

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

915 CRIMINAL WRIT PETITION NO.254 OF 2023

**KISHANRAO MADHAVRAO DESHMUKH
VERSUS
PREM HARIBHAU DESHMUKH**

Mr.Abhinay Dilip Khot h/f. Mr. P.D. Bachate, Advocate for the petitioner.
Mr.M.P. Kale, Advocate for sole respondent.

**CORAM : KISHORE C. SANT, J.
DATED : 28.04.2023**

PC :-

01. Heard. The petition is taken up for final disposal by consent.

02. The petition is filed by original accused in a proceeding under section 138 of the Negotiable Instruments Act, lodged by the respondent. Undisputed facts in the petition are that the respondent lodged a complaint in the Court. After evidence of the complainant was over, statement under section 313 of the Cr.PC. of the petitioner-accused also came to be recorded. The accused filed his affidavit of evidence and was cross-examined by the complainant. Later on the accused filed affidavit of evidence of one more witness at Exh.68 and the same was read and recorded by the learned Trial Court. The respondent, therefore filed an application below Exh.69 objecting

filing of the affidavit of the witness for the accused. It is stated in the application that the affidavit of other witness for the accused is not tenable, as the same is filed without seeking prior permission of the Court. The application was, therefore, made praying that the affidavit of evidence of the witness for the accused be discarded. The learned JMFC, Court No.3, Gangakhed by way of his order, relying upon judgment in the case of **Rajni Dhingra Vs. Sanjee Chugh (CRM-M-41179 of 2019)** of High Court of Punjab and Haryana at Chandigarh, allowed the application as below :-

- “1) Application is allowed.
- 2) Affidavit filed by accused for examination in chief is hereby discarded.
- 3) Accused is directed to adduce oral evidence.”

03. The learned Advocate for the petitioner submits that the learned Trial Court has committed grave error by allowing application of the complainant. He submits that the case of **Rajani (Supra)** would not be applicable in the facts of this case as in that case permission was sought by the accused to tender evidence by way of affidavit for the accused and the said application was rejected. Here in this case, admittedly affidavit of the accused was read and recorded and thereafter he was even cross-examined by the complainant and in view of this fact said judgment is not applicable. He

relied upon judgment of the Gujarat High Court in the case of **Rakeshbhai Maganbhai Barot Vs. State of Gujarat (Special Criminal Application No.3367 of 2018)**, wherein the Court has considered scheme of the complaint under section 138 of the NI Act. There also the question of giving evidence on affidavit under section 145 of the NI Act was for consideration. In para 17, the Court discussed as below :-

“17. Therefore, it is clear that having regard to the Scheme of the Cr.PC., the Legislature in its wisdom has left it open to the accused to exercise the option of examining himself as a witness for an offence punishable under Section 138 of the NI Act, in deliberately omitting any reference to the evidence of the accused by way of affidavit. For it would run against a first principle in criminal law, namely, that an accused shall not be called as a witness except on his own request in writing. The evidence on behalf of the accused would include that of the accused, subject to Section 315 Cr.PC. If the evidence of the witnesses could be by way of affidavit in terms of Section 145 NI Act, the evidence of the accused could also be way of affidavit.”

. The Court further allowed the application and the order passed by the Trial Court refusing permission to the accused to file affidavit of evidence came to be set aside. The accused was permitted to tender his evidence including evidence of his witness by way of affidavit.

04. The learned Advocate for the respondent fairly submitted that from his application it is seen that he has not objected to the affidavit that was already tendered by accused himself. His objection was to filing of the

affidavit of other witness for the accused and that too without seeking prior permission of the Court. He submits that looking to his prayer he has not objected to the evidence of the accused on affidavit.

05. Looking to the application Exh.69, it is clearly seen that the complainant has no objection to the affidavit which was already tendered by the accused himself. From the order it is seen that the learned Trial Judge took it as objection to the affidavit filed by the accused in lieu of examination-in-chief and passed an order discarding said affidavit. In clause (3) of the order it is seen that again the learned JMFC has passed an order erroneously directing the accused to adduce oral evidence. Both these orders are clearly in absence of prayer to that effect. At the most he could have passed order discarding evidence affidavit of the witness i.e. Exh.68 and that too only for the reason that it was tendered without seeking prior permission. In view of above, the following order :-

ORDER

- I) The criminal writ petition is allowed.
- II) The impugned order dated 30.11.2022 passed by the learned JMFC, Court No.3, Gangakhed on application Exh.69 is quashed and set aside.

III) The learned Trial Judge to proceed with the Trial. If an application is filed by the accused seeking permission to lead evidence of his witness on affidavit, same shall be considered on its own merits.

[KISHORE C. SANT, J.]