



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

**CRIMINAL REVISION APPLICATION NO.70 OF 2023
WITH
INTERIM APPLICATION NO. 1696 OF 2023**

1. Navneet Singh Gogia

AND

2. Simran Kaur Gogia

Both Residing : Flat No. 504/505

Shreeji Heights

Section 46-A,

Plot Nos. 1,1A,1B,1C.

Nerul, Navi Mumbai.

...Applicants

Vs.

1. The State of Maharashtra

and

2. Sushma B. Chandak

202, Labh Darshan

South Pond Road,

Vile Parle (West)

Mumbai – 400 056.

...Respondents

**WITH
INTERIM APPLICATION (ST) NO. 12134 OF 2023**

Sushma Chandak

...Applicant

Vs.

1. Navneet Singh Gogia

AND
2. Simran Kaur Gogia
AND
3. The State of Maharashtra ...Respondents

WITH
CRIMINAL REVISION APPLICATION NO.71 OF 2023
WITH
INTERIM APPLICATION NO. 1695 OF 2023

1. Navneet Singh Gogia
AND
2. Simran Kaur Gogia
Both Residing :
Flat No. 504/505
Shreeji Heights
Section 46-A,
Plot Nos. 1,1 A,1 B,1 C.
Nerul, Navi Mumbai. ...Applicants

Vs.

1. The State of Maharashtra
and
2. Rahul B. Chandak
202, Labh Darshan
South Pond Road,
Vile Parle (West)
Mumbai – 400 056. ...Respondents

WITH
INTERIM APPLICATION (ST) NO. 12146 OF 2023

Rahul B. Chandak ...Applicant

Vs.

1. Navneet Singh Gogia

AND

2. Simran Kaur Gogia

AND

3. The State of Maharashtra**...Respondents**

Amrut Joshi a/w Yazad Udwadia i/by Jugal Kanani	Advocate for the Applicants
Adv. Naresh Jain, Adv. Neha Anchlia	Advocate for the Respondent No. 2
Ms. Sangeeta E. Phad	APP to Respondent-State

CORAM : S. M. MODAK, J.

RESERVED ON : 20th SEPTEMBER 2024PRONOUNCED ON : 21st JANUARY 2025**INDEX**

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JUDGMENT :-

1. The only issue argued before me is about power of the trial Court to proceed with the trial for an offence punishable under Section 138 of the Negotiable Instruments Act in absence of the accused. That is to say, *‘when neither accused nor his advocate appeared during evidence recording stage, whether trial Court can a) proceed further, b) dispense statement under section 313 of the Criminal Procedure Code and c) convict the accused?’*

Background

2. There were two Summary cases filed before the Court of the Metropolitan Magistrate 33rd Court. They are :- a) No. 4001/SS/2016 and b) No. 4081/SS/2016.

The present Respondent No. 2 was the Complainant. Whereas there were three accused persons. One is the Company and Nos. 2 and 3 are its Directors. These revisions are filed by accused nos. 2 and 3. The accused issued two cheques dated 29.10.2015 for Rs. 50 Lakhs each, in all amounting to Rs. 1 Crore. They were issued towards discharge of hand loan. On presentation, they were dishonoured and that is why, two private cases were filed.

Appearance

3. Initially, accused have appeared before the trial Court. The events are as follows:-

- a) They furnished bail on 07/07/2017.
- b) Their plea was also recorded on 07/07/2017.
- c) However thereafter, they have remained absent and even their advocate.
- d) Even on one occasion that is on **25/09/2017** bailable

warrant for Rs. 5,000/- was issued.

e) The Complainant filed an affidavit of examination-in-chief on **06.02.2018**. Cross-examination was deferred.

f) Finally, on 19.03.2018, no cross order was passed.

g) Complainant closed the evidence and matter is adjourned for recording of 313 statement to 05.06.2018.

h) Draft of 313 statement is annexed to the revision application. It contains only questions and no answers.

4. Finally, the learned Magistrate convicted all the accused for an offence punishable under Section 138 read with 141 of the Negotiable Instruments Act vide two judgments dated 05/06/2018. The sentence in every case is as follow:-

a) Simple imprisonment for one year and in case of default for three months;

b) fine is double amount of cheque i.e. Rupees One crore in every case.

c) There is simple interest of 9% from the date of the complaint till its realization.

d) The amount has to be paid to the Complainant by way of

compensation.

