THE HON'BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA

CRIMINAL PETITION No.1594 of 2020

ORDER:

The instant petition under Section 482 of the Code of Criminal Procedure, 1973[1] is filed by the Petitioner/Accused, seeking to direct the learned Additional Judicial Magistrate of First Class, Srikalahasti, Chittoor District,[2] to accept his evidence in the form of chief examination affidavit in C.C.No.315 of 2017.

Factual Background

2. The Respondent No.1 herein filed a complaint in C.C.No.315 of 2017 before the learned Magistrate, against the Petitioner/Accused for the offence under Section 138 of Negotiable Instruments Act, 1881[3] for dishonour of cheque, alleged to have been issued in discharge of legally enforceable debt. At the stage of examination under Section 313 Cr.P.C., the petitioner/accused filed his chief examination affidavit before the trial Court and the same was not accepted by the learned Magistrate.

3. Thereafter, the petitioner filed Crl.M.P.No.514 of 2020 in C.C.No.315 of 2017 to permit him to file his evidence affidavit under

[1] In short "Cr.P.C."
[2] In short, "Magistrate Court"
[3] In short "the Act"

Section 145 of the Act and the same was dismissed by the trial Court. Aggrieved by the said Order of dismissal, the present petition has been filed.

4. Heard Sri Siva Prasad Reddy Venati, learned counsel for the petitioner and Ms.D.Prasanna Lakshmi, learned Assistant Public Prosecutor for the State/Respondent No.2.

5. Learned counsel for the petitioner would submit that since the complaint is under Section 138 of the Act, the evidence of the accused can be filed by way of an affidavit and there is no prejudice caused to the other side in leading his evidence by way of affidavit. Learned counsel would also submit that, subject to the provisions of Section 315 of the Code of Criminal Procedure, the accused can also give his evidence on affidavit.

6. Learned Assistant Public Prosecutor would submit that the petitioner is not entitled to give his chief evidence by way of an affidavit, vide the bar under Section 145 of the Act.

Point for Determination

7. Having heard the contentions raised by the learned counsel, this Court perused the material available on record. The point that arises for determination is;

"Could an accused in Section 138 of N.I. Act case, be permitted to give his evidence by way of an affidavit, like the complainant, in view of Section 145 of N.I.Act?"

Determination by the Court

8. Section 138 of the N.I. Act criminalises the dishonour of cheques, through which the Legislature intends to prevent dishonesty on the part of the drawer of the cheque. Section 138contains the essential ingredients necessary to tap in the offence followed by a proviso that contains three clauses viz., (a), (b), and (c). It is a settled principle of law that the offence under Section 138 is said to have been committed only on the combined fulfilment of the ingredients in main provision and eventualities in the proviso clauses. Section 139 states that the Court must presume unless the contrary is proved that, the holder of the cheque received the cheque for discharging in whole or in part of a debt or liability.

9. The core provision around which contentions surround in this matter i.e., Section 145, reads as follows;

> *"Section 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."*

10. A bare reading of the Section 145(1), makes it clear that the provision entails a complainant to give his evidence on an affidavit. No mention is made with respect to the Accused. The Hon'ble Apex Court in ***Mandvi Cooperative Bank Ltd. v. Nimesh B. Thakore***[4]**,** made a holistic analysis on the special provision under Section 145 of N.I.Act. At para 23, the Hon'ble Apex Court explained the crux of the provision as follows;

> ***"23.*** *Section 145 with its non obstante clause, as noted above, makes it possible for the evidence of the complainant to be taken in the absence of the accused. But the affidavit of the complainant (or any of his witnesses) may be read in evidence "subject to all just exceptions". In other words, anything inadmissible in evidence e.g. irrelevant facts or hearsay matters would not be taken in as evidence, even though stated on affidavit."*
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> *(Emphasis supplied)*

11. At para 25, in ***Mandvi Cooperative Bank Ltd.*** (supra), Citing the procedural simplicity measures brought by the virtue of Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 and

