Reserved on : 09.07.2024
Pronounced on : 19.07.2024

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF JULY, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.3519 OF 2024 (GM – RES)

BETWEEN:

MRS. ZAHEDA INAMDHAR
W/O SHERKHAN M. INAMDHAR
AGED ABOUT 63 YEARS
RESIDING AT NO.865,
1ST FLOOR, 15TH CROSS
1ST STAGE, 1ST PHASE,
CHANDRA LAYOUT
BENGALURU – 560 072.

... PETITIONER

(BY SRI P.P.HEGDE, SR.ADVOCATE FOR
SMT.MONISHA N.S., ADVOCATE)

AND:

DR. FATIMA HASSINA SAYEEDHA
AGED ABOUT 41 YEARS
RESIDING AT K MEHBOOB HUSSAIN
PLOT NO.12, OPP. RAILWAY STATION
NEAR MASJID-E-HUDA
REHAMATH NAGAR

GULBARGA – 585 102.

... RESPONDENT

(BY SRI UMESH M.N., ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CR.P.S., PRAYING TO QUASH THE RECORDING OF EVIDENCE OF THE ACCUSED/RESPONDENT BY WAY OF AFFIDAVIT IN C.C NO. 27337/2017 ON THE FILE OF 22ND ADDL. CHIEF METROPOLITAN MAGISTRATE AT BANGALORE, VIDE ANNEXURE-D AS ILLEGAL AND CONSEQUENTLY DIRECT THE TRIAL COURT TO RECORD THE EVIDENCE OF THE ACCUSED IN ACCORDANCE WITH LAW AND ETC.,

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 09.07.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner is before this Court calling in question proceedings of recording of evidence of the accused by way of an affidavit in C.C.No.27337 of 2027 pending before the 22nd Additional Chief Metropolitan Magistrate, Bengalore arising out of a complaint filed under Section 200 of the Cr.P.C., alleging offences punishable under Section 138 of the Negotiable Instruments Act, 1881 ('the Act' for short) and has sought quashment of the order dated 13-12-2023 which rejects Section 311 Cr.P.C. application

filed by the petitioner seeking further cross-examination of the respondent/accused.

2. Heard Sri P.P. Hegde, learned senior counsel appearing for the petitioner and Sri M.N.Umesh, learned counsel appearing for the respondent.

3. Facts, in brief, germane are as follows:-

The petitioner and the respondent have a transaction. The transaction leads to issuance of a cheque by the accused in favour of the complainant. The presentation of the cheque leads to it getting dishonored. The dishonouring of the cheque leads the complainant before the concerned Court invoking Section 200 of the Cr.P.C., by registering a complaint. Presently, the proceedings are pending before the concerned Court in C.C.No.27337 of 2017. The issue in the *lis* does not pertain to the merit of the claim of the complainant or the defence of the accused. On 16-11-2018, the petitioner was cross-examined by the counsel for the accused. This again happens on 18-02-2019. On 25-03-2019 the accused files an

affidavit. On the affidavit, further cross-examination of DW-1/accused was taken up and recorded as nil owing to the absence of the complainant. The complainant then prefers an application under Section 311 of the Cr.P.C., seeking further cross-examination of DW-1. The accused files objections. An order comes to be passed rejecting the application filed under Section 311 of the Cr.P.C. It is this order that has driven the petitioner to this Court in the subject petition.

4. The learned senior counsel Sri P P Hegde appearing for the petitioner would submit that what is called in question is the proceedings that entertained filing of affidavit by the accused in lieu of her presence for examination-in-chief. The learned senior counsel would contend that the accused sitting in Dubai files the affidavit in lieu of examination-in-chief and the Court accepts it. While an application is filed seeking further cross-examination under Section 311 of the Cr.P.C., by the petitioner, it is rejected, which is contrary to law. He would seek quashment of the aforesaid action and not to permit the accused to continue the trial on the strength of the affidavit that is filed as examination-in-chief.

It is his submission that it runs completely counter to plethora of judgments rendered by the Apex Court, co-ordinate Bench of this Court and several other High Courts.

5. Per contra, the learned counsel appearing for the respondent would vehemently refute the submissions contending that there is no illegality in the learned Magistrate taking the affidavit in lieu of examination-in-chief of the accused as there is no bar in law for such action. He would also place reliance on certain judgments to buttress his submissions. Insofar as the application under Section 311 of the Cr.P.C., is concerned, the learned counsel would submit that the accused was offered for cross-examination on 28-06-2023. The complainant did not choose to cross-examine her. Therefore, it was taken as nil and would submit that there is no warrant to recall the defence witness No.1 for further cross-examination. He would seek dismissal of the petition. The judgments relied on by both the learned counsel would bear consideration *qua* their relevance in the course of the order.

6. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record. In furtherance thereof, the issues that fall for consideration are:

(i) Whether the act of the concerned Court in permitting filing of an affidavit in lieu of examination in-chief by the accused is sustainable?

(ii) Whether the rejection of the application filed under Section 311 of the Cr.P.C., is tenable in law?

Issue No.1:

(i) Whether the act of the concerned Court in permitting filing of an affidavit in lieu of examination in-chief by the accused is sustainable?

