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IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 28<sup>TH</sup> DAY OF APRIL, 2025

BEFORE

THE HON'BLE MR. JUSTICE SHIVASHANKAR AMARANNAVAR

**CRIMINAL PETITION NO.101514 OF 2025**

**BETWEEN:**

ASHOK S/O. SIDDAPPA BANKAR,  
AGED ABOUT 33 YEARS, OCC: PRIVATE SERVICE,  
R/O: SIDDESHWAR NAGAR,  
UNKAL NEAR DHANAMMA TEMPLE,  
HUBBALLI – 580 031.

...PETITIONER

(BY SRI. SAIYAD D. MULLA, ADVOCATE)

**AND:**

FAYAZ AAHMAD S/O. AURANGZEB NAIKAR,  
AGED ABOUT 36 YEARS,  
OCC: PRIVATE SERVICE,  
R/O: HOUSE NO.121, GOUDAR ONI,  
GOPANKOPPA, HUBBALLI – 580 023.

...RESPONDENT

(BY SRI. G.V.BHARAMAGOUDAR &  
SMT. BHAGYSHREE N. BIKKANNAVAR, ADVOCATES)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C. (528 OF BNSS), SEEKING TO QUASH THE ENTIRE PROCEEDINGS IN CC NO.12253/2024 FOR THE ALLEGED OFFENCE PUNISHABLE UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881 PENDING ON THE FILE OF THE LEARNED I ADDL. CIVIL JUDGE AND JMFC COURT HUBBALLI, AGAINST THE PETITIONER/ACCUSED WHICH LACKS THE PROCEDURAL COMPLIANCE. PASS SUCH ORDERS, AS THIS HON'BLE COURT DEEMS FIT TO GRANT IN THE FACTS AND CIRCUMSTANCES OF THE CASE, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS CRIMINAL PETITION, COMING ON FOR ADMISSION THIS DAY, ORDER WAS MADE THEREIN AS UNDER:

CORAM: THE HON'BLE MR. JUSTICE SHIVASHANKAR AMARANNAVAR



**ORAL ORDER**

The question that arises for consideration is that the procedure of hearing accused at the stage of taking cognizance as prescribed in the first proviso to Section 2023 of Bharatiya Nagarik Suraksha Sanhita 2023 [*hereinafter referred to as 'BNSS' for short*] apply to the complaints for offence under Section 138 of Negotiable Instruments Act, 1881.

2. Section 223 of BNSS deals with examination of complainant which reads thus;

**"223. "Examination of complainant" -**

*(1) A Magistrate having jurisdiction, while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*

*Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:*

*Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-*



- (a) *if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or*
- (b) *if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:*

*Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.*

(2) *A Magistrate shall not take cognizance on a complaint against the public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless -*

- (a) *such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and*
- (b) *a report containing facts and circumstances of the incident from the officer superior to such public servant is received."*

3. Section 223 of BNSS corresponds to Section 200 of Cr.P.C. Section 223 of BNSS makes a departure from the earlier provision contained in Section 200 Cr.P.C, 1973, since under the proviso to Sub-Section (1) of 223,



the Magistrate cannot take cognizance of an offence, without giving the accused an opportunity of being heard.

4. The said provision was not there in repealed Section 200 of Cr.P.C. In view of the change in law and as contemplated in the first proviso to Section 223(1) of the BNSS, it is necessary to examine as to whether the Magistrate empowered to adjudicate complaint under Section 138 r/w Section 142 of the N.I.Act is also required to comply with the above said first proviso to Section 223(1) of the BNSS or not.

5. The Madurai Bench of Madras High Court in Criminal OP(MD) No.19778/2022 and other connected matters between **M/s.Ultimate Computer Care and Another Vs. M/s.S.M.K.Systems** decided on 12.02.2025 has held as under;

*"Having regard to the fact that the N. I. Act has prescribed a special procedure, it is a Special Law within the meaning of Section 5 of the BNSS, 2023. Hence, the procedure of hearing the accused at the stage of taking cognizance as prescribed in the proviso to Section 223 BNSS*



*shall not apply to complaints under Section 138 of the N.I.Act, 1881.”*

6. The BNSS, 2023 came into force with effect from 01.07.2024.

Section 5 of the Act deals with the heading “Saving”. It provides that nothing contained in BNSS shall, in the absence of a specific provision to the contrary, affect any special or Local Law for the time being in force, prescribed by any other law for the time being in force.(Corresponding to Section 5 of the CrPC, 1973).

