

ASSAM SCHEDULE VIII, FORM NO 127

HIGH COURT CRIMINAL FORM (M) 106

ORDER SHEET FOR MAGISTRATE'S RECORDS

DISTRICT: KAMRUP (METRO)

PRESENT: - SUNDEEP KASHYAP DAS, AJS

IN THE COURT OF MUNSIFF NO-4 cum JUDICIAL MAGISTRATE FIRST CLASS

C.R 902<sup>C</sup> of 2016

SL NO OF ORDERS	DATE	ORDER	SIGNATURE
	10.03.2017	<p>Today is the date fixed for Necessary Order</p> <p><b>PETITION FILED BY ACCUSED</b></p> <p>Accused has filed a petition no-421/17 dated 04.02.2017 u/s 145 (2) of Negotiable Instruments Act, 1881 praying to allow the accused to cross-examine the complainant by recalling him</p> <p><b>CIRCUMSTANCES LEADING TO FILING THE ABOVE PETITION</b></p> <p>The instant case was fixed at the stage of Cross-examination of Complainant. Accused moved a petition for dispensing his personal attendance on the ground of illness. The same was rejected as it was not supported with any medical documents. None</p>	

appeared on behalf of the accused inspite of repeated calls for conducting cross-examination and as such as per proviso to Section 309 (2) of Cr.P.C, the cross-examination was dispensed with.

**ARGUMENTS ON THE PETITION**

**SUBMISSION BY LEARNED COUNSEL FOR PETITIONER**

Learned Defence Counsel has submitted that it is within the discretion of this Court to call any witness for examination in the nature of examination in chief, cross-examination and re-examination within the ambit of Section 145 (2) N.I Act.

He has cited one decision of Hon'ble Supreme Court of India Mandvi Co-Operation Banl Limited v. Nimesh B. Thakore reported in AIR 2010 SC 1402

**OBJECTION RAISED BY LEARNED COUNSEL FOR COMPLAINANT**

Learned Counsel for the Complainant has submitted that the said petition should be rejected as the accused already availed the opportunity to cross-examination but he did not utilised it. Allowing the petition u/s 145 (2) Cr.P.C would amount to reviewing the decision of the Court where the cross-examination was dispensed with.

First of all, it goes without saying that cross-

	<p>examination is one of the most vital instruments on the part of the accused to counter the allegations levelled against him by prosecution. Accordingly, the sequence of Section 138 of Evidence Act is arranged systematically, i.e. the moment examination in chief is over; accused can cross-examine the said witness.</p> <p>However, utilising the opportunity for cross-examination is equally important. The accused cannot take it for granted that he may cross-examination whenever he wants and court will grant adjournments as per his wish.</p> <p>Reverting back to the case at hand, the instant case has been fixed at the stage of cross-examination since 19.11.2016</p> <p>On 19.11.2016, complainant remained present to face the cross-examination as per order of the Court but accused filed a petition vide no-4734 praying for adjournment on the ground that he was busy in 'medical'. Court considered the prayer of the accused and as such adjournment was allowed and fixed 22.12.2016 for Cross-examination.</p> <p>On 22.12.2016, complainant once again attended the court to face the cross-examination but Learned Defence Counsel had submitted that he was unwell to conduct the cross-examination. Once again,</p>	
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		<p>adjournment was allowed and fixed 05.01.2017.</p> <p>On 05.01.2017, complainant was present but accused filed a petition vide no-66/17 for dispensing his personal attendance on the ground of illness but none came forward to move the petition. Moreover, no medical documents submitted regarding his illness. Even though in the said order this Court observed that physical presence of the accused not required during cross-examination but his engaged Counsel required to be present and sufficient to conduct the cross-examination. However, he could nowhere be seen on that given day. The Court went through the proviso (c) to Section 309 (2) of Cr.P.C where a witness is present in court but a party or his pleader is not present or party or pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination in chief or cross-examination of the witness, as the case may be.</p> <p>Nowhere in the petition had the accused stated any reason for non-examination of the complainant by his engaged Counsel. The petition was meant only for dispensing his personal attendance. If a petition can be filed for dispensing personal attendance on behalf of the accused then why the same person, in other</p>	
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	<p>words, his engaged Counsel could not cross-examine the witness.</p> <p>The period from 19.11.2017 to 05.01.2017 was a considerable amount of time for completing the process of evidence. Adjournments, no doubt, essential for parties to cope up with any emergency situation but in an era where one is talking about speedy trial, mechanical adjournments should not take its due course. Granting adjournments on regular basis unless it is absolutely necessary would become a mockery of justice. The message to the persons filing cases in court for justice will have a wrong impression that inspite of regular attendance in court, he gets nothing but adjournments.</p> <p>I have gone through the provision of Section 145 (2) of N.I Act where it states that 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.</p> <p>In N.I Act cases, first evidence on affidavit u/s 145 (1) N.I is filed which is equivalent to Section 200 of Cr.P.C, cognizance taken, process issued against the accused, he appeared, process of bail gets over, offence explained and after that cases are fixed for cross-examination of the complainant. In that stage</p>	
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		<p>application u/s 145 (2) N.I Act comes into play where you need to recall the witness to face cross-examination, this is because evidence on affidavit is taken as examination in chief and on that very day unlike any criminal cases cross-examination is not conducted on the same day. Therefore, in order to conduct the cross-examination, you need to recall a witness u/s 145 (2) of N.I Act.</p> <p>But, in the instant case, opportunity for cross-examination was already granted to the accused by this Court by fixing 19.11.2016, 22.12.2016 and 05.01.2017 for cross-examination. So, the accused should have utilised that very opportunity but he failed to avail the same. Therefore, at present, the question of allowing application u/s 145 (2) of N.I Act does not arise at all.</p> <p>The procedure adopted in N.I Act cases are what provided under Code of Criminal Procedure and it is an established principle that criminal court cannot review its own decision. The cross-examination was dispensed with already and allowing the same by means of Section 145 (2) N.I Act would amount to reviewing the decision given by the court which is not permissible at all.</p> <p>Moreover, the decision submitted by Learned Counsel for the petitioner has nothing to do with</p>	
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	<p>allowing this petition as the Hon'ble Supreme Court merely explained the provision of Section 145 (2) N.I Act and its scope. Nowhere, the Apex Court stated that cross-examination can be allowed under the said provision again where once the same was rejected.</p> <p>The accused is reminded of the fact that he had already passed through the stage of Section 145 (2) of N.I Act as the complainant was called thrice to face the cross-examination and accordingly he attended but accused did not cross-examine him for one ground or the other which was not satisfactory to this court at all.</p> <p>As cross-examination is important to accused, in the same way, disallowing mechanical adjournments equally important. Interest of justice is not meant only to accused but also to prosecution as well. There should be balance in both the sides and only then justice will suffice.</p> <p>Situated thus, the prayer of the petitioner is not allowed and thereby petition 421/17 is rejected</p> <p>Fix.....for Statement defence of the accused</p>	
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