ABC 2019 (I) 324 GUJ
ACQUITTAL & BAIL CASES

HIGH COURT OF GUJARAT

(J.B.Pardiwala, J.)

Special Criminal Application No. 3367of 2018

Decided on 29 January, 2019

RAKESHBHAIMAGANBHAIBAROT - Appellant(s).

Versus

STATE OF GUJARAT - Respondent(s).

Law Covered:- *(A) Code of Criminal Procedure, 1973 — Section 4 — Scope — all offences other than the IPC shall be investigated, enquired into, tried & otherwise be dealt with according to the provisions of the CrPC — but subject to any enactment for the time being in force regulating, inter alia, the manner of trying or dealing with such offences.*

(B) Code of Criminal Procedure, 1973 — Section 4 — vis-à-vis — Negotiable Instruments Act, 1881 — Section 138 — The application of the procedure prescribed by the CrPC is subject to the procedure prescribed by the NI Act, and the provisions of the NI Act would have an overriding effect. (Para 9)

(C) Interpretation of Statute — Code of Criminal Procedure, 1973 — Section 5 — Intention of Legislature — Held, the section saves the existing special and local laws — prescribing special procedure, on the coming into force of the Code. (Para 9)

(D) Interpretation of Statute — Code of Criminal Procedure, 1973 — Section 200 — Vis-à-vis — Negotiable Instruments Act, 1881 — Section 145 — Term "Notwithstanding anything contained in the Code...." — Interpretation of — Held, Section 145 of the Act is an exception to the normal rule as envisaged in Sec. 200, CrPC — that the complainant would be required to give his evidence by appearing in person & by making a statement on oath before the Court. (Para 10)

(E) Negotiable Instruments Act, 1881 — Chapter XVII — "penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts." — offences under Chapter XVII are triable by a JMFC or by a Metropolitan Magistrate — & the procedure applicable to summary trials under the Code, contained in Sections 262 to 265, both inclusive, as far as may be, apply to such trials. (Para 10)

(F) Intention of Legislation — Negotiable Instruments Act, 1881 —Chapter XVII — Scope & Ambit — was introduced in the Act with a view to provide greater efficacy to the transactions undertaken on the basis of cheques — and to instill confidence in the minds of the people in the commercial world with regard to the workability of the system of payments made by cheques. (Para 11)

(G) Intention of Legislature — Negotiable Instruments Act, 1881 —Chapter XVII — Scope — the procedure prescribed has been made less cumbersome and more user friendly — Time is of essence in any commercial transaction — & it appears that being sensitive to this aspect, the Parliament legislated the said chapter in the Act — Negotiable Instruments Act, 1881 — Sections 138 139, 143, 144 & 146. (Para 11)

(H) Negotiable Instruments Act, 1881 — Section 138 — Scope — The section creates the offence where the drawer fails to make payment of the amount of money covered by the cheque to the payee or the holder in due course— within 15 days of the receipt of the notice of dishonour, and the dishonour is for specified reasons. (Para 11)

(I) Negotiable Instruments Act, 1881 — Section 139 — Scope — the section raises a rebuttable presumption that the holder of a cheque received the cheque for the discharge, in whole or in part, of any, debt or other liability. (Para 11)

(J) Negotiable Instruments Act, 1881 — Section 143 — Scope — The dictate of the law is that the summary trial should normally be continued from day to day until its conclusion — & the endeavour of the court should be to conclude the trial within six months from the date of filing of the complaint. (Para 12)

(K) Negotiable Instruments Act, 1881 — Section 145 — Enacting of — Intention of Legislation —to expedite the disposal of complaints made u/s 138 of the Act— & to save the time of the court and the witness(s) — & to save costs and inconvenience being caused to one or the other party. (Para 13)

(L) Negotiable Instruments Act, 1881 — Section 145 — Evidence by way of affidavit — omission of any reference to the evidence of the accused — Intention of Legislature — Held, the Legislature in its wisdom has left it open to the accused to exercise the option of examining himself as a witness for an offence punishable u/s 138, Negotiable Instruments Act, 1881, in deliberately omitting any reference to the evidence of the accused by way of affidavit — For it would run against a first principle in criminal law

namely, that an accused shall not be called as a witness except on his own request in writing. (Para 17)