7. To consider this issue, it is germane to notice Sections 138 and 145 of the Act. They read as follows:

> *"**138. Dishonour of cheque for insufficiency, etc., of funds in the account**.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made*

with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

… … …

*"**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."

(Emphasis supplied)

Section 145 of the Act confers a right on the complainant to give affidavit evidence. It stops at that. It does not confer the same right on the accused. The contention is that since the law does not expressly bar, it should be permitted. Heavy reliance is placed by the learned counsel for the respondent on the judgment rendered by the coordinate Bench of this Court in the case of ***AFZAL PASHA v. MOHAMED AMEERJAN***[1]. The coordinate Bench has held in the said judgment as follows:

"…. …. ….

> ***5.*** *In the light of the above, the point for consideration before this Court is whether it would be impermissible for the accused to tender evidence by way of affidavit having regard to the tenor of Section 145 of the NI Act.*
>
> *It is seen that Sections 143 to 147 of the NI Act were inserted by the Negotiable Instruments (Amendment & Miscellaneous Provisions)Act, 2002. One of the objects to bring about the new Legislation mentioned in the Objects and Reasons of the Act of 2002 was to provide for summary trial of the cases under the Act, with a view to speed up the disposal of cases. Section 143 provides for the cases under the NI Act being tried summarily. Hence Sections 262 to 265 of the CrPC would be applicable. Section 145 of the NI Act, provides for a departure in the manner of tendering evidence at the trial, and permits evidence by way of affidavit.*
>
> *The said Section is extracted hereunder for ready reference:*

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[1] *ILR 2016 KAR 4145.*

> *"**145. Evidence on affidavit.**— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, 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 fact contained therein."*

Sub-Section (1) contemplates an option which the complainant has of tendering his evidence by way of an affidavit. The omission of reference to the accused is for an obvious reason as shall be presently pointed out.

Sub-Section (2) would indicate that there could be affidavit evidence of both witnesses for the complainant and also witnesses for the accused. For otherwise, there would be no need to refer to an "application of the prosecution" to "examine any person giving evidence on affidavit…"

This is in consonance with the procedure prescribed for a Summary trial (which is the same as is specified for the trial of a Summons case, under the CrPC. See: Section 262 CrPC). The procedure prescribed there under does not contemplate the accused standing as a witness. Though he may examine witnesses on his behalf.

Chapter XXTV of the CrPC contains the General Provisions as to Enquiries and Trials. Section 315 thereof reads as follows:—

> ***"315. Accused person to be competent witness.—***
>
> *(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defense and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:*
>
> ***Provided that—***

(a) he shall not be called as a witness except on his own request in writing;

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:

***Provided** that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject or any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry."*

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

A closer scrutiny of Section 145 would indicate that the same is intended to ensure that the trial is concluded as expeditiously as possible. The said provision does not in any manner affect the right of the accused to cross examine the complainant and his witnesses. The said provision enables even the defence evidence to be led by affidavits. Thus, the said provision is purely procedural in nature. In this behalf, the Apex Court has in Shreenath v. Rajesh [(1998) 4 SCC 543 : AIR 1998 SC 1827] , has held that in interpreting any procedural law, where more than one interpretation is possible, the one which

curtails the procedure without eluding the justice, is to be adopted. The procedural law is always subservient to and is in aid to justice. Ksl Industries v. Khandelwal [2006 (1) Mh.LJ (Cri) 86] .

The Apex Court in Mandvi Co-Operative Bank Limited (supra), has not examined the matter in the above perspective.

On the other hand, the view taken and the directions issued in a more recent decision of the Apex Court, in the case of Indian Bank Association (supra) does contemplate evidence by affidavit by the accused. The relevant portion is extracted hereunder:

"DIRECTIONS:

21. 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 -

(1) 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 cmplaint 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.

(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 on the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.

(3) The court may indicate in the summons 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.

(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.

(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 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.***

22. We, therefore, direct all the criminal courts in the Country dealing with Section 138 cases to follow the abovementioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act. The writ petition is, accordingly, disposed of as above."

Incidentally, in the above judgment, the Supreme Court has referred to with approval the views expressed in the following decisions, in stating thus:—

> *"22. We notice, considering all those aspects, few High Courts of the Country have laid down certain procedures for speedy disposal of cases under Section 138 of the Negotiable Instruments Act. Reference, in this connection, may be made to the judgments of the Bombay High Court in* ***KSL AND INDUSTRIES LTD. V. MANNALAL KHANDELWAL [2005 CRI.LJ 1201 (BOM)] , INDO INTERNATIONAL LTD. V. STATE OF MAHARASHTRA*** *[2006 Cri.LJ 208] , and* ***HARISCHANDRA BIYANI V. STOCK HOLDING CORPORATION OF INDIA LTD.,*** *[(2006) 4 Mh.LJ 381] , the judgment of the Calcutta High Court in* ***MAGMA LEASING LIMITED V. STATE OF WEST BENGAL*** *[(2007) 3 CHN 574] , and the judgment of the Delhi High Court in* ***RAJESH AGARWAL V. STATE*** *[ILR (2010) 6 Del 610] .*

In ***KSL AND INDUSTRIES LTD****. v.* ***MANNALAL KHANDELWAL*** *(supra), a Division Bench of the Bombay High Court in order to accomplish the underlying object of the Act, has issued certain directions, one of which reads as follows:—*