Criminal appeals

5. Both the accused woke up from slumber and two criminal appeal nos. 382 of 2018 and 383 of 2018 were filed before the Court of City Civil Greater Mumbai. One of the ground was statement of the accused was not recorded under Section 313 of the Criminal Procedure Code. It does not find favour with them. The Appellate Court emphasized on the conduct of the accused in not appearing on six occasions (para no. 15). The Appellate Court concluded, “*accused have not rebutted the presumption*”. The Appellate Court emphasized on not adducing any evidence and rejected that contention (para no. 25). The conviction and the sentence are confirmed on 28.02.2023 vide two separate judgments. That is how these two revisions are filed.

Filing of Revisions

6. This Court while suspending the sentence has directed the Applicants-accused to deposit the amount in installments. The Complainant was permitted to withdraw the amount as per two orders dated 29.11.2023. This Order was stayed by me as per subsequent order dated 01.02.2024 considering the circumstances prevailing at

that time. Thereafter, the Complainant insisted for recalling the said Order. It was not recalled. Instead, both revisions are heard finally.

7. Both the learned Advocates argued vehemently and relied upon various citations. **The Hon'ble Supreme Court** has also dealt with issue of recording of statement and manner of its recording. In some of the judgments, **the High Courts** have given general guidelines to the trial Magistrate how to proceed in a matter arising under the provisions of Section 138 of the Negotiable Instruments Act and dealing with different stages. It is true in some of the judgments, the Courts have dealt with the issue of importance of 313 statement and whether such statements can be dispensed with and whether such statements can be recorded in non-traditional way. It is important to note that trial magistrate has not recorded the statements of accused and even evidence is also recorded in the absence of the accused. Before going into the legal issues, it will be material to consider how both the Courts below dealt with this issue.

Findings by the trial Court

8. In para no. 7, the events are recorded by the trial Court. It consists of recording of plea, claiming exemption on various occasions,

not cross-examining the Complainant. The trial Court referred the documents filed by the Complainant (para nos. 8 and 9) and then concluded about issuance of the cheque for discharge of the legal liability and reason for dishonour being account block.

Submissions

9. According to learned Advocate Mr. Joshi, trial Court findings are erroneous on the following grounds:-

- a) **the trial Court concluded**, “*accused has not discharged the burden*”, but in these revisions, this point is not canvassed on behalf of the applicants and rightly so.
- b) **the trial Court referred** about direction no. 4 in case of ***Indian Bank Association and others Vs. Union of India and Others***¹, but according to him, direction no. 4 never talks about dispensing statement under Section 313 of the Criminal Procedure Code.

Finding by the Appellate Court

10. In the memo of the appeal, Applicants have made grievance about non recording the statement under Section 313 of the Criminal

1 2014 (5) SCC 590

Procedure Code. The Appellate Court in para no. 15 has emphasized on the continuous absence of the Applicants on six occasions and even absence of their advocates. The Appellate Court further observed reason for absence is vaguely pleaded. But it is not substantiated by any such cogent evidence, at Para no. 16.

11. It is undisputed fact that after recording of the plea both the accused have not appeared before the trial Court. It is undisputed fact that the Complainant was not cross-examined. It is undisputed fact that statement of the accused under Section 313 was not recorded. According to the Applicants, Complainant has not tried to secure the presence of the Applicants and trial Court has also failed in applying the provisions of Section 313(1)(b) of the Criminal Procedure Code and as such Applicants are denied the opportunity to explain about the evidence against them.

12. Whereas according to learned Advocate for the Complainant, by their conduct they have waived the right of cross-examination. He emphasized on various amendments made in the provisions of the Negotiable Instruments Act for speedy disposal of the cases.

13. So the issue is whether question need to be decided on the basis

of earlier settled approach about:-

“compulsory recording of statement under Section 313”

OR

*“whether question need to be decided by considering
the provisions of chapter XVII of Negotiable
Instruments Act.”*

For that purpose, the provisions of law and observations in the judgments needs to be considered.

Provisions of Criminal Procedure Code

14. There are several provisions in the Code of Criminal Procedure about manner of **conduct of trial of a criminal case**. Primarily, it depends on type of offenses and corresponding punishment. The legislatures have classified the offences. It is prescribed in the first schedule of the Code.

Classification of offences

15. Offenses are classified into two parts. It is :--

- a. **Part-I** deals with offenses under Indian Penal Code.
- b. **Part-II** deals with offenses committed under other laws.

