

Before Rajbir Sehrawat, J.

SHASHANK JHA —*Petitioner*

versus

M/S DIYA ASSOCIATES, SIRSA —*Respondent*

CRM-M No.5076 of 2019 (O&M)

February 04, 2019

Negotiable Instruments Act, 1881—S.145—Evidence on affidavit—Accused while appearing as his own witness in defence does not have any right to lead evidence by way of affidavit—Application filed by accused for allowing him to appear as defence witness and to lead evidence by way of affidavit rightly dismissed.

Held that above said pronouncement made by the Hon'ble Supreme Court leaves no doubt regarding the right of the accused to lead evidence by way of affidavit and it is amply clarified by the Supreme Court that the accused, while appearing as his own witness in defence; does not have any right to lead the evidence by way of affidavit. However, even if the judgment of the Supreme Court in case of Indian Bank Association, is taken to be suggesting contrary to the judgment of the Supreme Court rendered in Mandvi Co-op Bank Ltd., then also, it is the judgment rendered by the Supreme Court in Mandvi Co-op Bank Ltd. which shall hold the field, being earlier in point of time and having been delivered by a Bench of equal strength.

(Para 10)

Anjali Khosla, Advocate
for the petitioner.

RAJBIR SEHRAWAT, J.(ORAL)

(1) The prayer in the present petition is to quash the order dated 11.01.2019 passed by Judicial Magistrate Ist Class, Sirsa vide which the application filed by the petitioner under Section 145 of NI Act for allowing him to appear as defence witness and to lead evidence by way of affidavit was partly dismissed.

(2) The facts as narrated in the petition shows that a complaint under Section 138 of NI Act was filed against the present petitioner wayback in 2012. Since then, the case has been going on before the trial Court. The evidence of the prosecution has been completed.

(3) At the stage of defence evidence, the petitioner-accused has moved an application for permission to be his own witness and to lead the evidence by way of affidavit. The trial Court has partly allowed the application filed by the present petitioner. Although the present petitioner, being an accused in the case, has been permitted to appear as his own witness in the case, however, the permission to lead his evidence by way of affidavit has been declined by the trial Court.

(4) While arguing the case, learned counsel for the petitioner has submitted that Section 145 of NI Act permits the evidence to be taken by the trial Court through affidavits. Still further, it is contended by the counsel that as per provisions of Section 315 Cr.P.C., the accused is to be taken as a competent witness in a trial against him. Therefore, the petitioner has every right to appear as his own witness and to lead the evidence in his defence. Still further, counsel for the petitioner has contended that since Section 145 of NI Act provide for taking the evidence by the trial Court through affidavits, therefore, no distinction can be made between the evidence of the complainant and the evidence of the accused. It is further submitted that by availing this provision, the trial Court should have permitted the petitioner to lead the evidence through affidavits. Counsel for the petitioner has relied upon a judgment of High Court of Karnataka in case *Afzal Pasha* versus *Mohamed Ameerjan – Criminal Petition No.1684 of 2016*, decided on 09.09.2016 and a judgment of High Court of Gujarat at Ahemdabad in *Rakesh Bhai Magan Bhai Barot* versus *State of Gujarat – Special Criminal Application No.3367 of 2018* decided on 29.01.2019.

(5) Having heard learned counsel for the petitioner and perusing the case, this Court does not find any substance in the argument raised by learned counsel for the petitioner. There is no dispute that the accused is a competent witness in a case against him and, therefore, he has right to defend himself, even by appearing as a witness, subject to the other provisions of law. Hence, the trial Court has rightly permitted the accused/ petitioner to appear and depose himself in his defence.

(6) So far as the insistence of the petitioner on leading the evidence through affidavit is concerned, this Court finds that the trial Court has given a valid reasoning for declining the prayer made by the petitioner. The trial Court has followed the mandate of the Hon'ble Supreme Court, as laid down in its judgment reported in *Mandvi Co-op Bank Ltd.* versus *Nimesh B. Thakore*¹. A perusal of the judgment of

¹ 2010(1) JT 259

the Hon'ble Supreme Court shows that in that case, the High Court had permitted the evidence of the accused to be led by way of affidavit. However, the Hon'ble Supreme Court, after considering the entire proposition threadbare, held the order of the High Court to be wrong. Accordingly, the order passed by the High Court in that case was set aside; holding that the accused cannot be permitted to lead his evidence by way of an affidavit in terms of Section 145 of NI Act.

