the occurrence, and, when the mechanical expert, was not an ocular witness to the occurrence, rather his examining the vehicle, after, the occurrence of the afore mishap, (a) thereupon the nonoccurrence of the afore echoings in the respectively rendered testifications, by, the afore witnesses, constrains this Court, to, conclude, vis-à-vis, reticence by both, vis-à-vis, the afore factum probandum, rather bolstering an inference, vis-à-vis, the afore defects, rather happening, at the precollision, or, preaccident phase, of, hence driving, of, the offending vehicle rather by the deceased.

7. In view of the above, there is no merit in the appeal, and, the same is accordingly dismissed. The impugned judgment is maintained and affirmed. All pending applications stand disposed of accordingly.

***Result*:-** Appeal dismissed.

ABC 2020 (I) 127 HP
ACQUITTAL & BAIL CASES

HIGH COURT OF HIMACHAL PRADESH

(Sandeep Sharma, J.)

CrMMO No 215 of 2019

Decided on 28 November, 2019

JAGDEEP SINGH ***-Petitioner(s).***

Versus

RAMESH SINGH ***- Respondent(s).***

Law Covered*:- *(A) Negotiable Instruments Act, 1881 — Section 138, 145(1) & 145(2) — Seeking recall/re-examination/ cross-examination of the complainant by accused — assigning reason(s) — requirement for —Held, the second part of S.145(2), nowhere talks about assigning reasons in the application for recall/re-examination of a witness — meaning thereby that it is obligatory for the court to recall complainant or its witnesses, if an application is made in that behalf — Order of the Court below, rejecting the application of the accused for examination/crossexamination of the complainant rectified — Directed to fix a date for examination/cross-examination. (Para 8)

(B) Negotiable Instruments Act, 1881 — Section 145(2) — Seeking recall/re-examination/ cross-examination of the complainant by accused — effect on complainant — Held, no prejudice, whatsoever, would be caused to the complainant, in case

complainant and/or his witnesses are examined/cross-examined — rather, this would enable court below to render proper adjudication of the controversy inter se parties. (Para 8) a

Facts:- *The question, which was determined in the present case was that whether in terms of S.145(2) of the NI Act, it is mandatory for the applicant, seeking cross-examination of the complainant, to assign reason(s) for recalling/reexamination/ cross-examination of the complainant. It was held that S.145(2), nowhere talks about assigning reasons in the application for recall/re-examination of a witness.* b

Law of relief:- ***It is not mandatory for the applicant to assign reason, in case the complainant and/or his witnesses are examined/cross-examined by accused u/s 145(2), NI Act.*** c

Held:- In the aforesaid judgment, this court has specifically ruled that the second part of S.145(2), nowhere talks about assigning reasons in the application for recall/re-examination of a witness, d meaning thereby that it is obligatory for the court to recall complainant or its witnesses, if an application is made in that behalf, as such, order passed by learned Court below, rejecting the application of the accused for examination/crossexamination of the complainant is against the provisions of S.145(2) and deserves to be rectified by this Court. e Moreover, no prejudice, whatsoever, would be caused to the complainant, in case complainant and/or his witnesses are examined/ crossexamined, rather, this would enable court below to render proper adjudication of the controversy *inter se* parties. (Para-8)

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Counsel:- ***For Petitioner(s):*** *Mr. Arun Sehgal, Adv.*

For Respondent(s): *Mr. Sanjeev Kumar Suri, Adv.*

Cases Referred:-

1. *Anu Sharma vs. Punjab National Bank, (Para-4)*
2. *Mandvi Cooperative Bank Ltd. vs. Nimesh B. Thakore, (2010) 3 SCC 83, (Para-7)* g
3. *Dental Council of India vs. Hari Prakash and Ors., (2001) 8 SCC 61, (Para-7)*
4. *Nathi Devi vs. Radha Devi, (2005) 2 SCC 271, (Para-7)*
5. *Raghunath Rai Bareja vs. Punjab National Bank, (2007) 2 SCC 230, (Para-7)*
6. *Indian Bank Assn. v. Union Bank of India (2014) 5 SCC 590, (Para-7)* h
7. *Radhey Shyam Garg v. Naresh Kumar Gupta (2009) 13 SCC 201, (Para-7)*

