

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MMO No. 548 of 2019

Date of decision: 31.12.2019

Ashok Kumar.

...Petitioner.

Versus

Pal Jewellers, Gagret.

...Respondent

Coram

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes.

For the Petitioner:

Mr.Mukul Sood, Advocate.

For the Respondent:

Mr.Dheeraj K. Vashisht, Advocate.

Vivek Singh Thakur, Judge (oral)

This petition has been preferred by the petitioner against impugned order dated 28.8.2019 passed by learned Judicial Magistrate 1st Class, Court No. 2 Amb, District Una, H.P., whereby prayer of petitioner/accused to lead evidence in defence has been rejected in view of his statement recorded on 14.2.2019 before framing notice of accusation, wherein, accepting liability, he has prayed time to pay the cheque amount to the respondent/complainant in 4-5 installments.

2. Brief facts of the case are that respondent-complainant has filed a complaint under Section 138 of Negotiable Instruments Act (hereinafter referred to as the 'NI Act' in short) against the petitioner/accused, wherein, after service, petitioner appeared and accepted his liability to pay the cheque amount, but had prayed some time for payment thereof within 4-5 installments with further undertaking to make first installment of ₹15,000/- in the month of March. Thereafter, matter was adjourned for 30.3.2019, on which date, accepting prayer of the petitioner-accused, seeking time to make payment, case was adjourned for 10.4.2019.

Whether the reporters of the local papers may be allowed to see the Judgment? Yes

On 10.4.2019, petitioner/accused did not appear and his application for exemption was allowed and case was fixed for his presence on 20.4.2019. On 20.4.2019, notice of accusation was framed and put to the accused, wherein he pleaded not guilty and case was fixed for recording of evidence of complainant on 23.7.2019. Evidence of complainant was closed on 27.8.2019 and thereafter statement of petitioner/accused under Section 313 Cr.P.C. was recorded on 28.8.2019 and in his statement, petitioner/accused, in answer to question No. 10, expressed his intention to lead evidence in defence, but his prayer was rejected by the Magistrate for his undertaking recorded on 14.2.2019, accepting the liability to pay the cheque amount.

3. No doubt petitioner/accused has admitted his liability for payment of cheque amount, before framing of notice of accusation, but thereafter he has claimed that he has made the payment thereof on 20.4.2019. Learned counsel for the respondent/complainant has pointed out that after giving undertaking on 14.2.2019, petitioner-accused has prayed time for payment, which was extended up to 20.4.2019, but for non-payment of cheque amount on that date, notice of accusation was framed against him, wherein he instead of pleading guilty had claimed trial and on that date also he did not say that he had already made the payment and further that case was fixed for evidence of complainant on 23.7.2019 and 27.8.2019 and complainant had appeared as a witness and was cross-examined on behalf of petitioner/accused on 27.8.2019 and on that date in cross- not even a single suggestion was put to the complainant about the payment of the entire cheque amount by the petitioner/accused on 20.4.2019 and now suddenly at the time of recording of his statement under Section 313 Cr.P.C. he has come forward with the plea that he had made the payment on 20.4.2019 after visiting the shop of respondent/complainant and expressed his intention to lead evidence in defence. He has submitted that for the aforesaid circumstances the plea of the petitioner/accused that he had made

the payment to respondent is false and he is not entitled to lead any evidence and, therefore, and particularly keeping in view the undertaking given by the petitioner/accused on 14.2.2019, learned Magistrate has rightly rejected his prayer to lead evidence.

4. The arguments raised on behalf of respondent/complainant are to be considered by the trial Court at the time of arguments. Undoubtedly, petitioner has accepted his liability to pay the cheque amount to the respondent before framing of notice of acquisition and has also not asked any question with respect to payment thereof, as claimed by him to have been made on 20.4.2019, during cross-examination of the complainant, however, keeping in view the fact that in proceedings under Section 138 of the NI Act, in case of conviction, personal liberty of the accused may be curtailed, I am of the considered view that Court should not deny the right of the accused to lead evidence, especially on the very first day.

