

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1394 OF 2020

Kailash Sakharam Korade,
Age 45 yrs., Occ. Business,
R/o Bhorkheda, Tq. Jafrabad,
Dist. Jalna.

... Petitioner

... **Versus** ...

- 1 The State of Maharashtra
- 2 Shaikh Afsar Shaikh Gulam Sarwar,
Age 45 yrs., Occ. Business,
R/o Sipora Bazar, Tq. Bhokardan,
Dist. Jalna.

... Respondents

...

Mr. S.S. Bora, Advocate for the petitioner
Mrs. V.N. Patil-Jadhav, APP for the respondent No.1

...

CORAM : SMT. VIBHA KANKANWADI, J.
DATE : 11th DECEMBER, 2020.

JUDGMENT :

1 Heard learned Advocate Mr. S.S. Bora appearing for the petitioner. Taking into consideration the documents on record and the submissions made on behalf of the petitioner, it is not even necessary to issue

notice to the respondent No.2. Notice of respondent No.1-State is waived by learned APP.

2 It has been vehemently submitted on behalf of the petitioner that the petitioner is facing prosecution at the hands of present respondent No.2-original complainant under Section 138 of the Negotiable Instruments Act. Summary Trial Case No.489/2011 has been filed, which is in respect of dishonour of cheque for Rs.2,00,000/-. After the issuance of process the petitioner had appeared before the learned Magistrate. His plea has been recorded, trial proceeded, complainant submitted his affidavit-in-chief under Section 145 of the Negotiable Instruments Act on 11.09.2017. However, surprisingly when accused was about to start the cross-examination, the complainant submitted supplementary/additional affidavit-in-chief on 22.09.2017. The petitioner-accused was alien to the law of procedure, and therefore, filed pursis below Exh.61 raising objection to the said procedure. In fact, there was no explanation for submitting any supplementary affidavit-in-chief. In fact, there is no such provision under the Indian Evidence Act or in Code of Criminal Procedure. However, the learned Judicial Magistrate First Class, Bhokardan by his order dated 22.09.2017 allowed the said application to file additional affidavit. Being aggrieved by the same the present petitioner had approached the learned Sessions Judge by filing

Criminal Revision No.102/2017. The said revision came to be allowed on 02.01.2018 and the order passed by the learned Magistrate below Exh.62 was quashed and set aside. Thereafter, the learned Magistrate again reconsidered the application below Exh.62 and by order dated 15.11.2018 rejected the application below Exh.62. Thereafter, after a period of almost 8 months the learned Judicial Magistrate First Class, Bhokardan (Court No.2) accepted the further examination-in-chief of the complainant on 23.07.2019 and gave exhibits to all the documents. This procedure adopted by the learned Magistrate was not legal. Suo-moto permission could not have been given by the learned Magistrate to the complainant to adduce his further examination-in-chief by entering into the witness box. Being aggrieved by the said action of the learned Magistrate, once again the petitioner approached the learned Sessions Judge by filing Criminal Revision Application No.79/2019. The learned Additional Sessions Judge, Jalna rejected the revision application, firstly, on the count that the revision was not maintainable as it was challenging the interlocutory order, and secondly it has been observed that the exhibiting of the document is a procedural aspect and no illegality has been committed by the learned Magistrate. The present petition has been filed to challenge dismissal of the said revision.

perusal of Section 145 of the Negotiable Instruments Act would show that a complainant has been given a right to file affidavit-in-chief. He relied on the decision in **Radhey Shyam Garg vs. Naresh Kumar Gupta, (2009) 13 SCC 201**, wherein interpretation of Sub-section (2) of Section 145 of the Negotiable Instruments Act has been made to mean for the purpose of cross-examination. He, therefore, submitted that the learned Magistrate ought not to have recalled the complainant and would not have recorded his further examination-in-chief.

4 At the outset, it is to be noted that the learned Additional Sessions Judge has rightly held that the action taken by the learned Magistrate does not amount to recall of the complainant. It is only his further examination-in-chief, which earlier he wanted to give by way of additional affidavit-in-chief, but was not permitted to do so. But then certainly when his evidence was not complete, that means, his chief, cross and re was not complete, his entering in the witness box just for the sake of completing the act of exhibiting documents would be an interlocutory act, and therefore, the Criminal Revision Petition No.79/2019 filed by the present petitioner was barred under Section 397(2) of the Code of Criminal Procedure. The action taken by the Magistrate has not culminated the proceedings, and therefore, it is interlocutory. Even if for the sake of

argument we take that it would substantially affect the rights of the accused, and therefore, he could have filed the said petition under Section 397 of Cr.P.C. Yet, it is to be noted that as regards the provisions of Section 145 of the Negotiable Instruments Act is concerned, Sub-section (1) thereof gives discretion to the complainant to give evidence on affidavit. Sub-section (2) of the said section provides, "*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.*" The observations in **Radhey Shyam's** case (supra) are :

