

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.34 OF 2023
ALONG WITH
CRIMINAL WRIT PETITION NO.35 OF 2023

Rakesh Singh
S/o Late Anand Singh,
Age 31 years, Service, Indian National
Residing at Flat No. C-201,
Ajit Nagar, Near Manish Darshan
VS. .. Petitioner

1. Anil Madanmohan Gulati
63 years of age, married, Business, Indian,
R/o S-3, 1st floor, Greater Kailash-2,
New Delhi, 110048.
presently living at 307/B,
Kamat Rivera, Caranzalem, Goa

2. State of Goa,
As represented by,
The Public Prosecutor,
High Court Building,
Porvorim Goa ..Respondents

Mr. Salil Saudagar a/w Ms. Dolorosa Chiquita, Advocate for the
petitioner.
Ms. Asha Desai and Ms. N. Valvoikar, Advocate for the respondent
no.1.
Mr. Nikhil Vaze, Addl. Public Prosecutor for the respondent no. 2.

CORAM : M. S. KARNIK, J.
RESERVED ON : 3rd APRIL, 2023
PRONOUNCED ON : 09th MAY, 2023

JUDGMENT :

- 1.** Since common issues arise in both the writ petitions, by consent, both writ petitions are disposed of by this common order.
- 2.** The challenge in these petitions is to the order dated

07/10/2023 passed by the trial Court rejecting the applications under section 145(2) of the Negotiable Instruments Act, 1881 (for short “NI Act”) made by the petitioner- original accused for cross examination of the respondent no. 1-complainant.

3. Respondent no.1 filed the complaints under section 138 of the NI Act on the allegation that the cheques drawn by the petitioner in favour of the respondent no.1 were dishonoured vide bank return memo for the reason “insufficient funds”. According to the respondent no. 1, the liability of repayment of loan amount was Rs. 19 lakhs which the respondent no. 1 advanced to the petitioner. The summons was served on the petitioner on 04/01/2022. The petitioner pleaded not guilty on 05/04/2022. The applications were made by the petitioner on 21/06/2022 for permitting him to cross examine the respondent no. 1 under section 145(2) of the NI Act at Exhibit D-33. The petitioner set up a defence that there is no legally enforceable debt as claimed by the respondent no.1. Further, the petitioner denied having any loan transaction with the complainant. The petitioner stated that he did not receive any notice as contemplated under NI Act.

4. The respondent no. 1 filed reply at Exhibit D-35. The

applications under section 145(2) of the NI Act were opposed by the respondent no.1 on the ground that the petitioner has not set out any specific point of defence and the application is mere denial of the complaint. It is stated that the petitioner did not avail of his opportunity for defence at the time when legal notice was served upon the petitioner and secondly, when the Court summons of the complaint was served upon the petitioner.

5. Learned counsel for the petitioner apart from oral submissions, has filed written synopsis of arguments as under:

3. That the provisions of section 145 of the Negotiable Instruments Act, more specifically sub-section 2 of the said provision, confers an unfettered right of cross-examination on the accused. That the said provision states that the Magistrate “shall” on an application by the prosecution or accused, summon and examine any person giving evidence on affidavit. Thus, the section is mandatory in nature, when an application for cross-examination is moved.

4. It is further stated that the Amendment bringing about the addition of section 145 in the Negotiable Instruments Act, is procedural and not substantive and thus cannot take away a right of cross examination of an accused for want of disclosure of defence.

5. That further, all the judicial pronouncement, discussing and enumerating on the provisions of the Negotiable Instruments Act, have not nor have sought to in any manner curtail the right of cross examination of the accused, but have in fact emphasised the importance of the right to cross-examine, in matters of this nature.

[Reference : Mandvi Co-op Bank Ltd vs Nimesh B. Thakore; Indian Bank Association & Ors vs Union of India & Ors; Meters and Instruments Private Limited & Ors vs Kanchan Mehta]

6. It is humbly submitted on behalf of the Petitioner that an isolated statement in Meters and Instruments Private Limited and Ors vs. Kanchan Mehta is misinterpreted to mean that the Accused is required to carve out a defence in order to exercise his right of cross examination. It is submitted that, Meters and Instruments Private Limited & Ors vs Kanchan Mehta, was essentially dealing with the issue of the powers of the Magistrate to compound matters wherein the Complainant was unwilling to do so, and an isolated statement intended to assist a Magistrate in compounding matters is sought to be utilised in the context of applications under section 145(2). That the said statements at para 20 of the judgment when read in context does not in any manner call upon the accused to set out a defence for the purpose of an application under section 145(2) of the Act.

