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**2009 (1) CTC 763**

**IN THE HIGH COURT OF MADRAS**
**(*Madurai Bench*)**

**Prabha Sridevan and M. Jeyapaul, JJ.**

Criminal R.C. No.919 of 2007

19.9.2008

P. Janakumar .....***Petitioner***

Vs.

G. Pandiyaraj .....***Respondent***

***Negotiable Instruments*** — *Dishonour of Cheques — Evidence on Affidavit [s.145] — Whether Accused has right to let in evidence by filing affidavit — Decision in* ***V. Thanaiya*** *holding that such right is not available to accused, held, not correct — Accused, if chooses to be a witness, Court shall permit his chief-examination to be given in form of affidavit.*

***Negotiable Instruments*** — *Introduction of s.145 providing evidence on affidavit — Object of — To reduce time taken to complete trial of cases u/s.138.*

**Code of Criminal Procedure, 1973 (2 of 1974), Sections 273 to 276, 295 & 296 — Negotiable Instruments Act, 1881 (26 of 1881), Section 145 — Entitlement of accused in Section 138 offence to adduce evidence in affidavit — Construction and interpretation of Section 145 — Evidence on affidavit is accepted in criminal jurisprudence — Section 145(1) and (2) will have to be read conjointly — Both complainant and accused can give evidence on affidavit — Accused has right to be silent in offences under Section 138, Negotiable Instrument Act and if he chooses to give evidence such evidence can be given on affidavit — Restricting giving of evidence on affidavit to complainant alone by interpreting Section 145(1) alone would not advance object of legislation — Decision rendered in *V. Thanaiya v. M. Balasamy Nadar*, 2005 (2) CTC 288 overruled.**

Accused in offence under Section 138 sought permission of Court to state his evidence on affidavit. The Trial Court dismissed such Application and accused filed Revision. The ratio laid down in *V. Thaniya's case* holding that only complainant could file evidence on affidavit was doubted and matter was referred to Division Bench.

Evidence on affidavit is not unknown to criminal jurisprudence and similar provisions are found in Section 295 and Section 296 of the Code of Criminal Procedure. *[Para 7]*

So, with these decisions to guide us, we will again examine the issue on hand. The object of the amendment is to reduce the time spent by Court. Section 145(1) refers to complainant. Section 145(2) refers to 'any person'. This will be meaningless if we were to hold that the complainant and the complainant alone can furnish his evidence on affidavit. Both the provisions have to be read together, and

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considering the object of the amendment, the Court must permit the accused also to give his chief-examination in affidavit, if he chooses to do so. The accused of course always has the right to be silent. Even in these cheque cases the accused can choose not to be a defence witness. At the same time, Section 313 of the Code provides for examination of the accused and Section 315 provides that the accused person may be a competent witness. This is subject to Section 316 which lays down that no influence should be used to induce disclosure. *[Para 12]*

As regards giving evidence, the accused person shall not be asked to do so except on his own request in writing as per Section 315 of the Code. When he chooses to be a witness, the Court can permit the accused to give his chief examination on affidavit. The prosecution always has the right to cross-examine the accused and the other witnesses on his side, if any, on what they have stated in the affidavit, as seen from Section 145(2) of the Code and the accused may also file an Application seeking permission to explain what he has stated in chief-examination by getting into the box to give evidence on re-examination. Similarly, the accused has the right to cross-examine the complainant and the other prosecution witnesses. And for this, they will be summoned by the Court. They can also apply to be summoned for giving evidence in re-examination. This is what Section 145(2) of the Code means. This alone would be the interpretation that would advance the object of the Amendment Act 2002. *[Para 14]*

Let us look at it from another angle. If Section 145(1) of the Code is to be treated as an indulgence or a privilege granted to the complainant, the right to equality requires the accused also to be given the same privilge or indulgence. Or if Section 145(1) is intended to facilitate the reduction of time spent by Court, then also, the accused should be allowed to give his chief-examination on affidavit. And, when we read Section 145(1) and (2) toegether, it would be clear that the Parliament could not have used the words 'any person giving evidence' in Section 145(2) if we have to limit the scope of Section 145(1) to mean complainant alone. By the same logic, if the accused offers his chief-examination on affidavit, the consequences of Section 145(2) will follow. If the prosecution makes an Application, the accused will be summoned to be cross-examined. *[Para 17]*