It is but natural not to specify laws under part-II. That is why test applied by framers of Indian Penal Code is “of punishment” and correlated it to type of offence, entitlement to bail and name of the Court which can conduct trial. As per the punishment prescribed in this part if punishment is upto seven years, the offence is triable by the Court of JMFC. So also as per provisions of Section 142 of the Negotiable Instruments Act, **offence under Section 138 is triable by Magistrate**. But “what procedure to be followed for trial of offences “is a question”? **Such provision is contained in four different chapters.**

They are as follows:-

(i) Chapter XVII (18)

It deals with procedure of a trial before court of session.

(ii) Chapter XIX (19)

It deals with procedure of trial of warrant cases by Magistrates.

(iii) Chapter XX (20)

It deals with procedure of trial of summons cases by Magistrates.

(iv) Chapter XXI (21)

It lays down procedure for summary trials.

Section 143 encapsulate summary trial by the Magistrate at the

beginning. This section starts with '*non-obstant clause*'. But sub section (1) mentions '*the provisions of sections 262 to 265 (both inclusive) of the Code shall, as far as may be, apply to such trials*'.

16. There are two provisions in the Code which are relevant for deciding the controversy involved in these revisions. Their meaning and effect need to be looked into by considering the provisions of Negotiable Instruments Act. They are :--

- a. provision about recording the evidence in presence of the accused.
- b. provision relating to recording the statement of the accused.

Principle of natural justice

17. The principle of natural justice warrants opportunity of hearing to be given to the person affected by the outcome. This principle is recognized by Criminal Procedure Code by way of various sections. There is stage of recording of plea/charge. There is stage of giving of evidence and then cross-examination and giving evidence by way of defence. There is stage of general questioning by the Judge which is optional and there is mandatory questioning of the accused after evidence is closed. That is why the provisions of **Section 273** of the

Criminal Procedure Code contemplates recording of the evidence either in presence of the accused or in presence of his pleader (when his personnel attendance is dispensed with). **It is mandate of law, evidence has to be recorded in the presence of the accused.**

Presence of accused

18. Section 273 incorporated in Chapter XXIII (23) of the Code relating to “Evidence in enquiries and trials”. Section 273 ‘Evidence to be taken in presence of accused’ reads thus :-

“Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader”.

19. So there is mandate for recording the evidence in the presence of accused only. **There are only two exceptions. They are :-**

- a) When it is expressly provided.
- b) in the presence of the pleader, when his attendance is dispensed.

20. There are three provisions in the Criminal Procedure Code which exempts accused from appearing before the criminal court.

They are Sections 205, 317 and 299 of the Criminal Procedure Code. But their individual outcome and the stages at which and the circumstances under which they are to be resorted are different.

- a) As per **Section 205** of the Code while issuing summons the Magistrate may dispense with personal attendance of accused and permit him to appear through his pleader. **This contingency has not arisen in this case.**
- b) As per **Section 317** of the Code the Magistrate can dispense with the personal attendance of the accused when it is not necessary or when the accused persistently disturbs the proceedings. This question arises at the stage of inquiries and trial, but it can be resorted only when the accused is represented through the pleader.
- c) **Section 299** Court can record the evidence in the absence of the accused when either accused has absconded and there is no immediate prospect of his arrest.

21. In first two contingencies even though presence of the accused is dispensed with, he is represented by his pleader. In those contingencies, inquiry/trial is conducted and accused never make a

grievance that it is conducted behind his back. Furthermore, even though the accused is not personally present, the case can proceed further. Whereas **in third contingency covered as per Section 299** of the Code even though the evidence is recorded in the absence of accused, case is never disposed of. But such evidence can be considered after the arrest of the accused.

22. In order to deal with the contingency, cases remained pending for absence of the accused, the legislatures while enacting the **Bharatiya Nagarik Suraksha Sanhita, 2023** have incorporated new provisions dealing procedure to be adopted when accused did not appear in spite of adopting several mode.

23. Nothing of that sort has happened in these matters. But then still can it be said that “the learned Magistrate was justified in proceeding further in absence of the accused and without recording their statements”?

Recording statement of the accused

24. Apart from above, the legislatures have inserted chapter XXIV (24) which deals with “General provisions as to inquiries and trials”. These provisions apply to every inquiry and trial conducted under the

Code. One of the provision (which is relevant) is “***power of the Court to examine the accused***”. Section 313 itself lays down the purpose, and it is

“for enabling the accused personally to explain any circumstances appearing in the evidence against him”.