7. Assuming without admitting that the statement in Meters and Instruments Private Limited and Ors vs Kanchan Mehta, is not obiter dicta, and the said judgment calls upon the accused to disclose and defence, it is humbly stated that in the present case, the Petitioner had moved an application for cross examination, which clearly spells out two defences, one that there existed no loan transaction between the Petitioner and the Respondent and secondly that the Statutory Notice allegedly sent on the email of the Petitioner was never received by him. [Reference : Annexure C, Pg. 65]

8. It bears mentioning that the Respondent has not produced a single document in support of their claim of a loan transaction between himself and the Petitioner.

9. Therefore, even in terms of Meters and Instruments Private Limited and Ors vs Kanchan Mehta, the Petitioner has complied with the requirements, by disclosing his defence in his application under section 145(2) and the Ld. Magistrate thus acted beyond his jurisdiction by entering into the merits of the defence set out and rejecting the application.”

6. Learned counsel for respondent no. 1 has apart from oral submissions, tendered written submissions as under :

“2. The issue is squarely covered by the Judgment of the Hon’ble Supreme Court in the case of Indian Bank Association & Ors Vs. UOI. In Indian Bank Association (supra) directions were issued that, “after appearance of the accused, the Magistrate should ask

him to take notice under Section 251 of Cr.PC in order to enable the accused to enter his plea of defence and thereafter fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

In the case of Meters and Instruments Private Limited (supra), the Hon'ble Supreme Court has held that, "if the accused wants to contest the case, he must be required to disclose specific defence for such contest and for this purpose, its open to the Court to ask specific questions to the accused at that stage."

3. Therefore, considering the above settled position of law, the application filed by the accused is silent on the specific ground of defence or point on which the accused wishes to cross-examine the complainant. Therefore, the Ld. JMFC has rightly dismissed the application.

4. Further, relying upon the judgment of our Hon'ble High Court in the case of Rukmakar @ Bharat Tulshidas Naik Vs. Santosh Shaba Gaonkar & Anr. (Criminal Writ Petition No.35 of 2019) dated 05.04.2019 has made a reference to the judgments of the Hon'ble Supreme Court in the case of Indian Bank Association & Ors. Vs. Union of India & Ors., 2014 (5) SCC 590, and Meters and Instruments Private Limited & Anr. Vs. Kanchan Mehta, 2018 (1) SCC (Cri) 477.

Further relying upon the judgment of our Hon'ble High Court in the case of Rukmar the Ld. JMFC has observed that, "It would be needless to mention that the accused will have his opportunity to lead defence evidence and rebut the presumption if any, arising in the present proceedings."

5. The respondent relies upon the judgment of Paresh Bandekar Vs. Rajaram D. Satardekar And Anr. WPCR/24/2020 by order dated 24.02.2021 the Hon'ble High Court wherein the application for cross examination has been dismissed since the accused has not filed any reply to the statutory notice nor has set out any probable defense in the application."

7. Heard learned counsel. The trial Court rejected the application made by the petitioner under section 145(2) of the NI Act for the following reasons.

“9. Our Hon’ble High Court in the case of Rukmakar @ Bharat Tulshidas Naik Vs. Santosh Shaba Gaonkar & Anr. (Criminal Writ Petition No.35 of 2019) dated 05.04.2019 has made a reference to the judgments of the Hon’ble Supreme Court in the case of Indian Bank Association & Ors. Vs. Union of India & Ors., 2014 (5) SCC 590, and Meters and Instruments Private Limited & Anr. Vs. Kanchan Mehta, 2018 (1) SCC (Cri) 477.

10. In Indian Bank Association (supra) directions were issued that,”after appearance of the accused, the Magistrate should ask him to take notice under Section 251 of Cr.P.C. in order to enable the accused to enter his plea of defence and thereafter fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for reading a witness for cross-examination.

