

Maria S.

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.54 OF 2023**

Mr. Kishor Biradmal Bhandari,
66 years, Major of age, Indian
National, Plot No.22, Flat No.8,
Purandar Sahaakar, Chikali Road,
Near Kasturi Market, Tharmax
Chowk, Chinchwad Pune-19, r/o.
Sector 20, Plot No.42,
Krishnanagar, Near Nutan School,
Chinchwad, Pune-411019

... Petitioner

Versus

Mr. Chandrakant Krishna Gawas,
s/o. Late Krishna Gawas, Indian
National, aged 61 years, Sole
Proprietor of M/s. Sagar Marine
Services, Having office at SF-3, 2nd
Floor, Chase International, Fr.
Jose Vaz Road, Vasco da Gama,
Goa-403802.

...Respondent

Mr Dinesh Naik, Advocate with Ms V. Shivolkar,
Advocate for the Petitioner.

Mr Sudin Usgaonkar, Senior Advocate with Mr
Shukr Usgaonkar, Advocate for the Respondent.

**CORAM:
DATED :**

**PRAKASH D. NAIK, J
23rd AUGUST 2023**

JUDGMENT:

1. The petitioner has invoked jurisdiction of this Court under Article 227 of the Constitution of India and inherent powers of this Court under Section 482 of Code of Criminal Procedure. The

petitioner takes exception to order dated 21.02.2023 passed by the learned Judicial Magistrate First Class 'A' Court, Vasco-Da-Gama below Exhibit 45 in Criminal Case No.OA/244/OA/NIA/2019/A rejecting the petitioner's application under Section 145(2) of the Negotiable Instruments Act.

2. The respondent is the complainant. The complaint is filed under Section 138 of the Negotiable Instruments Act before the Court of learned Judicial Magistrate First Class, Vasco. It is alleged that complainant needed finance to revamp his business operations. Services of the accused were engaged as a facilitator for obtaining finance from a private licenced moneylender. The accused examined the financial solvency and credentials of the complainant and promised to arrange a loan of Rs.14 crores from moneylender. The accused quoted commission of 1% of required finance. The accused collected from the complainant, all the necessary papers required for the purpose of the proposed loan and also collected in advance, his full commission amounting to Rs.14,00,000/-. The amount was transferred by R.T.G.S. Eventually, the accused expressed his inability to arrange the promised loan and agreed to refund the commission amount of Rs.14 lakhs collected by him from the complainant with interest. The accused issued a cheque of Rs.15,47,000/- which included principal amount and the agreed interest. The cheque was dishonoured for want of sufficient funds. Notice dated 03.06.2019 was issued to the accused demanding the amount. The accused vide letter dated 10.07.2019 regretted his inability to honour the cheque and issued a fresh cheque dated

25.07.2019. The said cheque was dishonoured on 30.09.2019 for want of sufficient funds. Demand notice dated 04.10.2019 was issued to the accused. The notice was returned undelivered by the post office on the ground that the accused had left the address at which it was sent. The complainant thereafter personally served the notice on accused. Complaint was filed. Process was issued against accused.

3. The petitioner preferred an application under Section 145(2) of the Negotiable Instruments Act (N.I. Act) seeking leave to permit the accused to cross-examine the complainant. The application was rejected vide order dated 21.02.2023. While rejecting the application, the learned Magistrate observed that, vague statement is made in the application that there is no legally enforceable liability. There are no particulars set out by the accused to substantiate this statement. It is simply stated that material facts have been suppressed and false and fabricated complaint is filed. Even in written arguments filed by the accused, no probable defense is set out. Vague statements have been made that complainant has concocted a false story to harass the accused and grab the money. Loose statements are made that the accused does not owe any debt/liability and accused wants to cross-examine the complainant to protect his interest and bring the truth before the Court. Based on vague statements the Court cannot arrive at the satisfaction that accused has a probable defense for which complainant must be recalled and accused must be granted leave to cross-examine complainant. The complainant cannot be recalled only to give accused the pleasure of cross-examining him. The signature on

the cheque is not disputed. Mandatory presumption has to be raised under Section 139 of the NI Act that the cheque was issued in discharge of liability. It is for the accused to rebut this presumption. The accused has to set out in the application under what circumstances a cheque admittedly signed by him landed in the hands of the complainant. No such explanation has been given in the application. The application is conspicuously silent as to on what points the accused proposes to cross-examine the complainant. The other statement made by the accused is that the requirement of serving demand notice has not been complied. In order to take defense of non-service of demand notice, the accused was first required to show his bonafides by depositing the entire cheque amount before the Court. The accused has not done so within 15 days from receipt of summons. The accused cannot contend that there was no service of notice on him. There is no reason to grant the accused leave to cross-examine the complainant. The accused can displace the presumption, if any, arising under Section 118 and 139 of the Act by leading defense evidence, if so advised. While giving the said findings the learned Magistrate has relied upon the decisions in the case of ***Meters and Instruments Private Limited & Anr. v/s. Kanchan Mehta¹, Rajesh Agarwal v/s. State & Anr²; Rukmakar alias Bharat Tulshidas Naik v/s. Santosh Shaba Gaokar³; Deepak***

¹ 2018 (1) SCC (Cri) 477;

² 2010 (4) RCR (Cri) 124;

³ Criminal Writ Petition No.35/2019 decided on 05/04/2019;

***Surlakar v/s. Dominica A. Rodrigues*⁴, and *C. C. Alavi Haji v/s. Palapetty Muhammed & Anr.*⁵**

4. The grounds on which the learned Magistrate rejected the application preferred by the accused under Section 145(2) of the Negotiable Instruments Act can be summarised as under:-

(i) Vague statement is made in the application that there is no legally enforceable liability. No particulars set out to substantiate this statement.

