

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

**CRIMINAL APPLICATION NO. 992 OF 2019**

Rajshekhar Palaniswamy ...Applicant  
Versus  
M/s. Chopra Finance Corporation & Anr. ...Respondents

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Mr. Yatin Malvankar, Advocate for the Applicant.

Mr. Prashant Darandale for Respondent No.1.

Mr. A. R. Patil, A.P.P. for the Respondent – State.

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**CORAM : PRAKASH D. NAIK, J.**  
**DATE : 11<sup>th</sup> AUGUST, 2022.**

**PER COURT:**

1. The applicant is facing prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for short “NI Act”) vide SCC No.31379 of 2010 pending before the Court of 12<sup>th</sup> Joint Civil Judge Senior Division and Additional Chief Judicial Magistrate, Pune.

2. The complaint was filed by Respondent No.1 for offence under Section 138 of the NI Act. The learned Magistrate issued process against the accused.

3. The applicant/accused filed Affidavit in Chief on 20.02.2019. The Respondent No.1/Complainant filed an

application for discarding the Affidavit in lieu of Chief Examination filed by the accused. It was contended that, instead of recording the defence evidence in open Court, the accused filed evidence Affidavit. As per Chapter XVII of NI Act, it is not permissible for the accused to adduce his evidence by affidavit in lieu of chief examination. It is impermissible to consider the said affidavit as his defence evidence. The Affidavit in lieu of Chief examination filed by the Accused may be discarded and the Accused be directed to adduce his defence evidence by entering into witness box.

4. The accused filed say to the said application filed by complainant and contended that Accused can file is evidence through Affidavit. The complainant is trying to prolong the cross examination.

5. The learned Magistrate by order dated 22.04.2019 allowed the application of complainant and directed that the accused is at liberty to examine himself on oath before the Court vide Section 145 of the NI Act with reference to Section 254, 263 of Cr.P.C. The learned Magistrate has analysed the law laid down in the case of *M/s. Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakore*<sup>1</sup>, *Indian Bank Association and Others Vs. Union of India and others*<sup>2</sup>.

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<sup>1</sup> (2010) 3 Supreme Court Cases 83.

<sup>2</sup> (2014) 5 SCC 590.

It was observed that, Section 145 of the NI Act specifically lays down that the evidence of complainant may be given on Affidavit. The Court may on an application filed by the prosecution or the accused summon and examine any person giving evidence on affidavit. In view of observations laid down in *M/s. Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakore* (supra) and *Indian Bank Association and Others Vs. Union of India and others* (Supra), the complainant or his witnesses can depose on an affidavit before the Court. However, the said liberty is not available to the accused. Hence, the accused would be at liberty to examine himself on oath before the Court vide Section 145 of NI Act.

6. The applicant is aggrieved by the aforesaid Order and hence preferred this application challenging the said order before this Court.

7. Learned Advocate for the applicant submitted that, Section 145 of the NI Act, does not exclude the accused from filing affidavit of evidence. The law laid down in the subsequent decision of the apex Court in the case of *Indian Bank Association and Others Vs. Union of India and others* (supra) indicate that, the accused can file the affidavit of evidence. The Gujarat High Court in the case of *Rakeshbhai Maganbhai Bharot Vs. State of Gujarat* has considered

the decision of the apex Court and held that, the accused can file an affidavit of evidence in accordance with Section 145 of the NI Act.

8. Learned Advocate for the Respondent No.1 submitted that, Section 145 of the NI Act, contemplates the filing of affidavit of evidence by complainant. It does not provide such liberty to the accused. The accused intends to examine himself as a defence witness is required to step into witness box and can examine himself by recording oral evidence. The apex Court in the case of *M/s. Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakore* (supra), has categorically stated that, the affidavit of evidence can be filed by the complainant and not by the accused in accordance with Section 145 of the NI Act. The decision in the case of *Indian Bank Association and Others Vs. Union of India and others* (Supra), in no manner directs that, even the accused has right to file an affidavit of evidence as per Section 145 of the NI Act. Reliance is placed on the decision in the case of *SBI Global Factors Limited Vs. The state of Maharashtra and Ors.* dated 03.03.2021 delivered in Criminal Writ Petition No.1916 of 2019 wherein this Court has referred to various decisions and held that the accused cannot be permitted to file an affidavit in lieu of examination in chief in a case under

Section 138 of NI Act.

9. From the aforesaid analysis it is apparent that, the issue involved in this proceedings is whether the accused can file affidavit of evidence by way of his defence.

10. Section 145 of N.I. Act reads as follows:

*“ 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.”*

11. The apex Court in the case of *M/s. Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakore* (supra) has held as under :

*“ 44. Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on affidavit, the High Court has held that subject to the provisions of sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit. But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more importantly providing a*

*similar right to the accused would be in furtherance of the legislative intent to make the trial process swifter.*

45. *In paragraph 29 of the judgment, the High Court observed as follows:*

*"It is true that section 145(1) confers a right on the complainant to give evidence on affidavit. It does not speak of similar right being conferred on the accused. The Legislature in their wisdom may not have thought it proper to incorporate a word 'accused' with the word 'complainant' in sub-section (1) of section 145 in view of the immunity conferred on the accused from being compelled to be a witness against himself under Article 20(3) of the Constitution of India...."*

*Then in paragraph 31 of the judgment it observed:*

*".... Merely because, section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code..... I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in sections 315 and 316 of the Code."*

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 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."*

12. From the aforesaid view it is clear that, the accused in a proceedings under Section 138 of the NI Act cannot be permitted to file an affidavit of evidence.

13. Learned counsel for the applicant had urged that the directions issued by the apex Court in ***Indian Bank Association and Others Vs. Union of India and others*** (supra) more particularly direction No.5 indicate that, the accused can file affidavit of evidence. It is difficult to accept this submission. The said decision in no manner directs or permits the accused to file affidavit of

evidence in accordance with Section 145 of the NI Act.

14. This Court in the case of *SBI Global Factors Limited Vs. The state of Maharashtra and Ors* (supra) has referred to the decisions in the case of *M/s. Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakore* (supra), *Indian Bank Association and Others Vs. Union of India and others* (supra) and other decisions took a view that the accused cannot be permitted to file an affidavit of evidence in lieu of examination-in-chief.

15. In the light of the aforesaid decisions, the accused cannot be permitted to file an affidavit of evidence. There is no infirmity in the impugned order passed by the learned Magistrate. Learned Advocate for the applicants has relied upon the decision of the Gujarat High Court in the case *Rakeshbhai Maganbhai Bharot Vs. State of Gujarat* (supra) and contended that, the said Court has taken a view that the accused can be permitted to file affidavit of evidence in lieu of examination in chief. It is not possible to accept the said submission in view of the law laid down by the apex Court in the case of *M/s. Mandvi Cooperative Bank Ltd. Vs. Nimesh B. Thakore* (supra) as well as decision of this Court in the case of *SBI Global Factors Limited Vs. The state of Maharashtra and Ors* (supra).

16. Hence, Application is devoid of merits and deserves to be dismissed.

**ORDER**

i) Criminal Application No.992 of 2019 is rejected and stands disposed of.

**(PRAKASH D. NAIK, J.)**