Bombay High Court Peacock Industries Ltd., Mr. Daud ... vs Budhrani Finance Ltd. And State Of ... on 14 July, 2006 Equivalent citations: IV (2006) BC 302, 2006 (5) MhLj 162 Author: D Bhosale Bench: D Bhosale JUDGMENT D.B. Bhosale, J. Page 2469 1. The questions raised in this group of writ petitions are common, the fact situation against which they are raised is similar and though the parties are different they all arise from somewhat similar orders and hence this group of petitions is being disposed of by common judgment. 2. The questions that fall for my consideration are as under; (A) Whether sub-section (2) of Section 145 of the Negotiable Instruments Act, 1881, (for short, "the Act") confers an unfettered right on the Page 2470 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? 3. 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 for 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 fact situation against which the aforesaid questions have been raised. 4. In the first petition (Criminal Writ Petition No.1659 of 2005) the petitioner-accused has impugned the order dated 1.4.2005 rendered by the learned Magistrate in the complaint filed by the respondent-complainant under Section 138 of the Act, over-ruling the objection raised by the petitioner-accused. The objection was to the effect that Section 145 of the Act cannot be taken recourse to by the complainant for giving evidence on affidavit since the complaint in this petition was filed much before the Amending Act of 2002 by which Section 145 was inserted, came into force. The Amending Act was brought into force on 6.2.2003 whereas the complaint was filed on 3.4.1999. In this case the respondent-complainant, under Section 145(1) of the Act was allowed to give his evidence on affidavit after 6.2.2003 and when the accused was asked to cross examine the witness on 1.4.2005, the aforesaid objection was raised which was rejected by the order, impugned in the petition. In short, the submission was, the provisions of Section 145 of the Act cannot be give retrospective effect. Similar objection was raised in criminal writ petition no.2063 of 2005 and that was also over-ruled by the order impugned in that writ petition. In Writ Petition No.2100 of 2005 the accused preferred an application under Section 145(2) of the Act seeking direction to the complainant, who has given

his evidence on affidavit, to again depose to the facts which have already been stated in the affidavit in examination-in-chief. That application was rejected by order dated 16.7.2005 relying upon the judgment of this Court in KSL and Industries Ltd v. Mannalal Khandelwal and Anr. 2005 All MR (Cri) 1105. In Criminal Application No.1646 of 2006, similar application under Section 145(2) was filed and that was also rejected relying upon the very judgment of this Court. However, in that case the accused was given an opportunity to make a statement under Section 294 of the Code of Criminal Procedure (for short "the Code"). Most Page 2471 of the cases in this group are arising from similar orders passed on the applications made by the accused under Section 145(2). In Criminal Writ Petition No.2302 of 2005 the petitioner-accused has challenged the order dated 7.7.2005 rejecting his prayer to take the evidence of accused no.7 on affidavit relying upon the provisions of sub-section (1) of Section 145. That application was rejected by the learned Magistrate holding that sub-section (1) of Section 145 gives a right only to the complainant to give evidence on affidavit. In Writ Petition No.2192 of 2005 the accused filed application seeking de-exhibiting of the documents filed by PW 1 with his evidence on affidavit. That application was rejected by order dated 31.8.2005 holding that the accused had not taken any objection when the said affidavit was filed. In that case, the affidavit and the documents were filed on 30.3.2005 and the objection was raised on 31.8.2005. In most of the petitions, this Court while issuing notice has granted stay to the further proceedings. 5. Before I proceed to consider the questions raised in this group of writ petitions, it would be relevant to make a short reference to the background against which these questions have been raised by the learned Counsel for the petitioners. The learned Single Judge of this Court in Criminal Writ Petition No. 26 of 2004 (Raminder Singh Sahani v. Japfa Oberoi Agro Ltd and Anr.) had an occasion to consider similar question wherein after considering the provisions of Section 145 of the Act, it was observed that sub-section (2) of Section 145 of the Act makes it obligatory on the Court to summon and examine the complainant on the application made by the accused, and he proceeded to direct to the learned Magistrate to summon the complainant and record his oral examination-in-chief and thereafter, permit the accused/petitioner to cross-examine the complainant. Another learned Single Judge of this Court in Writ petition No.1228 of 2004, by his order dated 8.10.2004, however, recorded his prima facie disagreement with the view taken in Raminder Singh Sahani's case (supra) and made reference to the Division Bench of the following question: Whether, in spite of mandate of Section 145(1) of the said Act of 1881, the Court is obliged to examine the complainant even in respect of matters which have been stated on affidavit which have to be treated as examination-in-chief of the witness?" In view thereof, the question was referred to the Division Bench presided over by the then learned Chief Justice, which reframed the question as follows. "Whether, in spite of mandate of Section 145(1) of the Act, the Court is obliged to examine the complainant even in respect of matters which have been stated on affidavit? 6. The Division Bench decided the Criminal Writ Petition No.1228 of 2004 (KSL & Industries Ltd case) by judgment and

order dated 1.2.2005. The scheme of Chapter XVII of the Act consisting of Sections 138 to 147 and the Statement of Objects and Reasons were taken into consideration while interpreting the relevant provisions and addressing the question referred to by the learned Single Judge. Total pendency of the cases under Section 138 as on 31/12/2004, which was about 3.70 lacs, was also taken into consideration by the Division Bench for giving certain directions for speedy disposal of those cases. Page 2472 7. The reference was answered in negative. It would be relevant to reproduce paragraphs 38, 39 and direction (b) in paragraph 40 in the judgment of the Division Bench, which read thus; 38. Sub-section (1) of Section 145 gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. If this is made on affidavit, the same has to be accepted and such affidavit is required to be kept on record by the Court. The second part of sub-section (1) provides that the complainant may give his evidence on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceeding. Thus, it is clear that once the evidence of the complainant is given on affidavit, it may be read in evidence in any enquiry, trial or other proceeding, and it may be subject to all just exceptions. 39. We are clearly of the opinion that according to the language of Section 145 of the Act, the evidence (examination-in-chief) of the complainant can be given on affidavit, and thereafter, if the accused so desires, he/she may request the Court to call the complainant for cross-examination. 40.(b) 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. 8. It is against this backdrop, it appears that in another group of writ petitions (M/s Indo International Ltd and Anr. v. State of Mah. And Anr. Cri.Writ Petition No.1274 of 2005) decided by learned Single Judge on 25.7.2005, the similar arguments, as advanced before me, were advanced, raising an issue as to whether the question framed and referred to by the learned Single Judge in Writ Petition No.1228 of 2004 had been answered by the Division Bench in KSL & Industries Ltd case (supra). It was specifically argued in that group as also in this group of writ petitions that the aforestated question referred to, to the Division Bench, had not at all been answered in the said judgment. It was further argued that the decision of the learned Single Judge in Ramdinsingh Sahani's case is not overruled and, therefore, this Court is bound by the said decision. It was then submitted that while dealing with the said issue no reference to the mandate of sub-section (2), conferring unfettered right on the accused to seek oral examination-in-chief of the complainant, was made by the Division Bench. On the other hand, it was submitted that the law laid down by the Division Bench in KSL & Industries Ltd case is that once the complainant submits his affidavit of examination-in-chief, the application made by the accused under sub-seciton (2) of Section 145 of the Act, the Court is obliged to call upon the complainant to enter the witness-box only for the purpose