There are two stages prescribed wherein such questioning is contemplated. They are :-

- a) **When Court considers necessary** then it can be done and it can be at any stage of the inquiry/trial. This is optional. It depends upon facts and circumstances and so to say in the discretion of the Court.
- b) **such questioning is mandatory** by the Court. The parameters are :-
 - (i) after prosecution witnesses are examined but prior to entering upon defence by the accused.
 - (ii) such questions are to be put generally but about the case (about evidence coming against the accused).

Protection to accused

25. Sub-section (2),(3) and (4) of Section 313 are the safeguards and

they are inserted for protecting the interest of the accused. They are:-

- a) sub-section (2) oath shall not be administered to the accused when he is questioned by the Court.
- b) Sub-section (3) Accused is having freedom “*not to answer any questions*” and also he cannot be punished, if he will give false answer.
- c) Sub-Section (4) Court may consider (may not consider) the answers given by him in the inquiry / trial (can be put in evidence against him against trial of other offence).

26. If the scheme of Criminal law is considered, there is no provision for filing of reply by the accused to the case of prosecution/complainant. At the most and if accused desires, he may file written submission/memorandum of arguments as per the provisions of Section 314 of the Code. So also Chapter VII (Part II of the Evidence Act) dealing with “*burden of proof*” lays down rules about who has to shoulder the burden to prove certain facts. There are certain special provisions in Section 118 and Section 139 of the Negotiable Instruments Act dealing with “*presumption*”. It relieves the Complainant to prove certain fact. At the same time, accused is given

right to prove contrary facts.

27. When Section 313 (1)(b) mandates the Court to question the accused, ‘can it be said that in these cases the learned Magistrate was justified in not following the said mandate?’

28. Before answering above question, it will be relevant to consider the provisions of Chapter XVII of the Negotiable Instruments Act.

Provisions of Negotiable Instruments Act

29. No doubt, there are certain different provisions incorporated in Negotiable Instruments Act relating to setting the criminal law into motion, taking cognizance, other stages of criminal trial and so on. On these subjects, the provisions of the Code of Criminal Procedure and of the N.I.Act needs to be considered simultaneously. The following are the relevant stages of criminal trial :-

Taking cognizance

Section 190 of the Criminal Procedure Code lays down three modes of the taking cognizance. **But legislatures only recognizes one such mode for taking cognizance for an offence committed under Section 138 of the Negotiable Instruments Act. It is on the basis of the complaint.**

That is why the opening sentence of Section 142 (1) is

“notwithstanding anything contained in Code of Criminal Procedure”.

Generally there are no pre-conditions in taking cognizance as per Section 190 of the Criminal Procedure Code, but as per **Section 142** of the Negotiable Instruments Act, certain pre-conditions are prescribed.

About limitation

Section 142 of the Negotiable Instruments Act lays down period of limitation different from the period prescribed as per the Criminal Procedure Code. Section also lays down period of limitation for taking cognizance which is different from the period mentioned in the Code.

Mode of the service of summons

As per Criminal Procedure Code, the summons issued by the Criminal Court has to be served through Police. Whereas section 144 of the Negotiable Instruments Act authorizes the Magistrate to serve the summons either by speed post or by courier service (without assistance of the Police).

Power of the Court to try cases summarily

When offence is punishable upto two years then it can be tried summarily as per the provisions of **Section 260** of the Code. Whereas

as per the provisions of section 143 of Negotiable Instruments Act, every trial is summary trial (subject to proviso). There is also special provision made for conduct of the trial on day to day basis (this is hardly followed in practice due to several reasons).

Evidence on affidavit

There is no provision for giving of evidence on affidavit in the Criminal Procedure Code except what is incorporated in Section 295 and Section 296 of the Code. But as a matter of rule in an inquiry, evidence of Complainant can be given by way of an affidavit.

30. Chapter-XVII of Negotiable Instruments Act also contain provisions for dealing certain contingencies that arise during pendency of the case. They are:-

Power to direct interim compensation.

There is provision for awarding compensation in the Criminal Procedure Code, but it is at the time of final conclusion. But as per Section 143-A of the Negotiable Instruments Act, the Court can award **interim compensation** upto certain limit.

Offences to be compoundable

As per the provisions of Criminal Procedure Code only the offences

prescribed in the schedule can be compounded (permission or with permission of the Magistrate), whereas as per Section 147 of the Negotiable Instruments Act, every offence under Section 138 is compoundable and permission of the Magistrate is not required.