> *"(b) The Court concerned must ensure that examination-in-chief cross-examination and reexamination of the complainant must be concluded within three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in Court.* ***Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court****."*
>
> *(emphasis supplied)*

In M/s ***INDO-INTERNATIONAL LTD. V. STATE OF MAHARASHTRA*** *(**supra**), the decision in* ***KSL AND INDUSTRIES LTD. V. MANNALAL KHANDELWAL*** *(supra) has been relied upon and followed.*

In ***HARISCHANDRA BIYANI V. STOCK HOLDING CORPORATION OF INDIA LTD****. (**supra**), the Bombay High Court has again applied and followed the decision in* ***KSL AND INDUSTRIES LTD. V. MANNALAL KHANDELWAL*** *(**supra**).*

In ***MAGMA LEASING LTD. V. STATE OF WEST BENGAL*** *(**supra**), there is a reference to* ***KSL AND INDUSTRIES LTD. V. MANNALAL KHANDELWAL*** *(**supra**), and the same has been referred to and relied upon in holding that Section 145 enables the accused or defence to lay evidence by affidavit.*

In ***RAJESH AGARWAL V. STATE****, (**supra**), again the decision in* ***KSL AND INDUSTRIES LTD. V. MANNALAL KHANDELWAL*** *(**supra**), has been applied and the consistent view taken in these decisions has been approved and applied by the Supreme Court in direction No. 5, referred to hereinabove.*

Hence, in keeping with judicial propriety, the later judgment of the Apex Court can safely be applied when the divergent view is that of a co-ordinate bench of the same Court.

Accordingly, this petition is allowed. The Trial Court is directed to receive the affidavit evidence of the petitioner on his request, in accordance with Section 315 CrPC and proceed with the pending case in accordance with law."

On the basis of the said judgment the argument of the respondent/accused is now built up. Whether this requires to be followed, as it is a judgment of the coordinate Bench is necessary to be noticed. Though the judgment of the coordinate Bench considers the judgments of the Apex Court, I deem it appropriate to follow the judgments of the Apex Court and not the judgment of the coordinate Bench.

8. The Apex Court in the case of ***MANDVI COOPERATIVE BANK LIMITED v. NIMESH B.THAKORE***[2] has held as follows:

"…. …. ….

> ***44. Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on affidavit, the High Court has held that subject to the provisions of Sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that Section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit. But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more importantly providing a similar right to the accused would be in furtherance of the legislative intent to make the trial process swifter.***
>
> ***45.*** *In para 29 of the judgment, the High Court observed as follows:*

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[2] *(2010) 3 SCC 83*

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

Then in para 31 of the judgment it observed:

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

46. On this issue, we are afraid that the High Court overreached itself and took a course that amounts to taking over the legislative functions. On a bare reading of Section 143 (sic Section 145) it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of Section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word "accused" with the word "complainant" in Section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission.

> ***47.*** *There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word 'accused' with the word 'complainant' in Section 145(1)….", it was not open to the High Court to fill up the self-perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under Section 138 of the Act would be based largely on documentary evidence.*
>
> ***48.*** *The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well."*
>
> *(Emphasis supplied)*

The Apex Court holds that statute confers a right on the complainant to file his affidavit by way of evidence. The same right is not conferred upon the accused. Therefore, the act of permitting evidence of the accused by way of an affidavit was erroneous. The Apex Court, later, in the case of ***INDIAN BANK ASSOCIATION v. UNION OF INDIA***[3] has held as follows:

> "…. …. ….

[3] *(2014) 5 SCC 590*

13. *Section 145 of the Act deals with the evidence on affidavit and reads as follows:*

> *"**145.Evidence on affidavit**.—(1) Notwith-standing 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."*

14. *The scope of Section 145 came up for consideration before this Court in Mandvi Coop. Bank Ltd. v. Nimesh B. Thakore [(2010) 3 SCC 83 : (2010) 1 SCC (Civ) 625 : (2010) 2 SCC (Cri) 1] , 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 the word "accused" with the word "complainant" in Section 145(1), it does not mean that the Magistrate could not allow the accused 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 [(2009) 13 SCC 201 : (2009) 5 SCC (Civ) 61 : (2010) 1 SCC (Cri) 980] , 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 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 on 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. The 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, the court may fix up the case at an early date and ensure day-to-day trial."

(Emphasis supplied)

The Apex Court follows the judgment in the case of ***MANDVI CO-OPERATIVE BANK LIMITED*** *supra* and reiterates the same view. A coordinate Bench of this Court in ***SRI B.N. ASHWATH NARAYAN v. SRI SHANKAR***[4] has after following ***MANDVI COOPERATIVE BANK LIMITED*** case holds that the accused shall

[4] *Crl.R.P.No.1333 of 2018 decided on 02-02-2023*

not be permitted to lead evidence by way of an affidavit. The finding of the coordinate Bench *qua* on this point is as follows:

> ***"15(xv) In view of the judgment of the Hon'ble Apex Court in MANDVI COOPERATIVE BANK LIMITED v. NIMESH B.THAKORE, (2010) 3 SCC 83, the accused shall not lead his evidence in defence by way of an affidavit."***
>
> *(Emphasis supplied)*

9. Now coming to the judgments rendered by the other High Courts. The High Court of Punjab and Haryana in the case of ***RAJNI DHINGRA v. SANJEEV CHUGH***[5] has held as follows:

