Vinita

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.27 OF 2024

1 M/s Cassius Infracon Private Limited, Private limited company registered under Indian Companies Act 1956, having Registered Office at, 2, Guru Nanak Niwas, Dr. Charat Singh colony, Andheri (East), Mumbai 400093. Through its Director Mr. Mehul Champaklal Talsania Gera Emporium II, 7th Floor, Office Nos. 707-708, Patto, Panaji Goa 403001

2 Mr. Mehul Champaklal Talsania Aged 49 years Major, Indian National, 'Director' M/s Cassius Infracon Private Limited, Gera Emporium II, 7th Floor,Office Nos. 707-708, Patto, Panaji Goa 403001.

3 Mr. Rajesh Dhanraj Soni, Aged 40 years Major, Indian National, Director M/s Cassius Infracon Private Limited, 2, Guru Nanak Niwas, Dr. Charat Singh colony, Andheri (East), Mumbai 400093.

4 Mr. Abhishek Ramesh Vyas Aged 48 years, Major, Indian National, Gera Emporium II, 7th Floor, Office Nos. 707-708, Patto, Panaji Goa 403 001

... Petitioners.

Versus

Mr. Vidhyadhar Vttam Kerkar Son of late Mr. Uttam Anant Kerkar 48 years of age, self employed Married Indian National H. No. 9/463/J, Ganeshpuri, Housing Board Mapusa Bardez Goa 403507 ...Respondent.

Mr Jayant Karn, Advocate for the petitioners.

Mr Parag Rao and Mr Ajay Menon, Advocate for respondent.

CORAM: BHARAT P. DESHPANDE, J

RESERVED ON : 16th July 2024
PRONOUNCED ON: 24th July 2024

JUDGMENT

1. Rule. Rule is made returnable forthwith. Heard matter finally at the admission stage with consent.

2. The legality or otherwise of the order dated 14.8.2023 passed by the Magistrate is under challenge in the present petition.

3. Mr Karn would submit that the impugned order needs interference since it is first of all perverse and violative of principles of natural justice as no sufficient time was granted to the petitioner in the present matter and an application for recall of the order is rejected.

4. Mr Karn would submit that the action of the learned Magistrate in closing the cross examination of the complainant is clearly

arbitrary and amounts to denial of an opportunity. He submits that such rejection is clearly against the settled principles of criminal jurisprudence of granting fair opportunity to the accused to decide the matter as hurriedly did in the present matter. He would then submit that at the most some cost could have been awarded to the petitioners for the purpose of allowing the order of recall.

5. Mr Karn would further submits that order dated 14.8.2023 was passed without giving any opportunity to the petitioners thereby closing cross examination of the complainant. Petitioners then filed an application for recall of the order dated 14.8.2023 which was rejected by order dated 25.9.2023. He submits that both these orders are challenged in the present petition on the ground that there is no fair trial and opportunity has been denied hurriedly though the respondent/complainant took many opportunities for the purpose of verification and also after issuing process.

6. Mr Karn would submit that complaint under Section 138 of the Negotiable Instruments Act, 1881 ("the Act" for short) is filed against the petitioners wherein process was issued and the petitioners appeared. Substance of accusation was explained and immediately on the next date, order was passed of closing of the cross examination only on the ground that petitioners/accused failed to file any application under Section 145(2) of the Act. He submits that

petitioners by seeking recall of such order was supposed to file the application presuming that order will be recalled and then opportunity will be given to the petitioners to file such application. However by refusing to recall earlier orders, learned Magistrate has practically denied the opportunity to the accused to put forth his defence and to rebut the presumption under Section 139 of the Negotiable Instruments Act 1881.