of offering himself for cross-examination and re-examination, if any, and the complainant is not required to again depose to the facts which are already stated in the affidavit in examination-in-chief. The learned Single Judge in Indo International Ltd case after referring to the judgment of the Division Bench in KSL and Industries Ltd in depth, has observed that the submissions made by the learned Counsel for the Page 2473 petitioner that the Division Bench has not decided the issue in question, cannot be accepted. The submission that the decision of the Division Bench is contrary to law and requires reconsideration by the larger bench was also rejected. After considering the provisions of sub-section (2) of Section 145 the learned single Judge made the following observations: However, the use of the word"shall" in the later part of the same sub-section shows that it is mandatory for the trial Court to summon a witness for examination in the event of an application by the accused. There cannot be any dispute about the said proposition. Once an application is made by the accused, a witness examined by the complainant by filing an affidavit of examination-in-chief will have to be summoned. The Learned Counsel for the petitioner placed reliance on the use of the word "examination" as defined in the Indian Evidence Act includes examination-in-chief, cross-examination and re-examination. He, therefore, submitted that once a witness is summoned under sub-section (2) of Section 145 his examination, i.e examination-in-chief, cross-examination and re-examination will have to be recorded. I find it difficult to accept the submission. When the statute has referred to word "examination", the said word will have to be given a meaning with reference to the context in which it is used. The word "examination" has been obviously used in sub-section (2) in the context of the right of cross-examination of the rival party in case the evidence is led of a witness on affidavit. Thus, the mandatory provision of sub-section (2) is that the Court has to call the witness whose affidavit in examination-in-chief is filed for the cross-examination by the rival party when an application under sub-section (2) of Section 145 is made. After completion of cross-examination, the learned Judge will have to permit re-examination, if necessary, in accordance with the law of evidence. Therefore, the submission of the learned Counsel that the decision of the Division Bench is contrary to law cannot be accepted. 9. The judgment of the Supreme Court in State of Punjab v. Naib Din , wherein the provisions of Section 296(2) of the Code were under consideration, was considered and referred to by the learned Single Judge and he observed that this judgment of the Supreme Court cannot be pressed into service since the language employed in sub-section (1) of Section 145 is altogether different. It was further observed that Sub-section (1) starts with a non obstante clause carving out an exception to the provisions of the Code of Criminal Procedure, 1973. A reference to the judgment of this Court in criminal Application No. 3638 of 2005 (Harischandra Biyani v. Stock Holding Corporation of India Ltd and Anr) decided on 11.10.2005 also will have to be made. The learned Single Judge in that case, vide order dated 11.10.2005, dealt with somewhat similar submissions which were made in M/s Indo International Ltd case and has recorded her agreement with the view expressed by the learned Single Judge in that case. It may be stated that the

order passed by the learned Single Judge in M/s. Indo International Ltd. case was carried to Page 2474 the Supreme Court in S.L.P. However, the S.L.P. was disposed of in view of the statement made by the learned Counsel for the complainant that the complainant would make himself available before the Court for examination. The S.L.P. was not disposed of on merits. It is against this backdrop the learned Counsel appearing for the petitioners called upon me to address the questions framed in the first paragraph of the judgment. 10. In the course of arguments the learned Counsel for the parties, including senior counsel Mr.Mundargi and Mr.Aney, submitted that to bring uniformity in the procedure being followed by Magistrates dealing with the cases under Section 138 of the Act and to avoid delay in disposal of those cases as also to curtail revisions against the order of "issue process" or writ petitions under Article 227/226 of the Constitution of India or applications under Section 482 of the Code for quashing of the complaint, some guidelines/directions may be passed for the benefit of the parties and the Magistrates dealing with these cases. They also suggested to frame the following issue which I would like to address in the later part of the judgment. Whether it is necessary to issue guidelines to the trial Courts in respect of the procedure to be followed while instituting the complaint, issuing process and taking evidence of a person on affidavit with the documents and dealing with the objections, if any, taken by the accused in respect of the documents to be exhibited in the course of recording examination-in-chief and cross-examination of such witness? 11. The leading arguments on the first question were advanced by Mr Mundargi, learned Senior Counsel. At the outset, he submitted that the Division Bench in the judgment in KSL and Industries Ltd case, while addressing the reference made by the learned Single Judge in Writ Petition No. 1228 of 2004, did not consider the scope of both sub-sections (1) and (2) of Section 145. Section 145(2) did not fall for consideration in the said judgment. Moreover, according to Mr. Mundargi, the judgment does not record dissenting view from the one taken by the learned Single Judge in Raminder Singh Sahani's case. Mr.Mundargi, further submitted that the another learned Single Judge in M/s Indo International Ltd, while dealing with similar arguments, has held that the Division Bench did consider the scope of sub-section (2) and in view thereof, reference to the Larger Bench is necessary to consider whether the scope of sub-section (2) of Section 145 fell for the consideration in KSL and Industries Ltd. Mr.Mundargi then submitted that the provisions of Section 145(2) require a proper interpretation inasmuch as whether it contains only a right of cross-examination as held in M/s.Indo International Ltd. According to Mr.Mundargi, Section 145(2) cannot be restricted only to the cross examination and it includes even examination-in-chief as can be seen from the very language of sub-section (2). He further submitted that the "Rule of Literal Construction" will have to be applied while interpreting Section 145 and the 'words' therein must be given their ordinary meaning. Then, my attention was drawn to the words "shall" and "examine" employed in subsection (2) of Section 145 to contend that the Magistrate is bound to call a person, who has given his examination-in-chief on affidavit, to step into witness box to give oral

examination-in-chief, on the application made by the accused or the Page 2475 complainant and that the right of the accused under sub-section (2), in any case, cannot be restricted only to cross-examination of the complainant. It was further submitted that Section 145(1) starts with non obstante clause and carves out an exception to the provisions of the Code and not to the Evidence Act, and therefore, while accepting the affidavit, the provisions of Sections 136, 141 and 142 of the Evidence Act cannot be overlooked. It was further submitted that the Supreme Court in the State of Punjab v. Naib Deen , while dealing with the provisions of Section 296 of the Code has held that the Magistrate is bound to summon a witness for his examination-in-chief or cross-examination in the event of an application made by the accused under sub-section (2) of Section 296 of the Code, which is analogous to Section 145(2) of the Act. That judgment has conclusively dealt with the controversy and, therefore, the same interpretation will have to be put on the language of Section 145(2) of the Act. Some difficulties as also prejudice being caused were pointed out in the course of the arguments in respect of exhibiting the documents filed with the affidavit under sub-section (1) of Section 145. According to the learned Counsel for the petitioners, the rights of the accused under the provisions of the Evidence Act will stand violated if affidavit and documents annexed thereto are taken on record and the accused is only asked to cross-examine the witness without considering and deciding the objections to any item of the affidavit and to exhibit the said documents. Most of the learned Counsel appearing for the different petitioners in this group of writ petitions adopted the submissions advanced by Mr. Mundargi, learned senior counsel for the petitioners. Mr. Marwadi, learned Counsel for the petitioners also advanced the argument on the same line. 12. On the other hand, Anne, learned senior counsel appearing in Criminal Writ Petition No.2192 of 2005 in reply to the submissions advanced by the learned Counsel for the petitioners on the first question made the following points:-Firstly, he submitted that Section 145(1) creates a statutory right to tender evidence on affidavit and, therefore, the provisions of Section 145(2) could never be interpreted to render this right nugatory. Secondly, he submitted that sub-sections (1) and (2) of Section 145 create two distinct and separate rights, the former being in favour of the complainant and the latter being for the benefit of both, the complainant and the accused and, therefore, both the provisions must be construed harmoniously and while so doing, he further submitted, the principle of purposive interpretation will have to be borne in mind. In support of this contention, he placed reliance upon three judgments of the Supreme Court: (i) U.P. Bhoodan Yagna Samiti U.P. v. Braj Kishor and Ors , (ii) A.R. Antulay v. R.S. Nayak and Anr. and Standard Chartered Bank v. Directorate of Enforcement . Page 2476 Lastly, he placed reliance upon the judgments of this Court in KSL and Industries Ltd case and M/s Indo International Ltd case and submitted that this Court has already interpreted the provisions of Section 145(2) and the matter is no longer res integra. Mr Anne also invited my attention to the expression “examine” in sub-section (2) and submitted that the purposive interpretation of this expression will have to be made in