31. If we consider about quoted provision of the Negotiable Instruments Act together we can gather the intention of the Legislature while incorporating these provisions. There is departure from the provisions laid down in Criminal Procedure Code on certain issues. In an entire Criminal administration justice system, right from filing of the complaint till conclusion of the trial, there are various stages. The provisions quoted above relates to the subjects laid down therein. **The issue is** “*when this chapter XVII of the Negotiable Instruments Act does not deal with other subjects in Criminal trial, does it mean to say that the provisions of the Criminal Procedure Code dealing with that subject are applicable?*” and **when the Court finds that** “*accused is taking disadvantage of the protection granted by Criminal Procedure Code, how the Criminal Court is required to deal with such a situation*” **is an issue.**

32. On this background, it is material to consider the observations

in the judgments. Both the sides relied upon few of the judgments delivered by the Hon'ble Supreme Court, but in none of these judgments “the issue of recording the evidence of the Complainant in the absence of the accused and dispensing with statement Section 313” has arisen.

Supreme Court Judgments

33. In case of **Indian Bank Association and others Vs. Union of India and Others**² the Hon'ble Supreme Court has taken stock of the directions given by various High Court about speedy disposal of Section 138 prosecution and issued some directions. They start from the stage of the filing of the complaint till recording of the evidence. Three months time was fixed in completing evidence. It is true that there are no directions about conducting trial in absence of the accused and about dispensing with Section 313 statement.

34. Whereas in case of **TGN Kumar Vs. State of Kerala and others**³. Hon'ble Supreme Court dealt with the legality of the direction issued by the High Court of Kerala. Those directions were issued in exercise of inherent powers of the High Court under Section 482 of the

² 2014 (5) SCC 590

³ 2011 (2) SCC 772

Criminal Procedure Code. There were direction of dispensing with mandatory questioning of the accused and instead, filing of statement by the accused. In that case, there was petition filed by the accused under Section 482 of the Code praying for dispensing her personal appearance. The High Court took upon themselves and issued general directions. They were set aside. The Hon'ble Supreme Court held "it is prerogative of the Magistrate".

35. In case of Keya Mukherjee Vs. Magma Leasing Limited and Anr.⁴ the accused applied for dispensing with his examination under 313 and record it through pleader. Personal exemption was granted during the trial however prayer for dispensation of the 313 statement was rejected. The Hon'ble Supreme Court took pragmatic view and order of refusing dispensation was set aside. In short, there can be questionnaire prepared, and they can be answered within the time limit. Total dispensation was held not permissible.

36. The judgment of the Hon'ble Supreme Court in case of Basavaraj R. Patil and other Vs. State of Karntaka and Others⁵ is also considered in above judgments. It was case of matrimonial offence.

4 2008 (8) SCC 447

5 2000 (8) SCC 740

The husband was abroad. His statement under Section 313 was dispensed with and judgment of acquittal was pronounced. The High Court remanded the matter. In a revision preferred by the first informant, the Hon'ble High Court took pragmatic view and prescribed mechanism to deal with such a situation. If accused applies for dispensing with the statement supported by an affidavit, personal presence can be dispensed with and the questionnaire can be prepared and response by accused can be called for. The purpose of recording the statement is reiterated. It is for the benefit of the accused for explaining the circumstance against him. However, if the Court finds that it is causing prejudice to the accused recording can be dispensed with if certain compliance are made.

37. No doubt *“the issue of recording the statement when the physical presence is dispensed and then recording it through other modes”* have cropped up. As said above contingency “accused remaining absent and evidence is recorded and in such eventuality whether the statement can be dispensed with or not” has not cropped up in above judgments. **So these judgments does not give us any guidance how to deal with present controversy. It only gives**

general guidance about necessity of the recording Section 313 statement. The purpose is to give an opportunity to the accused to explain the circumstances against him and in that way it is for his benefit. But if Court finds it is causing prejudice to him by insisting upon physical presence, the Court has dwelled upon a mechanism to record it in non-traditional way. That is by preparing a draft of the questions and giving answers by the accused with advent of technology. Now the presence of the accused is not to be interpreted in narrow way. That is to say physical presence but it also includes presence through electronic mode.

38. That is why the Hon'ble Supreme Court in case of the *State of Maharashtra V/s. Praful B. Desai*⁶ has sanctioned recording the evidence of witness staying abroad in a trial conducted at Bombay.