(ii) It is simply stated that material facts have been suppressed and false and fabricated complaint is filed.

(iii) No probable defence is set out in written argument.

(iv) Vague statements have been made that complainant has concocted a false story to harass the accused and grab the money.

(v) Loose statements are made that the accused does not owe any debt/liability and accused wants to cross-examine the complainant to protect his interest and bring the truth before the Court.

(vi) Based on vague statements, the Court cannot arrive at the satisfaction that the accused has a probable defence for which complainant must be recalled and accused must be granted leave to cross-examine the complainant.

(vii) Complainant cannot be recalled only to give the

⁴ Criminal Writ Petition No.22/2023, decided on 11.01.2023

⁵ 2007 (6) SCC 555

accused the pleasure of cross-examining him.

(viii) The signature on the cheque is not disputed. Mandatory presumption has to be raised under Section 139 of the Negotiable Instruments Act that the cheque was issued in discharge of liability. It is for the accused to rebut this presumption. It was, therefore, necessary for the accused to at least set out in the application under what circumstances a cheque admittedly signed by him landed in the hands of the complainant. No such explanation has been given in the application.

(ix) The application is conspicuously silent as to on what points the accused proposed to cross-examine the complainant.

(x) The accused stated that the requirement of serving demand notice is not complied. In order to take the defence of non-service of demand notice, the accused was first required to show his bonafides by depositing the entire cheque amount before the Court. Accused has not done so within 15 days from receipt of summons. Accused cannot, therefore, contend that there was no service of notice on him.

(xi) There is no reason to grant accused leave to cross-examine the complainant.

(xii) Accused can displace the presumption, if any, arising under Section 118 and 139 of the Act by leading defence evidence, if so advised.

5. The reasons assigned by the trial Court would mean that the accused has to satisfy the trial Court, the grounds to recall complainant and as to on what points the accused intends to cross-examine the complainant. If these reasons are accepted, probably in no case the accused would be permitted to cross-examine the complainant.

6. Section 145 of the Negotiable Instruments 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.”

7. Plain reading of the aforesaid provision, it can be seen that it does not contemplate any grounds to be urged in such application or that Court should be satisfied about grounds for recalling complainant for the purpose of cross-examination.

8. Learned advocate for the petitioner submitted that the impugned order is contrary to law. Petitioner cannot be deprived of opportunity to cross-examine the complainant. The grounds for recalling the complainant for the purpose of cross-examination in accordance with Section 145(2) of the Act were spelt out in the application preferred by the petitioner. The trial

Court ought to have allowed the petitioner to cross-examine the complainant so as to reveal the truth. The applicant is disputing the receipt of the notice allegedly sent by the complainant. The petitioner is disputing the genuineness of letter dated 10.07.2019 relied upon by the respondent-complainant wherein it was stated that the accused has apologized for not organising the finance and that he intends to refund the amount of Rs.14 lakhs paid to him towards commission and the cheque for Rs.15,47,000/- was issued towards refund of the principal amount with interest but unfortunately he could not arrange the funds to pay the cheque. The complaint is vague. It does not provide the details of transactions. The trial Court has misconstrued and misinterpreted the law relating to Section 145(2) of the NI Act. If the petitioner is not allowed to cross-examine the complainant, the complaint will go unchallenged and the contents of evidence led by the complainant will be treated as gospel truth without standing the cross-examination. The trial Court has directed the petitioner to remain present to record statement under Section 313 of CrPC. Grave and irreparable prejudice will be caused to the petitioner if he is not allowed to cross-examine the complainant.

9. Learned advocate for the petitioner has relied upon the following decisions:-

a)	<i>Rakesh Singh v/s. Anil Madanmohan Gulati & Anr⁶.</i>
b)	<i>Abdul Aziz Lokhandwala and etc.etc. V/s. Nasir Ali and Ors⁷.</i>

⁶ Criminal Writ Petitions No.34 and 35 of 2023 of High Court of Bombay at Goa delivered on 09.05.2023.

c)	<i>Mandvi Cooperative Bank Limited v/s. Nimesh B. Thakore⁸</i>
d)	<i>Noor Mohammed v/s. Khurram Pasha⁹</i>
e)	<i>M/s. Indo-international Ltd., Chennai & anr. V/s. State of Maharashtra & anr¹⁰.</i>
f)	<i>KSL and Industries Ltd., Mumbai v/s. Mannalal Khandelwal and another¹¹.</i>
g)	<i>Meters And Instruments Private Limited And Another v/s. Kanchan Mehta¹².</i>

10. Learned Senior Advocate Mr Usgaonkar appearing for the respondent-complainant submitted that there is no infirmity in the impugned order. The petitioner cannot take plea of non-service of notice without depositing the amount. The issue relating to cross-examination of the complainant cannot be taken casually. The petitioner cannot be allowed to urge casual defenses. The application under Section 145(2) of NI Act was vague. The accused has not explained under what circumstances he signed the cheque. The cross-examination of the complainant cannot be for pleasure of the accused. The signature on the cheque is not disputed. The petitioner has admitted the liability vide letter dated 10.07.2019. The petitioner has not raised a specific defense for the purpose of cross-examination of the complainant. The petitioner has not specified any cause for cross-examination of the complainant. Learned Magistrate has rightly rejected the application preferred