7. Per contra, Mr Rao would submit that matter being a summary procedure case, is required to be conducted in a time bound manner and in fact on day to day basis. However, petitioners took several adjournments only for the purpose of appearance and furnishing sureties. He submits that when the matter was posted for substance of accusation, the same was explained to the petitioners/accused who pleaded not guilty. Learned Magistrate then placed the matter for trial, however no application was filed by the petitioners/accused seeking cross examination of the complainant, cross was closed and the matter was adjourned for recording statement under Section 313 of Code of Criminal Procedure ("Cr.P.C." for short)

8. Mr Rao would further submit that on the next date petitioners filed an application for recall of the order dated 14.8.2023 which was rejected and rightly so since there was no application filed under Section 145(2) of the Act. He submits that in absence of such

application, the question of recall of the order dated 14.8.2023 would not arise.

9. Rival contentions fall for consideration.

10. A private complaint under Section 138 of the Act is filed against the petitioners claiming that a memorandum of understanding was executed between the parties whereby the complainant agreed to purchase plot D and accordingly issued some cheques.

11. Though the initial request was there not to present the cheques, memorandum of understanding shows that part payment is required to be made on 30.11.2021 and accordingly cheques were presented for encashment, however, the same were returned unpaid.

12. Complainant issued a legal notice demanding the amount mentioned in the cheques. Even though such notice was received, there was no payment forthcoming and accordingly, offence stands concluded against the petitioners and the directors resulting in filing of the complaint.

13. Records show that after verification of the complaint on the basis of filing of the affidavit, process was issued against the accused.

14. Admittedly proceedings under Section 138 of the Act are required to be conducted as summary procedure unless the Magistrate comes to the conclusion that there is need to convert it into summons triable matter. There is no such order passed by the learned Magistrate in the present complaint to convert it into summons triable matter.

15. Record shows that from 15.8.2022 matter is shown as pending for appearance and submission of sureties as well as recording of substance of accusation. Finally on 15.7.2023 all the accused/ petitioners remained present before the Magistrate and the substance of accusation was explained. All the accused plead not guilty and accordingly order was passed that the accused shall face the trial. The next date was fixed on 14.8.2023.

16. When the matter was called out on 14.8.2023 an application was filed on behalf of the complainant for payment of interim compensation under Section 143A of the Negotiable Instruments Act which was kept for say. However at the same time the learned Magistrate observed that since no application is filed for cross examination, opportunity to cross stands closed and the matter was adjourned for recording 313 statements of the accused.

17. Petitioners/accused therefore filed an application on 25.9.2023 vide Exh. D-42 praying to recall the order dated 14.8.2023 i.e. closer of the cross examination. It is necessary to note here that on 25.9.2023, along with application for recall of order dated 14.8.2023, no application under Section 145(2) of the Act giving the ground and seeking permission to cross examine the complainant was presented. Application for recall of the order dated 14.8.2023 was rejected by the learned Magistrate, which is also impugned in the present proceedings.

18. Section 143 of the Negotiable Instruments Act, 1881 reads thus:-

> ***Section 143. Power of Court to try cases summarily****.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:*
> *Provided that in the 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 an amount of fine exceeding five thousand rupees:*
> *Provided further 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, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.
(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.
(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint."

19. Perusal of the above provision which was inserted by Act of 55 of 2002 and came into effect from 6.2.2003 would clearly go to show that all offences under the said chapter i.e. chapter XVII starting with Section 138, shall be tried by Judicial Magistrate First Class and provision of Sections 262 to 265 of Code of Criminal Procedure as far as may be applied to such trials.

20. Chapter XXI of Cr.P.C. deals with powers to try summarily. Section 262 deals with procedure for summary trial. Thus it is clear that from Section 143 of the Act that proceedings under Section 138 of the Act shall be tried summarily by the Magistrate and the provisions of Sections 263 to 265 of the Cr.P.C. shall as far as may be applied to such trial.

21. Section 145 of the 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."*

22. Reading of the above provisions would go to show that it starts with a non obstante clause and provides that 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 proceedings.

