

CRM-M-41179 of 2019

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-41179 of 2019

Date of Decision: 05.11.2019

Rajni Dhingra

...Petitioner

VERSUS

Sanjeev Chugh

...Respondent

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. R.S. Rai, Senior Advocate
with Mr. Anurag Arora, Advocate
for the petitioner.

SURINDER GUPTA, J.

A short question, which arises in this petition, is as to whether accused while appearing as witness in defence can be allowed to lead his evidence on affidavit?

2. Learned trial Court declined the request of petitioner (accused) while relying on observations in case of **Mandvi Cooperative Bank Limited vs. Nimesh B. Thakore, (2010) 3 SCC 83.**

3. Learned counsel for the petitioner has argued that in case of **Indian Bank Association and others vs. Union of India and others, (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 deposited 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 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 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.

9. Consequently, this petition has no merit and the same is dismissed.

(SURINDER GUPTA)
JUDGE

November 05, 2019
jk

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No