(M) Negotiable Instruments Act, 1881 — Section 145 — Evidence by way of affidavit — Held, if the evidence of the witnesses could be by way of affidavit in terms of Sec. 145 NI Act, the evidence of the accused could also be way of affidavit. (Para 17)

Facts:- *The complainant filed a private complaint in the Court of the CJM against the applicant herein for the offence punishable u/s 138, NI Act. During the pendency of the application the applicant-accused requested before the trial Court to accept the evidence of the accused on oath but the trial Court refused to accept it. Aggrieved accused preferred the present application before the honourable Gujarat High Court. The only question for consideration before the hon'ble Court was, whether the accused of a complaint u/s 138 of the Negotiable Instruments Act is entitled to lead his evidence on affidavit. It was held by the honourable Court that if the evidence of the witnesses could be by way of affidavit in terms of Sec. 145 NI Act, the evidence of the accused could also be way of affidavit.*

Law of relief:- In terms of Sec. 145 NI Act, the accused is entitled to lead his evidence on affidavit.

Held:- Section 4 of the Code, *inter alia*, states that all offences under any other law (i.e. laws other than the IPC) shall be investigated, enquired into, tried and otherwise be dealt with according to the provisions of the Code, but subject to any enactment for the time being in force regulating, *inter alia*, the manner of trying or dealing with such offences. The Act is a law which regulates the manner in which the trial of the offence under Section 138 shall be conducted. The application of the procedure prescribed by the Code is, therefore, subject to the procedure prescribed by the Act, and the provisions of the Act would have an overriding effect. This intention of the Legislature is also demonstrated by Section 5 of the Code, which saves the existing special and local laws, *inter alia*, prescribing special procedure, on the coming into force of the Code. (Para-9)

Section 145 of the Act begins with words "Notwithstanding anything contained in the Code....". Therefore, Section 145 of the Act is an exception to the normal rule as envisaged in Section 200 of the Code, that the complainant would be required to give his evidence by appearing in person and by making a statement on oath before the Court. Section 145 is located in Chapter XVII of the Act which deals with "penalties in case of dishonour of certain cheques for insufficiency

of funds in the accounts." By virtue of Section 143 of the Act, notwithstanding anything contained in the Code, offences under the said Chapter XVII of the Act are triable by a Judicial Magistrate of the First Class, or by a Metropolitan Magistrate and the procedure applicable to summary trials under the Code, contained in Sections 262 to 265, both inclusive, as far as may be, apply to such trials. (Para-10)

It is now well-recognized that Chapter XVII was introduced in the Act with a view to provide greater efficacy to the transactions undertaken on the basis of cheques and to instill confidence in the minds of the people in the commercial world with regard to the workability of the system of payments made by cheques. The transactions, wherein consideration passes through cheques cannot be lightly taken any longer by the drawers of the cheques, as the breach of such transactions as a result of the dishonour of the cheques issued by one of the parties, would result in penal consequences in certain situations. A reading of Chapter XVII of the Act also shows that the procedure prescribed has been made less cumbersome and more user friendly. Time is of essence in any commercial transaction, and it appears that being sensitive to this aspect, the Parliament legislated the said chapter in the Act. This is also clear from the reading of Sections 138, 139, 143, 144 and 146 of the Act. Section 138 creates the offence where the drawer fails to make payment of the amount of money covered by the cheque to the payee or the holder in due course, as the case may be, within 15 days of the receipt of the notice of dishonour, and the dishonour is for specified reasons. Section 139 raises a rebuttable presumption that the holder of a cheque received the cheque for the discharge, in whole or in part, of any, debt or other liability, Section 143 makes applicable the procedure of summary trials as prescribed in the Code. (Para-11)

Therefore, the dictate of the law is that the summary trial should normally be continued from day to day until its conclusion and the endeavour of the court should be to conclude the trial within six months from the date of filing of the complaint. (Para-12)

Section 145 of the Act has also to be read and understood keeping in mind the orientation of the law contained in Chapter XVII of the Act. The complainant is normally the driving force behind the complaint, and the most important witness in any, such complaint. In spite of this being the position, Section 45(1) of the Act carves out an exception to the normal rule, and provides that the complainant may

give his evidence on affidavit which may, subject to just exceptions, be read in evidence in any enquiry, trial and other proceedings under the Code. This is an enabling provision, introduced presumably for the reason that a complaint of this nature is based on documentary evidence viz. the cheque, the dishonour memo, the notice and its acknowledgment. This exception is also structured to cut out the time that may be spent in recording the statement of the complainant if he is obliged to appear in person and make his statement before the court. The purpose, behind enacting Section 145 of the Act appears to be to expedite the disposal of complaints made under Section 138 of the Act, and to save the time of the court and the witness(s), and to save costs and inconvenience being caused to one or the other party. (Para-13)

