistrate is only to satisfy itself that such

grounds are probable grounds of defence and not only the moonshine defence. Thus, the limited scope available to the Magistrate is to ascertain as to whether such defence is probable defence and if so, allow the Application.

39. As discussed earlier in this case, the Petitioner/Accused disclosed probable defence by claiming that the cheque was not issued for legally enforceable debt. If no opportunity is given to cross-examine the Complainant, the Accused would certainly lose his right to rebut the presumption under Section 139 of the N.I. Act. Thus, the impugned order would clearly go to show that inspite of showing some probable defence, the learned Magistrate refused to summon the Complainant thereby depriving the available rights of the Accused.

40. In my considered opinion, the learned Magistrate committed an error in observing that the defence raised by the Accused/ Petitioner is vague and does not disclose the details and the same is found to be incorrect. There are grounds raised in the Application which only after permitting cross-examination of the Complainant could be ascertained as a specific defence. Such defence raised in the Application could be considered as sufficient to bring the case of the Petitioner in terms of "setting up a specific defence" as held by

the Apex Court in the case of **Meters and Instruments Pvt. Ltd.** (supra) as at that stage, nothing more is expected from the Petitioner/Accused. Admittedly, the Petitioner/Accused is entitled to have a fair trial which includes cross-examination of the Complainant and his witnesses.

41. The impugned order therefore suffers from improper exercise of jurisdiction. Hence, needs to be quashed and set aside.

42. The impugned order stands quashed and set aside. The Application filed by the Petitioner under Section 145(2) of the N.I. Act is accordingly allowed.

43. Rule is made absolute in the above terms.

BHARAT P. DESHPANDE, J.

VAIGANKAR ESHA SAINATH
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