11. In the case of Meters and Instruments Private Limited (supra), the Hon’ble Supreme Court has held that,”if the accused wants to contest the case, he must be required to disclose specific defence for such contest and for this purpose, it is open to the Court to ask specific questions to the accused at that stage.”

12. Therefore, considering the above settled position of law, the application filed by the accused is silent on the specific ground of defence or point on which the accused wishes to cross-examine the complainant. Therefore, the permission sought by the accused to cross-examine the complainant, cannot be granted. It would be needless to mention that the accused will have his opportunity to lead defence evidence and rebut the presumption if any, arising in the present proceedings.”

8. The subject matter of the present petitions concerns the right of the accused to cross examine the complainant under sub-section 2 of section 145 of the NI Act. Section 145(2) being at the heart of the controversy, needs to be reproduced. The same reads thus :

“145(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.”

9. The question of considering the special provisions laid down by section 145 of the NI Act for a dishonoured cheque trial and to consider how far certain assertions made by the accused are in accordance with the provisions contained in the two sub-sections of that section came up for consideration before the Supreme Court in ¹**Mandvi Co-operative Bank Limited Vs. Nimesh B. Thakore**. The Supreme Court answered 3 issues that arose for consideration. These 3 issues are set out in paragraph 7 which reads thus:

“7. The High Court judgment has given rise to these seven appeals, in which the following three issues arise for consideration by this court:

1. The extent of the right of the accused under Section 145(2) of the Act: whether the right of the accused is limited to cross-examination of any person giving evidence on affidavit or is it open to the accused to insist that notwithstanding the evidence earlier given on affidavit, on coming to the court the complainant or his witness should first give deposition in examination-in-chief before being cross-examined by him? [Appeals arising from SLP (Crl.) No.4760 of 2006, SLP (Crl.) No.5689 of 2006, SLP (Crl.) No.1106 of 2007, SLP (Crl.) No.6442 of 2007, SLP (Crl.) No.6443 of 2007, SLP (Crl.) No.6703 of 2007.]
2. Whether the provisions of sub-sections (1) and (2) of Section 145 of the Act would apply to proceedings that were pending on 6-2-2003, the date on which those provisions were inserted in the Act? [Appeal arising from SLP (Crl.) No.4760 of 2006.]
3. Whether the right to give evidence on affidavit as provided to the complainant under Section 145(1) of the Act is also available to the accused? [Appeal arising from SLP (Crl.) No.3915 of 2006.]”

1 (2010) 3 Supreme Court Cases 83

10. Their Lordships examined the relevant legal provisions and ascertained the object and reasons for which those provisions were brought into existence by making amendment in the NI Act. Relevant in the context of the present case are paragraphs 20 to 25 which are as under :

“20. It may be noted that the provisions of Sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Code of Criminal Procedure, the main body of adjective law for criminal trials. The provisions of Section 146 similarly depart from the principles of the Evidence Act. Section 143 makes it possible for the complaints under Section 138 of the Act to be tried in the summary manner, except, of course, for the relatively small number of cases where the Magistrate feels that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily.

21. It is, however, significant that the procedure of summary trials is adopted under Section 143 subject to the qualification "as far as possible", thus, leaving sufficient flexibility so as not to affect the quick flow of the trial process. Even while following the procedure of summary trials, the non obstante clause and the expression "as far as possible" used in Section 143 coupled with the non obstante clause in Section 145 allows for the evidence of the complainant to be given on affidavit, that is, in the absence of the accused. This would have been impermissible (even in a summary trial under the Code of Criminal Procedure) in view of Sections 251 and 254 and especially Section 273 of the Code. The accused, however, is fully protected, as under sub-section (2) of Section 145 he has the absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross-examination.

22. Sub-section (2) of Section 143 mandates that the trial would proceed, as far as practicable, on a day-to-day basis and sub-section (3) of the section requires the Magistrate to make the endeavour to conclude the trial within six months from the date of filing of the complaint. Section 144 makes the process of service of summons simpler and cuts down the long time ordinarily consumed in service

of summons in a regular civil suit or a criminal trial.