Section 145 of the Code was introduced to reduce the time taken to complete the trial in these cases. So, our construction must advance the object, without violaitng the language. The chief-examination of the complainant can be furnished by affidavit. The Court shall permit him to do so. The chief-examination of all other witnesses, including the accused if he chooses to be a witness, can be furnished in the form of an affidavit. Any person who gives evidence on affidavit, and it includes the accused, may be examined by the Court if it thinks fit, and shall be summoned to give his evidence in cross-examination or re-examination, on application by the prosecution or the accused, as the case may be. *[Para 19]*

**Interpretation of Statues — Statute to be interpreted so that objects sought to be achieved is advanced — Object of Section 145(1) is to reduce time spent by Court — Considering object Court must permit accused also to give evidence by affidavit if he so desires.**

The object of the amendment is to reduce the time spent by Court. Section 145(1) refers to complainant. Section 145(2) refers to 'any person'. This will be meaningless if we were to hold that the complainant and the complainant alone can

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furnish his evidence on affidavit. Both the provisions have to be read together, and considering the object of the amendment, the Court must permit the accused also to give his chief-examination in affidavit, if he chooses to do so. *[Para 12]*

As regards giving evidence, the accused person shall not be asked to do so except on his own request in writing as per Section 315 of the Code. When he chooses to be a witness, the Court can permit the accused to give his chief-examination on affidavit. The prosecution always has the right to cross-examine the accused and the other witnesses on his side, if any, on what they have stated in the affidavit, as seen from Section 145(2) of the Code and the accused may also file an Application seeking permission to explain what he has stated in chief-examination by getting into the box to give evidence on re-examination. Similarly, the accused has the right to cross-examine the complainant and the other prosecution witnesses. And for this, they will be summoned by the Court. They can also apply to be summoned for giving evidence in re-examination. This is what Section 145(2) of the Code means. This alone would be the interpretation that would advance the object of the Amendment Act 2002. *[Para 14]*

Section 145 of the Code was introduced to reduce the time taken to complete the trial in these cases. So, our construction must advance the object, without violaitng the language. *[Para 19]*

**CASES REFERRED**

*Basavaraj R. Patil v. State of Karnataka,* 2000 (8) SCC 740 .......... *13*
*Directorate of Enforcement v. Deepak Mahajan,* AIR 1994 SC 1775 .......... *11*
*KSL & Industries Ltd. v. Mannalal Khandelwal,* 2005 Crl. L.J. 1201 .......... *8, 9*
*M. Pentiah v. Veeramallappa,* AIR 1961 SC 1107 .......... *11*
*NEPC Micon Ltd. v. Magma Leasing Ltd.,* 1999 (2) CTC 347 (SC) .......... *11*
*Peacock Industries Ltd. v. Budhrani Finance Ltd.,* 2007 (1) Crimes 271 —[Relied on] .......... *9*
*Seaford Court Estates Ltd. v. Asher,* 1949 (2) All ER 155 .......... *11*
*Shreenath v. Rajesh,* AIR 1998 SC 1827 .......... *11*
*V. Thanaiya v. M. Balasamy Nadar,* 2005 (2) CTC 288 —[Overruled] .......... *1, 20*

**Mr. M. Thirunavukkarasu, Advocate for Petitioner.**

**Mr. S. Chellam, Advocate for Respondent.**

**Mr. K.K. Ramakrishnan (Intervenor).**

**REFERENCE ANSWERED — MATTER DIRECTED TO BE LISTED BEFORE SINGLE JUDGE**

*Prayer : Criminal Revision against the order dated 7.11.2007 passed in Crl. M.P. No.6563 of 1007 in C.C. No.205 of 2007 on the file of the Judicial Magistrate No.II, Srivilliputhur.*

## JUDGMENT

### Prabha Sridevan, J.

**1.** The question before us is whether the accused has the right to let in evidence by filing an affidavit under Section 145 of the Negotiable Instruments Act, 1983. In ***V. Thanaiya v. M. Balasamy Nadar,*** 2005 (2) CTC 288, it was held that such a right is not available to the accused. But, another learned Single Judge, before whom the present Criminal Revision Case was listed, was not inclined to agree with the said view and therefore,

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the matter was referred to a Division Bench and it was placed before us on the directions of the Honourable the Chief Justice.