23. Sub section 2 of Section 145 of the Act then provides that the Court may and if it thinks fit, and shall, on an application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

24. Thus the above provisions and more specifically sub section 2 of Section 145 of the Act deals in two parts. First part is the power of

the Court who may, if it thinks fit, summon and examine any person who has given his evidence on affidavit. Second part is also to be looked into as an application is required to be filed either by prosecution or by the accused requesting to summon and examine any person who is giving evidence on affidavit as to the facts contained therein. Thus the requirement is that the Court may, of its own motion or on an application by prosecution or accused, summon and examine such a person who is giving evidence on affidavit. Wordings would clearly go to show that even the prosecution i.e. the complainant is also entitled to summon his own witness who is giving evidence on affidavit for further examining it in the Court. Similarly the accused, on an application to that effect is entitled to summon and examine any person giving evidence on affidavit.

25. Thus it is clear that the accused, if he so desire to examine any person and more specifically the complainant and his witness who has deposed on affidavit,must file an application to that effect and accordingly, the Court is required to decide whether to recall the witnesses or not.

26. Matter in hand would go to show that the complainant deposed on affidavit at the time of verification of the complaint and such deposition on affidavit is required to be considered as evidence in any inquiry/trial or other proceedings as provided under Section 145(1) of

the Act. Complainant need not step into the witness box again in order to prove his affidavit after the process is issued to the accused. This fact is clearly established in the directions issued by the Apex Court in the case of ***Indian Bank Association and others Vs Union of India and others***, [1] in paragraph 23 which reads thus:-

> *"23 Many of the directions given by the various High Courts, in our view, are worthy of emulation by the criminal courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given:*
>
> *23.1 The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinise the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.*
>
> *23.2 The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of*

1 (2014) 5 SCC 590

the police or the nearby court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow-up action be taken.

23.3 The court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the court may pass appropriate orders at the earliest.

23.4 The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 CrPC to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

23.5 The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses instead of examining them in the court. The witnesses to the complaint and the accused must be available for cross-examination as and when there is direction to this effect by the court."

27. In the case of ***Meters and Instruments Private Limited and another Vs Kanchan Mehta***,[2] the Apex Court while dealing with evidence under Section 138 of the Act observed in paragraphs 11 and 12 as under:-

> *"11 While it is true that in Subramanium Sethuraman v. State of Maharashtra [Subramanium Sethuraman v. State of Maharashtra, (2004) 13 SCC 324 : 2005 SCC (Cri) 242] this Court observed that once the plea of the accused is recorded under Section 252 CrPC, the procedure contemplated under Chapter XX CrPC has to be followed to take the trial to its logical conclusion, the said judgment was rendered as per statutory provisions prior to the 2002 Amendment. The statutory scheme post-2002 Amendment as considered in Mandvi Coop. Bank [Mandvi Coop. Bank Ltd. v. Nimesh B. Thakore, (2010) 3 SCC 83, pp. 95-96, paras 25, 26 : (2010) 1 SCC (Civ) 625 : (2010) 2 SCC (Cri) 1] and J.V. Baharuni [J.V. Baharuni v. State of Gujarat, (2014) 10 SCC 494 : (2015) 1 SCC (Cri) 1] has brought about a change in law and it needs to be recognised. After the 2002 Amendment, Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the court, where the accused*

---

2 (2018) 1 SCC 560

tenders the cheque amount with interest and reasonable cost of litigation as assessed by the court. Such an interpretation was consistent with the intention of legislature. The court has to balance the rights of the complainant and the accused and also to enhance access to justice. Basic object of the law is to enhance credibility of the cheque transactions by providing speedy remedy to the complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the ends of justice. Appropriate order can be passed by the court in exercise of its inherent power under Section 143 of the Act which is different from compounding by consent of parties. Thus, Section 258 CrPC which enables proceedings to be stopped in a summons case, even though strictly speaking is not applicable to complaint cases, since the provisions of CrPC are applicable "so far as may be", the principle of the said provision is applicable to a complaint case covered by Section 143 of the Act which contemplates applicability of summary trial provisions, as far as possible i.e. with such deviation as may be necessary for speedy trial in the context.