JUDGMENT

SANDEEP SHARMA, J.: - 1. Instant petition under S.482 CrPC read with Art. 227 of the Constitution of India, is directed against order

dated 22.1.2019 passed by learned Additional Chief Judicial Magistrate, Nurpur, District Kangra, Himachal Pradesh in Case No. 270 of 2015, whereby an application under S.145(2) of the Negotiable Instruments Act (hereinafter, 'Act') having been filed by the petitioner -accused (hereinafter, 'accused') seeking permission to examine/cross -examine the complainant, came to be dismissed.

2. Precisely the facts, as emerge from the record are that the respondent-complainant (hereinafter, 'complainant') filed a complaint under S.138 of the Act in the court of learned Additional Chief Judicial Magistrate, Nurpur, District Kangra, Himachal Pradesh, alleging therein that the accused took Rs.1.00 Lakh from him on account of ticket fare and Visa expenses for sending the complainant's son abroad for employment. However, the fact remains that after receipt of money from the complainant, accused failed to send complainant's son abroad and also failed to repay the money taken by him from the complainant and, he (accused) with a view to discharge his liability, issued cheque baring No.736991 dated 30.9.2015, amounting to Rs.1.00 Lakh, drawn on an account maintained by accused with Punjab National Bank, Ganoh, Nurpur, District Kangra, Himachal Pradesh. Said cheque, on its presentation, came to be dishonoured on account of insufficient funds in the account of the accused, vide memo dated 3.5.2015, as such, complainant was compelled to initiate proceedings under S.138 of the Act against the accused in learned Court below.

3. Learned Court below, on the basis of material adduced before it, put notice of accusation to the accused for having committed offence punishable under S.138 of the Act, to which he pleaded not guilty and claimed trial. During pendency of the proceedings, accused moved an application under S.145(2) of the Act, seeking therein permission to cross-examine the complainant stating therein that a false case has been planted by the complainant against him. Learned Court below, vide order dated 22.1.2019, dismissed the aforesaid application. Learned Court below, while dismissing the application observed that bare assertion of the accused that a false case has been planted against him, is not sufficient to allow his prayer for examination/cross-examination of the complainant. In the aforesaid background, accused has approached this Court in the instant proceedings, praying therein to allow his application under S.145(2) of the Act, after setting aside the impugned order.

4. Learned counsel for the accused, while making this Court peruse provisions of S.145(2) of the Act, as well as placing reliance upon judgment rendered by this Court in judgment rendered by this Court in CrMMO No. 216 of 2019 titled ***Anu Sharma vs. Punjab National Bank***, decided on 7.8.2019, strenuously argued that the impugned order passed by learned Court below is not sustainable being contrary to the provisions contained under the Act as well as law laid down by this Hon'ble Court. Learned counsel for the accused further contended that S.145 (2) of the Act nowhere provides for assignment of reasons, if any, in the application, praying therein to provide opportunity to cross-examine complainant.

5. Per contra, Mr. Sanjeev Kumar Suri, learned counsel for the complainant supported the impugned order passed by learned Court below, and contended that since no plausible explanation ever came to be rendered on record by the accused for cross-examination of the complainant, application having been filed by him rightly came to be dismissed.

6. I have heard learned counsel for the parties and perused the material available on record.

7. The question, which needs determination in the extant proceedings is that whether in terms of S.145(2) of the Act, it is mandatory for the applicant, seeking cross-examination of the complainant, to assign reason(s) for recalling/reexamination/ cross-examination of the complainant. This issue has been elaborately discussed by this Court in **Anu Sharma**(supra), relevant paragraphs of which are reproduced hereunder:

> "5. At this stage, it would be apt to reproduce provisions of S.145 of the Act *ibid* as under:
>
> "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."

6. Careful perusal of S.145(1) reveals that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the evidence of the complainant may be given by him on affidavit and same, subject to all just exceptions can be read in evidence in any enquiry, trial or other proceeding under the said Code. S.145(2) further provides 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.