39. It is true there are few of the High Court judgments which have dealt with present controversy and they are relied upon by the Applicants.

High court judgments

40. The High Court of Karnataka in case of *Mr. G. H. Abdul Kadri Vs. Mohammed Iqbal* (Criminal Revision Petition No. 1323 of 2019)

6 (2003) 4 SCC 601

has set aside the conviction and remanded the matter to the trial Magistrate and granted liberty to the accused to cross-examine the witnesses. In para no. 16, it is observed “*speedy trial does not mean jumping the stages in criminal trial*”. Examination under Section 313 cannot be dispensed with, if there is incriminating evidence and unless personal appearance is dispensed with. It favours the grievance made by applicants/accused.

41. The High Court of Kerala in case of *Raju J. Vylattu Vs. P. V. Alexnder Anr.* in Criminal Revision Petition 3007 of 2011 dealt with situation of not recording the statement of the accused when accused did participated in the trial, but trial Court itself failed to record Section 313 statement. There was emphasis on recording such statement. The conviction was rightly set aside and trial Court was directed to record the statement.

42. Learned Single Judge of this Court in case of *Runwal Developers Pvt. Ltd. Vs. Yogesh Mehta and Anr.* in Writ Petition No. 632 of 2016 with Writ Petition No. 633 of 2016 has dealt with the contingency of pronouncing judgment by the trial Magistrate in the absence of the accused by ignoring the provisions of the Section 353

(7) and (8) of the Code of Criminal Procedure. There was emphasis on the provisions of Section 353 (7) of the Criminal Procedure Code which protects the judgment delivered by Criminal Court in the absence of the accused.

43. Learned Advocate Mr. Amrut Joshi relied upon the observations in case of **Raghunath Rai Bareja and Anr. Vs. Punjab National Bank and Others**⁷ on the point of conflict between law and equity and in that case it is held that equity can be held supplementary to law, but it cannot supplant or override the law (para no. 29). It is further held that law will prevail over the equity. He is right. But certainly this Court can interpret the provisions of section 313 and section 273 of the Code on the touchstone of the provisions of the Negotiable Instruments Act.

Judgments relied upon by the Complainant

44. In case of **Prakash Chimanlal Sheth Vs. T. Ramalingam Nadar and Others**⁸, in a prosecution under Section 138 of the Negotiable Instruments Act the accused remained absent. Even there was no cross order. The Complainant applied for dispensing the statement under

⁷ (2007) 2 SCC 230

⁸ 2022 SCC Online Bom 10161

Section 313 of the Criminal Procedure Code. **It was rejected. Learned Single Judge of this Court allowed that prayer.** There was an emphasis on the insertion of Sections 143 to 147 in the Negotiable Instruments Act for speedy disposal of such prosecutions. Other judgments of the Hon'ble Supreme Court and High Courts were also considered. The learned Single Judge has held,

'It is not the Complainant's duty to secure the presence of the accused in such a case, to record their 313 statement. If the accused are not bothered to remain present before the Court, the Complainant, who is already a victim should not be made to suffer for no fault of his. The fate or the command/control of a criminal trial cannot left to the mercy of the accused in this manner and to such an extent, that unless the accused wishes, the trial will not move an inch ahead'. (Para no. 17)

45. In case of **B. N. Ashwath Narayan Vs. Shri Shankar in Criminal Revision Petition No. 1333 of 2018** learned single Judge observed there is no provision for recording of the statement of the accused under Section 313 of the Criminal Procedure Code, when there is summary trial under Section 263 of the Criminal Procedure Code, at

para no. 11. General directions were given. Direction No. (xiii) - the Court shall not record the statement of the accused under 313 of the Criminal Procedure Code, once the witness are examined. There is every reason to doubt the said proposition of law.

46. Whereas in case of *R. V. Kulkarni Vs. Dakshina Murthy* in Criminal Revision Petition No. 437 of 2010, dated 28.06.2012 the High Court Karnataka deprecated the conduct of the accused in consistently remaining absent in spite of the remand of the matter by the Appellate Court for recording the statement under Section 313 of the Code. After first remand in appeal against conviction, the accused remained absent. The judgment was pronounced. It was challenged. The grievance was accepted. Again it was remanded for 313 statement. Then also accused remained absent. It was held the accused has effectively taken advantage of the legal position. The order of the remand by the Appellate Court was set aside and the judgment of the conviction was sustained. The above sad observations are referred in *Prakash Chimanlal Sheth* (supra).

