

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**WRIT PETITION NO. 3868 OF 2016**

Shri. Vijaykumar Chediram Jat .....Petitioner  
Versus  
Shri. Vinodkumar Mahavirprasad Swami & Anr. ....Respondents

Venkatesh A. Shastry for the petitioner.  
Mr. Anup Lahoti with Sachin Patil with Chetan Alai for respondent  
no.1.  
Mr. V.V. Gangurde, APP for the State.

***CORAM : SMT. ANUJA PRABHUDESSAI, J.***  
***DATE : 09<sup>th</sup> NOVEMBER, 2017***

**P.C. :**

1. The petitioner herein who was an accused in Summary Criminal Case No. 424813 of 2011 filed under Section 138 of Negotiable Instruments Act has challenged the order dated 30<sup>th</sup> July, 2016 whereby the learned 23<sup>rd</sup> Judicial Magistrate First Class, Pune has allowed the application filed by the respondent-complainant and directed the petitioner to lead oral evidence in lieu of affidavit in evidence (exhibit-64) filed by him.

2. Heard Mr. Venkatesh Shastry, learned counsel for the petitioner, Mr. Anup Lahoti for respondent no.1 and Mr. V.V. Gangurde, APP for the State. Perused the records. Considered the submissions advanced by the learned counsels for the respective parties.

3. It is well settled that the Apex Court in the case of ***M/s. Mandvi Co-op. Bank Ltd V/s. Nimesh B. Thakore AIR 2010 SC1402*** has held that :-

*“ 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 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. 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. ”*

4. In the light of above, the petitioner/accused was not entitled to file his affidavit in evidence. The learned Magistrate has already given

an opportunity to the accused/petitioner to lead oral evidence, if he so desires. The order does not suffer from any infirmity, perversity or illegality. The petition has not merits and is dismissed.

**(SMT. ANUJA PRABHUDESSAI, J.)**