(7) Learned counsel for the petitioner has further relied upon a subsequent judgment of the Hon'ble Supreme Court rendered in *Indian Bank Association and others versus Union of India and others*² to contend that the judgment of the Hon'ble Supreme Court rendered in *Mandvi Co-op Bank Ltd.* (supra) has found a reference in this judgment and after considering the same, the Hon'ble Supreme Court has laid down the guidelines regarding leading evidence in a complaint under Section 138 of NI Act. Therefore, the judgment of the Hon'ble Supreme Court rendered in *Mandvi Co-op Bank Ltd.* (supra) has been explained and distinguished by the subsequent judgment of the Supreme Court. Hence, the petitioner should be allowed to lead the evidence by way of affidavit.

(8) However, this Court finds that even in the subsequent judgment in case of *Indian Bank Association* (supra), the Hon'ble Supreme Court has not specifically permitted the evidence to be led by the accused by way of affidavit. In contrast, the proposition for consideration before the Hon'ble Supreme Court in *Mandvi Co-op Bank Ltd.* (supra) was; specifically qua the right of the accused to lead the evidence by way of affidavit. As observed above, the Hon'ble Supreme Court has thoroughly examined the proposition. A substantial question was framed by the Hon'ble Supreme Court in this case regarding the right of the accused to lead evidence by way of affidavit. The same is reproduced as under:-

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

1. xx xx xx xx xx xx

2. xx xx xx xx xx xx

3. Whether the right to give evidence on affidavit is provided to the complainant under Section 145(1) of the Act

² 2014 (2) RCR (Criminal) 598

is also available to the accused? (appeal arising from SLP (Crl.) No.3915/2006)”

(9) However, the Hon'ble Supreme Court categorically negated the proposition by holding that; by any interpretation of the language, as contained in Section 145 of NI Act, it cannot be said that the accused has a right to lead the evidence through affidavit. The relevant paragraphs of the judgment of the Hon'ble Supreme Court are as under:-

“30. 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. In paragraph 29 of the judgment, the High Court observed as follows:

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

Then in paragraph 31 of the judgment it observed:

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

to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in sections 315 and 316 of the Code."

31. On this issue, we are afraid that the High Court overreached itself and took a course that amounts to taking-over the legislative functions.

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34. *In Raghunath Rai Bareja and Anr. versus Punjab National Bank and Ors.*³ while observing that it is the task of the elected representatives of the people to legislate and not that of the Judge even if it results in hardship or inconvenience, Supreme Court quoted in affirmation, the observation of Justice Frankfurter of the US Supreme Court which is as follows:

"41. As stated by Justice Frankfurter of the US Supreme Court (see "Of Law and Men: Papers and addresses of Felix Frankfurter") "Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislator. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."

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36. 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

³ (2007) 2 SCC 230

to tender his evidence on affidavit and consequently, we set aside the direction as contained in sub-paragraph (r) of 34 paragraph 45 of the High Court judgment. The appeal arising from SLP (Crl.) No. 3915/2006 is allowed.”

(10) The above said pronouncement made by the Hon'ble Supreme Court leaves no doubt regarding the right of the accused to lead evidence by way of affidavit and it is amply clarified by the Supreme Court that the accused, while appearing as his own witness in defence; does not have any right to lead the evidence by way of affidavit. However, even if the judgment of the Supreme Court in case of *Indian Bank Assosication* (supra) is taken to be suggesting contrary to the judgment of the Supreme Court rendered in *Mandvi Co-op Bank Ltd.* (supra), then also, it is the judgment rendered by the Supreme Court in *Mandvi Co-op Bank Ltd.* (supra); which shall hold the field, being earlier in point of time and having been delivered by a Bench of equal strength.

(11) In view of the above, this Court does not find any ground to interfere with the impugned order. Hence, the present petition deserves to be dismissed.

(12) Accordingly, the petition is dismissed, being devoid of merits.

Manpreet Sawhney