Therefore, it is clear that having regard to the Scheme of the Cr.P.C., the Legislature in its wisdom has left it open to the accused to exercise the option of examining himself as a witness for an offence punishable under Section 138 of the NI Act, in deliberately omitting any reference to the evidence of the accused by way of affidavit. For it would run against a first principle in criminal law namely, that an accused shall not be called as a witness except on his own request in writing. The evidence on behalf of the accused would include that of the accused, subject to Section 315 Cr.P.C. If the evidence of the witnesses could be by way of affidavit in terms of Section 145 NI Act, the evidence of the accused could also be way of affidavit. (Para-17)

Counsel:- ***For Appellant(s):*** *Mr Mp Thakur, Adv.*
For Respondent(s): *Mr. Kumarh Trivedi, Ms Moxathakkar, Advs.*

Cases Referred:-

1. *M/s.Mandvi Cooperative Bank Limited v. Nimesh B.Thakore, (2010)3 SCC 83, (Para-3)*
2. *Indian Bank Association and others v. Union of India and others, (2014) 5 SCC 590, (Para-5)*
3. *KSL Industries v. Khandelwal, 2006(1) Mh.LJ (Cri) 86, (Para-18)*
4. *KSL and Industries Ltd. Vs. Mannalal Khandelwal, 2005 Cri.L.J. 1201 (Bom), (Para-18)*
5. *Indo International Ltd. Vs. State of Maharashtra, 2006 Cri.L.J. 208, (Para-18)*
6. *Harischandra Biyani vs. Stock Holding Corpn. of India Ltd.,(2006)4 MahLJ 381, (Para-18)*
7. *Magma Leasing Limited v. State of West Bengal, (2007)3 CHN 574, (Para-18)*
8. *Rajesh Agarwal vs. State, ILR (2010)6 Del 610, (Para-18)*

JUDGMENT

a ***J. B. PARDIWALA, J.: -*** 1. By this application under Article 227 of the Constitution of India, the applicant - original accused calls in question the legality and validity of the order passed by the 3rd Additional Civil Judge, Himmatnagar, dated 27th March 2018 below application Exh.128 in the Criminal Case No.3145 of 2014.

b 2. It appears from the materials on record that the respondent no.2 herein - original complainant filed a private complaint in the Court of the Chief Judicial Magistrate, Himmatnagar, against the applicant herein for the offence punishable under Section 138 of the Negotiable Instruments Act. The complaint has been registered as the
c Criminal Case No.3145 of 2014 and the same is pending as on date in the Court of the Chief Judicial Magistrate, Himmatnagar. The applicant - original accused preferred an application Exh.128, which reads as under :

d *"1) The present matter is at the stage of evidence of the accused.*

2) The court has refused to accept the evidence of the accused on oath, therefore, it is necessary to file the present application.

3) This application is preferred relying upon the judgment dated 21.04.2013 delivered in the case of Banking Association V/s. Union of India, whereby all the courts of the country are directed to
e *follow the instructions contained therein.*

"The Apex Court appreciating the efforts of Bombay and Kolkata High Courts for speedy disposal of 138 cases, finally laid down the following procedure to be observed by all criminal courts in the country for speedy and expeditious disposal of 138 cases. The
f *essence of these procedures can be summarized as follows:*

"The Apex Court of the country has given directions to make speedy disposal of the complaints of Section-138 of the Negotiable Instrument Act. The said directions are mentioned at last in the judgment annexed herewith. I request the Ld. Court to go through
g *the same. It is mentioned in the Para-5 that "Ld. Courts should accept the evidences of the witness on oath instead of recording it orally. Ld. Court can direct the witnesses of the complainant and accused to remain present for cross - examination as and when the Ld. Court calls for.""*

h *4) The Hon'ble Supreme Court has passed this judgment after considering the decision in the case of Mandavi Cooperative*

Bank Ltd. v/s. Nimesh Thakore and, therefore, the directions given in this judgment should be followed by all the courts of the country.