12 *The sentence prescribed under Section 138 of the Act is up to two years or with fine which may extend to twice the amount or with both.*

What needs to be noted is the fact that power under Section 357(3) CrPC to direct payment of compensation is in addition to the said prescribed sentence, if sentence of fine is not imposed. The amount of compensation can be fixed having regard to the extent of loss suffered by the action of the accused as assessed by the court. The direction to pay compensation can be enforced by default sentence under Section 64 IPC and by recovery procedure prescribed under Section 431 CrPC. [Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551 : 1988 SCC (Cri) 984; Suganthi Suresh Kumar v. Jagdeeshan, (2002) 2 SCC 420 : 2002 SCC (Cri) 344; K.A. Abbas v. Sabu Joseph, (2010) 6 SCC 230 : (2010) 3 SCC (Civ) 744 : (2010) 3 SCC (Cri) 127; R. Mohan v. A.K. Vijaya Kumar, (2012) 8 SCC 721 : (2012) 4 SCC (Civ) 585 : (2012) 3 SCC (Cri) 1013 and Kumaran v. State of Kerala, (2017) 7 SCC 471 : (2017) 3 SCC (Civ) 431]"

28. Finally the Apex Court observed in paragraph 16 that it is clear that the trial under Chapter XVII of the Act are expected normally to be summary trial. Once the complaint is filed which is accompanied by the dishonoured cheque and the bank's slip and the affidavit, the Court ought to issue summons. The service of summons can be by post/e-mail/courier and must indicate that the accused could make

specified payment by deposit in a particular account before the specified date and inform the Court as well as complainant by e-mail. If he makes payment he may not be required to appear and if the Court is satisfied that the payment has not been duly made and if the complainant has no valid objection. If the accused is required to appear, his statement ought to be recorded forthwith and the case is to be fixed for defence evidence, unless the complainant's witnesses are recalled for examination.

29. Then the Apex Court in case of ***Meters and Instruments Private Ltd*** (supra) observed in paragraph 18 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."

30. From the above observations, it is clear that the evidence of the complainant is given on affidavit supported with bank slip and the material regarding dishonour of the cheque,it is unnecessary for the Magistrate to record any further preliminary evidence of the complainant. Such an affidavit in evidence though produced at the time of verification can be read as evidence at all stages of the trial and other proceedings. Manner of the examination of the person giving affidavit is as per Section 264 of Cr.P.C. Since the scheme is to

follow summary procedure, Section 264 of Cr.P.C., provides judgment to be passed when the accused pleads not guilty unless an application is filed for recall of the witnesses as provided under Section 145(2) of the Act. These provisions are required to be read in tandem.

31. In *Expeditious Trial of Cases under Section 138 of the N. I. Act, 1881,*[3] the Constitutional Bench of the Apex Court discussed the power of Magistrate to try summary and procedure adopted by the Magistrate to convert summary trial into summons triable mechanically, considered in detail provisions and the mandate of Section 143 of the Act. The main issue in that proceeding was the power of the Court under Section 258 of Cr.P.C. to stop the proceedings and in that context observations in the case of Meters and Instruments Private Limited(supra) were considered as inappropriate. However, specific directions were issued to the High Court to issue practice directions to the trial Court to treat service of summons in one complaint confirming part of the transactions as deem service in respect of all complaints filed before the same Court relating to dishonour of the cheque issued in part and the same transaction.

