Sr. No. 94

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CRM(M) No. 374/2025
CrlM No. 742/2025

Mohd Afzal Beigh, age 45 years S/o Abdul Rashid Beigh, R/o Poonch Colony, Bahu Fort, Jammu. …..Petitioner(s)

Through: Mr. M Nadeem Bhat, Advocate

Vs

Noor Hussain S/o Late Gulam Ali R/o Village Sigdi, Tehsil Mughal Maidan, A/p H.No. 124, Ward No.9, Asrarabad, Tehsil and District Kishtwar ….. Respondent(s)

Through:

Coram: HON'BLE MR. JUSTICE MOHD. YOUSUF WANI, JUDGE

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JUDGMENT
02.05.2025

(ORAL)

1. In the facts and circumstances of the case and having regard to the issue involved, this Court is of the considered opinion that the matter can be disposed of even at this threshold stage without notice to the other side.

2. The matter is, accordingly, taken up for final disposal.

3. Through the medium of the instant petition having been filed under the provisions of Section 528 of Bharatiya Nagrik Suraksha Sanhita 2023 (for short BNSS), the petitioner has sought quashment of the order dated 27.03.2025 passed by the Court of learned Judicial Magistrate (Munsiff), Kishtwar on a complaint filed by the respondent against the former under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act' for short) and titled as *'Noor Hussain vs Mohd Afzal'* Beigh,

as also of the issuance of non-bailable warrant of arrest through a subsequent order dated 15.04.2025, on the main ground that the learned Magistrate while directing the **issuance of** pre-cognizance notice through the order impugned dated 27.03.2025 and of the non-bailable warrant of arrest through a subsequent order dated 15.04.2025, has acted in contravention of the procedure established for the trial of a complaint under the provisions the Act.

4. It is submitted by the learned counsel that a complaint under Section 138 of the Act, is required to be dealt with strictly under the provisions of the Act, more specially, contained under Section 142. He submitted that issuance of pre-cognizance notice and the subsequent non-bailable warrant of arrest by the learned trial Magistrate is unwarranted under law governing a complaint filed under Section 138 of the Act. He submitted that the Magistrate while taking cognizance on a complaint under Section 138 of the Act has to satisfy whether the conditions as laid down in the proviso to Sections 138 and under Section 142 of the Act stand complied with thereby justifying a cause of action to the complainant/payee to file a complaint. As according to the learned counsel, the Magistrate while dealing with the complaint under Section 138 of the Act is not bound by the requirements that are needed to be completed, in case of a complaint filed under Section 223 BNSS. Learned counsel submitted that Section 142 of the Act providing for taking of cognizance of an offence under Section 138 of the Act starts with a “Non-obstante” clause thereby ruling out the strict application of the provisions of Section 223 of the BNSS.

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5. Admittedly, Section 142 of the Act which gives the powers to a Judicial Magistrate to take cognizance of an offence punishable under Section 138 of the Act starts with "Non obstante" clause. A clear understanding of the provisions of Section 142 of the Act makes it clear that a Court of Judicial Magistrate 1st Class or a Metropolitan Magistrate can take cognizance of an offence punishable under Section 138 of the Act only upon a complaint made in writing by the payee or as the case may be the holder in due course of the cheque. The provisions further provide that such a complaint has to be made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act. Clause (2) of the Section 142 of the Act lays down as to which Court is vested with the jurisdiction to inquire into and to try an offence under Section 138 of the Act.

It is profitable to reproduce the provisions of Section 142 of the Act for the sake of convenience.

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"Section 142 in The Negotiable Instruments Act, 1881

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."

6. Starting "Non obstante" clause of Section 142 of the Act actually bars the taking of the cognizance of an offence under Section 138 of the Act except upon a complaint in writing made by the payee or as the case may be the holder in due course of the cheque. Thus, taking of cognizance of an offence under Section 138 of the Act, otherwise than on a complaint in writing *viz* on a police report under Section 193 BNSS corresponding to Section 173 of the repealed Code of Criminal Procedure 1973 (hereinafter referred to as the 'Code' for short) is only barred by the "Non obstante" clause of Section 142 of the Act. A payee of the cheque or the holder in due course of the same cannot upon dishonour of the cheque by the concerned banker, approach the police concerned for lodging the FIR.

Section 142 of the Act or any other provision of the Chapter (xvii) of the Act does not bar the satisfaction in terms of the requirements as mentioned under Section 223 BNSS corresponding to Section 200 of the Code *viz* examination upon oath of the complainant/payee/holder of the cheque and the witnesses present as also of the issuance of the pre-cognizance notice. Such requirements are mandatory in respect of the complaints filed before the criminal Courts for taking cognizance on penal offences especially covered under BNS (corresponding to repealed IPC).

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Since, the remedy for an offence under Section 138 of the Act is a complaint, as referred to under Section 142 of the Act, therefore, the observance of the requirements as mentioned under Section 223 BNSS regarding examination of the complainant/payee and the witnesses present on oath as also the issuance of the pre-cognizance notice introduced by the new legislation, is not at all barred but desired in respect of a complaint filed under Section 138 of the Act. The affidavit statements of the complainant as well as of the witnesses present can also suffice.

7. Likewise, the "Non obstante" clause appearing in Section 143 of the Act under the foregoing provisions of the clause (1) mandates the summary trials as per the provisions of Section 285 to 288 BNSS (corresponding to Sections 262 to 265 of the Code) in respect of the complaints filed under Section 138 of the Act notwithstanding the applicable procedure as warranted for summons trial cases, from the view point of the quantum of punishment provided for an offence under Section 138 of the Act, which is imprisonment for a term, which may extend to two years or with fine, which may extend to the twice the amount of cheque or with both.