7 2010 Cri LJ 1981

8 (2010) 3 SCC 83

9 (2022) 9 SCC 23

10 2006 CRI.L.J. 208

11 2005 CRI. L.J. 1201

12 (2018) 1 SCC 560

by the petitioner on the grounds stipulated in the impugned order. The trial for dishonour of cheque under the NI Act is different from an ordinary criminal trial. Such trials are conducted in a summary manner. The provisions have been given an overriding effect over the Criminal Procedure Code as evident from Sections 142-145 of the NI Act which opens with the words, “Notwithstanding anything contained in the Code of Criminal Procedure, 1973.” To ensure a speedy trial, there is no right to cross-examine a complainant unless the accused makes an application stating specifically the grounds on which he wishes to cross-examine the complainant. Such cross-examination cannot be permitted for mere pleasure of the accused. The petitioner was required to disclose a specific defense to contest the complaint and substantiate the same. Having failed to do so, accused cannot be permitted to cross-examine the complainant on flimsy grounds devoid of any particulars. The accused ought to have urged his defense in the reply to the statutory notice. The petitioner did not file any reply to the notice. Moonshine grounds are raised for the first time in the application without any substance. In view of Section 139 and 118A of the Act, every cheque is presumed to have been issued in discharge of legally enforceable debt. Vague statements, devoid of any particulars or details, alleging absence of a legally enforceable debt are not sufficient to rebut this presumption. There is presumption under Section 27 of the General Clauses Act that any notice sent by registered post is deemed to have been properly effected. The statutory notice was sent to the accused on 04.10.2019 and the respondent received a postal acknowledgment “Addressee left” which means service is

effected. If the petitioner wanted to dispute the service, he was bound to deposit the cheque amount within 15 days of receipt of summons. The grounds urged by the petitioner that he had no control over his account when the cheque was issued, is an afterthought. No averment has been made in the application regarding the circumstances which led to lose control over the cheque. The right of cross-examining the witness is not a fundamental right as is contended in petition but it is statutory right which is subject to qualification and waiver. It is settled law that the application under Section 145(2) cannot be allowed mechanically at the pleasure of the accused. There has to be a ground which should be spelt out in the application of the accused. The petitioner has neither pleaded the requisite particulars for supporting the grounds on which cross-examination of respondent is sought nor produced any evidence for substantiating his plea. The issuance of cheque having been admitted, the onus shifts on accused to discharge the presumption of legally enforceable debt. There are several foreign decisions which lay down the law that right to cross-examine is not a necessary concomitant of a fair trial. The jurisdiction of this Court in exercise of powers under Article 227 of the Constitution of India as well as Section 482 of the Cr.PC should be exercised sparingly. No case is made out for interfering in the impugned order.

11. Learned counsel for the petitioner has relied upon the following decisions:-

i)	<i>Rajesh Agarwal v/s. State</i> ¹³
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13 ILR (2010) VI Del 610

ii)	<i>Kaushalya Devi Massand v/s. Roopkishore Rathore¹⁴</i>
iii)	<i>Kalamani Tex v/s. P. Balasubramanian¹⁵</i>
iv)	<i>Aysha Khan v/s. A Bhasi¹⁶</i>
v)	<i>Ajithkumar v/s. Rejinkumar¹⁷</i>
vi)	<i>Yogendra Bhagatram Sachdev v/s. State of Maharashtra¹⁸</i>
vii)	<i>Rangappa v/s. Sri Mohan¹⁹</i>
viii)	<i>C.C. Alavi Haji v/s. Palapetty Muhammed²⁰</i>
ix)	<i>M/s. Damu Datta Naik Karmali v/s. Mariano Anthony Rodrigues²¹</i>
x)	<i>Rakesh Nemkumar Porwal v/s. Narayan Dhondu Joglekar²²</i>
xi)	<i>NEPC Micon Ltd v/s. Magma Leasing Ltd²³</i>
xii)	<i>Laxmi Dyechem v/s. State of Gujarat²⁴</i>
xiii)	<i>Deepak Surlakar v/s. Dominica Rodrigues²⁵</i>
xiv)	<i>M/s. Meters And Instruments Private Limited & Anr. V/s. Kanchan Mehta²⁶</i>
xv)	<i>Paresh Bandekar v/s. Rajaram D. Satardekar²⁷</i>

14 (2011) 4 SCC 593

15 (2021) 5 SCC 283

16 Criminal Revision Petition No.2609/2009 dated 13.08.2009 by High Court of Kerala.

17 Criminal Appeal No.1028 of 2002 dated 11.06.2009, Kerala High Court.

18 All MR (Cri) 639

19 (2010) 11 SCC

20 (2007) 6 SCC 555

21 Criminal Appeal No.60 of 2006 dated 08.02.2008 of High Court of Bombay at Goa.

22 (1993) 1 Mah LJ 630

23 (1999) 4 SCC 253

24 (2012) 13 SCC 375

25 Criminal Writ Petition No.22 of 2023(Filing) dated 11.01.2023, High Court of Bombay at Goa.

26 (2018) 1 SCC 560

xvi)	<i>Hamida v/s Rashid And Others</i>²⁸.
xvii)	<i>Jaisingh And Other v/s. Municipal Corporation of Delhi And Anr</i>²⁹.
xviii)	<i>R v/s. Xhabri</i>³⁰.
xix)	<i>Emilio De La Paz v/s. Intermediate Appellate Court</i>³¹.
xx)	<i>R v/s. Cook</i>³².
xxi)	<i>People v/s. Parker</i>³³.
xxii)	<i>Cropper v/s. People</i>³⁴
xxiii)	<i>Bui v/s. DiPaolo</i>³⁵
xxiv)	<i>U.S. V/s. Ovalle-Marquez</i>³⁶.