Chapter XVI of BNSS, 2023, deals with heading “Complaints to Magistrate” (Sections 223 to 226) (Corresponding to Sections 200 to 203 of the CrPC, 1973).

Chapter XVII of Negotiable Instruments Act, 1881, deals with “penalties in case of dishonour of certain cheques for insufficiency of the funds in the accounts of the drawer” (Sections 138 to 148).



7. Section 138 of NI Act reads thus;

**"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—**

*Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:*

*Provided that nothing contained in this section shall apply unless—*

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*



- (c) *the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

*Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."*

8. Section 142 of NI Act reads thus;

**"142. Cognizance of offences.—**(1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—*

(a) *no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;*

(b) *such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:*

*Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.*

(c) *no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.*

*[(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—*



(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

*Explanation.— For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]”*

9. The Negotiable Instruments Act is Special Statute. The Hon’ble Apex Court in ***Mohd.Abdul Sammad Vs The State of Telangana and another***<sup>1</sup> observed in the context of Section 125 of the Cr.P.C that provisions of special law prevail over general law.

10. In ***Suresh Nanda Vs CBI***<sup>2</sup> the Supreme Court observed that the Passport Act is a Special Law whereas

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<sup>1</sup> (2024) INSC 506

<sup>2</sup> 2008(3) SCC 674





Cr.P.C is a General Law. It is well settled that the special law prevails over General Law.

11. The Apex Court in ***P. Mohan Raj & others Vs M/s. Shah Brothers Ispat Pvt. Ltd***<sup>3</sup>, observed that provisions contained in Section 138 of the NI Act is really a hybrid provision to enforce payment under a bounced cheque, if it is otherwise enforceable in Civil Law. On a bare reading of Section 142 of the NI Act, the procedure under the Cr.P.C has been departed from. First and foremost, no Court is to take cognizance of an offence punishable under Section 138 of the NI Act except on a complaint made in writing by the payee or the holder in due course of the cheque – the victim. By Section 147 of the NI Act, offences under the NI Act are compoundable without any intervention of the Court as is required by Section 320(2) of the Cr.P.C (Section 359 of BNSS). Section 138 NI Act proceedings can be said to be a “Civil Sheep” in a “criminal wolf’s” clothing, as it is interest of

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<sup>3</sup> AIR 2021 SC 1308



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.

12. The Hon'ble Apex Court in ***M. Abbas Haji Vs P.N.Channakeshava***<sup>4</sup> held that proceedings under Section 138 of the NI Act are quasi-criminal proceedings. The principles, which apply to acquittal in other criminal cases, cannot apply in the cases under Section 138 of the NI Act.

13. The Apex Court ***in Re: Expeditious trial of cases under Section 138 of NI Act in suo motu Writ Petition (Criminal) No.2/2020***<sup>5</sup> by order dated 16.04.2021 laid down guidelines for early disposal of complaints filed under Section 138 of the NI Act."

14. Section 143 of NI Act reads thus;

**143. Power of Court to try cases summarily.—** (1)Notwithstanding anything

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<sup>4</sup> (2019) 9 SCC 606

<sup>5</sup> 2021 INSC 257



*contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:*

*Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:*

*Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.*

*(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.*

*(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial*



*within six months from the date of filing of the complaint.*

15. Section 144 of NI Act reads thus;

**144. Mode of service of summons. —**

*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works; for gain, by speed post or by such courier services as are approved by a Court of Session.*

*(2) Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the Court issuing the summons may declare that the summons has been duly served.*

16. Section 145 of NI Act reads thus;

**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.*

17. Before issuing process, the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him on oath. As a rule the Magistrate may rely upon affidavit filed by the complainant in support of complaint, which shall be treated as a sworn statement, to issue process.