Conclusion

47. After considering the above observation in all the judgments, I

am inclined to take a view, in a case before this Court when it is found out that the accused is not attending the trial, nor sought for dispensing the personal attendance and not represented by the advocate, **the trial Magistrate is justified in proceeding in absence of the accused and without recording 313 statement also.** However, when such power can be exercised is a question of fact. Trial Court can consider :-

- a) for how many occasions accused has remained absent
- b) steps taken by the complainant to secure presence of the accused.
- c) reason why presence could not be secured.
- d) whether all modes permissible as per law were exhausted.

After ascertaining all factors, then only such power can be exercised.

Above are few of the factors.

48. It is very well true that this view does not fit into the traditional view of '*mandatory recording of the statement and even giving the benefit to the accused about certain lacunae in recording Section 313 statement*'. Even if there is lacunae in recording 313 statement, long back in case of ***Shivaji Sahebrao Bobade and Anr. Vs. State of***

Maharashtra⁹) the Hon'ble Supreme Court opined questioning on remaining aspect can be done even by the Appellate Court, para no. 16.

Nature of prosecution

49. I have taken this view considering the nature of prosecution under Section 138 of the Negotiable Instruments Act. In many cases the Hon'ble Supreme Court has observed that “*cases under Section 138 of the Negotiable Instruments Act are quasi criminal*”.

50. Recently, the Hon'ble Supreme Court in case of P. Mohanraj and others Vs. Shah Brothers ISPAT Private Limited¹⁰ has dealt with nature of cases under Section 138 being quasi-criminal. The Hon'ble Supreme Court observed “*Section 138 proceeding can be said to be a “civil sheep” in a ‘criminal wolf’s’ clothing*”.

51. The issue involved in that case was whether the proceeding under Section 138 read with Section 141 of the Negotiable Instruments Act are covered by the moratorium provisions under Sections 14 of the Insolvency and Bankruptcy Code. That is why there was an occasion for the Hon'ble Supreme Court to consider the nature

9 1973 (2) SCC 793

10 (2021) 6 SCC 258

of proceeding under Chapter XVII of the Negotiable Instruments Act (para no. 54). The ingredients of Section 138, 141, 142, 143-A, 148 were considered.

52. So also the distinction in between Civil proceeding and Criminal proceeding as interpreted by the Hon'ble Supreme Court in the earlier cases is also considered (para no. 52). **Civil proceeding** also includes revenue proceedings as well as writ petition filed under Article 226 of the Constitution of India provided the reliefs are sought to enforce right of the Civil nature. Whereas the **Criminal proceedings** are the proceeding in which larger interest of the State is considered. That is why the Hon'ble Supreme Court observed:-

“Given these tests, it is clear that a Section 138 proceeding can be said to be a “civil sheep” in a “criminal wolf’s” clothing, as it is the interest of the victim that is sought to be protected, the larger interest of the State being subsumed in the victim alone moving a court in cheque bouncing cases, as has been seen by us in the analysis made hereinabove of Chapter XVII of the Negotiable Instruments Act”. (para no. 53).

53. The Hon'ble Supreme Court referred various earlier judgments.

They are as follows:-

- a) The observations made in case of **Goaplast (P) Limited Vs. Chico Ursula D'souza**¹¹. The object for introducing Chapter XVII was reiterated. The object is
“inculcate faith in the efficacy of banking operations and giving creditability to negotiable instruments in business transactions and in order to promote efficacy of banking operations”, page no. 54.
- b) The object for incorporating chapter as reproduced in case of **Vinay Devanna Nayak V/s Ryot Sewa Sahakari Bank Limited**¹² was considered (para no. 55)
- c) The observations in case of **Damodar S. Prabhu V/s. Sayed Babalal H.**¹³ relating to compounding provisions contained under Section 147 of the Negotiable Instruments Act were also considered, (para no. 56).
- d) Furthermore, the observations in case of **R. Vijayan Vs.**

¹¹ 2003 (3) SCC 232

¹² 2008 (2) SCC 305

¹³ 2010 (5) SCC 663

Baby¹⁴ were considered (para no. 60). The legislature have done unique exercise which blurs the dividing line in between Civil and Criminal jurisdiction. One of the observations is,

“the avowed object of Chapter XVII of the Act is to ‘encourage the culture of use of cheques and enhance the creditability of the instrument’. In effect, its object appears to be both punitive as also compensatory and restitutive, in regard to cheque dishonour cases”. (from para no. 16 of the said judgment).