**2.** A Criminal Complaint for the offence under Section 138 of the Negotiable Instruments Act, 1983 preferred invoking the provision under Section 200 of the Code of Criminal Procedure has been taken on file in Calender Case No.205 of 2005. The matter was pending before the Judicial Magistrate No.II, Srivilliputhur. The accused filed a Petition for permission to give evidence on affidavit. This was resisted by the complainant. Learned Judicial Magistrate No.II, Srivilliputhur dismissed the said Petition. Aggrieved by that, the Revision was filed.

**3.** Learned counsel for the petitioner submitted that Section 145(2) uses the word 'any person' and therefore, there cannot be any restriction on who can give their evidence on affidavit, and the words 'any person' would include the accused and the word 'any person' should be given the same effect as found in Article 14 of the Constitution of India. Sub-section (2) must be read purposively and if so, it would include the accused and his witnesses also. The Section also provides for examination of the witnesses with regard to what is stated in the affidavit on the application of prosecution or the accused. If the Parliament had intended that only the complainant and his witnesses are entitled to give their evidence on affidavit, they would have used the words 'on the application of the accused'. There is no necessity for the prosecution to file an application for examination of the complainant's witnesses on oath. The object and reasons for the amendment of the Act show that it has been enaqcted to facilitate speedy trial. If so, the giving of evidence on affidavit by the accused would meet this end. Our basic criminal jurisprudence pre-supposes presumption of innocence and fair trial and therefore, whatever indulgence is given to the complainant must be given to the accused and if the complainant is entitled to give his evidence on affidavit, the accused should also be given the same right.

**4.** Mr. K.K. Ramakrishnan appearing as Intervenor also made his submissions. Section 139 of the Act raises several presumptions and therefore, the accused will have to rebut the presumption. A trial on a Complaint under Section 138 of the Act is different from a trial in other Criminal cases where there is presumption of innocence which throws the entire burden of proof on the prosecution. Here, execution of the instrument and passing of consideration are all matters which are presumed and they have to be rebutted and therefore, the benefit given to the complainant should be given to the accused as well. Learned counsel also submitted that there is a difference between Sections 243 and 254 of the Code of Criminal Procedure. Section 243, which deals with evidence for defence, gives an option to the accused to put in a written statement, but there is nothing to indicate the examination of the accused. Whereas Section 254 provides for hearing the accused also. Learned counsel submitted that considering the purpose of the amendment which should be dealt with as a *causus omissus*,

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this Court, with a view to advance the objects and reasons of the Act, must permit the accused to give evidence in chief-examination. Several decisions were cited.

**5.** Section 138 of the Negotiable Instruments Act, 1983 (hereinafter referred to as 'the Act') was introduced by the Banking, Public Financial Institutions and Negotiable Instruments (Amendment) Act, 1988 to give greater credibility to our trade, business, commerce and industry. Its constitutional validity has been upheld. Section 138 deals with dishonour of cheques for want of insufficiency, etc. of funds in the account; Section 140 deals with the defence which is not permissible in any prosecution under Section 138; Section 141 deals with offences by companies; and Section 142 deals with cognizance of offence. Though these provisions are comparatively recent, they have let loose an avalanche of litigation. Had a judicial impact assessment been made as mentioned in Salem Bar Association Case regarding the litigation this enactment would generate and the consequent financial impact on the State , we do not know if the result would have been in favour of enacting S. 138.

**6.** In the year 2002, Section 145 was introduced in the Act, which came into effect from February, 2003. It reads as follows :

> "*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."

The Statement of Objects and Reasons of the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 is extracted hereinbelow:

> "The said provisions in the Negotiable Instruments Act, 1881, *viz.*, Sections 138 to 142 in Chapter XVII, have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the Courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time-bound manner, in view of the procedure contained in the Act. The proposed amendments in the Act are made for early disposal of cases relating to dishonour of cheques, enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee director from prosecution under the Act."

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**7.** Evidence on affidavit is not unknown to criminal jurisprudence and similar provisions are found in Section 295 and Section 296 of the Code of Criminal Procedure. Therefore, the evidence of witnesses is, as a rule, recorded in open Court in the presence of the presiding officer, as seen from Section 274, Section 275 and Section 276 of the Code. In fact, Section 273 stipulates that except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader. Therefore, the rule is that evidence shall be recorded in open Court. Clearly, the provisions in the Code of Criminal Procedure permitting evidence by affidavit are exceptions. When any Application containing allegations against any public servant is made during the course of trial, the Court may direct the applicant to give evidence by affidavit. Evidence of a formal character also may be given by affidavit. The scheme of the Code of Criminal Procedure also shows that this rule that every witness should be examined on oath in open Court in the presence of the accused is applicable to Private Complaint cases also. The prosecution that follows pursuant to a Complaint under Section 138 of the Act is a Private Complaint case. So, Section 145(1) of the Code is a departure from the norm. The complainant would otherwise have been bound to give his chief-examination on oath, but he is given the option to decide whether he would enter the witness box for his chief-examination or whether he would give his evidence on affidavit. This provision has been introduced only to reduce the time factor, considering the pile-up of cheque cases.