the light of the history and object of Legislature and the mischief it seeks to cure. The learned Counsel appearing for the respondents-complainants, in almost all the writ petitions, adopted the submissions advanced by Mr Anne, learned senior counsel. 13. For considering the questions involved in these writ petitions it would be relevant to look at the circumstances under which Chapter XVII of the Act was introduced, the provisions of Section 143 to 149 were inserted and the problems which Legislature intended to tackle. The Banking, Public Financial Institutions and the Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988) inserted Chapter XVII comprising of Sections 138 to 142 with effect from 1.4.1989. It was inserted with a view to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reasons that it exceeds the arrangements made by the drawer, with adequate safe-guards to prevent harassment of honest drawers. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The provisions of Sections 138 to 142, however, were found deficient in dealing with dishonour of cheques. It was found that the punishment provided, has proved to be inadequate, the procedure prescribed for the Courts to deal with such matters cumbersome and that the Courts are unable to dispose of such cases expeditiously in a time-bound manner in view of the procedure contained therein. A large number of cases were reported to be pending under Sections 138 in various Courts in the country. 14. Keeping that in view, a Working Group was constituted to review Section 138 of the Negotiable Instruments Act,1881 and to make recommendations as to what changes were needed to effectively achieve the purpose of that section. The Working Group along with other representations from various institutions and organisations made recommendations which were examined by the Government in consultation with the Reserve Bank of India and other legal experts, and a Bill, namely, the Negotiable Instruments (Amendment) Bill, 2001 was introduced in the Lok Sabha on 24.7.2001. 15. The Bill was referred to the Standing Committee on Finance which made certain recommendations in its report submitted to Lok Sabha in November, 2001. Keeping the recommendations of the Standing Committee on Finance in view the Parliament decided to bring out, inter alia, the following Page 2477 amendments insofar as Chapter XVII of the Negotiable Instruments Act, 1881, is concerned namely:-to increase the punishment as prescribed under the Act from one year to two years; to increase the period for issue of notice by the payee to the drawer from 15 days to 30 days; to provide discretion to the Court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act; to prescribe procedure for dispensing with preliminary evidence of the complainant; to prescribe procedure for servicing of summons to the accused or witness by the Court through speed post or empanelled private couriers; to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases; to make the offences under the Act compoundable; to exempt those directors from prosecution under Section 141 of the Act who are nominated as

directors of a company by virtue of their holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government, or the State Government, as the case may be; and to provide that the Magistrate trying an offence shall have power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees. The proposed amendments were aimed at 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 Negotiable Instruments Act, 1881. 16. Accordingly, the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 was passed by the Parliament and it received the assent of the President on 17.12.2002 by which the amendments to Sections 138, 141, 142 in Chapter XVII were made and the provisions of Sections 143 to 147 were newly inserted in the said Chapter. The amendments were also made to some other provisions in the Negotiable Instruments Act, to which in the instant group of the writ petitions we are not concerned and hence reference to those amendments is avoided. All this background or circumstances will have to be taken into consideration while appreciating the arguments advanced by the learned Counsel for the parties and for interpretation of Section 145 of the Act. For better appreciation, it would be advantageous, at this stage, to reproduce Section 145 of the Act which reads thus: 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. 17. Before I proceed further, it would be relevant to glance through the judgments of the Supreme Court, cited before me, for the purpose of Page 2478 interpretation of Section 145 of the Act. The Supreme Court in U.P.Bhoodan Yagna Samiti Vs Braj Kishore case (supra) has settled that when one has to look at the intention of the Legislature, one has to look at the circumstances under which the law was enacted, the preamble of the law, the mischief which was intended to be remedied by the enactment of the statute. In that case while upsetting the Allhabad High Court's judgment, the Supreme Court held that the term "Bhoomiheen Kisan" could not be interpreted to mean rich persons residing in cities who technically did not hold agricultural land, as it would defeat the object of Legislature. The observations made in paragraph 14 may be useful and hence they are reproduced as under: 14. This principle of interpretation was not enunciated only for interpretation of law but it was enunciated for interpreting any piece of literature and it meant that when you have to give meaning to anything in writing then you must understand the real meaning. You can only understand the real meaning by understanding the reference, context, the circumstances in which it was stated and the problems or the situations which were intended to be met by what was said and it is only when

you take into consideration all this background, circumstances and the problems which have to be tackled that you could really understand the real meaning of the words. This exactly is the principle which deserves to be considered. 18. In A.R. Antulay's case (supra) the Supreme Court observed that it is clear that the words should normally be given their ordinary meaning bearing in mind the context. It is only where the literal meaning is not clear that one resorts to the golden rule of interpretation or the mischief rule of interpretation. The Supreme Court in that judgment has quoted the observations of Tindal C.J. in Sussex Peerage Claim (1884) II Ce & Fin 85, 143, to which useful reference can be made. The relevant observations read thus: The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer Stowell V. Lord Zouch, is 'a key to pen the minds of the makers of the Act, and the mischiefs which they intend to redress'. Page 2479 19. Similarly, the observations of a three-Judge Bench of the Supreme Court in Balram Kumawat v. Union of India (2003) 7 SCC 621 made in paragraph 23 may be useful for our purpose. The relevant observations in paragraph 23 read thus: 23. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so. Thus, it is clear that for interpretation of the provisions, like the one that falls for my consideration, one must look into the history and object of Legislature. The words of Section 145 of the Act will have to be interpreted bearing in mind the background, circumstances and the problems which the Legislature intended to tackle and also the object of law it seeks to achieve. In short, the Rule of Purposive Interpretation will have to be borne in mind while interpreting Section 145 of the Act. 20. If two sub-sections of Section 145 are interpreted by applying the Rule of Literal Construction which requires the words appearing in the Act to be given their ordinary meaning, it would defeat the very purpose and object of inserting the said section in the Act. The phraseology in sub-section (1) "the evidence of the complainant may be given by him on affidavit", as argued by one of the learned Counsel for the petitioners, perhaps, will have to be interpreted to mean the complainant alone can give evidence on affidavit and not his witness/es. Similarly, every application, either written or oral, made by the accused under subsection (2) seeking direction to the witness who has given evidence on affidavit, to step into witness box to depose to the facts already stated in the affidavit of examination-in-chief, will have to be allowed just for

asking. Such an interpretation of sub-section (2) of Section 145 would not only defeat the very object of the amendment but would impede speedy and swift progress of the trial proceedings rendering the provisions of sub-section (1) of Section 145 nugatory and redundant. In my opinion, such interpretation is not permissible. No part of statute can be interpreted in a manner that would render any other part redundant, as the Legislature could never have intended to enact redundant provision. 21. In the light of the language employed by the Legislature in both the sub-sections of Section 145, the different interpretations were put by the two learned Single Judges of this Court on the language of the said section and hence the reference was made to the Division bench. The Division Bench has addressed the aforesaid question or not was, inter alia, considered by another learned Single Judge in Indo International Ltd's case wherein he held that the question was fully answered by the Division Bench. I find myself in agreement with the opinion expressed by the learned Single Judge. A plain reading of the judgment in KSL and Industries Ltd. case clearly demonstrates that the Division Bench was all throughout conscious of sub-section (2) of Section 145 also. It is factually incorrect to contend that Section 145(2) did not fall for consideration in the said judgment. In fact, the language of the question referred to for consideration makes it clear that Section 145(2) was Page 2480 very much before the Court. In any case, the ratio of the judgment does not support the contention that the accused has a right to apply to the trial Court to compel the complainant or his witness who has given his evidence on affidavit to enter into the box to be examined in-chief. In paragraph 39 the Division Bench has clearly observed that according to the language of Section 145 of the Act, the evidence (examination-in-chief) of the complainant can be given on affidavit and, thereafter, if the accused so desires, he/ she may request the court to call the complainant for cross-examination. In paragraph 40 while giving directions to accomplish the underlying object of the Act, in clause (b) thereof, the Division Bench has further observed that the witnesses of the complainant and the accused must be made available for cross-examination as and when there is a direction to that effect under Section 145(2). It is thus clear that sub-section (2) was before the Division Bench and the rights created thereunder. I, therefore, do not deem it necessary to make reference to the Larger Bench, as prayed for by the learned Counsel for the petitioners. 22. I, however, would like to add some more reasons in support of the view taken by the Division Bench in KSL and Industries Ltd case. To understand the real meaning of the word "examine" employed in sub-section (2) of Section 145, we have to bear in mind, as observed earlier, the reference, the context, the circumstances in which it was introduced and the problems or the situations which was intended to be met or the mischief it seeks to cure. Even after introduction of the provisions of Sections 138 to 142 it was found that those provisions were deficient in dealing with dishonour of cheques and, therefore, the provisions of Sections 143 to 147 were introduced to make the procedure easier and faster. 23. A plain reading of sub-section (1) of Section 145, which starts with non obstante clause carving out an exception to the provisions of the Code, gives complete freedom and option to the complainant

to give his evidence on affidavit making it further clear that such evidence shall be read in any enquiry, trial and other proceedings subject to all just exceptions. In other words, the choice or the option is left to the complainant either to give his evidence on affidavit or give oral examination-in-chief. That is the mandate of sub-section (1) of Section 145 as observed by the Division Bench in KSL and Industries Ltd case. Sub-seciton (2) gives right to the Court, if it thinks fit, to summon and "examine" any person giving evidence on affidavit as to the facts contained therein. Similarly, sub-section (2) makes it mandatory for the Court to summon and "examine" any person giving evidence on affidavit as to the facts contained therein on the application of the prosecution or the accused. 24. Thus, it is clear that sub-sections (1) and (2) of Section 145 create two distinct and separate rights, former being in favour of the complainant and the latter being for the benefit of both, the complainant and the accused, besides the right of the Court to summon and examine any person giving evidence on affidavit. The word "examine" in Section 145(2), thus, would mean and include "examination-in-chief", "cross-examination", "re-examination" and "examination by the Judge". Let me first consider the right of the Court under sub-section (2) of Section 145. The right of the Court under sub-section (2), Page 2481 is to call a witness, who has given his evidence on affidavit as provided for under sub-section (1), for putting questions as contemplated under Section 165 of the Indian Evidence Act. Putting questions to the witness by the Court is also an examination of a witness. The examination of a witness by the Court cannot be termed as "examination-in-chief" or "cross-examination" or "re-examination". It is an independent right conferred on the Court under Section 165 to put questions to the witness in order to discover or to obtain proper proof of relevant facts, in any form at any time. When the court exercise this right, neither party nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question. 25. Sub-section (2) also confers right on both, the prosecution and the accused, to "examine" any person giving evidence on affidavit as to the facts mentioned therein. The phraseology "as to the facts contained therein" cannot be read to mean that the witness can be called to depose everything that he has stated on affidavit in examination-in-chief. The right of the accused in case of the witness whose examination-in-chief has already been recorded, whether orally or on affidavit, is only to "cross examine" the witness and nothing further. There may be case/s where the accused may not exercise his right to cross-examine a witness at all. But if he desires to exercise such right the Court has "no power" and "cannot refuse" such permission to the accused. The right of the accused under sub-section (2), is only to cross-examine a person giving evidence on affidavit in respect of the facts contained therein. It does not confer right on the accused to seek direction to any person, giving evidence on affidavit, to step into witness box and give oral examination-in-chief even in respect of matters which have been stated on affidavit. If sub-section (2) of Section 145 is interpreted to mean that in every case where the accused apply to the Court to summon the complainant or his witness who has given evidence on affidavit

under sub-section (1) and the Court is obliged to summon him to tender oral examination-in-chief, then the very object of inserting such provision would be defeated. The accused, who, for whatsoever reason, is interested in protracting the trial, will not allow the Court to take examination-in-chief on affidavit by making a simple application under Section 145(2) seeking direction to the witness to step into witness box for giving oral evidence. The sub-section (2) cannot be interpreted in a manner that would render sub-section (1) of Section 145 redundant. Let us test it from another angle. If the word "examine" is interpreted to mean that even the accused has a right to seek oral "examination-in-chief" of a person who has given evidence on affidavit, perhaps one would also have to hold that the complainant can also "cross examine" his own witness who has given evidence on affidavit under sub-section (2) of Section 145. Such interpretation would be absurd. The Legislature could never have intended to enact such absurd provision. 26. Insofar as the right of the prosecution to "examine" a witness as provided for in Section 145(2) is concerned, it means the right of "examination-in-chief" and "re-examination" of a person who has given his evidence on affidavit and has been cross-examined. The right of "re-examination" is not in dispute. Page 2482 Insofar as the right of examination-in-chief is concerned, it can be exercised by the complainant in a case where he has given his evidence (examination-in-chief) on affidavit and filed documents with it, and if the objection raised by the accused is directed towards the mode of proof alleging the same to be irregular and insufficient. If such objection to the document/s is raised, after filing of the document with the affidavit in lieu of examination-in-chief that would enable the party tendering the evidence on affidavit or otherwise to cure the defect and resort to such mode of proof as would be regular. The complainant cannot assume while giving evidence on affidavit that such an objection would be raised though he is expected to be vigilant while filing affidavit to see that no objections are raised. If an objection as to the mode of proof is raised and if the complainant, under Section 145(2) applies for tendering further evidence (examination-in-chief) by stepping into witness box to cure such defect and resort to such mode of proof as would be regular, the Court will have to allow the complainant to give further examination-in-chief to cure the defect before the cross examination begins. It is this right which, in my opinion, can be exercised by the complainant under sub-section (2) of Section 145. In short, the word "examine" confers right on the complainant to examine himself or his witness in chief, who has given his evidence (examination-in-chief) on affidavit, particularly if the objection to the document/s to be exhibited, is directed towards the mode of proof alleging the same to be irregular or insufficient, to cure the same by resorting to such mode of proof as would be regular. 27. Section 296 of the Code provides that the evidence of any person whose evidence is of a "formal character" may be given by affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceedings under this Code. Sub-section (1) of Section 296 thus speaks of evidence of a "formal character". The Supreme Court in State of Punjab v. Naib Din while dealing with the provisions of Section 296 has stated What is meant by an evidence of a formal character ? In that case

two police personnel had produced the affidavits recording the role played by them in forwarding a sample of the chemical analyser. The trial Magistrate found that evidence of the prosecution was enough to convict the accused under Section 9 of the Opium Act. In the appeal conviction was upheld by the Sessions Court. In revision, the High Court of Punjab and Haryana held that no opportunity was given to the petitioner to cross examine those two constables who had filed their affidavit. In other words, they were not tendered for cross examination. The Supreme Court while dealing with the judgment of the High Court observed that the view adopted by the learned Single Judge was stilted for approval and proceeded to consider the question whether it is necessary for the prosecution, as indispensable course to examine the police official who played only a formal role during investigation. It is against this backdrop the Supreme Court in paragraph 7, 8 and 10 observed thus: 7. The normal mode of giving evidence is by examining the witness in court. But that course involves, quite often, spending of time of the Page 2483 witness, the trouble to reach the court and wait till he is called by the court, besides all the strain in answering questions and cross-questions, in open court. It also involves cost which on many occasions are not small. Should a person be troubled by compelling him to go to the court and depose if the evidence which he is to give is purely of a formal nature? The enabling provision of Section 296 is thus a departure from the usual mode of giving evidence. The object of providing such an exception is to help the court to gain the time and object of providing such an exception is to help the court to gain the time and cost, besides relieving the witness of his troubles, when all that the said witness has to say in court relates only to some formal points. 8. What is meant by an evidence of a formal character? It depends upon the facts of the case. Quite often different steps adopted by police officers during the investigation might relate to formalities prescribed by law. Evidence, if necessary on those formalities, should normally be tendered by affidavits and not by examining all such policemen in court. If any party to a lis wishes to examine the deponent of the affidavit it is open to him to make an application before the court that he requires the deponent to be examined or cross-examined in court. This is provided in sub-section (2) of Section 296 of the Code. When any such application is made it is the duty of the court to call such person to the court for the purpose of being examined. 10. In the present case, the facts stated in the affidavit were purely of a formal character. At any rate, even the defence could not dispute that aspect because no request or motion was made on behalf of the accused to summon the deponents of those affidavits to be examined in court. In such as situation, it was quite improper that the High Court used such a premise for setting aside the conviction and sentence passed on the respondent, that too in revisional proceedings. In my opinion, the judgment does not state that on the application made under sub-section (2) of Section 296, it is the duty of the court to call such person to the Court for the purpose of being examined in chief by keeping aside the affidavit filed by the witness of a formal character. In any case the judgment of the Supreme Court will not apply to the facts of the present case. The evidence contemplated under sub-section (1) of Section 145 cannot be termed as evidence

of a formal character. The provisions of Section 296 of the Code cannot be equated with the provisions of Section 145(2) of the Act. The law laid down by the Supreme Court in that case is, therefore, of no avail to the petitioners. Moreover, the provisions of Section 145(1) start with non-obstante clause which carves out exception of the Code of Criminal Procedure. 28. In Criminal Writ Petition No.2302 of 2005 the accused has impugned the orders passed by the courts below by which the permission sought by the accused under Section 145(1) of the Act to give evidence on affidavit was rejected initially by the Magistrate vide order dated 7.7.2005 and thereafter by the Additional Sessions Judge in revision by order dated 18.8.2005. In that case, after accused no.3 was examined under Section 313 of the Code, accused no.2 examined himself as a witness for the defence. Thereafter, petitioner -accused no.7 made an application for allowing him to Page 2484 give evidence on affidavit. That application was rejected by the learned Magistrate holding that such a right under Section 145(1) of the Act is conferred only on the complainant and not on the accused and hence he has no right to tender his evidence on affidavit. The view of the Magistrate was affirmed by the learned Sessions Judge in the revision and hence the petitioner-accused is before this Court. 29. 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 its 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. The exception is, however, made under the provisions contained in Section 315 and 316 of the Code. Both these provisions protect the rights of the accused, who desires to be a witness, as envisaged under the Constitution. Section 315 of the Code speaks of the accused person to be competent witness, whereas Section 316 provides that no influence to be used to induce disclosure. 30. A plain reading of the provisions contained in Sections 315 and 316 of the Code clearly demonstrates that accused could be a competent witness for the defence 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. However, he cannot be called as a witness except on his own request in writing. His failure to give evidence cannot 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. Similarly, he cannot be promised or threatened to disclose or withhold any matter within his knowledge, except as provided in Sections 306 and 307 of the Code. Thus, it is left only to accused to be a witness at the trial and if he decides to be a witness and on his own makes request in writing he can be examined in the case where charges are made against him. 31. It is thus clear that if the accused makes a written application to the Court seeking permission to give evidence on affidavit, the Court can grant it subject to the provisions contained in Section 315 and 316 of the Code. In the instant case such request was made and hence the only question before the Magistrate to consider was whether to allow him to give

his evidence on affidavit. 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. The observations of the Division Bench in paragraph 40(b) KSL and Industries Ltd. case (supra) clearly indicate that even the accused should be given option/freedom to give his evidence on affidavit. But such request should be made by accused in writing as provided for in Section 315(1)(a) of 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. Page 2485 32. Next I would like to consider the question whether the provisions of Section 145 of the Act, operate prospectively or retrospectively. This question is essentially raised in Writ Petition No.1659 of 2005 and Writ Petition No.2063 of 2005. Mr.Lopo Singh, learned Counsel for the petitioner, based his arguments on the judgment of the Supreme Court in Hitendra Vishnu Thakur and Ors. v. The State of Maharashtra and Ors. 1994 Supreme Court Cases (Cri.) 1087. In the light of the law laid down by the Supreme Court in that case it was submitted that the amended provisions of Section 145 clearly affect substantive rights of the accused contained in Chapter XX and XXI and Section 461 of the Code as well as the rights of accused under various provisions of the Evidence Act relating to examination of the witnesses. 33. On the other hand Mr.Aney, learned senior counsel appearing for the complainant in that case submitted that this question is no longer res integra and it has been answered by this Court in M/s.Indraprastha Holdings Ltd. v. Shri Vijay J.Shah and Anr. CDJ 2006 BHC 149. He further submitted that where the Amending Act is to substantive law it operates prospectively whereas any amendment to procedural law it must operate retrospectively unless a contrary intention is seen in the amending Act. In support of this proposition, he too placed reliance upon the judgments of the Supreme Court in Hitendra Thakur's case and on Rajendrakumar v. Kalyan . Mr.Aney further submitted that the Code of Criminal Procedure and the Evidence Act are general laws and are statutes primarily of a procedural or enabling nature, and the rights created thereunder can always be altered or changed by the Legislature specifically intended for special situations. The Legislature is competent to legislate on a class of offences and to provide separate procedure to deal with the same. He then submitted that in view of the non-obstante clause in Section 145, the provisions of the Code cannot have any bearing, and their inapplicability cannot be seen as a denial of a substantive right. 34. This Court in M/s.Indraprastha Holdings Ltd. (supra) has considered the very question whether the provisions of the Negotiable Instruments Act, 1881 as amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 are applicable to the complaints under Section 138 of the Act which are pending on the date on which the Amending Act came into force. While dealing with the said question several judgments of the Supreme Court including the judgment in the case of Hitendra Thakur (supra), on which

heavy reliance was placed upon, the learned Single Judge held that most of the provisions inserted by the Amending Act of 2002 and in particular Section 145 are purely procedural in nature and there is nothing in the Amending Act to indicate that the provisions therein were intended to apply prospectively. The said judgment also quoted the principles culled out from Hitendra Thakur's case, and observed that every litigant has a vested right in substantive law, and that amendment which created new disabilities or created new rights and liabilities only would be prospective in operation. I do Page 2486 agree with the view expressed by the learned Single Judge in M/s. Indraprastha Holdings Ltd. I, however, would like to add few more lines in support of that view. 35. A bare look at the provisions contained in Chapter XX and XXI or Section 461 of the Code would show that there is nothing contained therein that could be said to amount substantive right. Chapter XX deals with the trial of summons case whereas Chapter XXI is concerned with summary trials. Both chapters are in fact concerned with the procedure to be followed in summons or summary trials. The provisions contained in these chapters did not indicate any substantive right. Moreover, the provisions of Section 145 begin with a non-obstante clause carving out exception to the provisions of the Code. Therefore, even if it is accepted that any of the provisions contained in Chapter XX and XXI or Section 461 creates substantive right, the effect of non-obstante clause is to exclude anything adverse that may be contained in the Code while interpreting and implementing the amended provisions of Section 145. The Code of Criminal Procedure and the Evidence Act are general laws and the rights created thereunder cannot be termed as substantive rights or vested rights of substantive nature causing any prejudice whatsoever to the accused by the Amending Act of 2002 and in particular Section 145. A bare perusal of Section 145 show that both the sub-sections (1) and (2) as introduced by the Amending Act of 2002 fall within the realm of procedural law, and hence they would be applicable to the pending cases since there is no vested right in an accused in the procedural law. Moreover, the object which influenced the Parliament to introduce the provisions of Section 145 cannot be overlooked. The observations of the Supreme Court in Rajendra Kumar's case (supra) are also useful. The Supreme Court in that case has observed that some differentiation exists between a procedural statute and statute dealing with substantive rights and in the normal course of events, matters of procedure are presumed to be retrospective unless there is an express ban on to its retrospectivity. It is against this backdrop the provisions contained in Section 145 cannot be said to have prospective effect and it must operate retrospectively. 36. Mr.Aney, learned senior counsel made me to view the matter from another angle as well. It was submitted that the accused have not challenged the Constitutional validity of the provisions of Section 145(1) and 145(2) of the Negotiable Instruments Act. These provisions are inserted by amendment to further the object of the Negotiable Instruments Act. A bare perusal of the provisions of Chapter XVII of the Act show that the provisions relate to separate class of offences. The Legislature in its wisdom has thought it fit to treat the procedure relating to this crime in a separate manner, and has,

therefore, enacted the provisions of Section 145 by the Amending Act of 2002 to create a separate procedure. The provisions of the Act, though classificatory, create permissible classification which has nexus with the object sought to be achieved, namely, speedy trial to the offences under section 138 of the Act. Thus the provisions of the Act when juxtaposed to the provisions of other criminal laws such as the Code of Criminal Procedure or the Evidence Act it only relate to separate procedure to deal with such crimes. Such legislative device is neither new nor illegal. The courts have often considered Page 2487 laws which deal with the creation of separate class of crimes and the procedure to deal with them, and have held that so long as the legislation is not ultra virus the constitution, it is permissible for the Legislature to create a separate class of offences and lay down separate procedures to deal with them. In Antulay's case the Supreme Court found nothing objectionable in making the class of cases immune from the applicability of other laws in general or the Code of Criminal Procedure in particular. Even in Kartar Singh v. State of Punjab 1994 CRI.L.J. 3139 while considering the validity of a special law dealing with terrorist and disruptive activities, the Supreme Court considered all earlier laws and held that reasonable and scientific classification of the offences and offenders was permissible discrimination and a law prescribing special procedure departing from the procedure for trying offences in normal circumstances was permissible. While dealing with the challenge to the exclusion of the provisions of the Evidence Act, the Supreme Court held that so long as law regulate right of trial and the right of accused to defend himself, no fault could be found in providing a procedure different from ordinary law. It is thus clear that looking at the matter from any angle it cannot be said that by introducing the provisions of Section 145 substantive rights of the accused are taken away and, therefore, these provisions cannot be given retrospective effect. The question (B) framed in paragraph 2 of the judgment accordingly stands answered in the affirmative. 37. In writ petition No.2192 of 2005 the accused, by filing independent application, had prayed for de-exhibiting few documents filed by the complainant P. W.1 with his affidavit in lieu of examination in chief. That application was rejected by the learned Magistrate on merits, and while so doing it was observed that merely because the documents are exhibited does not mean their contents are proved and accused can raise objections as to their admissibility at the time of final arguments. It may be noticed that the affidavit and the documents were filed on 30.3.2005 and copies thereof were served on the accused on the very day. The documents were also exhibited on the same day. However, the application for de-exhibiting the documents was filed after five months i.e. on 31.8.2005. It is against this backdrop Mr.Mundargi, learned senior counsel for the petitioners submitted that, where the objection is directed towards mode of proof alleging the same to be irregular or insufficient, the Court should apply its mind and pronounce its decision on the question of admissibility then and there, and it cannot be deferred as is done in that writ petition. Mr.Mundargi in the course of arguments also made certain suggestions as to what procedure the Court should follow. The sum and substance of his suggestions was that the objections, if any, raised about the

admissibility of a document, the Court should not exhibit such document and even if the decision on such objection is deferred, the choice should be left to the accused, without prejudice, either Page 2488 to cross examine the witness before the decision on the objection or reserve his right to cross examine the witness in respect of such document if the objection is upheld at a latter stage. A heavy reliance was placed on the judgment of the Supreme Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P.Temple and Anr. . 38. On the other hand Mr. Aney, learned senior counsel placed heavy reliance upon the judgment of the Supreme Court in Bipin Shantilal Panchal v. State of Gujarat and Anr. AIR 2001 SC 1158 and submitted that the Supreme Court in that case had laid down a procedure for all the trial Courts to follow while considering the objection/s of admissibility of the evidence. He further submitted that the objected documents should be marked and taken on record permitting the parties to lead evidence on the same or cross examine the witnesses about the same and then decide the question of admissibility of the documents at the stage of final judgment. Insofar as the judgment in R.V.E. Venkatachala's case (supra) is concerned, he submitted that the course suggested by the Supreme Court in Bipin Panchal's case (supra) can also be adopted even where the objection is directed towards the mode of proof alleging the same to be irregular or insufficient. He then submitted that in the cases under Section 138 no prejudice will be caused to the accused if the mode suggested by the Supreme Court in Bipin Panchal's case is adopted. 39. In R.V.E. Venkatachala's case the Supreme Court was dealing with the judgment of the High Court by which two documents, namely, A-30 and A-34 which were photo copies of the order passed by the Assistant Commissioner H.R. & C.E. (Admn.) Department, Coimbatore and rent agreement executed between the appellant and tenant-respondent therein, were held to be inadmissible in evidence. The High Court, by entering into a question of admissibility of the evidence of the aforesaid, two very material pieces of the documentary evidence which were admitted in the evidence without any objection when they were tendered in the evidence and taken into consideration by the two courts below while evaluating the evidence and recording the findings of facts, excluded the documents from consideration. In the light thereof the Supreme Court was considering whether it was permissible for the High Court to do so. Admittedly, in that case the documents were tendered in the evidence and marked as exhibits without any objection by the defendant. The Supreme Court while dealing with the aforementioned situation made the following observations: Ordinarily any objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an Page 2489 exhibit,' an objection as to its admissibility is not excluded and is available to be raised even at a later stage

or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons, firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practise and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court. It is clear from the observations made by the Supreme Court that the objection should be taken before the evidence is tendered and the documents are marked as exhibit. The objection that a particular document should not have been admitted in the evidence or mode adopted for proving the document was irregular or insufficient cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. If objection about the mode of proof, being irregular, insufficient in respect of any document/s is taken at the appropriate point of time, the Supreme Court, in this judgment, states that it should be decided then and there only so that, it would enable the party tendering evidence to cure the defect and resort to such mode of proof as would be regular. The Supreme Court, therefore, holds that the omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. Therefore, in case of an evidence being tendered on affidavit, where such objection is raised as to the mode of proof it would enable the said party to seek indulgence of the Court for permitting a mode or method of proof and cure the defect by applying under Section 145(2) of the Act to lead further evidence. In a given case the Court may give such option to cure the defect on its own and record that such option was given. If the party tendering document/s with affidavit does Page 2490 not opt to lead further evidence to cure the defect, it should be left to the court either to decide the objection

then and there or as indicated by the Supreme Court in Bipin Panchal's case, mark such document for identification, and decide it in the final judgment. It is, however, desirable to defer the decision to avoid any hindrance which may impede the progress of trial proceedings. If the Court defers the decision it is for the accused to decide whether to cross examine the witness and whatever would be the decision on the objection in the final judgment that would be binding on the accused subject to his right of appeal and to challenge such finding before the appeal Court. In any case the accused cannot be allowed to reserve his right to further cross examine the witness after the objections are decided at later stage. I don't see any reason as to why the Court cannot adopt such course. 40. The Supreme Court in Bipin Panchal's case has laid down the procedure which the trial Courts must follow whenever objection/s of any kind whatsoever is/are raised by either of the parties in the course of recording of evidence of a witness. The relevant paragraph 12 to 15 reads thus: 12. It is an archaic practise that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing Order on such objection. But the fall out of the above practise is this: Suppose the trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional Court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the trial Court. In such a situation the higher Court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should be trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recastor or re-moulded to give way for better substitutes which would help acceleration of trial proceedings. 13. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed. Page 2491 14. The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days.