12. In the application under Section 145(2) of N.I. Act, the petitioner had contended that the complaint is false and fabricated. It is filed by suppressing relevant and important material. Suppression of facts which goes to the root of the case which needs to be brought before the Court can be revealed only by means of cross-examination of the complainant. There is no legally enforceable debt. The requirements of service of notice on the accused is not complete. The accused has no control or management on his account to instruct operation of accounting

²⁷ Criminal Writ Petition No.24 of 2020 dated 24.02.2021, High Court of Bombay at Goa.

²⁸ (2008) 1 SCC 474

²⁹ (2010) 9 SCC 385.

³⁰ (2006) 1 All ER 776

³¹ G. R. No.71537, 17.09.1987, Supreme Court of Philippines, Third Division, Manila.

³² (1997) 1 RCS 1113, Supreme Court of Canada.

³³ Cal. Ct. App., 28.12.2017, California Court of Appeals.

³⁴ 251 P.3d 434 (Colo.2011), 25.04.2011, Supreme Court of Colorado.

³⁵ 170 F.3d 232 (1st Cir.1999), Docket No.98-1312, 15.03.1999, United States of Appeals, First Circuit.

³⁶ 36 F.3d 212 (1st Cir. 1994), 29.09.1994, United States Court of Appeals, First Circuit.

in any permissible way. The accused has good case on merits. The accused be permitted to cross-examine the complainant to enable him a fair opportunity to rebut the case of complainant and prosecution. The accused has a good case to succeed on merits and interest of justice tilts in favour of the accused. If not permitted to cross-examine the complainant, he will succeed in his clandestine approach which can be delved into only by means of cross-examination revealing the factual aspects that rebuts the complainant's case will remain unearthed. The accused will suffer irreparable prejudice if not permitted to cross-examine and there will be no prejudice to the complainant if the application preferred by the accused is allowed.

13. At the stage of making an application for recalling the complainant for cross-examination it is not expected that the accused would elaborate his entire defense and would seek permission by stating as to on what points he proposes to cross-examine the complainant. It is pertinent to note that the accused is required to rebut the presumption under Section 139 and Section 118A of the N.I. Act. Section 139 of the N.I. Act comes with a rider that the presumption provided therein can be rebutted. Fair opportunity must be given to the accused to rebut the presumption. It is difficult to digest that the accused can be permitted to do so only by examining himself in his defense or any other witness as his defense witnesses. The cross-examination of the witness forms the core of the defense of the accused. The admission sought to be brought on record in the cross-examination would have a bearing on the innocence of the accused. Merely because the cheque is signed by the accused or

even if the signature on the cheque is admitted, it does not mean that it is sufficient to determine the guilt of the accused. The learned Magistrate has therefore committed an error in rejecting the application preferred by the petitioner. The order passed by learned Magistrate is beyond the scope of Section 145(2) of the N.I. Act.

14. Section 145(1) of the N.I. Act provides that notwithstanding anything contained in the Code of Criminal Procedure, the evidence of the complainant may be given by him on affidavit and same, subject to all just exceptions can be read in evidence in any inquiry, trial or other proceedings under the said Code.

15. Section 145(2) of the N.I. Act provides that, 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 first part of the Section 145(2) provides that, the Court, of its own, may summon prosecution or accused and examine any person giving evidence on affidavit as to facts contained therein. The second part provides that, the Court shall summon a person who has given evidence by affidavit on an application is made by the opposite party.

16. The aforesaid provision does not indicate that a party making application under the said provision, is required to assign reasons for summoning the person, who has given evidence by way of affidavit. Section 145 also does not

contemplate that, complainant or any of its witnesses, whose evidence is on affidavit must be made to depose in examination in chief, all over again.

17. The Negotiable Instruments Act was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act 1988 wherein a new Chapter XVII was incorporated for the penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of credibility of the instrument. The statement of objects and reasons appended to the bill stated that the new chapter provided that, where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangements made by the drawer of the cheque with the bankers for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to twice the amount of cheque, or with both.

18. The first amendment inserted Chapter XVII in the N.I. Act comprising Section 138 to 142. Section 138 provided penalty for dishonour of cheque. Section 139 created presumption that the cheque was issued by the drawer in discharge of any debt or liability owed by him to its holder. Section 140 provided that it

would not be open to the accused in a prosecution under Section 138 to take the plea that when he issued the cheque he had no reason to believe that on presentation, the cheque may be dishonoured for the reasons stated in that Section. Section 141 dealt with offences by companies. Section 142 stipulated conditions for taking cognizance of offence punishable under Section 138 of the Act.

19. The Act was again amended by Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. The statement of objects and reasons appended to the Bill stated that, the existing provisions in the Negotiable Instruments Act 1881, namely Sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the Courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act. Large number of cases are pending under Section 138 to 142 of the Act in various Courts. Working group was constituted to review Section 138 of the Act and make recommendations as to changes needed to effectively achieve purpose of that Section. Pursuant to recommendations Section 143 to 147 were introduced by 2002 Amendment.

20. Section 143 relates to Power of Court to try cases summarily. Section 144 provides mode of service of summons. Section 145 relates to Evidence on affidavit. Section 146

provides for Banks' slip *prima facie* evidence of certain facts and Section 147 makes provision for compounding offence.