> "…. …. ….
>
> ***3.*** *Learned counsel for the petitioner has argued that in case of Indian Bank Association v. Union of India, (2014) 5 SCC 590, it has been observed that the Court in the complaint case under the provisions of Negotiable Instruments Act may allow the accused to give his evidence on affidavit unless there is a just and reasonable ground to refuse such permission. Statement of accused, in this case, is based on lot of documentary evidence, which cannot be deposed in oral statement, as such, allowing of permission to accused to give his evidence on affidavit will not cause any prejudice to complainant and order of trial Court relying on observations in case of Mandvi Cooperative Bank Ltd. (supra) is not sustainable.*
>
> ***4.*** *The Apex Court in case of Mandvi Cooperative Bank Ltd. (supra) took up and decided the issue as to whether the accused can be allowed to give evidence on affidavit as per*

[5] *2019 SCC OnLine P & H 2464*

provisions of Section 145 (2) of the Negotiable Instruments Act and observed as follows:—

> *"44. Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on affidavit, the High Court has held that subject to the provisions of sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit. But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more importantly providing a similar right to the accused would be in furtherance of A the legislative intent to make the trial process swifter.*
>
> *45. In paragraph 29 of the judgment, the High Court observed as follows:*
>
> > *"It is true that section 145(1) confers a right on the complainant to give evidence on affidavit. It does not speak of similar right being conferred on the accused. The Legislature in their wisdom may not have thought it proper to incorporate a word 'accused' with the word 'complainant' in subsection (1) of section 145 in view of the immunity conferred on the accused from being compelled to be a witness against himself under Article 20(3) of the Constitution of India…."*
>
> *Then in paragraph 31 of the judgment it observed:*
>
> > *"…. Merely because, section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code…..I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in sections 315 and 316 of the Code."*

46. On this issue, we are afraid that the High Court overreached itself and took a course that amounts to taking-over the legislative functions. 32. On a bare reading of section 143 it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word 'accused' with the word 'complainant' in section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission.

47. There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word 'accused' with the word 'complainant' in section 145(1)……", it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence.

48. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well."

5. *After discussing the law on the point, the Apex Court did not agree with observations of High Court allowing permission to accused to lead evidence on affidavit and observed in para 52 as follows:—*

> *"52. In light of the above we have no hesitation in holding that the High Court was in error in taking the view, that on a request made by the accused the magistrate may allow him to tender his evidence on affidavit and consequently, we set aside the direction as contained in sub-paragraph (r) of paragraph 45 of the High Court judgment. The appeal arising from SLP (Crl.) No. 3915/2006 is allowed."*

6. *The above observations of the Apex Court in case of* ***Mandvi Cooperative Bank Ltd. (supra)*** *have not been set aside or dissented in case of* ***Indian Bank Association (supra),*** *wherein in para 12 a reference was made to above observations as follows:—*

> *"12. The scope of Section 145 came up for consideration before this Court in* ***Mandvi Cooperative Bank Limited v. Nimesh B. Thakore (2010) 3 SCC 83****, 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."*

7. *The Apex Court in case of* ***Indian Bank Association (supra)*** *was dealing with the issue of laying down appropriate guidelines/directions to be followed by the Courts while trying complaints under Section 138 of the Negotiable Instruments Act and the issue before the Apex Court was to ensure expeditious disposal of such cases. Though, reference to observations of the Apex Court in case of* ***Mandvi Cooperative Bank Ltd. (supra)*** *was made in para 12 of the judgment but as already discussed the law settled by the Apex Court in that case is clear and has not been set aside or dissented so far.*

Even that was not in issue before the Apex Court in case of ***Indian Bank Association (supra)****.*

8. *In view of clear proposition of law as laid down in* ***Mandvi Cooperative Bank Ltd. (supra)*** *by Hon'ble Apex Court, the petitioner being an accused, who is facing trial in complaint under the provisions of Negotiable Instruments Act, is not competent to tender his evidence through affidavit and learned trial Court has not committed any error while declining permission to this effect to petitioner."*

The High Court of Punjab and Haryana follows the judgments in ***MANDVI COOPERATIVE BANK LIMITED*** and ***INDIAN BANK ASSOCIATION*** cases *supra*. It further becomes germane to notice the judgment of the High Court of Bombay in ***VIRAL ENTERPRISES v. STATE OF MAHARASHTRA***[6] wherein it is held as follows:

"…. …. ….

7. The substance of the petition is that if viewed in the light of the object of insertion of the provisions contained in section 143 to 147 of the NI Act, 1881, by Act, 55 of 2002, the accused also has a right to adduce his evidence on an affidavit. The learned Metropolitan Magistrate was in error in declining to accept such evidence on affidavit by placing reliance on the decision of the Supreme Court in the case of Mandvi Cooperative bank Limited v. Nimesh B. Thakore[1] as the subsequent judgment of the Supreme Court in the case of Indian Bank Association v. Union of India[2] had further expanded the scope of provisions contained in section 145 of the NI Act, 1881, with a view to give impetus for expeditious conclusion of the proceedings under section 138 of NI

[6] *2024 SCC OnLine Bom.1774*

Act, 1881 and the said decision was not properly construed by the learned Magistrate. Thus, to advance the object of the provisions contained in sections 143 and 145 of the NI Act, 1881, the petitioners/accused deserve to be permitted to adduce the evidence on an affidavit.