7. Close scrutiny of the aforesaid provisions contained in S.145(2) clearly reveals that it is in two parts, first part provides that the court, of its own, may summon accused to examine him with regard to the contents contained in the affidavit given by him in his evidence, whereas second part casts a duty upon the court to summon a person, who has given evidence by way of affidavit, if application is made for this purpose by the opposite party. Aforesaid provision nowhere suggests that a party making application under this provision of law, is required to assign reasons for summoning the person, who has given evidence by way of affidavit. No doubt, S.145 (1), as has been taken note herein above, provides that notwithstanding anything contained in the Code, evidence of the complainant can be given by him on affidavit, but this provision further provides that the evidence given by way of affidavit may be read subject to all just exceptions in evidence, in any enquiry, trial or proceedings under the said Code.

8. S.145, with its non obstante clause, as taken note herein above, though provides for evidence of the complainant by way of affidavit but, certainly, affidavit of the complainant can be read in evidence, subject to all just exceptions, meaning thereby nothing inadmissible in evidence i.e. irrelevant facts or hearsay evidence would be taken as evidence even though stated on affidavit.

9. True it is that the plea of the accused that on being summoned under S.145(2), complainant or any of its witnesses, whose evidence is on affidavit, must be made to depose in examination-in-chief, all over again, cannot be accepted because, acceptance of the same would amount to

duplication. S. 137 of the Evidence Act, nowhere defines "examine" to mean and include three kinds of examination of witnesses; it simply defines examination-in-chief, cross-examination and reexamination, whereas, S.145(2) provides that court may at its discretion, call a person giving his evidence again to be examined as to facts contained therein.

10. S.145(2) expressly provides that a court may, if it thinks fit, summon and examine any person, giving evidence on affidavit. Affidavit filed by the person, who is summoned is already on record in the nature of examination-in-chief, hence, on being summoned on the application made by the accused, deponent of the affidavit (complainant or any of its witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit.

11. At this stage, it would be apt to reproduce following paragraphs of judgment rendered by Hon'ble Apex Court in ***Mandvi Cooperative Bank Ltd. vs. Nimesh B. Thakore, (2010) 3 SCC 83:***

> "30. Nevertheless, the submissions made on behalf of the parties must be taken note of and properly dealt with. Mr Ranjit Kumar, learned Senior Advocate, appearing for the appellant in appeal arising from SLP (Crl.) No. 4760/2006 pointed out that sub-section (2) of section 145 uses both the words, "may" (with reference to the court) and "shall" (with reference to the prosecution or the accused). It was, therefore, beyond doubt that in the event an application is made by the accused, the court would be obliged to summon the person giving evidence on affidavit in terms of section 145(1) without having any discretion in the matter. There can be no disagreement with this part of the submission but the question is when the person who has given his evidence on affidavit appears in court, whether it is also open to the accused to insist that before cross-examining him as to the facts stated in the affidavit he must first depose in examination-in-chief and be required to verbally state what is already said in the affidavit.

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31. Mr. Ranjit Kumar referred to section 137 of the Indian Evidence Act, that defines "examination-in-chief", "crossexamination" and "re-examination" and on that basis sought to argue that the word "examine" occurring in section 145(2) must be construed to mean all the three kinds of examination of a witness. This, according to him, coupled with the use of the word "shall" with reference to the application made by the accused made it quite clear that a person giving his evidence on affidavit, on being summoned under section 145(2) at the instance of the accused must begin his deposition with examination-in-chief, before he may be cross-examined by the accused. In this regard he submitted that section 145 did not override the Evidence Act or the Negotiable Instruments Act or any other law except the Code of Criminal Procedure. He further submitted that the plain language of section 145(2) was clear and unambiguous and was capable of only one meaning and, therefore, the provision must be understood in its literal sense and the High Court was in error in resorting to purposive interpretation of the provision. In support of the submission he relied upon decisions of this court in ***Dental Council of India vs. Hari Prakash and Ors., (2001) 8 SCC 61*** and ***Nathi Devi vs. Radha Devi, (2005) 2 SCC 271***.