5) Before disposing of the present application, the court should take into consideration that, "not only the courts should follow the laws, but they should also follow the directions given by the Hon'ble Apex Court."

In the aforesaid circumstances, by submitting this application we, the accused, as well as our witnesses, propose to give our evidence on affidavit by way of examination-in-chief. Therefore, an appropriate order be passed for giving evidence of the accused as well as of the witnesses of the accused on affidavit by way of examination-in-chief."

3. The court below adjudicated the application Exh.128 and rejected the same by placing strong reliance on the decision of the Supreme Court in the case of ***M/s.Mandvi Cooperative Bank Limited v. Nimesh B.Thakore,*** reported in ***(2010)3 SCC 83***.

4. Being dissatisfied with the order passed by the trial court below application Exh.128, the applicant - original accused is here before this Court with this application.

5. Mr.Thakur, the learned counsel appearing for the applicant, vehemently submitted that the trial court committed a serious error in passing the impugned order. According to the learned counsel, the decision of the Supreme Court in the case of M/s.Mandvi Cooperative Bank Limited (supra) is directly in conflict with the later decision of the Supreme Court in the case of ***Indian Bank Association and others v. Union of India and others***, reported in ***(2014)5 SCC 590***. He would submit that in view of the recent pronouncement of the Supreme Court in the case of Indian Bank Association (supra), the accused has a right to lead his evidence on affidavit. In such circumstances, the learned counsel prays that there being merit in this application, the same may be allowed and the impugned order be quashed. The learned counsel prays that the application Exh.128 filed before the trial court may be allowed.

6. On the other hand, this application has been vehemently opposed by Mr.Kumar Trivedi, the learned counsel appearing for the respondent no.2 - original complainant. Mr.Trivedi would submit that no error, not to speak of any error of law, could be said to have been committed by the trial court in rejecting the application Exh.128.

Mr.Trivedi would submit that the decision of the Supreme Court in the case of M/s.Mandvi Cooperative Bank Limited (supra) is very clear. The Supreme Court has laid down the law that Section 145(1) of the Act confers right on the complainant to give evidence on affidavit, but there is no similar right conferred on the accused. In such circumstances referred to above, Mr.Trivedi prays that there being no merit in this application, the same may be rejected.

7. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is, whether the accused of a complaint under Section 138 of the Negotiable Instruments Act is entitled to lead his evidence on affidavit.

8. I am not impressed by the submission of Mr. Trivedi, the learned counsel appearing for the original complainant, that Section 145 of the Act excludes the accused and only entitles the complainant and his witnesses to give their evidence on affidavit.

9. Section 4 of the Code, *inter alia*, states that all offences under any other law (i.e. laws other than the IPC) shall be investigated, enquired into, tried and otherwise be dealt with according to the provisions of the Code, but subject to any enactment for the time being in force regulating, *inter alia*, the manner of trying or dealing with such offences. The Act is a law which regulates the manner in which the trial of the offence under Section 138 shall be conducted. The application of the procedure prescribed by the Code is, therefore, subject to the procedure prescribed by the Act, and the provisions of the Act would have an overriding effect. This intention of the Legislature is also demonstrated by Section 5 of the Code, which saves the existing special and local laws, *inter alia*, prescribing special procedure, on the coming into force of the Code.

10. Section 145 of the Act begins with words "Notwithstanding anything contained in the Code....". Therefore, Section 145 of the Act is an exception to the normal rule as envisaged in Section 200 of the Code, that the complainant would be required to give his evidence by appearing in person and by making a statement on oath before the Court. Section 145 is located in Chapter XVII of the Act which deals with "penalties in case of dishonour of certain cheques for insufficiency of funds in the accounts." By virtue of Section 143 of the Act, notwithstanding anything contained in the Code, offences under the said Chapter XVII of the Act are triable by a Judicial Magistrate of

the First Class, or by a Metropolitan Magistrate and the procedure applicable to summary trials under the Code, contained in Sections 262 to 265, both inclusive, as far as may be, apply to such trials.