… … …

9. *At the outset, Mr. Karia, learned counsel for respondent No. 2 submitted that the aforesaid question sought to be raised by the petitioner/accused is no longer res integra. The question stands firmly concluded against the accused by the decision of the Supreme Court in the case of Mandvi Cooperative bank (supra). Moreover, this Court in the cases of SBI Global Factors Limited v. The State of Maharashtra and Nitin Shriram Sabe v. Prakashrao Keshavrao Deshmukh, has repelled the endeavour of the accused, who are facing the prosecution under section 138 of NI Act, to reopen the issue on the ground of subsequent judgment in the cases of Indian Bank Association (supra), and the judgment of Gujrat High Court in the case of Rakeshbhai Maganbhai Barot v. State of Gujrat[5]. Thus, this petition being devoid of substance and having been filed with a view to delay the disposal of the complaints, deserves to be summarily dismissed.*

... … …

12. *Mr. Patel further urged, the omission to include the word "accused" in section 145 of the NI Act, 1881 is for an obvious reason which the learned single Judges of the Karnataka High Court and Gujrat High Court have expounded in the aforesaid decision. It was further urged that, at any rate, no element of prejudice is likely to be caused to the complainant if the accused is permitted to adduce evidence on an affidavit. The complainant would have effective opportunity to cross examine the accused. Therefore, a procedure which advances the cause of expeditious conclusion of the complaint under section 138 of NI Act, 1881 deserves to be preferred, submitted Mr. Patel.*

13. *In the case of SBI Global Factors Limited (supra) and Nitin Sabe (supra), the learned single judge of this Court have held that the question sought to be raised by the accused, like petitioner herein, is no longer res integra and stands concluded by the decision of the Supreme Court in the case*

of Mandvi Cooperative bank (supra). At the outset, it must be noted these decisions, being rendered by co-ordinate Benches, bind this Court.

14. *Mr. Patel made a strenuous effort to demonstrate that the issue cannot be said to have been concluded by the judgment in the case of Mandvi Cooperative bank (supra) as the scope of section 145 of the NI Act, 1881 was further expanded by the Supreme Court in the case of Indian Bank Association (supra) and, therefore, this Court, if warranted, may refer the issue to a larger Bench.*

15. *I have given anxious consideration to the submissions canvassed on behalf of the parties. In view of the submission canvassed by Mr. Patel, on the premise that Indian Bank Association (supra) deviates from the decision in the case of Mandvi Cooperative bank (supra), I deem it appropriate to consider the issue sought to be raised in this petition in the light of the text and context of the provisions contained in sections 143 and 145 of the NI Act, 1881. With the insertion of Chapter XVII into NI Act, 1881, there was an exponential increase in the complaints under section 138 of NI Act, 1881 putting enormous strain on the criminal justice administration system. The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 introduced sections 143 to 147 in Chapter XVII in addition to a number of changes in Sec. 138, 141 and 142 of NI Act, 1881, as they stood then.*

... *…* *…*

19. *This Court while dealing with a large number of petitions wherein the various facets of the amended provisions of NI Act, 1881 came up for consideration, inter alia, held that the evidence in defence like the complainant's evidence also be given on an affidavit. When the matter went in appeal before the Supreme Court, in the case of Mandvi Cooperative bank (supra), the Supreme Court, inter alia, considered the following question:—*

> *"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?"*

20. *After an elaborate analysis, the Supreme Court held that this Court had overreached itself and took the course that amounts to taking over legislative functions. The observations of the Supreme Court in paragraph Nos. 44 to 48 and 52 are instructive and, hence, extracted below.*

> *44] Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on affidavit, the High Court has held that subject to the provisions of sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit. But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more importantly providing a similar right to the accused would be in furtherance of the legislative intent to make the trial process swifter.*
>
> *45] In para 29 of the judgment, the High Court observed as follows:*
>
> > *"It is true that section 145(1) confers a right on the complainant to give evidence on affidavit. It does not speak of similar right being conferred on the accused. The Legislature in their wisdom may not have thought it proper to incorporate a word 'accused' with the word 'complainant' in sub-section (1) of section 145 in view of the immunity conferred on the accused from being compelled to be a witness against himself under Article 20(3) of the Constitution of India…."*
>
> *Then in paragraph 31 of the judgment it observed:*
>
> *"…. Merely because, section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code….. I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in sections 315 and 316 of the Code."*
>
> *46] On this issue, we are afraid that the High Court overreached itself and took a course that amounts to taking-over the legislative functions. On a bare reading of section*

143 it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word 'accused' with the word 'complainant' in section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission.

47] There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word 'accused' with the word 'complainant' in section 145(1)……", it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence.

48] The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well.

.. ….

52] In light of the above we have no hesitation in holding that the High Court was in error in taking the view, that on a request made by the accused the magistrate may allow him to tender his evidence on affidavit and consequently, we set aside the direction as contained in sub-paragraph (r) of paragraph 45 of the High Court judgment. The appeal arising from SLP (Crl.) No. 3915/2006 is allowed.