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, e.g., irrelevant facts or hearsay matters would not be taken in as evidence, even though stated on affidavit.

24. Section 146, making a major departure from the principles of the Evidence Act provides that the bank's slip or memo with the official mark showing that the cheque was dishonoured would by itself give rise to the presumption of dishonour of the cheque, unless and until that fact was disproved. Section 147 makes the offences punishable under the Act, compoundable.

25. It is not difficult to see that sections 143 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of the Negotiable Instruments Act and Sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial. Here we must take notice of the fact that cases under Section 138 of the Act have been coming in such great multitude that even the introduction of such radical measures to make the trial procedure simplified and speedy has been of little help and cases of dishonoured cheques continue to pile up giving rise to an unbearable burden on the criminal court system."

11. The Supreme Court held that the evidence on affidavit given by the complainant or his witness under section 145(1) is in the nature of his examination-in-chief and on being summoned by the Court on application made by the accused under section 145(2), is not required to depose again in examination-in-chief before being cross

examined as to the facts stated in the affidavit. In paragraphs 30 and 34, the Supreme Court held thus :

“30. Nevertheless, the submissions made on behalf of the parties must be taken note of and properly dealt with. Mr. Ranjit Kumar, learned Senior Advocate, appearing for the appellant in appeal arising from SLP (Crl.) No.4760 of 2006 pointed out that sub-section (2) of section 145 uses both the words, "may" (with reference to the court) and "shall" (with reference to the prosecution or the accused). It was, therefore, beyond doubt that in the event an application is made by the accused, the court would be obliged to summon the person giving evidence on affidavit in terms of section 145(1) without having any discretion in the matter. There can be no disagreement with this part of the submission but the question is when the person who has given his evidence on affidavit appears in court, whether it is also open to the accused to insist that before cross-examining him as to the facts stated in the affidavit he must first depose in examination-in-chief and be required to verbally state what is already said in the affidavit.

31. Mr. Ranjit Kumar referred to Section 137 of the Evidence Act, that defines "examination-in-chief", "cross-examination" and "re-examination" and on that basis sought to argue that the word "examine" occurring in Section 145(2) must be construed to mean all the three kinds of examination of a witness. This, according to him, coupled with the use of the word "shall" with reference to the application made by the accused made it quite clear that a person giving his evidence on affidavit, on being summoned under Section 145(2) at the instance of the accused must begin his deposition with examination-in-chief, before he may be cross-examined by the accused. In this regard he submitted that Section 145 did not override the Evidence Act or the Negotiable Instruments Act or any other law except the Code of Criminal Procedure. He further submitted that the plain language of Section 145(2) was clear and unambiguous and was capable of only one meaning and, therefore, the provision must be understood in its literal sense and the High Court was in error in resorting to purposive interpretation of the provision. In support of the submission he relied upon decisions of this court in *Dental Council of India v. Hari Prakash* and *Nathi Devi v. Radha Devi Gupta*.

32. Mr. Siddharth Bhatnagar, learned counsel for the appellant

in the appeal arising from SLP (Crl.) No.1106 of 2007 also joined Mr. Ranjit Kumar in the submission based on literal interpretation. He also submitted that ordinarily the rule of literal construction should not be departed from, particularly when the words of the statute are clear and unambiguous. He relied upon the decision in Raghunath Rai Bareja v. Punjab National Bank.

33. 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 Sections 143 to 146. The scheme of Sections 143 to 146 does not in any way affect the judge's powers under Section 165 of the Evidence Act.

34. 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."

(emphasis supplied)

12. In the case of ²**Indian Bank Association and ors. Vs. Union of India and ors.**, the Supreme Court in paragraphs 14, 15, 16 observed thus :

"14. The scope of Section 145 came up for consideration before this Court in Mandvi Coop. Bank Ltd. v. Nimesh B. Thakore, and the same was explained in that judgment stating that the legislature provided for the complainant to give his evidence on affidavit, but did not provide the same for the accused. The Court held that even though the legislature in their wisdom did not deem it proper to incorporate a word "accused" with the word "complainant" in Section 145(1), it does not mean that the Magistrate could not allow the complainant to give his evidence on affidavit, unless there was just and reasonable ground to refuse such permission.