5. Section 143 of the NI Act empowers the Magistrate to try the case under Section 138 of NI Act summarily, applying, and as far as may be, the provisions of Sections 262 and 265 Cr.P.C., both inclusive. Further provisions of Section 143 of NI Act also provide that for the nature of case and keeping in view possibility of sentence of imprisonment which may have to be passed or for any other reason also if it is considered undesirable to try the case summarily, the Magistrate after recording an order to that effect, can decide the case by conducting a trial other than summary trial. The Magistrate may try such case as summary case or a warrant case as the case may be, warranted by given facts and circumstances. In Section 143A conducting of different kinds of trial under NI Act has been recognized, empowering the Court to order the drawer of the cheque to pay interim compensation to the complainant in summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint and also any other case upon framing of charges. Charge is not framed in summary

case trial or summons case trial but in warrants case trial. In summons case trial, under Section 251 of NI Act, notice of accusation has to be framed, whereas in summary case, but abstract of accusation is to be informed to the accused, after recording an order to that effect. In present case, notice of accusation has been framed and put to the accused, which indicates that Magistrate is trying the case as a summons case trial.

6. In summons case trial, under Chapter XX of Cr.P.C., when accused is not convicted under Sections 252 or 253 Cr.P.C., procedure has been prescribed in Section 254, wherein it is provided that in such eventuality, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of prosecution and also to hear the accused and take all such evidence as he produces in his defence and in sub Section (2) of Section 254 Cr.P.C., it is provided that Magistrate may, after he thinks fit, on application of the prosecution or the accused, issue a summon to any witness, directing him to attend or to produce any document or thing. Whereas Sub Section 3 of Section 254 Cr.P.C. provides that before summoning any witness on such application, the Magistrate may require deposit of reasonable expenses of the witnesses incurred in attending for the purpose of trial. Therefore, rejection of prayer of accused to produce evidence, despite the fact that under Section 313 Cr.P.C, a question was put to him giving option to lead defence evidence, in response where to accused has expressed his intention to lead evidence, is not sustainable, being contrary to the provisions of law applicable to the case.

7. Considering the entire facts and circumstances, for the ends of justice, petitioner/accused is granted one opportunity to lead the evidence and parties are directed to appear before the trial Court on 20th January, 2020, on which date the trial Court shall fix a date for recording the evidence of petitioner/accused, giving him at least 30 days, on which date petitioner/accused shall produce his evidence on self responsibility and in

case any witness is to be summoned with help of the Court, petitioner/accused shall take steps for issuance of dasti summons by ensuring the service of witness to be examined for the date fixed for recording the evidence of petitioner/accused and failure to serve the witness to be examined, evidence of the petitioner/accused shall be closed and thereafter complaint filed by the respondent/complainant shall be proceeded further in accordance with law and shall be decided as expeditiously as possible, preferably on or before 30th April, 2020. It is also clarified that on appearance of witnesses, in case adjournment is sought on behalf of respondent/complainant, the rider of one opportunity shall not be applicable and thereafter proceedings will continue and completed in accordance with law. In case petitioner/accused himself prays for time lesser than 30 days to examine his defence witnesses, the Court shall permit him to do so even prior to 30 days. For genuine, plausible and unavoidable reasons, beyond the control of the petitioner/accused, the Magistrate may give more than one opportunity to lead evidence in defence.

8. Learned counsel for the respondent has also prayed for passing of an order against the petitioner/accused in consequence to his undertaking given to the Court on 14.2.2019, for making the payment of cheque amount within 4-5 installments. No opinion is being expressed on this plea and all other pleas raised on behalf of respondent/complainant, as the same are to be considered by the trial court in accordance with law applicable to the case, at appropriate stage.

The petition stands allowed and disposed of in the aforesaid terms, so also the pending application(s) if any.

31th December, 2019
(KRS)

(Vivek Singh Thakur),
Judge.