**8.** In ***KSL & Industries Ltd. v. Mannalal Khandelwal,*** 2005 Crl. L.J. 1201, a Division Bench of the Bombay High Court gave directions for expeditious adjudication of these cheque cases and also answered the question whether the Court is obliged to examine the complainant even in respect of matters which have been stated on affidavit. The Bombay High Court observed as follows :

> "These provisions have been inserted in the Act recently; but even then as on 31st December, 2004, the total number of Complaints under Section 138 of the Act were about one lakh. The number of complaints which are pending in Bombay Courts seriously cast shadow on the credibility of our trade, commerce and business. Perhaps, the framers of this legislation could have never imagined that dishonesty of this magnitude is prevalant in our commercial world. Huge filing of these Complaints also reflects sudden decline in our moral standard and our value system. Immediate steps have to be taken by all concerned to ensure restoration of the credibility of trade, commerce and business. There are multiple reasons for accumulation of these complaints."

It was urged before the Division Bench, and rightly so, that if the Complaints are not disposed of expeditiously and it takes five to seven years, then the provisions of the Act would be rendered nugatory.

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**9.** In ***KSL & Industries Ltd. v. Mannalal Khandelwal,*** 2005 Crl.L.J. 1201, the Court was required to deal with only two questions as stated above. The judgment laid down several guidelines meant for the judicial officers in the disposal of the cases. In paragraph 40(b) of the judgment, the Division Bench held as follows :

> "The Court concerned must ensure that examination-in-chief, cross-examination and re-examination 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."

So, according to this judgment, the accused could give his evidence on affidavit since it says that the accused must be available for cross-examination. But this question had not been raised before the Division Bench. Subsequently, in ***Peacock Industries Ltd. v. Budhrani Finance Ltd.,*** 2007 (1) Crimes 271, the following questions were raised :

> "*(a)* Whether sub-section (2) of Section 145 of the Negotiable Instruments Act, 1881 (for short, "the Act") confers an unfettered right on the complainant and the accused to apply to the Court seeking direction to give oral examination-in-chief, of a person giving evidence on affidavit, even in respect of the facts stated therein and that if such a right is exercised, whether the Court is obliged to examine such a person in spite of the mandate of Section 145(1) of the Act ?
>
> *(b)* Whether the provisions of Section 145 of the Act, as amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, (for short "the amending Act of 2002") are applicable to the Complaints under Section 138 of the Act pending on the date on which the amendment came into force ? In other words, do the amended provisions of Section 145(1) and (2) of the Act operate retrospectively ?
>
> *(c)* I was given to understand by the learned counsel appearing for the petitioners in all the petitions that as the questions raised in this group of Petitions are questions of law, reference to the facts of individual case is not necessary and accordingly, I do not deem it necessary to narrate facts of each case for consideration of the questions that fall of my consideration. However, for the sake of convenience and brevity, I refer to the facts obtaining in the first Writ Petition No.1659 of 2005 and 3-4 other Writ Petitions to understand the facts situation against which the aforesaid questions have been raised."
>
> The learned Single Judge rejected the contentions made on behalf of the petitioners, (a) that evidence of the complainant would mean the evidence of the complainant alone and not his witnesses, and (b) that if an accused makes an Application with regard to the witnesses who had given evidence on affidavit, then such witnesses should again depose to the facts already stated in the affidavit by examination-in-chief by stepping into the witness box. The learned Judge held that such an

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interpretation would defeat the very object of the amendment and also impede speedy and swift progress of the case. We think this view is correct. That is the only way Section 145(1) can be read. As far as Section 145(2) is concerned, it cannot be interpreted to mean that in every case where the accused applies to the Court to summon the complainant or his witness, then such witness will be obliged to tender oral examination-in-chief once over again. For, then the accused, who is interested in protracting the trial, will frustrate the reception of the evidence on affidavit by simply making an Application under Section 145(2). The object of the amendment would be successfully nullified.

