

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 2551 OF 2006

Yazdi Piroj Dandiwala

.. Petitioner

v/s.

M/s. Malav Agencies & Anr.

..Respondent

Mr. Sanjog Parab for the petitioner

Mr. S.P. Rajepandhare for the respondent no.1

Mrs. R.V. Newton, APP for respondent State

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED: 22nd SEPTEMBER, 2015.

P.C.

1. Heard. By this petition, the petitioner herein has challenged the impugned order dated 14.09.2006 whereby the learned Magistrate declined to exclude paragraph 14 of the affidavit in evidence, filed by the complainant-respondent.

2. The respondent-complainant had filed affidavit-in-evidence under Section 145(1) of the N.I. Act. Section 145 of the N.I. Act, which was introduced by the 2002 Amendment, reads as under.

“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 inquiry, 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.”

3. As it has been held by the Apex Court in ***Mandvi Co-operative Bank Ltd. Vs. Nimesh B. Thakore (2010)3 SCC 83***, which read thus :-

“23. Section 145 with its non obstante clause, as noted above, 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 witnesses) may be read in evidence “subject to all just exceptions”. In other words, anything inadmissible in evidence i.e. irrelevant facts or hearsay matters would not be taken in as evidence, even though stated on affidavit.”

4. In the instant case, the complaint was filed for the offences under Section 138 of the N.I. Act and Sections 403, 406, 420 and 120-B of the IPC. By order dated 05.10.2000, the learned Magistrate had issued process only under Section 138 r/w 141 of the N.I. Act. Accordingly, the plea of the accused was also recorded for the offence under Sections 138 and 141 of the NI Act. However, in paragraph 14 of the affidavit-in-evidence, the complainant had alleged that the petitioner herein had also committed offence punishable under Sections 403, 406, 420 and 120-B of the IPC. These facts were not relevant since the learned Magistrate had not taken cognizance of the said offences under IPC and the said order was not challenged before the appellate forum. The learned Magistrate was, therefore, not justified in rejecting the request of the petitioner to strike of the evidence at paragraph 14 and or not to read in evidence the fact stated in paragraph 14 of the affidavit-in-evidence.

5. In view of the above, the petition is allowed. The impugned order dated 14.09.2006 is quashed and set aside. Consequently,

the learned Magistrate is directed to exclude and not to read in evidence in paragraph 14 of the affidavit in evidence of PW-1. Both the parties are directed to appear before the learned trial Court on 19th October, 2015.

6. Considering that the case is of the year 1997, the learned Magistrate is directed to dispose of the same as expeditiously as possible and preferably within a period of six months from the receipt of the copy of this order.

(ANUJA PRABHUDESSAI, J.)

Certificate

Certified to be true and correct copy of the original signed
judgment / order.