21. In the case of *KSL and Industries Ltd., Mumbai v/s. Mannalal Khandelwal and Anr* (supra), reference was made by the learned Single Judge of this Court to the division Bench and the division Bench determined whether inspite of mandate of Section 145(1) of the Act, the Court is obliged to examine the complainant even in respect of matters which have been stated on affidavit. It was held that Sub-Section (1) of Section 145 gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. If this is made on affidavit, the same has to be accepted and such affidavit is required to be kept on record by the Court. The second part of Sub-Section (1) provides that the complainant may give his evidence on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceedings. Thus, it is clear that once the evidence of the complainant is given on affidavit, it may be read in evidence in any enquiry, trial or other proceeding, and it may be subject to all just exceptions. The Court further observed that “**We are clearly of the opinion that according to the language of Section 145 of the Act, the evidence (examination-in-chief) of the complainant can be given on affidavit, and thereafter, if the accused so desires, he/she may request the Court to call the complainant for cross-examination**”.

22. In *Indo-International Ltd., Chennai v/s. State of Maharashtra and Another* (supra), this Court dealt with interpretation of Section 145 of the N.I. Act. The complainant in that case filed affidavit of examination-in-chief by taking recourse to the provisions of Section 145(1) of the Act. Application was preferred by accused requesting the learned Magistrate to exercise his powers under Sub-Section (2) of Section 145 of the Act and pass suitable orders for summoning and examining the complainant as a witness. The contention raised in the application is that once an application is made under Sub-Section (2) of Section 145 by the accused, the Court was bound to call the complainant for the purpose of recording his examination-in-chief. Another contention raised was that the examination-in-chief which is referred to in Sub-Section (2) of Section 145 is not restricted to the cross-examination of respondent No.2 who had filed an affidavit of examination-in-chief. It was held that the division Bench in the case of *KSL and Industries Ltd., Mumbai v/s. Mannalal Khandelwal and Anr* (supra) has decided the issue. Once the complainant files affidavit of evidence, he cannot be called under Section 145(2) for recording examination in chief. The Court refused to accept the submission that use of word “examination” in Sub-Section (2) of Section 145 is examination as defined in Indian Evidence Act. It was observed that when the statute has referred to word “examination”, the said word will have to be given a meaning with reference to the context in which it is used. **The word “examination” has been obviously used in Sub-Section (2) in the context of the right of cross-examination of the rival party in case**

evidence is led of a witness on affidavit. Thus, the mandatory provision of Sub-Section (2) is that the Court has to call the witness whose affidavit in examination-in-chief is filed for the cross-examination by the rival party when an application under Sub-Section (2) of Section 145 is made.

23. In *Abdul Aziz Lokhandwala and etc.etc. V/s. Nasir Ali and Ors* (supra), the constitutional validity of Section 145 was challenged before the division Bench of this Court. The contention of the petitioners/accused was that in a case under Section 138 of N.I. Act, the complainant have tendered affidavits in lieu of examination in chief which contains leading questions. As per Section 142 of the Evidence Act, leading questions must not, if objected to by the adverse party, be asked in an examination in chief or in a re-examination except with the permission of the Court. Section 145 of N.I. Act is ultra vires the provision of Article 21 of Constitution of India. Whereas, it was contention of State that separate procedure is provided for Section 138 of N.I. Act. It is a special provision. Sufficient safeguard is provided to the accused under the Act. The accused is given opportunity to cross-examine the complainant on such affidavit. As per Section 145 of the Act, 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 proceedings. The division Bench analysed Section 145 of the N.I. Act and held that, considering the scheme of the Act, it cannot be said that simply because the complainant is permitted to give evidence by way of an affidavit, the right of the accused to

a fair trial is denied in any manner. **The accused is entitled to cross-examine the said complainant in connection with the affidavit tendered by the complainant.**

24. In *Mandvi Cooperative Bank Ltd v/s. Nimesh B. Thakore* (supra), the apex Court considered the special provision of Section 145 of N.I. Act in trial relating to dishonour of cheque and to consider how far certain assertions made by the accused are in accordance with provisions contained in the two Sub-Sections of that Section. One of the questions considered by the Bombay High Court before the matters travelled to apex Court was, whether Sub-Section (2) of Section 145 of the N.I. Act confers an unfettered right on the complainant and the accused to apply to the Court seeking direction to give oral examination-in-chief of a person giving evidence on affidavit, even in respect of the facts stated therein and that if such a right is exercised, whether the Court is obliged to examine such a person inspite of mandate of Section 145(1) of the Act. This Court had held that the person (the complainant or his witness) giving evidence on affidavit may be summoned by the Court for putting questions as envisaged under Section 165 of the Evidence Act. He would also be summoned on an application made by the accused but the right of the accused is limited to cross-examination of the witness. In terms of Section 145(2) the accused can undoubtedly cross-examine a person whose evidence is given on affidavit but the accused cannot insist that the witness, on coming to Court, should first depose in examination-in-chief even in respect of matters which are stated by him on affidavit. The High Court also held that the provisions of Sub-Section (1) and (2) of

Section 145 were not substantive but only procedural in nature and those provisions would be applicable to the cases pending on the date they came into force. The apex Court considered the issue as to 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 accused to insist that complainant should first give deposition in examination-in-chief before being cross-examined by him. It would be appropriate to reproduce the following paragraphs in this decision.

*“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 allow 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 Code of Criminal Procedure) in view of Section 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**”.*

“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. 4760/2006 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 Indian 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 vs. Hari Prakash and Ors. (2001) 8 SCC 61 and Nathi Devi vs. Radha Devi, (2005) 2 SCC 271.”