15. This Court while examining the scope of Section 145 in Radhey Shyam Garg v. Naresh Kumar Gupta, held as follows :- (SCC p.208, para 19)

"19. If an 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 10 of 19 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."

16. Considerable time is usually spent for recording the statement of the complainant. The question is whether the Court can dispense with the appearance of the complainant, instead, to take steps to accept the affidavit of the complainant and treat the same as examination-in-chief. Section 145(1) gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. The Court has to accept the same even if it is given by way of an affidavit. Second part of Section 145(1) provides that the complainant's statement on affidavit may, subject to all just exceptions, be read in evidence in any inquiry, trial or other

proceedings. Section 145 is a rule of procedure which lays down the manner in which the evidence of the complainant may be recorded and once the Court issues summons and the presence of the accused is secured, an option be given to the accused whether, at that stage, he would be willing to pay the amount due along with reasonable interest and if the accused is not willing to pay, Court may fix up the case at an early date and ensure day-to-day trial.”

(emphasis supplied)

13. Their Lordship then noticed that few High Courts of the country have laid down certain procedures for speedy disposal of cases under section 138 of NI Act. The Supreme Court in paragraph 23 issued directions for dealing with the cases under section 138 of NI Act. The same reads thus :

“23. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the Criminal Courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given :-

23.1. The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

23.2. The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow-up action be taken.

23.3. The court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the court

may pass appropriate orders at the earliest.

23.4. The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for re-calling a witness for cross-examination.

23.5. The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses, instead of examining them in the court. The witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the court.”

14. In ³Meters and Instruments Private Limited and anr. Vs.

Kanchan Mehta, the Supreme Court was considering the issue as regards the rejection of the prayer by the High Court for compounding offence under section 138 of NI Act on payment of cheque amount and in the alternative for exemption from personal appearance. When the matter came up for hearing before the Supreme Court, notice was issued to consider the question as to how the proceedings for an offence under section 138 of the Act can be regulated, where the accused is willing to deposit the cheque amount. The question for consideration was “Whether in such a case, the proceedings can be closed or exemption granted from personal appearance or any other order can be passed”. After considering the

3 (2018) 1 Supreme Court Cases 560

observations of the Supreme Court in **Indian Bank Association and ors.** (supra), Their Lordships in paragraph 14 observed thus :

“14. We may, however, note that this Court in Indian Bank case held that general directions ought not to be issued which may deprive the Magistrate to exercise power under Section 205 Cr.P.C. We need to clarify that the judgment of this Court is not a bar to issue directions which do not affect the exercise of power under Section 205, to require personal attendance wherever necessary. Needless to say that the judgment cannot be read as affecting the power of the High Court under Article 225 of the Constitution read with Articles 227 and 235 to issue directions to subordinate courts without affecting the prevailing statutory scheme.”

15. Upon elaborating the matter further, the Supreme Court held in paragraph 18 as under :

“18. From the above discussion following aspects emerge:

18.1. Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is “preponderance of probabilities”. The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

18.2. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

18.3 Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the

accused.

18.4 Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.PC. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.PC. With this approach, prison sentence of more than one year may not be required in all cases.

18.5. Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonour of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.PC. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

16. Then, in paragraph 20, it is held thus:

“20. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e-mail ID of the accused. If e-mail ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant. If the accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes

necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily. ”

(emphasis supplied)

17. Learned counsel for the petitioner submits that the above observations of the Supreme Court in paragraph 20 that “the accused, who wants to contest the case, must be required to disclose specific defence for such contest” are in the context of compounding or when the Court directs deposit of specified amount. It is not possible for me to accept this submission of learned counsel for the petitioner. Their Lordships in clear terms have held that the accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is further held that it is open for the Court to ask specific questions to the accused at that stage.