11. It is now well-recognized that Chapter XVII was introduced in the Act with a view to provide greater efficacy to the transactions undertaken on the basis of cheques and to instill confidence in the minds of the people in the commercial world with regard to the workability of the system of payments made by cheques. The transactions, wherein consideration passes through cheques cannot be lightly taken any longer by the drawers of the cheques, as the breach of such transactions as a result of the dishonour of the cheques issued by one of the parties, would result in penal consequences in certain situations. A reading of Chapter XVII of the Act also shows that the procedure prescribed has been made less cumbersome and more user friendly. Time is of essence in any commercial transaction, and it appears that being sensitive to this aspect, the Parliament legislated the said chapter in the Act. This is also clear from the reading of Sections 138, 139, 143, 144 and 146 of the Act. Section 138 creates the offence where the drawer fails to make payment of the amount of money covered by the cheque to the payee or the holder in due course, as the case may be, within 15 days of the receipt of the notice of dishonour, and the dishonour is for specified reasons. Section 139 raises a rebuttable presumption that the holder of a cheque received the cheque for the discharge, in whole or in part, of any, debt or other liability, Section 143 makes applicable the procedure of summary trials as prescribed in the Code. Section 143 (2) & (3) are very relevant and read as follows:

> "143. Power of Court to try cases summarily-
>
> *(1) .....*
>
> *(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.*"

12. Therefore, the dictate of the law is that the summary trial should normally be continued from day to day until its conclusion

and the endeavour of the court should be to conclude the trial within six months from the date of filing of the complaint.

13. Section 145 of the Act has also to be read and understood keeping in mind the orientation of the law contained in Chapter XVII of the Act. The complainant is normally the driving force behind the complaint, and the most important witness in any, such complaint. In spite of this being the position, Section 45(1) of the Act carves out an exception to the normal rule, and provides that the complainant may give his evidence on affidavit which may, subject to just exceptions, be read in evidence in any enquiry, trial and other proceedings under the Code. This is an enabling provision, introduced presumably for the reason that a complaint of this nature is based on documentary evidence viz. the cheque, the dishonour memo, the notice and its acknowledgment. This exception is also structured to cut out the time that may be spent in recording the statement of the complainant if he is obliged to appear in person and make his statement before the court. The purpose, behind enacting Section 145 of the Act appears to be to expedite the disposal of complaints made under Section 138 of the Act, and to save the time of the court and the witness(s), and to save costs and inconvenience being caused to one or the other party.

14. Sub-section (1) of Section 145 of the Act contemplates an option which the complainant has of tendering his evidence by way of an affidavit. The omission of reference to the accused is for an obvious reason as shall be presently pointed out.

15. Sub-section (2) would indicate that there could be affidavit evidence of both witnesses for the complainant and also witnesses for the accused. For otherwise, there would be no need to refer to an "application of the prosecution" to "examine any person giving evidence on affidavit ...".

16. This is in consonance with the procedure prescribed for a Summary trial (which is the same as is specified for the trial of a Summons case, under the Cr.P.C. See: Section 262 Cr.P.C.). The procedure prescribed there under does not contemplate the accused standing as a witness. Though he may examine witnesses on his behalf.

17. Therefore, it is clear that having regard to the Scheme of the Cr.P.C., the Legislature in its wisdom has left it open to the accused to exercise the option of examining himself as a witness for an offence punishable under Section 138 of the NI Act, in deliberately

omitting any reference to the evidence of the accused by way of affidavit. For it would run against a first principle in criminal law namely, that an accused shall not be called as a witness except on his own request in writing. The evidence on behalf of the accused would include that of the accused, subject to Section 315 Cr.P.C. If the evidence of the witnesses could be by way of affidavit in terms of Section 145 NI Act, the evidence of the accused could also be way of affidavit.

18. I take notice of the fact that the question of law which I have been called upon to answer was the very same question which was looked into by a learned Single Judge of the Karnataka High Court in the case of Afzal Pasha v. Mohamed Ameerjan (Criminal Petition No.1684 of 2016, decided on 9th August 2016). I may quote the relevant observations made by the learned Single Judge of the Karnataka High Court thus :