21. Indian Bank Association and Others filed Writ Petition before the Supreme Court under Article 32 of the Constitution of India seeking appropriate guidelines, directions to be followed by all the Courts dealing with complaints under section 138 of NI Act, 1881 so as to ensure expeditious disposal of the complaints. In Indian Bank Association (supra), the Supreme Court took note of the decision in the case of Mandvi Cooperative bank (supra) and issued a number of directions*. Direction 5, on which Mr. Patel placed very strong reliance, reads as under:—*

> *(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 Court. Witnesses to the complainant and accused must be available for cross-examination as and when there is direction to this effect by the Court.*
>
> *(emphasis supplied)*

22. Special emphasis was laid on the observations, "the Court has option of accepting affidavits of the witnesses. The word "witnesses", according to Mr. Patel, subsumes in its fold an accused. Therefore Indian Bank Association (supra) expands the scope of section 145 and permits the Court to record the evidence of accused on affidavit. To this extent, the Indian Bank Association (supra) deviates from the decision of the Supreme Court in the case of Mandvi Cooperative bank (supra).

23. *To bolster up the aforesaid submission, Mr. Patel invited the attention of the Court, to the decision of the Gujrat High Court in the case of Rakeshbhai Barot (supra) and Karnataka High Court in the case of Afzal Pasha (supra).*

24. I have perused the judgments in the cases of Rakeshbhai Barot (supra) and Afzal Pasha (supra). Rakeshbhai Barot (supra) substantially followed the reasoning of the decision of the Karnataka High Court in

the case of Afzal Pasha (supra). *It would, therefore, be expedient to extract the observations in the case of Afzal Pasha (supra), which reads as under:—*

> *2) The petition is filed by the accused, against whom a complaint is filed before the court below alleging an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (Hereinafter referred to as the 'NI Act', for brevity). The petitioner is contesting the case. At the stage when the case was set down for the evidence of the accused, he is said to have filed an application under Section 145(2) of the NI Act, seeking permission of the court to file an affidavit in lieu of oral evidence. The trial court having rejected the application on the ground that the same is not permissible, the present petition is filed.*
>
> *3) The learned counsel for the petitioner places reliance on the language of Section 145 of the NI Act to contend that the trial court has not taken into consideration the intent of the provision, which has been interpreted by the Apex Court in the case of Indian Bank Association v. Union of India, (2014) 5 SCC 590.*
>
> *…… …..*
>
> *5) …… Therefore, it is clear that having regard to the Scheme of the CrPC, the legislature in its wisdom has left it open to the accused to exercise the option of examining himself as a witness for an offence punishable under Section 138 of the NI Act, in deliberately omitting any reference to the evidence of the accused by way of affidavit. For it would run against a first principle in criminal law namely, that an accused shall not be called as a witness except on his own request in writing. The evidence on behalf of the accused would include that of the accused, subject to Section 315 CrPC. If the evidence of the witnesses could be by way of affidavit in terms of Section 145 NI Act, the evidence of the accused could also be way of affidavit.*
>
> *A closer scrutiny of Section 145 would indicate that the same is intended to ensure that the trial is concluded as expeditiously as possible. The said provision does not in any manner affect the right of the accused to cross examine the complainant and his witnesses. The said provision enables even the defence evidence to be led by affidavits. Thus, the said provision is purely procedural in nature. In this behalf, the Apex court has in Shreenath v. Rajesh, (1998) 4 SCC*

543 : AIR 1998 SC 1827, has held that in interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding the justice, is to be adopted. The procedural law is always subservient to and is in aid to justice. (See : KSL Industries v. Khandelwal, (2006) 1 Mah LJ (Cri) 86).

The Apex Court in Mandvi Cooperative Bank Limited, (supra), has not examined the matter in the above perspective.

On the other hand, the view taken and the directions issued in a more recent decision of the Apex Court, in the case of Indian Bank Association (supra) does contemplate evidence by affidavit by the accused.

……. ….

Hence, in keeping with judicial propriety, the later judgment of the Apex court can safely be applied when the divergent view is that of a co-ordinate bench of the same court.

25. *Evidently, the Karnataka High Court has proceeded on the premise that the decision of the Supreme Court in the case of Indian Bank Association (supra) takes a divergent view from that of Mandvi Cooperative bank (supra), and Indian Bank Association (supra), being a latter decision, it can be safely applied as both the judgments were rendered by Benches of co-equal strength.*

26. *Two questions come to the fore. First whether Indian Bank Association (supra) has taken a divergent view? Second, even if one proceeds on the premise that there is a deviation from the decision in the case of Mandvi Cooperative bank (supra), whether the decision in the case of Indian Bank Association (supra) commands precedential value for being latter in point of time.*

27. *In the case of Indian Bank Association (supra), after referring to the decision in the case of Mandvi Cooperative bank (supra), the Supreme Court observed, inter alia, as under:—*

12] The scope of Section 145 came up for consideration before this Court in Mandvi Cooperative Bank

Limited v. Nimesh B. Thakore, (2010) 3 SCC 83, 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.