“32. Mr. Siddharth Bhatnagar, learned counsel for the appellant in the appeal arising from SLP (Crl.) No. 1106/2007 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 vs. Punjab National Bank, (2007) 2 SCC 230.”

“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.”

25. Thus this decision clearly holds that the accused is fully protected as under Sub-Section (2) of Section 145 he has absolute and unqualified right to have complainant and any or all of his witnesses summoned for cross-examination. In the event an application is made by the accused, the complainant or any of his witness can only be subjected to cross-examination as to the facts stated in the affidavit.

26. The question which arises for consideration is under which provision discretion is vested with the Court to reject the application preferred by accused under Section 145(2) of the N.I. Act. Which provision of law requires accused to urge specific defense, provide details on what issues he/she proposes to cross-examine complainant, the accused to set out probable defense, accused can take defense of non-service of demand notice provided he deposits the cheque amount before the Court within 15 days from receipt of summons. The decisions referred hereinabove clearly indicate that accused has a right to cross-examine complainant under Section 145(2) of N.I. Act. The only pre-requisite contemplated under Section 145(2) of N.I. Act is to prefer an application for recalling complainant for cross-examination.

The discretion is not to refuse such application but discretion is vested with accused to prefer such application.

27. In the case of **Indian Bank Association & Ors. V/s. Union of India & Ors**³⁷, it was observed that the scope of Section 145 came up for consideration in **Mandvi Cooperative Bank Ltd.** (supra) and the same was explained in that judgment stating that legislature provided for the complainant to give his evidence on affidavit but do not provide the same for the accused. It was further observed that considerable time is spent for recording the statement of the complainant. Section 145 (1) gives complete freedom to the complainant to give his evidence by way of affidavit or by way of oral evidence. The Court noticed that High Courts of the country have laid down certain procedures for speedy disposal of cases under Section 138 of N.I. Act. Directions were issued for dealing with cases under Section 138 of N.I. Act. The trial Courts were directed that on the day when the complaint is filed under Section 138 of the Act, the Court shall scrutinize the complaint and if the complaint is accompanied by the affidavit and the documents, if any are found to be in order, take cognizance and direct issuance of summons. The Court should adopt a pragmatic and realistic approach while issuing summons and indication in summons that if the accused makes application for compounding of offences at the first hearing of case, Court would pass appropriate orders. Accused to be directed to furnish bail bond when he appears and take notice under Section 251 Cr.PC to enable him to enter his plea of

37 2014 5 SCC 590

defence and fix the case for defence evidence unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examinations. The evidence of complainant must be conducted within three months. The Court has option of accepting affidavits of the witnesses instead of examining them. Witnesses must be available for cross-examination as and when directed. These directions are for expeditious disposal of cases. The apex Court has protected the right of cross-examination under Section 145(2) of the Act, inspite directions to expedite disposal of cases. The decision nowhere directs that application under Section 145(2) requires mentioning of specific/probable defence and that should adjudicate on the nature of defence of the accused or that the application must provide all the details of proposed cross-examination.

28. In ***Meters And Instruments Pvt Ltd.***, (supra), the Apex Court was dealing with an order passed by the High Court rejecting the prayer of the appellants for compounding the offence under Section 138 of the Negotiable Instruments Act on payment of the cheque amount and in the alternative, for exemption from personal appearance. It was observed that the trials under Chapter XVII of the Act are expected normally to be summary trial. The offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on the accused in view of presumption under Section 139 but the standard of proof is 'preponderance of probabilities'. The same has to be normally tried summarily as per provisions of summary trial under Cr.P.C. 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 cost and interest is paid and if there is no reason to proceed with punitive aspect. The object of the provision being primarily compensatory, punitive element being mainly that object of inference the compensatory element compounding at the initial stage has to be encouraged. Though compounding requires consent of both parties, even in the absence of such consent the Court in the interest of justice on being satisfied that the complainant has been duly compensated can close the proceedings and discharge the accused. Since the evidence of the complainant can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him, it is unnecessary for the Magistrate to record further preliminary evidence. Such affidavit on evidence can be read as evidence at all stages of trial or other proceedings. Where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings under Section 143 of the Act read with Section 258 of Cr.P.C. 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 em-mail ID is available with the bank where the accused has an account, such bank on being required should furnish such email 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 email, 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 situation presence of accused can be required, unless the presence is exempted. The accused who wants to contest the case must be required to disclose specific defense for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial proceeds, it will be open to the Court to explore the possibility of settlement or to consider plea bargaining. Subject to this, trial can be on day-to-day basis. From the tenor of the aforesaid decisions it can be seen that the Apex Court was primarily dealing with the issue whether the case can be closed at the initial stage in the event the accused agrees to make the payment within stipulated time and the Court was not adjudicating on the issue of interpretation of Section 145(2) of N.I. Act. Keeping in mind the object of the Act the Court made certain observations with regards to the manner in which the trial can be concluded expeditiously. The interpretation of Section 145(2) of the N.I. Act was dealt with by the Apex Court in the case of ***Mandvi Cooperative Bank Ltd. v/s. Nimesh B. Thakore*** (supra). In the case of ***Meters And Instruments Private Limited And Another v/s. Kanchan Mehta*** (supra), reference was made that accused who wants to contest the case must be required to disclose specific defence for such contest and Court can question him. The decision does not indicate that when an application is made under Section 145(2) of the N.I. Act, the accused is required to disclose his specific defence. The

Supreme Court has not curtailed the right of the accused to have the complainant summoned for cross-examination. The isolated statement is being misinterpreted to mean that accused has to plead specific defense while seeking cross-examination under Section 145(2) of N.I. Act.