However, the subsequent proviso clauses of Section 143 of the Act clearly reveal that, if at the commencement of or in the course of a summary trial under Section 143 of the Act, it appears to the Magistrate that the nature of 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, not desired to try the case summary, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witnesses

who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code (BNSS now). The provisions of Section 143 of the Act also provide for expeditious trial of any offence under Chapter (xvii) of the Act.

It is profitable to reproduce the Section 143 of the Act for ready reference as under:-

> **"Section 143 in The Negotiable Instruments Act, 1881**
>
> **143. Power of Court to try cases summarily.—**
>
> (1) Notwithstanding anything 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."

8. It is understood that the Magistrates while being seized of the complaints, under Section 138 of the Act may feel themselves under a dilemma in respect of the procedure to be adopted on such complaints. A logical interpretation of the provisions of Section 143 of the Act especially as covered under the provisos makes it clear that a competent Court of a

Judicial Magistrate/Metropolitan Magistrate, is within its powers to choose just at the beginning to proceed on the matter in the manner as provided for trial of summons cases under BNSS and he is not required first to commence a summary trial but the only requirement is that the Court shall record an order regarding its such satisfaction. The adoption of procedure warranted for summons trial cases under BNSS appears to be desired as well as convenient as compared to summary trial procedure.

9. In view of the Section 142 of the Act, every offence punishable under the Act shall be compoundable notwithstanding anything contained in the BNSS. The proviso to Section 147 of the Act provides for extension of time in filing the complaint beyond the period upon satisfaction of the Court by the complainant that he had sufficient cause for not making the complaint within the prescribed period. The maintainability of a complaint under Section 138 of the Act is to be addressed by a competent Court in the light of the relevant provisions of the said Section and of the Section 142 of the Act. A Magistrate hearing a complaint under Section 138 of the Act, may under some circumstances, need to have recourse to any applicable provisions of Chapter (xxi) of the BNSS relating to the trial of summons cases by the Magistrates, for example, Sections 279 & 280 of the Sanhita regarding non-appearance or death of a complainant and withdrawal of the complaint, which is not barred.

10. Section 223 BNSS provides for issuance of pre-cognizance notice to the accused and said provision was not available in the corresponding Section 200 of the repealed Code. Such requirement provided under Section 223 of

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the BNSS by way of proviso appear to be justice orientated as the same takes care of any legitimate defence of the accused to be appreciated by the Magistrate even at an earliest, while holding a preliminary inquiry and is not barred at all even in respect of complaints under N.I.Act as hereinabove discussed. However, the non-observance of the requirements, provided under Section 223 BNSS, regarding the examination on oath of the complainant/witnesses and the issuance of the pre-cognizance notice shall not render the proceedings invalid.

11. The satisfaction of the competent Court, as regards the maintainability of the complaint, in terms of the accrual of cause of action, is covered under the "inquiry phase," preceding the "taking of cognizance". A Magistrate while entertaining a complaint under Section 138 of the Negotiable Instruments Act is not barred to have the observance of the provisions providing for pre-cognizance notice.

12. So far as the case in hand is concerned, the learned Magistrate upon satisfying himself regarding to record the service of pre-cognizance notice could have inferred, the forfeiture of the right of hearing by the accused at pre-cognizance stage of the complaint and proceeded ahead on the complaint in accordance with law. There was no need for the Magistrate to compel the appearance of the accused by issuance of a subsequent non-bailable warrant as the pre-cognizance hearing was meant for him which he acquiesced. The Magistrate is within its powers to compel the attendance of the accused after taking cognizance on the complaint and even under such circumstances, the normal approach of the Magistrates should be issuance

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of summon followed by a bailable warrant if needed and the issuance of the non-bailable warrants should be the last option.

13. Accordingly, the instant petition is **disposed of** by setting aside the impugned order dated 15.04.2025 regarding issuance of non-bailable warrant of arrest, however, with the direction to the petitioner/accused to appear before the trial Magistrate on the date of hearing that falls next after the uploading of this order, for his participation in the proceedings. It is needless to mention that if the Magistrate is yet to take cognizance on the complaint, the accused is still entitled to pre-cognizance hearing.

14. Before parting, it is needful to mention that provisions of Chapter (xvii) of the Negotiable Instruments Act, 1881 have been legislated by the parliament to facilitate smooth functioning of business transactions. The provisions were necessitated as in money transactions cheques were issued merely as a device to defraud the creditors. Dishonor of cheques causes incalculable loss, injury and inconvenience to the payee and credibility of business transactions suffers a setback. An offence under Section 138 of the N I Act relates to a civil wrong and as such the offence has been made compoundable. The Act is intended to legalize the system by which instruments contemplated by it could pass from hand to hand in the process of negotiation like any other commodities. The complaints under Sections 138 and 141 of the Negotiable Instruments Act need to be treated as priority sector litigation and tried expeditiously as per the mandate of the Act. The competent jurisdictional Courts are expected to make every endeavor that the cheque bounce cases are disposed of expeditiously in

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furtherance of which object, Alternate Dispute Resolution Mechanism provided under the Legal Services Authorities Act needs to be tried for such cases through the modes of Lok Adalat and Mediation etc, however, without any element of unnecessary delay on that pretext.

15. A copy of this order be forwarded to the learned Registrar General of this Court with a request for its circulation among the Judicial Magistrates working in the District Judiciary in the Union Territories of the Jammu and Kashmir/Ladakh.

(Mohd. Yousuf Wani)
Judge

Jammu
02.05.2025
Vijay

Whether the order is speaking: Yes
Whether the order is reportable: Yes

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Vijay Kumar
2025.05.05 17:57
I attest to the accuracy and
integrity of this document