**10.** The right to give evidence on affidavit was introduced in the Code of Civil Procedure also, and Order XVIII, Rule 4 of the Code reads as follows :

"[*4. Recording of evidence.* —

*(1)* In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

*(2)* The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit."

Here too, it is only the examination-in-chief that is given on affidavit, the cross-examination and re-examination of the witnesses whose evidence in-chief has been furnished by affidavit shall be taken by Court or the Commissioner appointed by it.

**11.** Several decisions were referred to by the learned counsel. In ***Shreenath v. Rajesh,*** AIR 1998 S.C. 1827, it was observed that while interpreting any procedural law, if more than one interpretation is possible, the one which curtails the procedure without eluding the justice has to be adopted. In ***NEPC Micon Ltd. v. Magma Leasing Ltd.,*** AIR 1999 SC 1952, the Supreme Court dealt with the manner in which Section 138 of the Act should be interpreted. In that case, the question was whether "Account Closed" endorsed by the Bank would give rise to an offence as envisaged in Section 138. It was contended therein that Section 138, being a penal provision, should be strictly interpreted. The Supreme Court rejected the plea and held that even with regard to penal provision, any interpretation which withdraws the life and blood of the provision and makes it ineffective

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should be averted. In ***M. Pentiah v. Veeramallappa,*** AIR 1961 SC 1107, paragraph 27, which is relevant, is extracted hereunder :

> "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the Courts are very reluctant to substitute words in a Statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good Sense.": see *Maxwell on Statutes* (10th Edn.) p. 229.

In ***Seaford Court Estates Ltd. v. Asher,*** 1949 (2) All ER 155, Denning, L.J. Said:

> "when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament ... and then he must supplement the written word so as to give "force and life" to the intention of the legislature .... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out ? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

In ***Directorate of Enforcement v. Deepak Mahajan,*** AIR 1994 SC 1775, it was held as follows :

> "Normally, Courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for Courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane."

**12.** So, with these decisions to guide us, we will again examine the issue on hand. The object of the amendment is to reduce the time spent by Court. Section 145(1) refers to complainant. Section 145(2) refers to 'any person'. This will be meaningless if we were to hold that the complainant and the complainant alone can furnish his evidence on affidavit. Both the provisions have to be read together, and considering the object of the amendment, the Court must permit the accused also to give his chief-examination in affidavit, if he chooses to do so. The accused of course always has the right to be silent. Even in these cheque cases the accused can choose not to be a defence witness. At the same time, Section 313 of the Code provides for examination of the accused and Section 315 provides that the accused person may be a competent witness. This is subject to Section 316 which lays down that no influence should be used to induce disclosure.

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**13.** In ***Basavaraj R. Patil v. State of Karnataka,*** 2000 (8) S.C.C. 740, the Supreme Court dealt with the purpose of Section 313 of the Code and speaking for the majority, K.T. Thomas, J. wrote :

> "The said recommendation has been followed up by Parliament and Section 313 of the Code, as is presently worded, is the result of it. It would appear *prima facie* that the Court has discretion to dispense with the physical presence of an accused during such questioning only in summons cases and in all other cases it is incumbent on the Court to question the accused personally after closing prosecution evidence."
>
> "The position has to be considered in the present set-up, particularly after the lapse of more than a quarter of a century through which period revolutionary changes in the technology of communication and transmission have taken place, thanks to the advent of computerisation. There is marked improvement in the facilities for legal aid in the country during the preceding twenty-five years. Hence a fresh look can be made now."
>
> "But the situation to be considered now is whether, with the revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country, is it necessary that in all cases the accused must answer by personally remaining present in Court. We clarify that this is the requirement and would be the general rule. However, if remaining present involves undue hardship and large expense, could the Court not alleviate the difficulties. If the Court holds the view that the situation in which he made such a plea is genuine, should the Court say that he has no escape but he must undergo all the tribulations and hardships and answer such questions personally presenting himself in Court."
>
> "We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall" in clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should, in appropriate cases, *e.g.,* if the accused satisfies the Court that he is unable to reach the venue of the Court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner."

Therefore, even where the word "personally" is used, the Supreme Court held that on Application, the accused may be allowed to answer questions without making his physical presence in Court on account of justifying exigency, and that such an approach would be pragmatic.