18. In my opinion, the Supreme Court in **Meter and Instruments Private Limited and anr.** (supra) has not at all diluted the proposition laid down in **Mandvi Cooperative Bank Limited** (supra) that “the

accused, however, is fully protected and under sub-section (2) of section 145 of the NI Act, he has absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross examination". The Supreme Court has not curtailed the right of the accused to have the complainant summoned for cross examination. The need to disclose specific defence for such contest is to discourage the accused from prolonging the trial unnecessarily. It is only to ensure that the accused does not contest the case on a sham defence or absent any defence. It is open for the Court to ask specific questions at that stage.

19. The accused has right to a fair trial. Once it is recognised that the accused has absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross-examination, the applicant cannot be deprived of such a right unless there are some extraordinary reasons for doing so. In fact, the object of section 145(2) is explained by the Supreme Court in **Meters and Instruments Private Limited and anr.** The Hon'ble Supreme Court in paragraph 9 observed that "the object of section 145(2) was simpler and swifter trial procedure. Only requirement is that the evidence must be admissible and relevant. The affidavit of the complainant

can be read as evidence”. The Supreme Court held that the accused has to disclose specific defence to contest the case. The observations of the Supreme Court in paragraph 20 of **Meters and Instruments Private Limited and anr.**, are relevant in the context of an accused who wants to contest the case. Further observation of Their Lordships that “ it is open to the Court to ask specific questions to the accused at that stage” assume significance. Though the accused has to disclose specific defence to contest the case, the purport of the observations of the Supreme Court in my humble opinion appears to be that the trial Court nonetheless has to be completely satisfied that the accused has not disclosed specific defence for such contest. If a specific defence is disclosed from the application with which the trial Court is satisfied, the trial proceeds. However, if the accused wants to contest the case by setting up some defence which the trial Court does not find satisfactory, it is open to the Court to ask specific questions to the accused at that stage and be completely satisfied that the defence is moon shine or illusory. Thus, the application for cross examination of the complainant under section 145(2) of NI Act is to be normally allowed. The trial Court has to be satisfied that the specific defence disclosed is not sham or illusory taken up only for the purpose of protracting the trial. The object is that the accused

cannot be allowed to take up some defence to contest the case when there is none.

20. In dealing with the cases of dishonour of cheques, this is a necessary safeguard to achieve object of speedy summary trial in view of amended provisions of NI Act viz. Sections 143 to 147 which must have given effect to in letter and spirit. The offence under section 138 of the NI Act is primarily a civil wrong. The burden of proof is on the accused in view of the presumption under section 139 and the standard of such proof is 'preponderance of probabilities'.

21. In view of the observations of the Supreme Court in the case of **Mandvi Cooperative Bank Limited** (supra), since the accused is fully protected under sub-section 2 of section 145 and has absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross- examination, it is not necessary for the trial Court to delve deep into the merits of the defence which is set up by the accused. The order of the trial Court on an application under section 145(2) cannot in any manner have the effect of defeating the absolute and unqualified right of the accused to cross examine the complainant.

22. For guidance, a profitable reference needs to be made to the

decision of the Supreme Court in **Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881 in Suo Motu Writ Petition (CRL.) No. 2 of 2020 dated 16/04/2021**. Having regard to the humongous pendency of complaints under section 138 of NI Act and the delay in disposal of complaints that the Supreme Court in paragraph 24 concluded as under :

“24. The upshot of the above discussion leads us to the following conclusions:

- 1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.
- 2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.
- 3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.
- 4) We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.
- 5) The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.
- 6) Judgments of this Court in Adalat Prasad (supra) and Subramaniam Sethuraman (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks

jurisdiction to try the complaint.

7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in *Meters and Instruments* (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.

8) All other points, which have been raised by the Amici Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints under Section 138 of the Act shall also be considered by the Committee.”

23. It is thus seen that in paragraph 7, Their Lordships have observed that section 258 of the Code is not applicable to the complaints under section 138 of the Act and the findings to the contrary in **Meters and Instruments Private Limited and anr.** (supra) do not lay down correct law. The decision in **Meters and Instruments Private Limited** otherwise holds the field.