---

3 RE reported in (2021) 16 SCC 116

32. In the case of *Narayan Shivdas Kadam vs Shriram Transport Finance Co. Ltd*,[4] discussed the provisions of Section 145(2) of the Act and more particularly the case of *Mandovi Co-operative Bank Ltd Vs. Nimesh B. Thakore*, [5] observed in paragraph 20 and 21 thus:-

> *"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*

4 2024 SCC Online Bom 653

5 (2010) 3 SCC 83

> *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".*

33. Thus it is clear from the above observations that there is no need for the complainant to further depose what he has stated in affidavit in evidence at the time of verification of the complaint and that such affidavit in evidence could be considered as examination in chief of the complainant and his witnesses.

34. As quoted above in the case of ***Meters and Instruments Private Ltd*** (supra), evidence of the complainant could be given on affidavit subject to Court summoning such complainant and his witnesses for examination, it is not necessary for the Magistrate to record further preliminary evidence. Such an affidavit could be read in evidence at all stages of the trial.

35. Section 145 of the Act is an enabling provision for the complainant to lead evidence on affidavit. Complainant when chooses to give evidence on affidavit during the course of inquiry or

trial or other proceedings, it cannot be said that such evidence on affidavit cannot be allowed during further stage of trial. Basically it is a rule of procedure laid down by the legislature in the manner in which evidence of the complainant needs to be recorded. However, Section 145 of the Act and more specifically sub section 2 allows the Court of its own motion to summon any such person who has given evidence on affidavit. Apart from power of the Court, prosecution i.e. complainant as well as accused are entitled, on an application being filed to summon the complainant and his witnesses for examination. However, the accused must disclose grounds for recalling such witnesses and probable defence on which he wants to cross examine the complainant and their witnesses. Thus it is clear that an application on behalf of the prosecution or accused is required to be filed thereby disclosing some grounds on which witnesses could be summoned by the Court.

36. It is no doubt true that the accused is having a valuable right to summon the complainant and his witness, however, has to disclose probable grounds on which recall of such witness is required. Once such probable grounds are disclosed in the application, a Court is duty bound to summon the complainant and his witness, who have already deposed on affidavit.

37. Matter in hand would clearly go to show that substance of accusation under Section 251 of Cr.P.C. was explained to the accused persons on 15.7.2023. Learned Magistrate then placed the matter for trial which is clear from the roznama recorded on 15.7.2023. As directed by the Apex Court in the case of ***Indian Bank Association and others*** (supra) and more particularly in paragraph 23.4 as quoted above, once the Magistrate exercises power under Section 251 of Cr.P.C. by explaining the substance of accusation and asking the plea of the accused, he is supposed to fix the matter for defence evidence unless an application is made by the accused under section 145(2) of the Act for recalling of witnesses for cross examination.

38. Since matter is required to be conducted in a summary manner, mandate of Section 143 of the Act and more specifically in sub section 2 and 3 will have to be adhered to.

39. The above provisions would clearly go to show that first of all matters under Section 138 of the Act are required to be tried summarily and that as far as possible proceedings be conducted from day to day basis until its conclusion unless the Court finds adjournment of the trial to the following date to be necessary for the reasons to be recorded in writing. Even otherwise, it is the duty of the Court to make an endeavour to conclude the trial within six

months from the date of filing. The main purpose of above provision is to install confidence with regards to Negotiable Instruments and to provide special procedure including obligations under the instruments which are not discharged.

40. The matter in hand clearly goes to show that the petitioners pleaded not guilty on explaining the substance of accusation as per Section 251 of Cr.P.C. and failed to file any application under Section 145(2) of the Act seeking recall of the complainant for cross examination. Thus first of all there is no application filed on behalf of the petitioner and secondly there are no grounds of probable defence for the purpose of such recall.