29. In the case of Re: ***Expeditious trial of cases under Section 138 of Negotiable Instruments Act, 1881***³⁸, the Apex Court had issued directions to the High Court and guidelines for conducting the trials for offence under Section 138 of the N.I. Act. It was also observed that Section 258 of the Code is not applicable to complaints under Section 138 of the N.I. Act and findings to the contrary in ***Meters And Instruments*** (supra) do not lay down correct law.

30. In the case of ***Noor Mohammed v/s. Khurram Pasha*** (supra), it was held that right to cross-examine the complainant or witnesses cannot be denied on account of failure on the part of the accused to deposit interim compensation as directed by the Magistrate under Section 143(A) of N.I. Act. The provision concerned nowhere contemplates that the accused who had failed to deposit interim compensation can be fastened with any other disability including denial of right to cross-examine the witnesses.

31. This Court in the case of ***Rakesh Singh v/s. Anil Madanmohan Gulati & Anr*** (supra), has dealt with the identical issue and it was observed that once it is recognized the

accused has absolute and unqualified right to have the complainant and any or all of his witnesses remain for cross-examination, the applicant cannot be deprived of such right unless there are some extraordinary reasons for doing so. The decision in ***Meters and Instruments*** case has not at all diluted the proposition laid down in ***Mandvi Cooperative Bank Ltd. v/s. Nimesh B. Thakore***, that the accused is fully protected under Sub-Section (2) of Section 145 of the N.I. Act, he has absolute and unqualified right to have the complainant and any or all the witnesses for cross-examination. The accused has right to a fair trial.

32. In the case of ***Rajesh Agarwal v/s. State*** (supra), it was observed that only after disclosing his plea of defence the accused can make an application that the case should not be tried primarily but as a summons trial. This application would disclose the defence of the accused and the reasons why he wants his case to be tried as summons trial.

33. In the case of ***Kaushalya Devi Massand v/s. Roopkishore Rathore*** (supra), it was observed that gravity of the complaint under the N.I. Act cannot be equated with the provisions of Penal Code or other criminal offences. In ***Kalamani Tex v/s. P. Balasubramanian*** (supra), it was observed that presumption as to legally enforceable debt is available against the accused even in case when he voluntarily signed and handed over a blank cheque towards the payment. The probable defence needs to be raised which must meet the standard of preponderance of probability. Once the accused

admits his signature on the cheque, the trial Court ought to have presumed that the cheque was issued as a consideration for legally enforceable debt. Once the signatures of an accused on the cheque are established the reverse onus clauses become operative. In the case of ***Rangappa v/s. Sri Mohan***(supra), it was held that presumption mandated by Section 139 includes a presumption that there exists a legally enforceable debt or liability. The fact that the accused failed to reply to the notice leads to the inference that there was merit in the complainant's application. In the case of ***C.C. Alavi Haji v/s. Palapetty Muhammed*** (supra), it was observed that Section 27 gives right to presumption that service of notice have been effected when it is sent to the Court addressed by registered post. A person who does not pay within 15 days of the receipt of the summons cannot contend that there was no proper service of notice as required under Section 138 by ignoring stipulated presumption to the contrary under Section 27 of General Clauses Act and Section 114 of the Evidence Act. These decisions refers to merits of the case. The observations in these decisions cannot be made applicable to application under Section 145(2) of N.I. Act. The Court is not adjudicating merits of case while deciding application for cross-examination of complainant.

34. In the case of ***Deepak Surlakar v/s. Dominica Rodrigues*** (supra), this Court has observed that the only statement made by the accused in the application under Section 145(2) of N.I. Act is that there exists no legal enforceable liability. There are no particulars set out by the accused to substantiate statements. Vague submissions have been made

that the complainant has narrated false facts. The signature on the cheque has not been denied by the accused. In the case of ***Apolonius Francisco Luis v/s. Sahajanand Investments Pvt. Ltd.*** passed in Criminal Writ Petition No.838/2021 dated 12.09.2022, this Court referred to several decisions and it was observed that the accused did not take steps for one year. The approach of accused was callous and casual. The application was filed without any probable defense. The intention of the accused was to delay the trial. In the case of ***Paresh Bandekar v/s. Rajaram Satardekar*** passed in Criminal Writ Petition No.24/2020 on 24.02.2021 it was observed that no reply to notice was given. He did not set out any probable defense. In the case of ***Rukumakar @ Bharat Tulshidas Naik v/s. Santosh Shaba Gaonkar & Anr*** passed in Criminal Writ Petition No.35/2019 on 05.04.2019, it is observed that the accused had first opportunity to set out his defense when he sends reply to statutory notice of the complainant. The second opportunity is in application seeking leave to cross-examine the complainant and the accused can disclose such grounds during the course of the hearing of application. The accused did not disclose the grounds as to why and on what points he proposes to cross-examine the complainant. The petition is silent about such probable defense. It is pertinent to note that the apex Court in the case of ***Mandvi Cooperative Bank*** (supra) has laid down that the accused 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.

The said decision does not spell out any requirement of setting specific or probable defense.

35. In the case of ***Hamida v/s. Rashid*** (supra), the Apex Court has observed that inherent powers conferred on the high Courts under Section 482 of Cr.P.C. has to be exercised sparingly with circumspection and in rare cases and that too to correct patent illegalities or when some miscarriage of justice is done.

36. In the case of ***Jai Singh v/s. Municipal Corp. of Delhi***(supra), the Supreme Court has observed that the High Court is expected to exercise wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well recognized constraints.