[4] (2010) 3 SCC 83

the rampant increase in the cheque dishonour cases, even thereafter, the Hon'ble Apex Court, observed as follows;

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

12. In ***Mandvi Cooperative Bank Ltd.*** (supra), the order under challenge therein permitted the accused to give evidence by filing an affidavit on par with the complainant by an interpretation to Section 145. The said impugned order was based on the reasoning that, the deliberate omission of "accused" in Section 145(1) was in view of the immunity under Article 20(3) of the Constitution of India and that when there is no express bar either in the Act or in the Cr.P.C., there is no reason to refuse to permit the accused to give evidence on affidavit,

subject to Sections 315 and 316 of Cr.P.C. The Hon'ble Apex Court set aside the impugned order, holding that having regard to the difference in nature of evidence of the complainant and that of the accused, it is not correct to extend the option available to the former by virtue of Section 145(1) to the latter, in the following terms;

> ***"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.

49. *Coming back to the first error in the High Court's reasoning, in the guise of interpretation it is not permissible for the Court to make additions in the law and to read into it something that is just not there. In Union of India v. Deoki Nandan Aggarwal [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219] this Court sounded the note of caution against the court usurping the role of legislator in the guise of interpretation. The Court observed: (SCC p. 332, para 14)*

> *"14. … It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the*

legislature but could not legislate itself. But to invoke judicial activism to set at naught the legislative judgment is subversive of the constitutional harmony and comity of instrumentalities."

52. *In the 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-para (r) of para 45 of the High Court judgment. The appeal arising from SLP (Crl.) No. 3915 of 2006 is allowed."*

(Emphasis supplied)

13. In that view of the matter, the Petitioner being Accused cannot be permitted to file an affidavit in lieu of Examination-in-Chief, as the provision under Section 145 (1) only entails a complainant to tender evidence in such a mode. When the language of the provision is clear and plain, and provides only for one meaning, it should be understood that the Act speaks for itself. Accordingly, point is answered. As such, the present petition is liable to be dismissed.

14. In the result, the Criminal Petition stands dismissed.

Pending Interlocutory applications, if any, shall stand closed.

JUSTICE VENKATA JYOTHIRMAI PRATAPA

Date : 21.12.2023
Dinesh

HON'BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA

Crl.P.No.1594 of 2020

Dt.21.12.2023

Dinesh

IN THE HIGH COURT OF ANDHRA PRADESH, AMARAVATI

****

CRIMINAL PETITION No.1594 of 2020

Between:

Kadiveti Ramanaiah,
S/o.Subbaramaiah, Hindu, Aged about 60 years,
Resident of Kaikala Street, Opposite Old Police Station,
Vakadu Village and Mandal,
SPSR Nellore District. …. Petitioner

And

1. Ponguri Prabhakara Reddy,
   S/o.Subrahmanyam Reddy, Aged about 55 years,
   Residing at 16-748, Sri Ram Nagar Colony,
   Vinayaka Temple Street, Srikalahasti Town,
   Chittoor District.
2. State of Andhra Pradesh,
   Represented by its Public Prosecutor,
   High Court of A.P at Amaravathi. ... Respondents

DATE OF JUDGMENT PRONOUNCED**: 21.12.2023**

SUBMITTED FOR APPROVAL:

THE HON'BLE SMT.JUSTICE VENKATA JYOTHIRMAI PRATAPA

1. Whether Reporters of Local Newspapers may be allowed to see the judgment? Yes/No

2. Whether the copies of judgment may be marked to Law Reporters / Journals? Yes/No

3. Whether Her Lordship wish to see the fair copy of the Judgment? Yes/No

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JUSTICE VENKATA JYOTHIRMAI PRATAPA

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! Counsel for petitioner : Sri Siva Prasad Reddy Venati

^ Counsel for Respondent No.2 : Ms.D.Prasanna Lakshmi,
Learned Assistant
Public Prosecutor

< Gist:

> Head Note:

? Cases referred:

1. (2010)32 SCC 83

This Court made the following: