Jose

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.43 OF 2025
WITH
CRIMINAL WRIT PETITION NO.42 OF 2025

Conroy J.F. De Melo
Son of Adv. Fortunato De Melo
Aged 45 years, Married,
Businessman, Indian National,
R/o F-5, Orient Towers, Comba,
Margao, Goa - 403601 ... Petitioner.

Versus

M/s Civilco Engineers & Associates,
Through its Partner,
Shri. Gaus Mohammed Shiraguppi
Aged 52 years, Business, Married,
Having office at SF-4, Block D,
Quadria Plaza, Haveli, Curti,
Ponda, Goa - 403401 ... Respondent.

Mr. Charles Elton da Gloria F E, Advocate for the Petitioner.

Mr. Gaurish Agni with Mr. Kishan Kavlekar, Mr. Madhav Cuncoliencar and Mr. Yash Naik, Advocates for the Respondent.

CORAM: VALMIKI MENEZES, J.

DATED: 4th August, 2025

ORAL JUDGMENT:

1. Registry to waive office objections and register the matters.

2. Rule. Rule made returnable forthwith. With the consent of the parties, petitions are disposed of finally.

3. These two petitions impugn orders dated 06.12.2024 respectively, passed in Criminal Case Nos.OA/30/2020 and OA/925/2019 by the J.M.F.C., A-Court, Ponda. By the impugned orders, the J.M.F.C. has dismissed an application filed by the Petitioner, the original Accused in these proceedings, under Section 138 of the Negotiable Instruments Act and refused leave to the Accused to lead his evidence. The Respondent is the Complainant in both these complaints under Section 138 of the Negotiable Instruments Act. Criminal Case No. OA/30/2020 pertains to a cheque dated 17.10.2019 for an amount of Rs.5,00,000/- whilst Criminal Case No. OA/925/2019 pertains to a cheque dated 30.09.2019 for an amount of Rs.20,00,000/-. Both these cheques have been signed and executed by the Accused/Petitioner herein in favour of the Complainant/Respondent.

4. In both complaints, after the cheques were dishonoured, notices were issued to the Accused calling upon the Accused to pay the amounts under the cheque; Accused has not replied to these notices, pursuant to which the complaints came to be filed before the Magistrate. Unfortunately, instead of the Magistrate proceeding with these cheque bounce cases, by filing a summary procedure provided under Section 260 of Cr.P.C., the Magistrate recorded the Plea of the

Accused, who pleaded to be tried. Thereafter, the verification of the complaint on affidavit was treated as the Complainant's evidence and the Accused filed an application under Sub-Section 2 of Section 145 of the Negotiable Instruments Act seeking leave to cross examine the Complainant.

5. Perusing of the application would reveal that there is no reason cited in the application to justify the grant of leave for cross-examination. The only reason stated in the application is that the matter is a commercial dispute. Contrary to the various Judgments of the Supreme Court and of this Court, which require proper reasons to be stated in such an application, to justify leave to cross examine the Complainant, the Magistrate, accepting the reasons cited by the Accused, that the matter pertains to commercial dispute, granted leave to cross examine by order dated 26.02.2024, in both cases.

6. In the examination-in-chief of the Complainant, the Complainant relied upon a "Agreement of Payment" dated 18.09.2019, execution of which was not denied by the Accused. It was on the basis of this agreement, according to the Complainant, that the cheques in question were executed in favour of the Complainant, which have been dishonoured.

7. Going through the cross-examination of the Complainant, there is no denial of the execution of this agreement. The Complainant has also not been cross examined, nor has the

Complainant been cross examined as to the contents of the agreement. In the cross examination, the only suggestion that has been put to the Complainant is that the cheques were issued to facilitate a business deal and not for repayment of a friendly loan. Even in the cross examination, there is absolutely no defence raised, nor is the transaction contained in the agreement denied. There is not even a suggestion as to what other contract or understanding was there between the parties raised as a defence as is now being done.

8. The matters were then listed on 16.08.2024 for recording the Statement under Section 313 of the Accused. On that date and thereafter on 27.08.2024, the Accused did not remain present either physically or through V.C. for reasons of which his statement could not be recorded. On 04.09.2024, he attended the Court through V.C. and his Statement under Section 313 Cr.P.C. was recorded virtually, and the Accused was directed to sign this statement and produce the same on the next date of hearing. During the recording of the Statement under Section 313, the Accused accepted that he had signed the Agreement of Payment dated 18.09.2019 and then stated that he would step into the witness box and give evidence in defence, and rely upon WhatsApp chats and telephonic recordings which he would produce in evidence. Instead of recording a written waiver of his right under Section 315 Cr.P.C., in terms of Clause (a) of the proviso to Sub-Section 1 of Section 315, the Court directly fixed the matter on 07.10.2024, supposedly for the Accused to file an affidavit

in evidence. There are two serious flaws which the learned Magistrate committed at this stage.

9. If the Accused wishes to lead evidence by examining himself, he is required in terms of Clause (a) of the proviso to Sub-Section 1 of Section 315, to record the waiver of his right and to state in writing that he wishes to depose in the matter. The Magistrate has proceeded to allow the Accused to lead evidence without the Accused first, on his own, making a request in writing, in terms of Clause (a) of the proviso to Section 315. This was a stage to be first complied with by the Magistrate, since the Accused cannot otherwise be compelled to act as a witness in his case, but where he wants to examine himself must specifically waive his right and record the same in writing by a request to the Court.

10. Thereafter, the Magistrate has proceeded to direct the Accused to lead his evidence by filing an affidavit, which again is not permissible, even in complaints filed under Section 138 of the Negotiable Instruments Act. Section 143 of the Negotiable Instruments Act provides for the Complainant giving evidence on affidavit, but does not provide for evidence of the Accused to be led through filing an affidavit in lieu of his evidence.

11. Sub-Section 2 of Section 145 permits the Court, if it thinks fit, and on an application of the Prosecution or the Accused, to examine any person summoned to give evidence on affidavit, but does not

permit such evidence of the Accused to be recorded on affidavit.

12. In ***SBI Global Factors Ltd. v. State of Maharashtra & ors.*** reported in **2022 (1) Mh.L.J. 384**, this Court considered a similar case, where the question was whether the Accused in proceedings under Section 138 of the Negotiable Instruments Act, was entitled to file an affidavit in lieu of examination in chief or not after considering the Judgment of the Hon'ble Supreme Court in ***Mandvi Co-op Bank Ltd. v. Nimesh B. Thakore***, reported in **2010(4) Mh.L.J. (S.C.) 220**, in paragraph 5 has held that such a course of permitting an Accused to lead evidence through an affidavit is not permissible under Section 145 of the Negotiable Instruments Act. The relevant portions of the Judgment are quoted below:

> "*5. The question, whether an accused in proceedings under Section 138 of the N.I. Act is entitled to file an Affidavit in-lieu of Examination-in-Chief or not, is no more res-integra. The Hon'ble Supreme Court in the case of Mandvi Co-op. Bank Ltd. vs. Nimesh B. Thakore, reported in 2010(4) Mh.L.J. (S.C.) 220 = 2010(2) Mh.L.J. (Cri.) (S.C.) 610 = Manu/SC/0016/2010: AIR 2010 SC 1402: (2010) 3 SCC 83, in para Nos.30, 31 and 32 has held as under:-*
>
> *"30. Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on affidavit, the High Court has held that subject to the provisions of sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit. But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more*

importantly providing a similar right to the accused would be in furtherance of the legislative intent to make the trial process swifter. In paragraph 29 of the judgment, the High Court observed as follows:-"It is true that section 145(1) confers a right on the complainant to give evidence on affidavit. It does not speak of similar right being conferred on the accused. The Legislature in their wisdom may not have thought it proper to incorporate a word 'accused with the word 'complainant' in sub-section (1) of section 145 in view of the immunity conferred on the accused from being compelled to be a witness against himself under Article 20(3) of the Constitution of India...."

Then in paragraph 31 of the judgment it observed: ".... Merely because, section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code..... I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in sections 315 and 316 of the Code."

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

32. On a bare reading of section 143 it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word 'accused' with the word 'complainant in section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission. There are two errors apparent in the

reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word 'accused' with the word 'complainant' in section 145(1).....", it was not open to the High Courtto fill up the self perceived blank. Secondly, the High Court was in eFFOR in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary: in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well."

6. The Hon'ble Supreme Court in the case of Indian Banks Association and ors. vs. Union of India and ors., reported in 2014(6) Mh.L.J. (S.C.) 10 = 2014(4) Mh.L.J. (Cri.) (S.C.) 35 MANU/SC/0387/2014: AIR 2014 SC 2528: (2014) 5 SCC 590, while dealing with the issue of large pendency of cases arising under Section 138 of the Negotiable Instruments Act, after taking into consideration various decisions in the field and also the ratio in the case of Mandvi Co-op. Bank Ltd. (supra), in para No.21, issued following directions.

"21. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the Criminal Courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given :-

DIRECTIONS:-

1) Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

2) MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. Court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.

3) Court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, Court may pass appropriate orders at the earliest.

4) Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

5) The Court concerned must ensure that examination-in-chief. cross-examination and re-examination of the complainant must be conducted 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."

7. The learned Single Judge of this Court in the case of Murlidhar

Chandiram Gyanchandani VS Jai Agencies through proprietor Anil Ramlochansingh Thakur, reported in 2013 MhLJ Online (Cri) 115 = MANU/MH/2736/2013: IV(2014) BC 372 (Bom.), while dealing with similar issue, as the case in hand, in para No.6, has held as under.

"After giving thoughtful considerations to the submissions advanced and controversy involved being restricted only to the extent of learned Magistrate having permitted the respondent-accused to adduce his evidence by way of an affidavit and the decision pointed out as well as the provisions to which attention is drawn, clearly indicating that such a direction could not have been given due to no such a stipulation is contained in the relevant section the relevant part of the order impugned will be required to be quashed and set aside Similarly, for expeditious disposal of said case, the direction deserves to be given, as canvassed."

8. In view of the elucidation of law by the Hon'ble Supreme Court in the case of Mandvi Co-op. Bank Ltd. (supra), it is clear that, an accused in a proceedings under Section 138 of the Negotiable Instruments Act cannot be permitted to file an Affidavit-of-Evidence in lieu of Examination-in-Chief."

13. A similar view has been taken by this Court in ***Viral Enterprises v. State of Maharashtra*, 2024 SCC OnLine Bom 1774**, in a batch of petitions which deal with the very same issue. This Judgment makes reference to ***Mandvi Co-op Bank Ltd.*** (supra) and ***Indian Banks Association & Ors. v. Union of India*** reported in **(2014) 5 SCC 590** and has held as under:

"7. The substance of the petition is that if viewed in the light of the object of insertion of the provisions contained in section 143 to 147 of the NI Act, 1881, by Act, 55 of 2002, the accused also has a right to adduce his evidence on an affidavit. The learned Metropolitan

Magistrate was in error in declining to accept such evidence on affidavit by placing reliance on the decision of the Supreme Court in the case of Mandvi Cooperative bank Limited v. Nimesh B. Thakore, (2010) 3 SCC 83, as the subsequent judgment of the Supreme Court in the case of Indian Bank Association v. Union of India, (2014) 5 SCC 590, had further expanded the scope of provisions contained in section 145 of the NI Act, 1881, with a view to give impetus for expeditious conclusion of the proceedings under section 138 of NI Act, 1881 and the said decision was not properly construed by the learned Magistrate. Thus, to advance the object of the provisions contained in sections 143 and 145 of the NI Act, 1881, the petitioners/accused deserve to be permitted to adduce the evidence on an affidavit.

19. This Court while dealing with a large number of petitions wherein the various facets of the amended provisions of NI Act, 1881 came up for consideration, inter alia, held that the evidence in defence like the complainant's evidence also be given on an affidavit. When the matter went in appeal before the Supreme Court, in the case of Mandvi Cooperative bank (supra), the Supreme Court, inter alia, considered the following question—:

> *"Whether the right to give evidence on affidavit as provided to the complainant under Section 145(1) of the Act is also available to the accused?"*

20. After an elaborate analysis, the Supreme Court held that this Court had overreached itself and took the course that amounts to taking over legislative functions. The observations of the Supreme Court in paragraph Nos. 44 to 48 and 52 are instructive and, hence, extracted below.

> *44] Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on affidavit, the High Court has held that subject to the provisions of sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit.*

But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more importantly providing a similar right to the accused would be in furtherance of the legislative intent to make the trial process swifter.

45] In para 29 of the judgment, the High Court observed as follows:

> *"It is true that section 145(1) confers a right on the complainant to give evidence on affidavit. It does not speak of similar right being conferred on the accused. The Legislature in their wisdom may not have thought it proper to incorporate a word 'accused' with the word 'complainant' in sub-section (1) of section 145 in view of the immunity conferred on the accused from being compelled to be a witness against himself under Article 20(3) of the Constitution of India...."*
>
> *Then in paragraph 31 of the judgment it observed:*
>
> > *".... Merely because, section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code..... I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in sections 315 and 316 of the Code."*

46] On this issue, we are afraid that the High Court overreached itself and took a course that amounts to taking-over the legislative functions. On a bare reading of section 143 it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of section 145 was merely an omission by the

legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word 'accused' with the word 'complainant' in section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission.

47] There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word 'accused' with the word 'complainant' in section 145(1)..... ", it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under section 138 of the Act would be based largely on documentary evidence.

48] The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well.

……

52] In light of the above we have no hesitation in holding that the High Court was in error in taking the view, that on a request made by the accused the magistrate may allow him to tender his evidence on affidavit and consequently, we set aside the direction as contained in sub-paragraph (r) of paragraph 45 of the High Court judgment. The appeal arising from SLP

(Crl.) No. 3915/2006 is allowed.

21. Indian Bank Association and Others filed Writ Petition before the Supreme Court under Article 32 of the Constitution of India seeking appropriate guidelines, directions to be followed by all the Courts dealing with complaints under section 138 of NI Act, 1881 so as to ensure expeditious disposal of the complaints. In Indian Bank Association (supra), the Supreme Court took note of the decision in the case of Mandvi Cooperative bank (supra) and issued a number of directions. Direction 5, on which Mr. Patel placed very strong reliance, reads as under:—

> *(5) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted 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 complainant and accused must be available for cross-examination as and when there is direction to this effect by the Court.*
>
> *(emphasis supplied)*

26. Two questions come to the fore. First whether Indian Bank Association (supra) has taken a divergent view? Second, even if one proceeds on the premise that there is a deviation from the decision in the case of Mandvi Cooperative bank (supra), whether the decision in the case of Indian Bank Association (supra) commands precedential value for being latter in point of time.

27. In the case of Indian Bank Association (supra), after referring to the decision in the case of Mandvi Cooperative bank (supra), the Supreme Court observed, inter alia, as under:—

> *12] The scope of Section 145 came up for consideration before this Court in Mandvi Cooperative Bank Limited v. Nimesh B. Thakore, (2010) 3 SCC 83, and the same was explained in that judgment stating that the legislature provided for the complainant to give his evidence on affidavit, but did not provide the same for the accused. The Court held that even though the legislature in their wisdom did not deem it proper to incorporate*

a word "accused" with the word "complainant" in Section 145(1), it does not mean that the Magistrate could not allow the complainant to give his evidence on affidavit, unless there was just and reasonable ground to refuse such permission.

……

16] We have indicated that under Section 145 of the Act, the complainant can give his evidence by way of an affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the Court, which makes it clear that a complainant is not required to examine himself twice i.e. one after filing the complaint and one after summoning of the accused. Affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post summoning stage. In other words, there is no necessity to recall and re-examine the complaint after summoning of accused, unless the Magistrate passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or under Section 145(2) of the Act suo moto by the Court. In summary trial, after the accused is summoned, his plea is to be recorded under Section 263(g) Cr. P.C. and his examination, if any, can be done by a Magistrate and a finding can be given by the Court under Section 263(h) Cr. P.C. and the same procedure can be followed by a Magistrate for offence of dishonour of cheque since offence under Section 138 of the Act is a document based offence. We make it clear that if the proviso (a), (b) & (c) to Section 138 of the Act are shown to have been complied with, technically the commission of the offence stands completed and it is for the accused to show that no offence could have been committed by him for specific reasons and defences.

28. From a correct reading of the decision in the case of Indian Bank Association (supra), I find it rather difficult to accede to the submission on behalf of the accused that the said decision deviates from the view taken by the Supreme Court in the case of Mandvi Cooperative bank (supra) in the matter of permitting the accused to lead evidence on an affidavit. The question that arose for

consideration in the case of Mandvi Cooperative bank (supra) was in the context of the import of amended section 143 and 145 of the NI Act, 1881, in particular. On the contrary, a larger issue of expeditious completion of the trial in the complaints under section 138 of the NI Act, 1881 was the subject matter of the Writ Petition filed by the Indian Bank Association (supra). In that context, the Supreme Court gave certain directions. However, despite noting the decision in the case of Mandvi Cooperative bank (supra), especially the fact that the provisions contained in section 145 were restricted to permitting the complainant to lead evidence on affidavit and do not provide the same dispensation to the accused, Indian Bank Association (supra) did not struck a discordant note.

29. It is true in clause 5 of the directions in paragraph 21 in the case of Indian Bank Association (supra) (extracted above), the Supreme Court observed that the Court has option of accepting affidavits of the witnesses, instead of examining them in Court. However, the said direction cannot be read out of context. It is well recognized that the words in a judgment cannot be read like statute. A decision is an authority for what it actually decides and not what logically flows from the said decision.

30. In the case of Mandvi Cooperative bank (supra), a Bench of coequal strength of the Supreme Court has elaborately considered the specific question as to whether an accused can be permitted to adduce evidence on oath and ruled against such course of action ascribing reasons. It cannot be urged that in the case of Indian Bank Association (supra), another two Judge Bench of the Supreme Court delved into the correctness of the said view and took a diametrically opposite view. The decision in the case of Mandvi Cooperative bank (supra), in my view, still holds the field.

31. The second aspect of Indian Bank Association (supra), being a decision latter in point of time, commands precedence, may not detain the Court. The legal position is absolutely clear.

32. As noted above, in my humble opinion, there is no conflict between the decisions in the cases of Mandvi Cooperative bank (supra) and Indian Bank Association (supra). Even if one proceeds

on the premise that decisions in the cases of Mandvi Cooperative bank (supra) and Indian Bank Association (supra) are irreconcilable, the rule is to apply the earliest view as the succeeding one would fall in the category of per incuriam. It would be suffice to note the statement of law in the case of Sundeep Kumar Bafna v. State of Maharashtra'.

> *19] It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam.*
>
> *(emphasis supplied)*"

14. The Magistrate has, therefore, acted with material irregularities whilst allowing for the above procedure which is contrary to the provision of Section 145 of the Negotiable Instruments Act and to the aforementioned case law. The correct course that ought to have been adopted by the Magistrate at this stage was for the Magistrate to direct the Accused, if he desired to examine himself, to place on record his request in writing for such examination. On such a request being

placed on record, the Trial Court ought to have considered the application, and if the Accused was permitted to lead his evidence, and if he sought production of any documents, he would have to make out a case for such documents to be allowed in evidence, subject to the rules of evidence. The application would be subject to dealing with such objections as may be raised by the Complainant.

Instead of taking the above course, the Magistrate thereafter allowed for three adjournments on 07.10.2024, 08.11.2024 and 06.12.2024 on which dates the Accused remained absent. These dates were given for the Accused to lead his evidence, and ultimately on 06.12.2024, when the Accused once again sought time, stating that he had to travel out of Goa for business, his application was rejected and his evidence was closed.

15. In ***Soni Anilkumar Prahladbhai v. State of Gujarat***, R/Special Criminal Application No. 4888 of 2022, decided on 06.06.2022, the High Court of Gujarat, whilst deciding on whether the Trial Court was justified in refusing to accept the examination in chief of the accused which was recorded without the accused having submitted a written request to be examined as a witness under Section 315 Cr.P.C., held as follows:

> "*11. Bare perusal of the provision of Section 315 would indicate that accused person can be competent witness, provided there is a written permission or there is a written request made to the concerned court at the instance of accused. Thus, in view of the provision of Section*

> *315 of the Cr.P.C., accused person can be a competent witness, but before that, accused is required to request in writing to the concerned Court.*
>
> *12. Keeping in mind the aforesaid legal provision as well as the facts of the present case, it appears that in the instant case, the petitioner has filed an application at Exh.80 dated 26.10.2021 before the concerned Magistrate, requesting to accept his examination-in-chief. I have an occasion to go through the certified copy of the original application at Exh.80. It appears that the petitioner by relying upon the judgment in the case of Rakeshbhai Maganbhai Barot (supra), straightaway, sought to submit his examination-in-chief. Admittedly, no written request made to the concerned court as envisaged in Section 315 of the Cr.P.C. Keeping in mind this peculiar and distinguishing fact and the mandate of Section 315 of the Cr.P.C., in my considered opinion, both the courts below have committed no mistake in not accepting the examination-in-chief of the present petitioner.*"

I am fully in agreement with the view taken by the Gujarat High Court on this issue, based on the reasons assigned by me above.

16. There is no doubt, that if the application of the Accused under Section 315 was in fact given in writing, and the Accused had sought adjournments on the three dates referred above, the Magistrate would have been fully justified in closing the evidence. There has been a gross delay on the part of the Accused in leading his own evidence and such an order, considering the delay of almost six months since the recording of the 313 Statement till the evidence was closed was well justified.

17. However, considering that the procedure as was required under Section 315 Cr.P.C. has not been followed, this would be a case that

calls for interference in the supervisory jurisdiction of the Court under Article 227 of the Constitution of India to correct the legal error that has taken place in following the procedure as laid down by law. Consequently, the impugned order closing the evidence of the Accused would be required to be quashed and set aside. Since the orders dated 06.12.2024 are now quashed and set aside, the Magistrate shall follow the following procedure.

18. The Accused, if he so desires, shall file a written application placing on record his desire to act as a witness in his own case in terms of Clause (a) of the proviso to Sub-Section 1 of Section 315 Cr.P.C. After this application is filed, the Magistrate shall permit the Accused to lead his oral evidence by personally stepping into the witness box and deposing in the matter. The Accused shall not be permitted to produce any documentary evidence unless he justifies the production of such evidence and specifically applies for the same during the course of his evidence. If such an application is made, the Magistrate shall take into consideration the line of cross-examination adopted by the Accused after he was granted leave under Sub-Section 2 of Section 145 of the Negotiable Instruments Act. The Magistrate shall also take into consideration the fact that no reply was filed to the notice under Section 138 issued by the Complainant prior to instituting the complaint. After evidence of the Accused is completed, if the Accused seeks to lead further evidence through any witness, the Magistrate shall not grant the same mechanically but

shall consider, on an application filed by the Accused to that effect, shall decide the necessity of examining such witnesses after considering the defence raised by the Accused during the cross examination of the Complainant.

19. Consequently, I pass the following order:

a) The impugned orders dated 06.12.2024 are quashed and set aside. The case shall stand relegated to the stage where the Accused shall file his statement/application under Section 315 in the manner stated above. The Magistrate shall then proceed to record the evidence of the Accused and follow the procedure referred to in the preceding paragraphs.

b) Considering that the Petitioner/Accused has contributed to a delay of almost one year since the completion of the evidence of the Complainant, and on one count or another, has been adjourning the matter for at least five hearings, the cost deposited by him shall be paid to the Respondent.

c) The Registry shall directly remit the cost deposited under order dated 09.01.2025 to the account of the Respondent, details of which are given below:

Name: Gous Mohammed M. Shiraguppi
Bank: YES Bank Ltd.
Branch: Ponda Goa
Account No.: 035685800000788
IFSC Code: YESB0000356

20. Rule is made absolute in the above terms.

21. Considering the trial is to be conducted as a summary trial, the trial shall be completed within two months from the date of this order.

VALMIKI MENEZES, J.