"15 If affidavit in terms of the provisions of Section 145 of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. He may be cross-examined and upon completion of his evidence, he may be re-examined. Thus, the words 'examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the court in terms of sub-section (2) of Section 145 of the Act', in our opinion, would mean for the purpose of cross-examination. The provision seeks to attend a salutary purpose.

The statements of objects and reasons for enacting the said provision, inter alia read, inter alia, as under :

"Keeping in view of the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out, inter alia, the following amendments in the

Negotiable Instruments Act, 1881, namely:--

(i) to (iii) ...

(iv) to prescribe procedure for dispensing with preliminary evidence of the complainant;

(v) ...

(vi) to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;”

5 We are required to consider the object behind making such provision under the Negotiable Instruments Act and it has been so stated in **Radhey Shyam**’s case itself that the object of the enactment of the said provision is for the purpose of expedition of the trial. Now, it is to be noted that the basic facts were stated by the complainant in his affidavit-in-chief. However, it appears that some fine statements were supposed to be made, especially, for getting the documents, which were produced by him, exhibited. We have to consider the fact that the proceedings under Section 138 of the Negotiable Instruments Act is quasi civil in nature. In a sense that in order to uphold the transactions those take place by virtue of cheques or negotiable instruments and to make it punishable the act was enacted, and therefore, certain provisions or rules, which are governing the evidence to be tendered on affidavit, in view of the amendments made to the Code of Civil Procedure would then be made applicable to the affidavits, those are filed

under Section 145 of the Negotiable Instruments Act. A reference can be made to the ratio laid down by the three Judge Bench decision in **Ameer Trading Corporation Ltd. vs. Shapoorji Data Processing Ltd.**, AIR 2004 SC 355, in which Hon'ble Apex Court had agreed that the view taken by this Court, as it was the Civil Appeal, arising out of the order passed by this Court, wherein, it was held by this Court that -

“In case of appealable cases under the Code of Civil Procedure, though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness-box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under Rule 5. In non-appealable cases, however, the affidavit in relation to examination-in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to Rule 13 of Order XVIII.”

6 Further, in **Mandavi Co-operative Bank Ltd. vs. Nimesh B. Thakore**, AIR 2010 SC 1402 it has been observed by the Hon'ble Supreme Court that -

“22. We are completely unable to appreciate the submission. The plea for a literal interpretation of section 145(2) is based on the unfounded assumption that the language of the section clearly says

that the person giving his evidence on affidavit, on being summoned at the instance of the accused must start his deposition in court with examination-in-chief. We find nothing in section 145(2) to suggest that. We may also make it clear that section 137 of the Evidence Act does not define "examine" to mean and include the three kinds of examination of a witness; it simply defines "examination-in-chief", "cross-examination" and "re-examination". What section 145(2) of the Act says is simply this. The court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused the court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of section 145(1) and having regard to the object and purpose of the entire scheme of section 143 to 146. The scheme of section 143 to 146 does not in any way affect the judge's powers under section 165 of the Evidence Act. As a matter of fact, section 145(2) expressly provides that the court may, if it thinks fit, summon and examine any person giving evidence on affidavit. But how would the person giving evidence on affidavit be examined, on being summoned to appear before the court on the application made by the prosecution or the accused? The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit. In so far as the prosecution is concerned the occasion to summon any of its witnesses who has given his evidence on affidavit may arise in two ways. The

prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for "re-examination". The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that event the witness may be summoned to appear before the court to cure the defect and to have the document(s) properly proved by following the correct legal mode. This appears to us as the simple answer to the above question and the correct legal position. Any other meaning given to sub-section (2) of section 145, as suggested by Mr. Ranjit Kumar would make the provision of section 145(1) nugatory and would completely defeat the very scheme of trial as designed under section 143 to 147."

7 Therefore, the Magistrate had the power to record the further affidavit-in-chief. No fault can be found with the impugned orders. No case is made out to exercise the Constitutional powers of this Court under Article 227 of the Constitution of India as well as inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973. Hence, the writ petition is rejected at the threshold.

(Smt. Vibha Kankanwadi, J.)