

**73C of 2012 ( Rg. No. 492 of 2014)**

Present : Sri C. Pramanik, J. M. 2<sup>nd</sup> Court, Bishnupur, ( J.O. Code WB01207)

**Order dated 11-11-2024**

Today is fixed for passing order on hearing of petition filed on behalf of the complainant on 13.05.2024.

Both parties their hazira through their Ld. Advocate.

I have heard submission of Ld. Advocate for both sides.

The complainant files the present petition dtd. 12-05-2024 praying to reject the affidavit in chief filed on behalf of the accused person on 21.02.2024.

Ld. Advocate for the complainant submitted that accused person cannot be permitted to adduce his evidence by way of affidavit in chief in view of provision of sec.145 (1) of the N.I. Act. Ld. Advocate referred the recent decision of the Hon'ble Andr Pradesh High Court reported in 2024(2) Indian Civil Cases 78 (A.P.). Ld. Advocate submits by referring the paragraphs No. 10 of the said decision of Hon'ble Court, that a bare reading of section 145(1), makes it clear that provision entails a complainant to give his evidence on an affidavit. No mention is made with respect to the Accused. The Hon'ble Apex Court in ***Mandvi Cooperative Bank Ltd. Vs. Nimesh B.Thakore reported in (2010) 3SCC 83***, made a holistic analysis on the special provision u/s 145 of N.I.Act. Ld. Advocate further submits that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. Ld. Advocate thus, prays for rejection of the affidavit in lieu of examination in chief.

Ld. Advocate for the accused person by referring provision 145(2) of N.I.Act submits that the court may allow the accused to give his evidence on affidavit. Ld. Advocate for the accused submits that as per provision of section 145(2) of the N.I. Act court may allow the accused to give the evidence on affidavit by applying the same analogy that complainant u/s 145(1) may give his evidence by affidavit unless there was a just and reasonable ground to refuse such permission. Ld. Advocate, thus, prays for rejection of the present petition.

Thus, the question remains whether an accused in proceeding u/s 138 of the N.I.Act is entitled to submit an Affidavit in lieu of examination in chief or not.

In this regard, it is profitable to refer the provision of section 145 of the N.I.Act:-

“..... **Section 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 all just exception, be read in evidence in any enquiry, trial or other proceedings under the said Code.

(2) The Court may, if it think 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.”

Hon'ble Supreme Court in ***Mandvi Cooperative Bank Ltd. Vs. Nimesh B.Thakore reported in (2010) 3SCC 83*** makes it clear that section 145 of the N.I.Act

Continued to next page.....

**Continued order dated 11-11-2024**

with its non obstinate clause, makes it possible for the evidence of the complainant to be taken in the absence of the accused. But the affidavit of the complainant (or any of his witness) may be read in evidence subject to all just exception. On bare reading section 145 of the Act it is clear that legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the languages of the provision is plain and unambiguous. The provision of section 145(2) of the N.I.Act entails the prosecution or the accused to summon or to examine who has given evidence on affidavit as to the facts contained therein. The provision of section 145(2) of the N.I.Act has not given permission to the accused to file affidavit of evidence in lieu of examination in chief.

Hon'ble Bombay High Court in ***SBI Global Factors Ltd. Vs. The State of Maharastra and others reported in AIR Online 2021 BOM 772***, in paragraph 8 has pleased to observe that in view of the Mandvi Cooperative Bank Ltd. Case, it is clear that accused in a proceeding under section 138 of the N.I.Act cannot be permitted to file an affidavit of evidence in lieu of examination in chief.

The legislature in their wisdom did not think it proper to incorporate a word 'accused' with the word 'complainant' in section 145 (1) of the N.I.Act. Hon'ble Court has pleased to observe the case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stands or fall on its own evidence. In case the defence does not 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 discharge or any debt or liability. This is the basic different between the nature of 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 extent the same option to the accused as well.

Thus, Hon'ble Supreme Court in Mandvi Cooperative Bank Ltd Case makes its explicit that accused cannot given permission to give his evidence on affidavit in lieu of examination in chief and the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so.

Being fortified of the above observation of the Hon'ble court. as discussed herein above, in the present case also, the accused cannot be permitted to give his evidence by way of affidavit in lieu of his examination in chief.

Accordingly the petition filed by the complainant on 13.05.2024 is considered and allowed on contest. There will be no order as to cost.

Fix **10-01-2025** for evidence of the accused.  
D/C by me

J.M, 2<sup>nd</sup> Court,  
Bishnupur, Bankura.