Second is that the superior Court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses. 15. We, therefore, make the above as a procedure to be followed by the trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence. 41. The Supreme Court has made the procedure stated in the aforesaid paragraphs mandatory for the trial Courts to follow whenever an objection is raised regarding admissibility of any material or any part of oral evidence. In paragraph 12 of the Judgment the Supreme Court has visualised an eventuality where the trial Court upholds a particular objection and excludes the material from being admitted in evidence. Let us take another eventuality into consideration. If the objection is raised regarding admissibility of any material in evidence or as to the mode of proof and if such an objection is overruled by the trial Court at the stage when it was raised, it is quite possible that such decision would be challenged in revision or in writ petition under Article 227 of the Constitution of India. There are instances where the superior Courts entertain such challenge and pending decision grant stay to the further proceedings before the trial Court. Such hindrances impede speedy and swift progress of the trial proceedings. That can be avoided if the procedure stated in paragraphs 13 and 14 in the Bipin Panchal's case is followed scrupulously. It is true that where an objection is directed towards the mode of proof alleging the same to be irregular and insufficient, the Court can take its own decision whether to decide it then and there or to defer it to be decided in the final judgment by marking the document for identification. In either case opportunity will have to be given to the complainant who has given his evidence on affidavit, before his cross examination begins, to lead further examination-in-chief to cure the defect and resort to such mode of proof as would be regular. If the Court finds that the decision on such objection can also be deferred to be decided at the stage in the final judgment, it would be open for the Court to do so in view of the judgment of the Supreme Court in Bipin Panchal's case. 42. It is true that in Writ Petition No.2192 of 2005 the written application - Exhibit-18 on page 31 of the petition, for de-exhibiting certain documents, was filed after five months i.e. on 31.8.2005, after filing of the affidavit in examination-in-chief and marking all the documents as exhibits by the Magistrate. However, I am told that cross examination of the witness has yet not begun. Keeping that in view, in my opinion, it is possible in the instant case for the learned Judge to consider the objections afresh and if they are directed towards the mode of proof being irregular or insufficient, he may de-exhibit those documents and mark Page 2492 them for identification. And, in that eventuality if the complainant files an application under Section 145(2) the Magistrate must consider such application in the light of the observations made in this judgment before directing the accused to cross examine the witness. Insofar as the documents of which an admissibility only is in dispute

those documents need not be de-exhibited and the issue of their admissibility be kept open to be addressed at the stage of arguments and to be decided in the final judgment. 43. That takes me to consider the request of all the learned Counsel for the parties to issue guidelines. Almost all matters in this group are from Mumbai. In Mumbai, I am informed, in all the metropolitan Magistrates Courts somewhat similar procedure is being followed right from the stage of institution of a complaint until its disposal. On a complaint being instituted under Section 200 of the Code, the Court examines the contents of a complaint to ascertain territorial jurisdiction, locus of the complainant and also verify the original documents annexed thereto. On being satisfied on all the three points, it records verification of the complainant in proforma. If Court finds, that all the ingredients of the offence under Section 138 exist, it issues process making it returnable within 4-6 weeks. Then the summons/s is/are served on the accused person/s through police stations and RPAD. After service of summons on the accused, in 90% of the cases, I am told, that the accused do not appear on the first date of hearing and the Courts grant them exemption requiring them to appear before the Court on the next date and direct them to furnish PR bond and surety under Section 88 of the Code. Sometimes on the same day, particulars of the offence are explained to the accused and they record his/their plea and then fix case for evidence. It is common experience that in a large number of cases the accused, after service of summons file either revision before the Sessions Court or writ petitions/applications under Articles 226, 227 of the Constitution of India or under Section 482 of the Code before the High court challenging issue of process or quashing of the complaint on variety of grounds. It is also common experience that the complainant, if the complaint is against a company, arraign all the directors as accused in the complaint as a result of which revision or writ petition by the accused become inevitable and if such petitions are filed the proceedings get further delayed due to interim orders passed in revision or writ petitions. It is also observed that the complainant makes avoidable averments and, out of anxiety, annex irrelevant documents to the complaint which also give rise to revisions and writ petitions disputing such facts or documents. 44. The service of summons on the accused person/s consumes lot of time for variety of reasons. If the accused are more in number and they are residents of different places within the jurisdiction of different police stations service of summons takes long time. In some cases, I am informed, the service of summons takes years. For service of summons, the complainant requires to depend on the police machinery. The police stations, for variety of reasons take long time to serve the summons on accused. Many a time, I am informed that the Court issue show cause notice to the concerned police stations or the officers for delay in enforcing the service of summons and warrants. That further consumes lot of time which results in further delay in disposal of cases. If the courier services as provided for under Section 144 of the Act are approved, that would undoubtedly Page 2493 facilitate the complainants to serve the summons on the accused persons at the earliest and that may also reduce substantial burden on the police machinery. 45. Keeping the present scenario, in so far as cases under Section

138 of the Act are concerned, in view and considering the request of all the learned Counsel for the parties, I deem it appropriate, in order to accomplish the underline object of the Act, to pass the following guide-lines/directions: (a) The directions passed by the Division Bench in KSL and Industries Ltd.'s case must be followed scrupulously by all the courts dealing with cases under Section 138 of the Act. The Courts should also bare in mind the judgment of this Court in Bhaskar Sen v. State of Maharashtra and Ors. while dealing with the application/s for exemption. Similarly, while recording evidence the procedure laid down by the Supreme Court in Bipin Shantilal Panchal's case must be followed whenever an objection is raised regarding the admissibility of any material or any item of oral evidence. (b) On receiving a complaint under Section 138 of the Act, the Magistrate should apply his mind to the complaint at the very inception and see whether a case is made out against the accused person/s before issuing process to them on the basis of the complaint. The complaint must contain material facts and particulars constituting an offence under Section 138 to enable the Magistrate to make up his mind for issuing process under Section 204 of the Code. (c) The Court must direct the complainant to adopt, all the modes of service of summons as provided for in Section 144 of the Act and need not depend only upon the police machinery. If summons is served on the accused person/s either by speed post or by courier services (as and when they approved by a Court of Sessions) or with the help of police or by E-mail as observed in KSL and Industries Ltd. case, the Complainant should file affidavit of service with the proof of service and if the Court is satisfied about the service, such service of summons may be treated as a good service and in that case the Court can proceed with the case without awaiting service of summons through Police. (d) The Magistrate issuing summons to the accused or a witness must direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works for gain as provided for in Section 144(1) of the Act. (e) It is also open for the Court, in a given case, to use the police staff attached to the Court, outside Court working hours, to serve the summons on accused or witness residing within the jurisdiction of the Court. (f) Where an acknowledgement purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or courier services that the accused or the witness refuse to take delivery of summons has been received, the Court issuing summons may declare that the summons has been duly served as provided for in Section 144(2) of the Act. (g) The Complainant while filing the complaint under Section 138 of the Act should avoid adding unnecessary person/s as accused in the case Page 2494 as also making irrelevant/unnecessary averments/statement in the complaint, keeping scope for the accused to dispute the same at initial stages and seek to quash the process either in revision before the Sessions Court or in writ petition in the High Court. (h) The Complainant/s should be more diligent while filing the complaint against a company/firm. Instead of adding all the Directors/Partners of the company/firm as accused, the complaint should be filed only against the person/s "in charge of, and responsible for" the conduct