- e) The observations in case of **Lafarge Aggregates and Concrete (India) (P) Ltd. Vs. Sukarsh Azad**¹⁵ were reproduced in para no. 62 the nature of the proceedings are hybrid in nature. This is consistent view.
- f) The observations in case of **M. Abbas Haji V/s T. N. Channakeshava**¹⁶ are considered in para no. 65. The

14 2012 (1) SCC 260

15 (2014) 13 SCC 779

16 (2019) 9 SCC 606

principles which apply to acquittal in other criminal cases cannot apply to this case. The Hon'ble Supreme Court by taking overview on various decisions concluded in that case :-

“a conspectus of these judgments would show that the gravamen of a proceeding under Section 138, though couched in language making the act complained of an offence, is really in order to get back through a summary proceeding, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply”. (para no. 67).

Appellation

54. Before concluding that “*prosecution under Section 138 of the Negotiable Instruments Act as quasi criminal nature*”, the Hon'ble Supreme Court has also considered the nature of the proceedings initiated as per the provision of the Contempt of Court Acts, 1971 (para no. 71). The observations about nature of the contempt proceedings being quasi criminal in nature was also considered.

Finally, it is concluded “clearly, therefore, given the hybrid nature of a civil contempt proceeding, described as “quasi-criminal” by several judgments of this Court, **there is nothing wrong with the same appellation “quasi-criminal” being applied to a Section 138 proceeding for the reasons given by us on an analysis of Chapter XVII of the Negotiable Instruments Act**”.

55. That is why the Hon’ble Supreme Court rejected strenuous arguments of learned Additional Solicitor General that “*the appellation “quasi-criminal” is misnomer, when it comes to Section 138 proceedings and that therefore some of the cases cited in this judgment should be given fresh look*”, (para no. 84).

56. In nutshell if the proceeding under Section 138 of the Negotiable Instruments Act are quasi-criminal in nature, **there is reason to believe that one of attribute of criminal trial about mandatory recording of statement under Section 313 of the Criminal Procedure Code is not applicable**. So in given set of facts narrated hereinabove, the accused cannot make complaint about causing prejudice if evidence is adduced in his absence and he cannot make complaint of non recording of the statement under Section 313 of the

Criminal Procedure Code if they have remained absent without justification. In a given case and after ascertaining certain factors, the Magistrate is justified in proceeding further in absence of accused and even dispense his statement.

57. That is why learned Single Judge of this Court in case of **Prakash Chimanlal Sheth** (Supra) dispensed with statement to be recorded under Section 313 of the Criminal Procedure Code. This prayer was made before the Metropolitan Magistrate, the accused was not attending the trial. It was rejected. However, learned Single Judge of this Court allowed the same prayer.

58. About merits that is to say “whether evidence is sufficient or not” there are no submissions. Hence, I have not dealt with. For the above discussion, it cannot be said that there is illegality in the findings recorded by the trial magistrate and confirmed by the Court of the Additional Sessions Judge. **There is no merit in both these revisions applications.**

59. The amount deposited in this Court by the Applicant needs to be paid to the Complainant. Hence, the following order is passed:-

ORDER

- (i) Both the revision applications are dismissed.
 - (ii) The order of conviction and the sentence passed by the Court of Metropolitan Magistrate in C.C. No. 4081/SS of 2016, dated 05.06.2018 and confirmed on 28.02.2023 by the Court of the Additional Sessions Judge, Mumbai in Criminal Appeal No. 382 of 2018 for the offence punishable under Section 138 of the Negotiable Instruments Act **is confirmed.**
 - (iii) The order of conviction and the sentence passed by the Court of Metropolitan Magistrate in C.C. No. 4001/SS of 2016, dated 05.06.2018 and confirmed on 28.02.2023 by the Court of the Additional Sessions Judge, Mumbai in Criminal Appeal No. 383 of 2018 for the offence punishable under Section 138 of the Negotiable Instruments Act is **confirmed.**
 - (iv) The amount of Rs. 1,20,00,000/- (Rs. One Crore Twenty Lakhs) deposited in Sessions Court alongwith interest, if any, be returned to the Complainant.
 - (v) Interim stay granted on execution of orders passed by both the Courts below stands vacated.
60. Both revision applications are disposed of.
61. Pending Interim Applications, if any, also stand disposed of.

[S. M. MODAK, J.]