> "2. *The petition is filed by the accused, against whom a complaint is filed before the court below alleging an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (Hereinafter referred to as the NI Act , for brevity). The petitioner is contesting the case. At the stage when the case was set down for the evidence of the accused, he is said to have filed an application under Section 145(2) of the NI Act, seeking permission of the court to file an affidavit in lieu of oral evidence. The trial court having rejected the application on the ground that the same is not permissible, the present petition is filed.*
>
> *3. The learned counsel for the petitioner places reliance on the language of Section 145 of the NI Act to contend that the trial court has not taken into consideration the intent of the provision, which has been interpreted by the Apex Court in the case of* ***Indian Bank Association v. Union of India, (2014)5 SCC 590****.*
>
> *4. On the other hand, the learned counsel for the respondent would submit that the trial court has rightly rejected the application in the light of the judgment of the Supreme Court in the case of* ***Mandvi Cooperative Bank limited v. Nimesh B. Thakore, (2010)3 SCC 83****. In the said case, the apex court had not agreed with the High Court which had held that Section 145(1) did confer a right on the complainant to give evidence on affidavit. But there was no similar right conferred on the accused. That the legislature apparently had posited, that the immunity conferred on the accused from being compelled to be a witness against himself under Article*

20(3) of the Constitution of India, did not warrant the incorporation of the word accused with the word complainant in sub-section 145 of the NI Act. The High Court had gone on to hold that, merely because, Section 145 did not expressly permit the accused to give evidence on affidavit, it did not mean that the Magistrate could not allow the accused to do so by applying the same analogy, unless there was just and reasonable ground to refuse such permission. It was held that there was no express bar on the accused to give evidence on affidavit, either in the NI Act or the Code of Criminal Procedure, 1973 (Hereinafter referred to as the CrPC , for brevity). The accused was permitted to tender evidence by way of affidavit.

Taking exception to the above reasoning of the High Court, the Apex Court held as follows:

"46. On this issue, we are afraid that the High Court overreached itself and took a course that amounts to taking-over the legislative functions. On a bare reading of section 143 (sic Section 145) it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word accused with the word complainant in section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission.

47. There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think it proper to incorporate a word accused with the word complainant in section 145(1)..... , it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence.

48. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily

documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant s evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant s evidence and to extend the same option to the accused as well."

5. In the light of the above, the point for consideration before this court is whether it would be impermissible for the accused to tender evidence by way of affidavit having regard to the tenor of Section 145 of the NI Act.

It is seen that Sections 143 to 147 of the NI Act were inserted by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. One of the objects to bring about the new legislation mentioned in the Objects and Reasons of the Act of 2002 was to provide for summary trial of the cases under the Act, with a view to speed up the disposal of cases. Section 143 provides for the cases under the NI Act being tried summarily. Hence Sections 262 to 265 of the CrPC would be applicable. Section 145 of the NI Act, provides for a departure in the manner of tendering evidence at the trial, and permits evidence by way of affidavit.

The said Section is extracted hereunder for ready reference:

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

Sub-section (1) contemplates an option which the complainant has of tendering his evidence by way of an affidavit. The omission of reference to the accused is for an obvious reason as shall be presently pointed out.

Sub-section (2) would indicate that there could be affidavit evidence of both witnesses for the complainant and also witnesses for the accused. For otherwise, there would be no need to refer to an application of the prosecution to examine any person giving evidence on affidavit..."

This is in consonance with the procedure prescribed for a Summary trial (which is the same as is specified for the trial of a Summons case, under the CrPC. See: Section 262 CrPC). The procedure prescribed there under

does not contemplate the accused standing as a witness. Though he may examine witnesses on his behalf.

Chapter XXIV of the CrPC contains the General Provisions as to Enquiries and Trials. Section 315 thereof reads as follows:-

"315.Accused person to be competent witness.-

(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defense and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

Provided that-

(a) he shall not be called as a witness except on his own request in writing;

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:

Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject or any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry."

Therefore, it is clear that having regard to the Scheme of the Cr.P.C., the legislature in its wisdom has left it open to the accused to exercise the option of examining himself as a witness for an offence punishable under Section 138 of the NI Act, in deliberately omitting any reference to the evidence of the accused by way of affidavit. For it would run against a first principle in criminal law namely, that an accused shall not be called as a witness except on his own request in writing. The evidence on behalf of the accused would include that of the accused, subject to Section 315 Cr.P.C. If the evidence of the witnesses could be by way of affidavit in terms of Section 145 NI Act, the evidence of the accused could also be way of affidavit.

A closer scrutiny of Section 145 would indicate that the same is intended to ensure that the trial is concluded as expeditiously as possible.