… …

16] We have indicated that under Section 145 of the Act, the complainant can give his evidence by way of an affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the Court, which makes it clear that a complainant is not required to examine himself twice i.e. one after filing the complaint and one after summoning of the accused. Affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post summoning stage. In other words, there is no necessity to recall and re-examine the complaint after summoning of accused, unless the Magistrate passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or under Section 145(2) of the Act suo moto by the Court. In summary trial, after the accused is summoned, his plea is to be recorded under Section 263(g) Cr. P.C. and his examination, if any, can be done by a Magistrate and a finding can be given by the Court under Section 263(h) Cr. P.C. and the same procedure can be followed by a Magistrate for offence of dishonour of cheque since offence under Section 138 of the Act is a document based offence. We make it clear that if the proviso (a), (b) & (c) to Section 138 of the Act are shown to have been complied with, technically the commission of the offence stands completed and it is for the accused to show that no offence could have been committed by him for specific reasons and defences.

28. *From a correct reading of the decision in the case of Indian Bank Association (supra), I find it rather difficult to accede to the submission on behalf of the accused that the said decision deviates from the view taken by the Supreme Court in the case of Mandvi Cooperative bank (supra) in the matter of*

permitting the accused to lead evidence on an affidavit. The question that arose for consideration in the case of Mandvi Cooperative bank (supra) was in the context of the import of amended section 143 and 145 of the NI Act, 1881, in particular. On the contrary, a larger issue of expeditious completion of the trial in the complaints under section 138 of the NI Act, 1881 was the subject matter of the Writ Petition filed by the Indian Bank Association (supra). In that context, the Supreme Court gave certain directions. However, despite noting the decision in the case of Mandvi Cooperative bank (supra), especially the fact that the provisions contained in section 145 were restricted to permitting the complainant to lead evidence on affidavit and do not provide the same dispensation to the accused, Indian Bank Association (supra) did not struck a discordant note.

29. *It is true in clause 5 of the directions in paragraph 21 in the case of Indian Bank Association (supra) (extracted above), the Supreme Court observed that the Court has option of accepting affidavits of the witnesses, instead of examining them in Court. However, the said direction cannot be read out of context. It is well recognized that the words in a judgment cannot be read like statute. A decision is an authority for what it actually decides and not what logically flows from the said decision.*

30. In the case of Mandvi Cooperative bank (supra), a Bench of co-equal strength of the Supreme Court has elaborately considered the specific question as to whether an accused can be permitted to adduce evidence on oath and ruled against such course of action ascribing reasons. It cannot be urged that in the the case of Indian Bank Association (supra), another two Judge Bench of the Supreme Court delved into the correctness of the said view and took a diametrically opposite view. The decision in the case of Mandvi Cooperative bank (supra), in my view, still holds the field.

31. *The second aspect of Indian Bank Association (supra), being a decision latter in point of time, commands precedence, may not detain the Court. The legal position is absolutely clear.*

32. As noted above, in my humble opinion, there is no conflict between the decisions in the cases of Mandvi Cooperative bank (supra) and Indian Bank Association (supra). Even if one proceeds on the premise that decisions in the cases of Mandvi Cooperative bank (supra) and Indian Bank Association (supra) are irreconcilable, the rule is to apply the earliest view as the succeeding one would fall in the category of per incuriam*. It would be suffice to note the statement of law in the case of Sundeep Kumar Bafna v. State of Maharashtra.*

> *19] It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam.*
>
> *(emphasis supplied)*

33. Thus, this Court regrets its inability to agree with the view of the Karnataka High Court in the case of Afzal Pasha (supra) on both the counts namely there being an inconsistency in the decisions in the cases of Mandvi Cooperative bank (supra) and Indian Bank Association (supra) and Indian Bank Association (supra), being a latter decision, deserves to be followed*.*

34. *At this stage, it must be noted that apart from the decisions of learned single Judges of this Court, in the cases of SBI Global Factors Limited (supra) and Nitin Shriram Sabe (supra), there are decisions of the other High Courts which*

have consistently held that Mandvi Cooperative bank (supra) still holds the field despite the pronouncement of the Supreme Court in the case of Indian Bank Association (supra), to which the attention of the Court was invited by Mr. Karia, namely, (i) Rajni Dhingra v. Sanjeev Chugh; (ii) P.T. Joy v. K.V. Sivasankaran; (iii) Prabhudas Panjainmal Rice and Dal Mill v. Avon Trade Link, Shakti Nagar, Katni; and (iv) Rajeshwar Dayal Pareek v. Alankar Marble and Grenite.

35. The upshot of aforesaid consideration is that, the decisions of this Court in SBI Global Factors Limited (supra) and Nitin Shriram Sabe (supra) have correctly held that the question sought to be raised by the petitioners is no longer res integra and stands concluded against the accused by the judgment of the Supreme Court in the case of Mandvi Cooperative bank (supra). This Court does not find any reason to take a different view of the matter than the one taken by the coordinate Benches in the cases of SBI Global Factors Limited (supra) and Nitin Shriram Sabe (supra). Therefore, I decline the invitation of Mr. Patel to take a different view of the matter and refer the question to a larger Bench*."*

(Emphasis supplied)