**14.** As regards giving evidence, the accused person shall not be asked to do so except on his own request in writing as per Section 315 of the Code. When he chooses to be a witness, the Court can permit the accused to give

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his chief-examination on affidavit. The prosecution always has the right to cross-examine the accused and the other witnesses on his side, if any, on what they have stated in the affidavit, as seen from Section 145(2) of the Code and the accused may also file an application seeking permission to explain what he has stated in chief-examination by getting into the box to give evidence on re-examination. Similarly, the accused has the right to cross-examine the complainant and the other prosecution witnesses. And for this, they will be summoned by the Court. They can also apply to be summoned for giving evidence in re-examination. This is what Section 145(2) of the Code means. This alone would be the interpretation that would advance the object of the Amendment Act 2002.

**15.** Interestingly, the manner in which the counsel argued, it appeared that they were under the impression that while giving evidence on affidavit, the rigour of being truthful was somewhat less than giving evidence by stepping into the box. We make it clear that all the rules which apply to oral evidence equally apply to the evidence given on affidavit and merely because a person gives evidence on affidavit, the witnesses cannot think that they can stray from the standard of truth or that they can produce documents which are not admissible in evidence. If in the cross-examination any doubt is raised, the same must be answered in re-examination. The Amendment has been brought in only to shorten the time spent in trial because the entire time spent in chief-examination is reduced to almost nil when the affidavit is filed in proof of the evidence given in chief-examination.

**16.** It is possible that in Section 145(1) of the Code, the word 'accused' was not used because the Parliament did not want the Courts to construe such a provision as a mandate to the accused to give evidence. If the word 'accused' had been used in Section 145(1), the complainants may contend, in a case where the accused chooses not to give evidence, that adverse inference should be drawn. But no person accused of an offence shall be compelled to give evidence against himself. The accused always has the right to remain silent. The right against self-incrimination applies to all types of criminal offences. This is one of the fundamental tenets of a fair trial. It may be that the legislature felt that introducing the word 'accused' in Section 145(1) of the Code would be considered to be a statutory compulsion which abrogates the privilege against self-incrimination. To avoid a possible construction which directly takes away the right against self-incrimination, the legislature may have avoided the use of the word 'accused'.

**17.** Let us look at it from another angle. If Section 145(1) of the Code is to be treated as an indulgence or a privilege granted to the complainant, the right to equality requires the accused also to be given the same privilge or indulgence. Or if Section 145(1) is intended to facilitate the reduction of time spent by Court, then also, the accused should be allowed to give his chief-examination on affidavit. And, when we read Section 145(1) and (2) toegether, it would be clear that the Parliament could not have used the

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words 'any person giving evidence' in Section 145(2) if we have to limit the scope of Section 145(1) to mean complainant alone. By the same logic, if the accused offers his chief-examination on affidavit, the consequences of Section 145(2) will follow. If the prosecution makes an application, the accused will be summoned to be cross-examined.

**18.** The Code of Criminal Procedure provides for the giving of evidence on affidavit to specific categories of witnesses. These witnesses are not witnesses giving direct evidence. For the first time, this provision is introduced to enable the complainant himself to give evidence on affidavit. Under Section 200 of the Code, the complainant shall be examined before the Magistrate who takes cognizance of his complaint, subject to the proviso. So, by way of caution, Section 145(1) begins with the *non-obstante* clause. Then follow the words which give to the complainant the option to give his chief-examination on affidavit. Therefore, the absence of the word 'accused' cannot be construed as exclusion, because the accused, when he chooses to do so, is always competent to be a witness.

**19.** Section 145 of the Code was introduced to reduce the time taken to complete the trial in these cases. So, our construction must advance the object, without violating the language. The chief-examination of the complainant can be furnished by affidavit. The Court shall permit him to do so. The chief-examination of all other witnesses, including the accused if he chooses to be a witness, can be furnished in the form of an affidavit. Any person who gives evidence on affidavit, and it includes the accused, may be examined by the Court if it thinks fit, and shall be summoned to give his evidence in cross-examination or re-examination, on application by the prosecution or the accused, as the case may be.

**20.** In the result, we answer the question posed to us as follows :

The decision in ***V. Thaniya v. M. Balasamy Nadar,*** 2005 (2) CTC 288 is not correct. If the accused chooses to be a witness in a case under Section 138 of the Negotiable Instruments Act, 1983, the Court shall permit his chief-examination to be given in the form of an affidavit.

**21.** The Registry is directed to list the matter before the learned Single Judge for appropriate orders.

**RSN**

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