The said provision does not in any manner affect the right of the accused to cross examine the complainant and his witnesses. The said provision enables even the defence evidence to be led by affidavits. Thus, the said provision is purely procedural in nature. In this behalf, the Apex court has in Shreenath v. Rajesh, AIR 1998 SC 1827, has held that in interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding the justice, is to be adopted. The procedural law is always subservient to and is in aid to justice. (See: ***KSL Industries v. Khandelwal, 2006(1) Mh.LJ (Cri) 86****).*

The Apex Court in Mandvi Cooperative Bank Limited, (supra), has not examined the matter in the above perspective.

On the other hand, the view taken and the directions issued in a more recent decision of the Apex Court, in the case of Indian Bank Association (supra) does contemplate evidence by affidavit by the accused. The relevant portion is extracted hereunder:

"DIRECTIONS:

21. 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:-

(1) Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize 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.

(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 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 un-served, immediate follow up action be taken.

(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.

(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 Cr.P.C. 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.

(5) The Court concerned must ensure that examination-in-chief, cross-examination and reexamination 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 court. The witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the court.

22. We, therefore, direct all the criminal courts in the country dealing with Section 138 cases to follow the above- mentioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act. The writ petition is, accordingly, disposed of, as above."

Incidentally, in the above judgment, the Supreme Court has referred to with approval the views expressed in the following decisions, in stating thus:-

"22. We notice, considering all those aspects, few High Courts of the country have laid down certain procedures for speedy disposal of cases under Section 138 of the Negotiable Instruments Act. Reference, in this connection, may be made to the judgments of the Bombay High Court in ***KSL and Industries Ltd. Vs. Mannalal Khandelwal, 2005 Cri.L.J. 1201 (Bom)****,* ***Indo International Ltd. Vs. State of Maharashtra, 2006 Cri.L.J. 208****, and* ***Harischandra Biyani vs. Stock Holding Corpn. of India Ltd.,(2006)4 MahLJ 381****, the judgment of the Calcutta High Court in* ***Magma Leasing Limited v. State of West Bengal, (2007)3 CHN 574****, and the judgment of the Delhi High Court in* ***Rajesh Agarwal vs. State, ILR (2010)6 Del 610.****"*

In KSL and Industries Ltd., vs. Mannalal Khandelwal (supra), a Division Bench of the Bombay High Court in order to accomplish the underlying object of the Act, has issued certain directions, one of which reads as follows:-

"(b) The Court concerned must ensure that examination-in-chief, cross-examination and reexamination of the complainant must be concluded within three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of

examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court." *(emphasis supplied)*

In M/s Indo-International Ltd., vs. State of Maharashtra, (supra), the decision in KSL and Industries Ltd., vs. Mannalal Khandelwal (supra) has been relied upon and followed.

In Harischandra Biyani vs. Stock Holding Corporation of India Ltd. (supra), the Bombay High Court has again applied and followed the decision in KSL and Industries Ltd., vs. Mannalal Khandelwal (supra).

In Magma Leasing Ltd. vs. State of West Bengal (supra), there is a reference to KSL and Industries Ltd., vs. Mannalal Khandelwal (supra), and the same has been referred to and relied upon in holding that Section 145 enables the accused or defence to lay evidence by affidavit.

In Rajesh Agarwal vs. State and another, (supra), again the decision in KSL and Industries Ltd., vs. Mannalal Khandelwal (supra), has been applied and the consistent view taken in these decisions has been approved and applied by the Supreme Court in direction no.5, referred to hereinabove.

Hence, in keeping with judicial propriety, the later judgment of the Apex court can safely be applied when the divergent view is that of a co-ordinate bench of the same court.

Accordingly, this petition is allowed. The trial court is directed to receive the affidavit evidence of the petitioner on his request, in accordance with Section 315 Cr.P.C. and proceed with the pending case in accordance with law."

19. I am in complete agreement with the reasonings assigned by the learned Single Judge of the Karnataka High Court as regards the issue in question and I propose to follow the same.

20. In view of the above, this application stands allowed. The impugned order passed by the 3rd Additional Civil Judge, Himmatnagar, below application Exh.128 in the Criminal Case No.3145 of 2014 is quashed and set-aside. The application Exh.128 filed by the applicant - accused is hereby allowed. The trial court shall permit the applicant - accused to tender his evidence including the evidence of his witnesses, if any, by way of affidavit. However, it need not be clarified that the accused and his witnesses must be

available for cross-examination as and when they are directed by the trial court to appear for the same.

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Result:- Application allowed.

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March 2019