

Criminal Case No. 8381 of 2022**Order Below Exhibit - 33**

1. The accused has filed this application to grant permission to tender her evidence on affidavit.
2. Read the application. Heard Ld. Advocate for the accused and Ld. Advocate for the complainant.
3. This matter is on stage of evidence of accused in the Further Statement u/s 313 of Cr.P.C. the accused has submitted that he wants to produce evidence in his defence. Today, Ld. Advocate for the accused has filed this application and prayed to grant the permission to file an examination in chief on affidavit.
4. The Ld. Advocate for defence has placed reliance on the judgment of the Hon'ble High Court of Gujarat in the case of Rakesh Maganbhai Barot V/s State of Gujarat and argued that in the said judgment dated 29/01/2019 the Hon'ble High Court has discussed both the judgment of Hon'ble Supreme Court i.e. **M/s Mandvi Co-Operative Bank Limited v. Nimesh B. Thakore, reported in (2010) 3 SCC 83** and **Indian Bank Association and others v. Union of India and other reported in (2014) 5 SCC 590**. Further, he has argued that as per the amended Section 145 inserted in the Negotiable Instruments Act, 1881 and as per the Section 145 (2) the evidence of the accused may be given by him on affidavit. He has argued that Section 145(2) read as "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" So, the Section itself says that on the application Court has to take evidence on affidavit and it is also include the evidence of the accused. He has further argued that the direction given in the case of Indian Bank Association and others v. Union of India and others in Para 21 the Hon'ble Supreme Court has directed all the Courts to accept affidavits of the witness, instead of examining them in Court so, when accused wants to give his evidence on affidavit Court has to permit him to do so.

So, conclusively he has argued that as per the Section 145(2) of the Negotiable Instruments Act and directions given in Indian Bank Association and others v. Union of India and others (Supra) which is more recent than Mandvi Co-Operative Bank Limited v. Nimesh B. Thakore (Supra) and therefore, the direction given under case of Indian Bank (supra) has to followed by the trial Court hence, has prayed to grant the permission to tender evidence of accused on affidavit. The Ld. Advocate for the accused has also argued that as per the Section 145(2) of the N.I. Act on the application the Court shall grant permission to tender evidence on affidavit for accused. Further, he has argued that as per the bare reading of the said section Court has discretionary power when evidence is not tender through affidavit and ask for the affidavit but, whenever application is filed by parties Court has to grant permission to tender their evidence on affidavit.

5. The complainant has opposed this application. The Ld. Advocate for the complainant has argued that, as per the Section 145 only complainant has right to give his evidence on affidavit. The Section does not permit accused to tender his evidence on affidavit moreover, the Ld. Advocate for the complainant has placed reliance on the observation made in the case of Kadiveti Ramanaiah V/s Ponguri Prabhakara Reddy by the Hon'ble High Court of Andhra Pradesh and argued that as per the said judgment accused is not competent to tender his evidence through affidavit. Ld. Advocate has prayed to reject the application of accused with cost.
6. After hearing both the sides, and having gone through the material on record the only question is to decide, whether the accused u/s 138 of N.I. Act is entitled to tender his own evidence on affidavit ? First, it is necessary to discuss section 145 of N.I. Act which reads as under,

"S.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"

So, as per the bare reading of the said Section 145 (2) the Section starts with "the Court may, if it thinks fit, and shall, on the application of prosecution or the accused ... " means if Court thinks it is proper and fit case to permit accused to give evidence on affidavit Court may permit but, it shall be on the application of the accused only. Now, it also important to discuss Section 315 of the Cr.P.C., which reads as follows;

"S.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 defence 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 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."

So, as per the bare reading of the Section 315 accused can examining himself as a witness but, provided he has to request in writing for the same. Now, as per the Section 145 (1) of N.I. Act starts with notwithstanding anything contained in the Cr.P.C, means as N.I. Act is a special statute the general rule of Cr.P.C. would not apply in this context and complainant and accused can tender his evidence as per the Section 145 of N.I. Act. Now, as per the judgment of Hon'ble Supreme Court in the case of Indian Bank Association (Supra) para 21 which reads as follows

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:-

Directions:-

1.....

2....

3....

4....

5.The Court concerned must ensure that examination in chief, cross-examination and re-examination of the complaint 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. Witnesses to the complainant and accused must be available for cross-examination as and when there is direction to this effect by the Court.

So, as per the direction, the Hon'ble Supreme Court has directed that, "The Court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complainant and accused must be available for cross-examination as and when there is direction to this effect by the Court." So, it is clear that witnesses included both the witnesses of complainant and accused. Now, with this direction if we read section 145(2) of N.I.Act i.e. "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". Which means the witnesses to the accused can tender his evidence on affidavit. So, in the case of N.I.Act if, accused wants to give his own evidence in his defence accused himself is witness for his defence hence, as per my view accused is witness for himself and as per the direction of the Hon'ble Supreme Court in the case of Indian

Bank Association (Supra) and Section 145(2) accused can tender his evidence on affidavit but, only condition is that the Court is in the opinion of accepting affidavit and it is only after the application of the accused. So, I am not inclined with the argument advanced by the Ld. Advocate for the accused that, the Court has to accept evidence of defence on affidavit, but, as discussed above, it is not necessary in all the case accused can tender his evidence on affidavit but, it depends on the case of defence and only after deciding the application of the accused and if court satisfied for the same, court can permit accused to tender his evidence on affidavit.

Here, in this case accused has filed an application to tender the evidence on affidavit but, for the same no any grounds are mentioned in the application which shows why he wants tender his evidence on affidavit, when he can give his deposition on oath. Moreover, the Ld. Advocate for the accused has stated in the application that as per the Section 145(2) parties can tender their evidence on affidavit and they have relied on the judgment of the Hon'ble Supreme Court in Indian Bank Association (Supra) and the judgment of the Hon'ble High Court of Gujarat in the case of Rakesh Barot (Supra). But, as discussed above and after considering the catena of judgments this Court does not find any reason for which discretion will use and grant permission to tender evidence on affidavit. The accused can give his evidence on oath. So, as per the discussed above I pass the following order;

-:: ORDER ::-

1. The application below Ex. 33 is hereby rejected.

The Order is pronounced in an open Court today on this 15th
Day of February, 2024.

Place : Jamnagar

Date : 15-02-2024.

(Vishal Jagdishkumar. Gadhavi)
VIIth Addl. Chief Judicial Magistrate,
Jamnagar
Code No. GJ01164