of the business of the company/firm at the time the offence was committed, as contemplated under Section 141 of the Act. He should make a categoric averment in the complaint making it clear that accused was/were in charge of, and responsible for the conduct of the business of the company/firm. (i) It is possible, in a given case, the Complainant while filing the complaint was not knowing as to who was/were the person/s in charge of and responsible for the conduct of the business of the company/firm at the time of the offence and may, therefore, add all the Directors/Partners as accused stating that at the relevant time they all were in-charge of and responsible for the conduct of the business of the company/firm. In such case/s, after service of summons on all the Directors/Partners, if the statement is made on behalf of the company/firm supported by a resolution of the Board of Directors or any other authenticate document, or by placing a deed of partnership or a deed of retirement on record, indicating the name/s of such Director/s/Partner/s of the company/firm, the Complainant may delete the name/s of other Directors/Partners from the array of the accused to avoid further proceedings for quashing by such directors/partners to avoid further delay in disposal of the case. The complainant, however, cannot be compelled to do so. (j) The Court, on being satisfied, may give option to the Complainant to delete the name/s of all such accused who was/were not in charge of and was/were not responsible for the conduct of the business of the company/firm and pass order of discharge or acquittal, as case may be, in respect of such accused. (k) Service of summons on the director/s or partner/s at the registered address of the company/firm must be treated as good service that being a place where the accused carries on business for gain as provided for under Section 144(2) of the Act. (l) The complainant should, as far as possible, file copies of all the relevant and necessary documents with the complaint duly attested/endorsed by him or his advocate as true copies and keep originals ready for perusal of the Court at the stage of verification and issue of process. The Courts should, avoid to keep original documents on record at that stage. (m) The Court must call upon the accused or his pleader, as provided for under Section 294 of the Code, to admit or deny the genuiness of the documents, other then the documents which have presumtive value in law. That would help the Complainant to know which of the documents he would have to prove by adopting such mode, as may be advised, during his own or his witnesses' examinations in chief on affidavit. The procedure under Sections 294, should be followed before the complainant files his affidavit under Section 145(1) of the Act. Page 2495 (n) The Complainant should avoid filing of unnecessary and irrelevant documents either with the complaint or at any subsequent stage including the stage of evidence being recorded orally or on affidavit. He should, as far as possible, rely upon the documents which have presumptive value and file original documents in support of the averments in the complaint to avoid further proceedings challenging the genuineness and/or admissibility of the documents at the stage when they are produced on record. (o) The documents that may be relevant and necessary to be filed with the Complaint under Section 138 of the Act, would be as follows: dishonoured cheque/s; bank memo of drawer's bank; debit advise of drawee's bank; office

copy of the notice endorsed by an advocate or a party as true copy with the acknowledgement receipt and/or postal certificate and/or document evidencing despatch of notice; returned envelope, if the notice was refused; reply, if any, to the notice by the accused; office copy of the bills or invoices, if any, with the endorsement of the advocate or the complainant as true copy; original agreement, or other document, if any, executed between the parties reflecting the transaction for which the cheque was issued; etc. (p) The Complainant should file his affidavit in lieu of examination in chief with all the documents to be exhibited in the court. The affidavit should be in the form, as if he is giving oral evidence in the Court, proving all the documents objected to by the accused and it should not be, in any case, in the form of written argument and avoid reproduction of the complaint as it is. The court on the very date shall see that a copy of the affidavit with all the proposed exhibits is served on the accused and then grant a short adjournment, if prayed for, to enable the accused to read it and raise an objection, if any, regarding admissibility of the document/s or any item of evidence. On the adjourned date of hearing the accused should place his written objection, if any, on record which the Magistrate should make note of and mark the objected document/s, (other than the documents which have presumptive value in law) tentatively as exhibits, as observed in Bipin Panchal's case, or mark it for identification where the objection is with regard to the mode of proof, alleging the same to be irregular or insufficient to be decided at the stage of final judgment. If the objection is oral, raised in the course of recording of oral examination-in-chief, the Court should note the objected item of the evidence or the document and mark it tentatively as exhibit or for identification, as case may be, to be decided at the stage of final judgment, and direct the accused to cross examine the witness without prejudice to such objections. (q) If the objection is with regard to the mode of proof in respect of any of the document/s (other than the documents which have presumptive value in law) alleging the same to be irregular or insufficient the court should allow the Complainant on his application made under sub Section (2) of Section 145, before his cross examination begins, to lead further evidence by stepping into witness box to cure the defect and adopt such mode as would be regular and sufficient. The cases where the Complainant does not make application under section 145(2), the Court should mark it for identification and defer the decision on such objection to be decided at the stage of final judgment. Page 2496 (r) If the accused desires to be a witness for the defence and if he makes an application seeking such permission in writing to the Magistrate as contemplated under Section 315 of the Code he may be allowed to tender his evidence on affidavit. Once the accused is allowed to tender his evidence on the affidavit it would be subject to all just exceptions and the guidelines and the directions passed in this judgment. 46. I now proceed to pass the order in all the writ petitions as follows: (a). Writ Petition nos.1876/05, 1959/05, 2100/05, 160/06, 2328/05, 2561/05, 2666/05, 2667/05, 3191/05, 2913/05, Criminal Application Nos.1646/06, 1647/06, 1648/06, 1649/06, 1650/06, 1651/06, 1652/06, 1653/06, 1654/06, 1655/06, 1656/06, 1657/06, 1658/06, 1659/06, 1660/06, 1661/06, 1662/06, 1663/06,

1664/06, 1665/06, Writ Petition Nos.314/06, 476/06, 525/06, 591/06, 592/06, 593/06, 594/06, 615/06, 961/06, 997/06, 998/06, 1035/06, 1058/06, 1094/06, 1177/06, 1178/06, 1179/06, 1240/06 in which the petitioner-accused have impugned the order by which their application under Section 145(2) of the Act came to be rejected, are dismissed. The applications of the accused in all these petitions seeking direction to the complainant or his witness to enter witness box and depose to the facts which have already been stated on affidavit in examination-in-chief, stand rejected. The learned Magistrate shall proceed with the cases and decide them in the light of the observations made in this judgment. (b) Writ petition nos.1659/05 and 2063/05, in which the petitioners opposed the complainant from giving his evidence on affidavit, as provided for under Section 145(1) of the Act, on the ground that the complaint was filed much before the Amending Act of 2002 came into force, by which the said provision was inserted, stand dismissed. The Magistrate shall proceed with both the cases and dispose them of keeping the observations made in this judgment in view. (c) In writ petition No.2303 of 2005, the order dated 18.8.2005 passed by the Sessions Court and dated 7.7.2005 rendered by the Magistrate are quashed and set aside. The learned Magistrate shall allow accused no.7 to tender his evidence on affidavit and deal with the same in the light of the observations made in this judgment. It is needless to express that if there is no written application on behalf of the accused seeking permission to give evidence on affidavit, the learned Magistrate shall, before allowing him to tender his evidence on affidavit, take in writing from the accused seeking such permission as contemplated under Section 315 of the Code. (d) Writ Petition No.2192 of 2005 is allowed. The order dated 31.8.2005 passed on the application (Exhibit-18) for de-exhibiting certain documents is set aside and that application is restored to file. The learned Magistrate shall deal with the said application afresh in accordance with law and in the light of the observations made in this judgment and in paragraph nos.37 to 42 and 45 thereof in particular.