



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO. 990 OF 2024

PETITIONER : Smt. Shakuntalabai wd/o Vishnuji Zade,
Aged about 56 years, Occu: Agriculturist,
R/o Amdi, Tahsil – Parseoni, District
Nagpur.

VERSUS

RESPONDENT : Shri Shekhar s/o Shankarlalji Jaiswal,
Aged about 50 years, Occu: Business,
R/o Plot No. 1272, Deshpande Layout,
Nagpur, District Nagpur.

Mr. S.K. Neware, counsel for petitioner.
None for the respondent.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : 23/01/2025

ORAL JUDGMENT :

1. Heard.
2. Though respondent is served, none appeared on behalf of the respondent.
3. Rule.

4. Rule made returnable forthwith. Heard finally by consent of learned counsel Mr. A.K. Neware for the petitioner.

5. By this writ petition, the petitioner has challenged the order passed by the Judicial Magistrate First Class, Ramtek, rejecting the application of the present petitioner, who is the original complainant, for disallowing the evidence on affidavit filed by the accused.

6. The petitioner had filed a criminal complaint under Section 138 of the Negotiable Instruments Act, 1881 ((hereinafter referred to 'N.I. Act') against the respondent bearing S.C.C No. 293/2015 before the Judicial Magistrate First Class, Ramtek. After recording the statement under Section 313 of Cr.P.C., the respondent had made a statement that he wants to adduce evidence in his defence, and he filed an affidavit of examination-in-chief, and therefore, the present petitioner had filed an application for disallowing the evidence on affidavit of the accused, which is not permissible under Section 145 of the N.I. Act. However, the learned Judicial Magistrate First Class, Ramtek, without assigning any reason, rejected the application, and hence this petition.

7. Learned counsel for the petitioner submitted that in view of Section 135 of the N.I. Act, especially Sub-Section 1, the complainant has right to give evidence on affidavit, but no such right is available to the accused.

8. He submitted that neither Section 296 (2) of Cr.P.C. nor the decision in the case of *State of Punjab vs. Naib Din, [(2001) 8 SCC 578]* is helpful to the present respondent to adduce the evidence on affidavit. He submitted that this aspect is dealt with by this Court in the judgment of *Viral Enterprises vs. State of Maharashtra [2024 ALL MR Cr.278]* as well as *M/s Mandvi Cooperative Bank Limited v. Nimesh B. Thakore [(2010) 3 SCC 83]*.

9. Learned counsel for the petitioner further submitted that, wherein this aspect is extensively dealt by this Court, as well as the Hon'ble Apex Court, and it is held that 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) of the N.I. Act, 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 evidence of the complainant and the accused in a case of a dishonored cheque. The case of the complainant in a complaint under Section 138 of the N.I. Act would be based largely on documentary evidence.

10. 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 evidence 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 a dishonored 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.

11. Thus, in view of the decision of the Hon'ble Apex Court, it is specifically held that Section 145(1) of the N.I. Act gives rights to the complainant, but no such right is available to the accused, and in the light of the said decision of the Apex Court, the learned Judicial Magistrate First Class, Ramtek, ought to have allowed the application, but he has not considered the import of Section 145(1) of the N.I. Act, and without assigning the reason, rejected the application, which is erroneous.

12. In view of the observations of the Hon'ble Apex Court, the application ought to have allowed by learned Judicial Magistrate First Class, Ramtek, and therefore, the order passed by the learned Magistrate deserves to be quashed and set aside. In

view of that, I proceed to pass the following order.

- a] The writ petition No. 990/2024 is allowed subject to the prayer clause-II.
- b] The application filed by the petitioner, Exhibit No. 67, is hereby allowed.
- c] The order passed by the learned Judicial Magistrate First Class, Ramtek, rejecting the application is hereby quashed and set aside.

13. **Rule** is made absolute in the above terms. No order as to costs.

[URMILA JOSHI-PHALKE, J.]