18. While following the summary trial procedure, where the accused does not plead guilty, the Court is required to record the substance of evidence followed by judgment containing a brief statement of reasons for the finding. The summary procedure has to be followed except, where exercise of power under second proviso to Section 143 of NI Act becomes necessary, where sentence of one year may be awarded to the accused and compensation under Section 395 of BNSS is considered by the Court as not adequate, having regard to amount of cheque, financial capacity and conduct of the accused or any other attendant circumstances. If the Magistrate feels



it necessary to convert a summary trial into a summons case, the Magistrate must record an order to the said effect as required under second proviso to Section 143 of NI Act. Sub-Section (3) of Section 143 provides that trial to be concluded within six months. The Hon'ble Apex Court in the case of **V.Bahaguni Vs. State of Gujarat**<sup>6</sup> has held that the Magistrate has to take steps to complete the proceedings before the time limits under Sub-Section (3) of Section 143 of NI Act.

19. In view of NI Act prescribing a special procedure, procedure of hearing the accused at the stage of taking cognizance as prescribed in the first proviso to Section 223 of BNSS shall not apply to the complaints for offence under Section 138 of NI Act.

20. The Co-ordinate Bench of this Court in the case of **Basanagouda R.Patil (Yatnal) Vs. Shivananda S. Patil**<sup>7</sup> dealt with the legal issue involved in the matter of

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<sup>6</sup> (2014) 10 SCC 495

<sup>7</sup> 2024 SCC Online Karnataka 96



application of proviso to Section 223(1) of BNSS before issuance of process by the Magistrate in pursuance of complaint lodged by the complainant under Section 223 of BNSS. The Court observed in the contest of the complaint filed before the Magistrate under Section 223 of BNSS that upon presentation of the complainant, the Magistrate is duty bound to examine the complainant on both [sworn statement by the complainant] and examine the witnesses, if any, the substance of such examination be reduced in writing. The Court added that the question of taking cognizance would not arise at that juncture. The Magistrate has to, in terms of the cognizance issue a notice to the accused who is given an opportunity to be heard. Notice shall be issued to the accused, at that stage, and after hearing the accused, the Court shall take cognizance and regulates its procedure thereafter. The Court further held that the accused should have an opportunity of being heard. Copy of complaint, sworn statement of the complainant, statement of witnesses, if any, shall be forwarded by the Court along with the notice



of the Court to the accused under Section 223(1) of BNSS to enable the accused to appear and submit his case before taking cognizance by the Court. In the said case, the offences alleged are under IPC, tried not by summary procedure as provided for offence punishable under Section 138 of NI Act. Therefore, the said decision cannot be applied to the present case on hand.

21. The Hon'ble Apex Court in the case of ***Kaushalya Devi Massand Vs. Roopkishore Khore***<sup>8</sup> observed that, the gravity of a complaint under the NI Act cannot be equated with an offence under the provisions of IPC or other Criminal offences. An offence under Section 138 of NI Act is almost is in the nature of civil wrong which has been given criminal overtones.

22. The co-ordinate Bench of this Court in the case of ***Hanumesh S/o. Sharanappa Karanagi Vs. M/s.Karanagi Brothers Enterprise*** in Criminal Petition No.201604/2024 decided on 11.02.2025 has relied upon

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<sup>8</sup> AIR 2011 SC 2566





the decision in ***Basanagouda R.Patil (Yatnal)*** *supra* and held that before taking cognizance of offence under Section 138 of NI Act, the Magistrate shall comply the requirement of Section 223 of BNSS. In the said case, the Court has not considered that the Negotiable Instrument Act is special statute and procedure provided for offence punishable under Section 138 of NI Act for trial is a summary procedure and Section 5 of BNSS.

23. Since Negotiable Instrument Act, 1881 is special enactment and in view of Section 5 of BNSS r/w. Section 143 of NI Act as far as the cases tried by the learned Magistrates under Section 138 of NI Act, there is no need for the Magistrate to give an opportunity of being heard to the accused before taking cognizance on the complaint of payee/holder in due course of cheque for offence punishable under Section 138 of NI Act.

24. In the case on hand, the learned Magistrate has not committed any error in not issuing notice to the



accused prior to taking cognizance. In the result the petition is ***dismissed***.

**SD/-  
(SHIVASHANKAR AMARANNAVAR)  
JUDGE**