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32. Mr. Siddharth Bhatnagar, learned counsel for the appellant in the appeal arising from SLP (Crl.) No. 1106/2007 also joined Mr. Ranjit Kumar in the submission based on literal interpretation. He also submitted that ordinarily the rule of literal construction should not be departed from, particularly when the words of the statute are clear and unambiguous. He relied upon the decision in ***Raghunath Rai Bareja vs. Punjab National Bank, (2007) 2 SCC 230.***

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34. We are completely unable to appreciate the submission. The plea for a literal interpretation of section 145(2) is based on the unfounded assumption that the language of the section clearly says that the

person giving his evidence on affidavit, on being summoned at the instance of the accused must start his deposition in court with examination-in-chief. We find nothing in section 145(2) to suggest that. We may also make it clear that section 137 of the Evidence Act does not define "examine" to mean and include the three kinds of examination of a witness; it simply defines "examination-inchief", "cross-examination" and "re-examination". What section 145(2) of the Act says is simply this. The court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused the court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of section 145(1) and having regard to the object and purpose of the entire scheme of sections 143 to 146. The scheme of sections 143 to 146 does not in any way affect the judge's powers under section 165 of the Evidence Act. As a matter of fact, section 145(2) expressly provides that the court may, if it thinks fit, summon and examine any person giving evidence on affidavit. But how would the person giving evidence on affidavit be examined, on being summoned to appear before the court on the application made by the prosecution or the accused? The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit."

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12. Subsequent to aforesaid judgment, question with regard to the competence of a Magistrate to summon a person, who has tendered his evidence by way of affidavit, while exercising power under S.145 CrPC came up for consideration before Hon'ble Apex Court in ***Indian Bank***

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Assn. v. Union Bank of India (2014) 5 SCC 590, wherein Hon'ble Apex Court, while taking note of the aforesaid judgment rendered in **Mandvi Cooperative Bank** (supra) reiterated that even if Legislature in their wisdom have deemed it not appropriate to incorporate "accused" with the word "complainant" in S.145 (1), it does not mean that the Magistrate could not allow the accused to give his evidence on affidavit, unless there was just and reasonable ground to refuse such permission. Hon'ble Apex Court in the aforesaid judgment also took note of the its earlier judgment rendered in ***Radhey Shyam Garg v. Naresh Kumar Gupta (2009) 13 SCC 201,*** wherein court observed that the words, "examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the court in terms of sub-section (2) of Section 145 of the Act", would mean for the purpose of cross-examination.

13. Hon'ble Apex Court held that the 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 either on an application made by the accused or under Section 145(2) of the Act or suo motu by the Court. Reliance is placed upon following paragraphs of **Indian Bank Assn**. (supra):

> "13. Section 145 of the Act deals with the evidence on affidavit and reads as follows :
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> "145. Evidence on affidavit.
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> (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."

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14. 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.

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15. This Court while examining the scope of Section 145 in ***Radhey Shyam Garg v. Naresh Kumar Gupta (2009) 13 SCC 201,*** held as follows :-

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"If an affidavit in terms of the provisions of Section 145 of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. He may be crossexamined and upon completion of his evidence, he may be re-examined. Thus, the words "examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the court in terms of sub-section (2) of Section 145 of the Act", in our opinion, would mean for the purpose of cross-examination. The provision seeks to attend a salutary purpose."

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16. Considerable time is usually spent for recording the statement of the complainant. The question is whether the Court can dispense with the appearance of the complainant, instead, to take steps to accept the affidavit of the complainant and treat the same as examination-in-chief. Section 145(1) gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. The Court has to accept the same even if it is given by way of an affidavit. Second part of Section 145(1) provides that the

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complainant's statement on affidavit may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceedings. Section 145 is a rule of procedure which lays down the manner in which the evidence of the complainant may be recorded and once the Court issues summons and the presence of the accused is secured, an option be given to the accused whether, at that stage, he would be willing to pay the amount due along with reasonable interest and if the accused is not willing to pay, Court may fix up the case at an early date and ensure day-to-day trial.

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17. Section 143 empowers the Court to try cases for dishonour of cheques summarily in accordance with the provisions of Section 262 to 265 of the Code of Criminal Procedure, 1973. The relevant provisions being Sections 262 to 264 are extracted hereinbelow for easy reference :

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"262. Procedure for summary trials.