The Bombay High Court holds that it does not agree with the view taken by this Court in the case of ***AFZAL PASHA*** *supra,* as it completely runs counter to the judgments of the Apex Court in the cases of ***MANDVI CO-OPERATIVE BANK LIMITED*** and ***INDIAN BANK ASSOCIATION*** cases (*supra*). This Court is also of the same view that the judgment in the case of ***AFZAL PASHA*** though rendered by a co-ordinate Bench of this Court, it has lost its precedential value, on the score that it is inconsistent with the

judgments rendered by the Apex Court *supra*. Therefore, holding the said decision as per incuriam, I deem it appropriate to hold that the statute does not confer any right on the accused to file his evidence by way of an affidavit. It is the right of the complainant, and the legislature in its wisdom has excluded the same right to be conferred upon the accused. In that light, holding no right to the accused to file the affidavit evidence, the proceedings of the learned Magistrate who has permitted filing of the evidence by way of an affidavit by the accused is illegal and unsustainable. Therefore, the said action of the learned Magistrate will have to be obliterated from the stage of acceptance of affidavit evidence of the accused. ***Accordingly, Issue No.1 is answered in favour of the petitioner, holding that the accused has no right to tender his evidence by way of an affidavit***.

Issue No.2:

(ii) Whether the rejection of the application filed under Section 311 of the Cr.P.C., is tenable in law?

10. The petitioner files an application under Section 311 of the Cr.P.C., Section 311 reads as follows:

> *"**311. Power to summon material witness, or examine person present**.—Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."*

The purport of Section 311 Cr.P.C. need not detain this Court for long or delve deep into the matter. The Apex Court in the case of ***VARSHA GARG v. STATE OF MADHYA PRADESH***[7] has held as follows:

> *"…. …. ….*
>
> ***31.** Having clarified that the bar under Section 301 is inapplicable and that the appellant is well placed to pursue this appeal, we now examine Section 311 of CrPC. Section 311 provides that the Court "may":*
>
> *(i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and*
>
> *(ii) Recall and re-examine any person who has already been examined.*
>
> ***32. This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court "shall" summon and examine or recall and re-examine any such person "if his evidence appears to the Court to be essential to the just decision of the case". Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.***

[7] *2022 SCC OnLine SC 986*

33. *The first part of the statutory provision which uses the expression "may" postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression "shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case". Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.*

34. *A two judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with pari materia provisions of Section 540 of the Criminal Code of Procedure 1898 observed:*

> *"16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice."*

35. *Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the "evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means." In that context the Court observed:*

> *"18 …Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such*

> *facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties."*

36. *Summing up the position as it obtained from various decisions of this Court, namely Rameshwar Dayal v. State of U.P., State of W.B. v. Tulsidas Mundhra, Jamatraj Kewalji Govani v. State of Maharashtra, Masalti v. State of U.P. Rajeswar Prosad Misra v. State of W.B. and R.B. Mithani v. State of Maharashtra, the Court held:*

> ***"27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."***

37. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

> ***38.*** *Section 91 CrPC empowers inter alia any Court to issue summons to a person in whose possession or power a document or thing is believed to be, where it considers the production of the said document or thing necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the CrPC.*
>
> ***39.*** *Section 91 forms part of Chapter VII of CrPC which is titled "Processes to Compel the Production of Things". Chapter XVI of the CrPC titled "Commencement of Proceedings before Magistrates" includes Section 207 which provides for the supply to the accused of a copy of the police report and other documents in any case where the proceeding has been instituted on a police report. Both operate in distinct spheres.*
>
> ***40.*** *In the present case, the application of the prosecution for the production of the decoding registers is relatable to the provisions of Section 91 CrPC. The decoding registers are sought to be produced through the representatives of the cellular companies in whose custody or possession they are found. The decoding registers are a relevant piece of evidence to establish the co-relationship between the location of the accused and the cell phone tower. The reasons which weighed with the High Court and the Trial Court in dismissing the application are extraneous to the power which is conferred under Section 91 on the one hand and Section 311 on the other. The summons to produce a document or other thing under Section 91 can be issued where the Court finds that the production of the document or thing "is necessary or desirable for the purpose of any investigation, trial or other proceeding" under the CrPC. As already noted earlier, the power under Section 311 to summon a witness is conditioned by the requirement that the evidence of the person who is sought to be summoned appears to the Court to be essential to the just decision of the case."*

If the findings of the Apex Court is pitted against the order impugned rejecting the application, it would undoubtedly run foul of the judgment of the Apex Court. Owing to the absence of the

complainant on a particular day, the cross-examination of the accused is rendered nil, apart from the illegality of permitting her to file the evidence by way of affidavit. It cannot be that the accused is not cross-examined at all, by the complainant. Therefore, the Court ought to have permitted further cross-examination of the accused/DW-1. In that light, ***issue No.2*** is also answered in favour of the petitioner.

11. For the aforesaid reasons, the following:

O R D E R

(i) Writ Petition is allowed.

(ii) The proceedings of the XXII Additional Chief Metropolitan Magistrate at Bengaluru insofar as it permits filing of an affidavit by the accused is quashed. The accused shall appear before the Court and tender her evidence if she so desires.

(iii) The order rejecting the application filed under Section 311 of the Cr.P.C., for further cross-examination of the accused is quashed. The

application filed by the petitioner seeking further cross-examination of DW-1 is allowed.

(iv) The XXII Additional Chief Metropolitan Magistrate at Bengaluru in terms of the order and the observations made in the order is directed to regulate his procedure and conclude the trial within a outer limit of six months from the date of this order, if not, earlier.

Sd/-
JUDGE

bkp
CT:MJ