37. The High Court of Himachal Pradesh at Shimla in the case of ***Anu Sharma v/s. Punjab National Bank*** decided on 07.08.2019 in CrMMO No.216/2019 had considered the question whether in terms of Section 145(2) of the Act, it is mandatory for the applicant, seeking cross-examination of the complainant to assign reasons for recalling/re-examination /cross-examination of the complainant. Court analysed Section 145 of N.I. Act, made following observations in paragraph 7 to 10 which are reproduced below:-

`7. Close scrutiny of the aforesaid provisions contained in S.145(2) clearly reveals that it is in two parts, first part provides that the court, of its own, may summon accused to examine him with regard to the contents contained in the affidavit given by him in his evidence, whereas second

part casts a duty upon the court to summon a person, who has given evidence by way of affidavit, if application is made for this purpose by the opposite party. Aforesaid provision nowhere suggests that a party making application under this provision of law, is required to assign reasons for summoning the person, who has given evidence by way of affidavit. No doubt, S.145(1), as has been taken note herein above, provides that notwithstanding anything contained in the Code, evidence of the complainant can be given by him on affidavit, but this provision further provides that the evidence given by way of affidavit may be read subject to all just exceptions in evidence, in any enquiry, trial or proceedings under the said Code.

8. S. 145, with its non obstante clause, as taken note herein above, though provides for evidence of the complainant by way of affidavit but, certainly, affidavit of the complainant can be read in evidence, subject to all just exceptions, meaning thereby nothing inadmissible in evidence i.e. irrelevant facts or hearsay evidence would be taken as evidence even though stated on affidavit.

9. True it is that the plea of the accused that on being summoned under S.145(2), complainant or any of its witnesses, whose evidence is on affidavit, must be made to depose in examination-in-chief, all over again, cannot be accepted because, acceptance of the same would amount to duplication. S. 137 of the Evidence Act, nowhere defines “examine” to mean and include three kinds of examination of witnesses; it simply defines examination-in-chief, cross-examination and re-examination, whereas, S.145(2) provides that court may at its discretion, call a person giving his evidence again to be examined as to facts contained therein.

10. S. 145(2) expressly provides that a court may, if it thinks fit, summon and examine any person, giving evidence on affidavit. Affidavit filed by the person, who is summoned is already on record in the nature of examination-in-chief, hence, on being summoned on the application made by the accused, deponent of the affidavit (complainant or any of its witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit.’

The Court then referred to decision in the case of **Mandvi Cooperative Bank** (supra) and decision in the case of **Indian Bank Association v/s. Union Bank of India** (supra). It was further observed that though there is no necessity to recall and re-examine complainant but Magistrate can pass a specific order to recall the complainant. Such an order is to be passed either on an application made by accused or under Section 145(2) of Act or suo motu by the Court. The High Court of Himachal Pradesh in subsequent decision in the case of **Jagdeep Singh v/s. Ramesh Singh** decided on 28.11.2019 in CriMMO No.390/2019 relied upon the aforesaid decision and observed that Section 145(2) nowhere talks about assigning reasons in the application for recall of a witness, meaning thereby it is obligatory for the Court to recall complainant or its witnesses, if an application is made in that behalf.

38. Most of the decisions relied upon by the learned counsel for the respondent are with regards to the presumption under Section 118 or 139 of the N.I. Act. Learned counsel for respondent has also placed reliance upon some foreign decisions. The principles enunciated therein are not applicable to the present case. The issue before the Court is about the right to cross-examine the complainant in accordance with Section 145(2) of the N.I. Act. I am of the concerned opinion that the impugned order is bad in law and deserves to be set aside. The application preferred by the petitioner was in consonance with Section 145(2) of the N.I. Act. The accused is entitled for fair trial. Considering the scope and object of Section 138 of the N.I. Act the accused cannot be deprived of his right to cross-

examination on flimsy ground. Right to fair trial is implicit in Article 21 of the Constitution of India. Section 145(2) of N.I. Act nowhere contemplates that application should be elaborate with details as to on what points the accused is required to cross-examine the complainant. It would be contrary to the canons of criminal jurisprudence to deny the right to defend and to expect the opening of the entire defense before the cross-examination commences. The observations made in the decision of the Supreme Court in the case of ***Meters And Instruments*** (supra), does not dilute the observations of the Apex Court in the case of ***Mandvi Cooperative Bank Ltd.***(supra). The learned Magistrate has therefore committed an error in disallowing the application for cross-examination. Depriving the accused the right to cross-examine in a casual manner is contrary to the criminal jurisprudence. He cannot be left with hope of examining defense witnesses without giving an opportunity to unearth the truth from the complainant. It is true there are presumptions under the N.I. Act. The presumption is that there exists enforceable liability in respect to the cheque which is issued but the presumption comes with a rider that the accused can rebut it and atleast during the trial he must be given an opportunity to rebut the same. In the circumstances, the impugned order is required to be set aside.

ORDER

- (i) Writ Petition is allowed.
- (ii) Impugned order dated 21.02.2023 passed by the learned Judicial Magistrate First Class 'A' Court, Vasco-

Da-Gama below Exhibit 45 in Criminal Case No.OA/244/OA/NIA/2019/A is set aside.

(iii) Application preferred by the petitioner under Section 145(2) of N.I. Act is allowed and is permitted to cross-examine the complainant.

(iv) Petition stands disposed of.

(PRAKASH D. NAIK, J.

MARIA SUZANA REBELLO

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