24. In compliance of the order of the Hon’ble Supreme Court of India dated 16/04/2021 passed in Suo Motu Writ Petition (CRL.) No. 2 of 2020, the Hon’ble Chief Justice of the High Court of Bombay issued the following practice directions by a Circular dated 27/01/2022 reading thus :

“1. The magistrates having jurisdiction to try offences under the Negotiable Instruments Act, 1881 (in short N.I. Act), shall record cogent and sufficient reasons before converting a complaint under section 138 of the N.I. Act from summary trial to summons trial in

exercise of power under the second proviso of section 143 of N.I.Act. Due care and caution shall be exercised in this regard and the conversion of summary trial to summons trial shall not be in a mechanical manner.

2. On receipt of any complaint under section 138 of N.I. Act, wherever it is found that any accused is resident of the area beyond the territorial jurisdiction of the magistrate concerned, an inquiry shall be conducted by the magistrate to arrive at sufficient grounds to proceed against the accused as prescribed under section 202 of Cr.PC.

3. While conducting any such inquiry under section 202 of Cr.PC., the evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the magistrate may restrict the inquiry to examination of documents without insisting for examination of witnesses for satisfaction as to the sufficiency of grounds for proceeding under the said provision.

4. Trial Court shall treat service of summons in one complaint under section 138 of the N.I. Act forming part of a transaction, as deemed service in respect of all complaints filed before the same Court relating to the dishonour of cheques issued as a part of the same transaction.

5. Trial Courts have no inherent power to review or recall the issue of summons in relation to complaint filed under section 138 of N.I. Act. However, the same shall not affect the power of the Trial Court under section 322 of Cr.PC to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.

6. Section 258 of Cr.PC has no applicability to complaints under section 138 of the N.I.Act. The words "as far as may be" in section 143 are used only in respect of applicability of sections 262 to 265 of the Code and the summary procedure to be followed for trials under the said Code.

7. The appellate courts before which appeals against the judgments in complaint under section 138 of the N.I.Act are pending are directed to make an effort to settle the dispute through mediation.

These practice directions shall come into force with immediate effect.

Strict compliance of the above directions be insured."

These practice directions in terms of the order passed by the Hon'ble

Supreme Court are in force.

25. In the present case, the accused denied the case set up by the respondent no.1 in the application filed by him under section 145(2) of the NI Act below Exhibit D-33. In paragraphs 2 & 3, the petitioner stated thus:

“2. The accused submits that neither is there any loan transaction as claimed by the complainant nor there exist any legally enforceable debt as claimed by the complainant. The accused further states that no notice as contemplated under the NI Act was even received by the accused.

3. The accused states that in order to substantiate his above stated defence the accused wishes to cross-examine the complainant in relation to the contents of the affidavit filed.”

26. The trial Court, in my opinion, committed error in observing that the petitioner is silent on the specific ground of defence or point on which he wishes to cross examine the complainant. It may be that the petitioner has an opportunity to lead defence evidence and rebut the presumption if any, however, that does not mean that the valuable right of the petitioner to cross examine the complainant which he is entitled to under section 145(2) of the NI Act can be lightly brushed aside. The averments made in the application Exhibit D-33 are sufficient to bring the case of the petitioner within the ambit of the expression ‘setting up a specific defence’ in terms of what is held by the Supreme Court in **Meters and Instruments Private Limited**

and anr. (supra). At this stage, nothing more is expected of the petitioner.

27. The decision relied upon by learned counsel for the respondent in ⁴**Rukmakar @ Bharat Tulshidas Naik Vs. Santosh Shaba Gaonkar & Anr.** is distinguishable on facts as this Court was of the opinion that the application was filed in a casual manner. The petitioner therein had not set out the grounds in the application or during the course of hearing of the application to cross-examine the complainant. It is in those circumstances that the order passed by the trial Court was not interfered with. Even in the case of ⁵**Paresh Bandekar Vs. Rajaram D. Satardekar And Anr.**, this Court observed that the accused did not set out any ground or probable defence. The accused failed to appear in the writ petition filed by the complainant challenging the order passed by the trial Court allowing the application made by the accused seeking the cross-examination of the complainant. The said decision is distinguishable on facts.

28. The writ petitions succeed and are allowed in terms of prayer clause “a”.

(M. S. KARNIK, J.)

4 Criminal Writ Petition No.35 of 2019 dated 05/04/2019

5 Criminal Writ Petition No. 24 of 2020 dated 24/02/2021.