(1) In trials under this Chapter, the procedure specified in this Code for the trial of summonsease shall be followed except as hereinafter mentioned.

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(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

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263. Record in summary trials.-In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely:-

(a) the serial number of the case:

(b) the date of the commission of the offence;

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(c) the date of the report or complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

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(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (ii), clause (iii) or clause (iv) of sub- section (1) of section 260, the value of the property in respect of which the offence has been committed;

(g) the plea of the accused and his examination (if any);

(h) the finding;

(i) the sentence or other final order a

(j) the date on which proceedings terminated.

264. Judgment in cases tried summarily. - In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the b evidence and a judgment containing a brief statement of the reasons for the finding."

18. We have indicated that under Section 145 of the Act, the complainant can give his evidence by way of an c 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 d 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 e 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 f 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 g 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 h stands completed and it is for the accused to show that no offence could have been committed by him for specific reasons and defences.

14. It is quite clear from the aforesaid exposition of law that though there is no necessity to recall and reexamine

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complainant but Magistrate can pass a specific order to recall the complainant. Such an order is to be passed either on an application made by the accused or under Section 145(2) of the Act or suo motu by the Court.

15. In the case at hand, application under S.145(2) came to be filed on behalf of the accused, seeking therein permission to cross-examine the accused with regard to contents contained in the affidavit tendered by him in evidence. But, as has been taken note herein above, application filed by accused came to be dismissed on the ground that the accused has not mentioned as to what was legally due from him to the Bank or what amount mentioned in the cheque was not legally recoverable from him at the relevant time, which reasoning given by learned Court below does not appear to be plausible, in view of the specific stand taken by accused in his application filed under S.145 (2), wherein he has stated that the accused issued blank cheque as security to the complainant, but complainant filled up wrong amount in the said cheque and subsequently concocted a false story with a view to grab money from the accused. Accused specifically mentioned in the application that he wants to cross-examine complainant's witnesses, who have given evidence on affidavit to protect his interest as well as to bring truth before the court.

16. Having carefully perused aforesaid plea raised by accused in the application, this court is not in agreement with the findings recorded by learned Court below, while passing impugned order that the defence plea raised by the accused is neither substantial nor specific. Accused has specifically taken a plea that though he had issued blank cheque as security, but subsequently wrong amount came to be filled in the same by complainant, as such, accused is well within his right to crossexamine the complainant and its witnesses, specifically on the aforesaid points. Moreover, as has been observed herein above, a careful perusal of the second part of S.145(2), nowhere talks about assigning reasons in the application for recall/reexamination of a witness, meaning thereby that it is obligatory for the court to recall complainant or its witnesses, if an application is made in that behalf.

17. Leaving everything aside, no prejudice, whatsoever, would be caused to the complainant, in case, complainant and its witnesses are cross-examined on the specific points, taken note herein above, rather, this would help the court below to effectively adjudicate upon the controversy *inter se* parties."

8. In the aforesaid judgment, this court has specifically ruled that the second part of S.145(2), nowhere talks about assigning reasons in the application for recall/re-examination of a witness, meaning thereby that it is obligatory for the court to recall complainant or its witnesses, if an application is made in that behalf, as such, order passed by learned Court below, rejecting the application of the accused for examination/crossexamination of the complainant is against the provisions of S.145(2) and deserves to be rectified by this Court. Moreover, no prejudice, whatsoever, would be caused to the complainant, in case complainant and/or his witnesses are examined/crossexamined, rather, this would enable court below to render proper adjudication of the controversy *inter se* parties.

9. Consequently, in view of detailed discussion made herein above, present petition is allowed. Order dated 22.1.2019 passed by learned Additional Chief Judicial Magistrate, Nurpur, District Kangra, Himachal Pradesh in Case No. 270 of 2015 is set aside. Application moved by the accused under S.145(2) of the Act is allowed. Learned Court below is directed to fix a date for examination/cross-examination of the complainant/witnesses of the complainant.

All pending applications are disposed of. Interim directions, if any, are vacated.

Result:- Petition allowed.

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