41. In the case of ***Ajju C. S. Sindolli Vs Elizabeth Rodrigues***,[6] is clearly distinguishable. In that case after explaining substance of accusation and pleading not guilty, the Magistrate recorded that since no application is filed under section 145(2) of the Act, matter to proceed for 313 statement and adjourned it to further date. On the next date the accused filed an application seeking permission to cross examine the complainant under Section 145(2) of the Act and for reopening the case. Both these applications were rejected, which were challenged before this Court. By placing reliance in the case of ***Meters and Instruments Private Ltd*** (supra),

6 Criminal Writ Petition No. 56/2023 decided on 126.10.2023

learned Single Judge (Coram Prakash D. Naik, J) observed that an accused who wants to contest the case, must be required to disclose specific defence for such contest and then it is open to the Court to ask specific questions to the accused at that stage. Thus in the case of ***Mr Ajju C. S. Sindolli***(supra), there was specific application filed giving details of the defence and further accused was ready and willing to make part payment and accordingly, the application was allowed. Such decision, to my mind, is clearly distinguishable as the matter in hand would go to show that no application under Section 145(2) disclosing probable defence is filed till date.

42. In the case of ***Om Prakash Vs Manoj Kumar and another***,[7] the Himachal Pradesh High Court is again distinguishable as in that matter also an application was filed under Section 145(2) of the Act. Besides, though judgment of the Himachal Pradesh High Court is having persuasive value, the same cannot be binding on this Court, once it is observed by the Apex Court in the case of ***Meters and Instruments Private Ltd*** (supra) that an application is required to be filed, disclosing probable grounds of defence, same must prevail.

---

7 Criminal Revision No. 485 of 2023

43. In the case of ***Noor Mohammed Vs Khurram Pasha***,[8] deals with power under Section 143(A) of the Act. Even otherwise in that matter an application under Section 145(2) of the Act seeking permission to cross examine the complainant was also filed. Learned Magistrate refused to recall the witness only on the ground that the accused failed to deposit the amount as directed by the Court as interim compensation under Section 143-A of the Act. Thus ***Noor Mohammed Vs Khurram Pasha***(supra) will not in any way help the petitioners.

44. In the case of ***Ashwani Kumar Sharma Vs M/s Himachal Fabrics***,[9] the Himachal Pradesh High Court while dealing with the provision of Section 145(2) of the Act and by relying on its earlier decision, is again not helpful since it is clearly distinguishable. In that matter after recording of the plea of not guilty, the case was adjourned for recording of the evidence of the complainant and the statement of one of the complainant's witnesses was recorded and then the matter was adjourned for cross examination. However, subsequently the complainant claimed that they rely upon the statements recorded as preliminary evidence on earlier occasions. Thus, it is clear that matter was initially tried as

---

8 (2022) 9 SCC 23

9 Cri. MMO NO. 540 of 2018 along with Cr. MMO No. 539 of 2018.

summons triable matter and subsequently it was tried to be taken up as summary trial matter.

45. In the case of ***Rasika Mohanlal Gangani Vs Vinod Makwana***,[10] by the learned Single Judge (Coram Prakash D. Naik, J) is again distinguishable. In that matter examination in chief of the complainant was recorded and since Advocate for the accused was not present, cross examination was closed. Subsequently an application for recall of the complainant was filed which was opposed by the complainant. Accused then filed another application under Section 145(2) of the Act which was again opposed by the complainant. Both these applications were allowed by the learned Magistrate and the complainant was recalled. Thus, the above decision will not be of any help since it is squarely on different facts and circumstances.

46. Petitioners failed to apply before the Court under Section 145(2) of the Act disclosing their probable defence for the purpose of recalling the complainant. Thus, there is no ground even to recall the order of closing of cross examination as no purpose would be served since there is no application disclosing probable grounds for the purpose of cross examination of the complainant.

---

10 Criminal Writ Petition No. 113 of 2023-F decided on 22.8.2023

47. For all the above reasons, no fault could be attributed to the order passed by the learned trial Court and much less any illegality or perversity so as to interfere in the supervisory and extra ordinary jurisdiction of this Court. Accordingly, the petition stands dismissed. Rule stands discharged. Parties shall bear their own cost.

48. Criminal Writ Petition stands disposed of in above terms.

BHARAT P. DESHPANDE, J.