

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

CRIMINAL APPLICATION NO. 490 OF 2020

Prakash Chimanlal Sheth

...Applicant

Versus

T. Ramalingam Nadar @ Ramalingam
Thirivium Nadar And Ors.

...Respondents

....

Mr. Rahul S. Kadam, Advocate for the Applicant.

Mr. A.R. Patil, APP for the Respondent - State.

CORAM : PRAKASH D. NAIK, J.

DATE : 14th SEPTEMBER, 2022.

ORDER :

1. The applicant has invoked the inherent powers of this Court under Section 482 of Criminal Procedure Code, challenging Order dated 13th February, 2020 passed by learned Metropolitan Magistrate 14th Court, Girgaon Mumbai in C.C. No.5658/SS/2015 rejecting application Exh.36.

2. The applicant is the complainant in C.C. No.5658/SS/2015 pending before Court of learned Metropolitan Magistrate, 14th Court, Girgaon Mumbai. The Respondent Nos.1 and 2 are accused in the said proceedings. The complainant has alleged that in discharge of liability the accused issued Cheque Bearing No. 519681 in favour of complainant for Rs.3,00,000/-. The cheque was deposited by complainant for clearing on 31st August, 2015. It was dishonoured vide return memo dated 3rd November, 2015 for want of sufficient

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funds in the account. The Accused was called upon to make payment. Payment was not made. Complaint was filed for an offence under Section 138 of Negotiable Instruments Act (for short 'N.I. Act).

3. Verification statement of the complainant was recorded. Process was issued against the Accused for an offence under Section 138 of N.I. Act. The Accused appeared before the Court. Plea of the Accused was recorded on 20th March, 2017. The Accused denied the charge. The applicant/complainant filed affidavit of evidence under Section 145 of N.I. Act. The documents were marked as exhibits and the proceedings were adjourned for cross-examination of the complainant.

4. The Accused preferred application for exemption through Advocate on 20th April, 2016. It was allowed for the day, with direction to keep the Accused present for bail. On 27th February, 2017 application was preferred at the instance of Accused seeking exemption for the day. Exemption was granted for the day to Accused No.2. On 29th June, 2017 application for exemption preferred on behalf of Accused No.2. It was allowed. On 27th July, 2017 application for exemption was preferred on behalf of Accused Nos. 1 and 2. The learned Magistrate allowed the exemption for the day. On 31st October, 2017 the Accused again preferred an

application for exemption from appearing before the Court which was allowed. On 24th July, 2018, Accused were absent and hence non-bailable warrants were issued against them. The case was adjourned to 14th September, 2018. Although initially Accused were represented by Advocate, subsequently the Advocate representing them did not appear for the Accused before Court. Vide Order dated 24th July, 2018 non-bailable warrant was issued against the Accused. Thereafter, again on 4th November, 2019 non-bailable warrant was issued against the accused.

5. The Applicant preferred an application before the trial Court for passing Order of “No Cross” by the Accused. The learned Magistrate passed the Order of no cross on 17th September, 2019. Case was kept for recording statement under Section 313 of Cr.P.C. The Accused did not appear before the trial Court.

6. The Applicant preferred an application before the trial Court for dispensing with recording of the statement of Accused under Section 313 of Cr.P.C. The application was rejected vide Order dated 13th February, 2020.

7. Learned Advocate for the Applicant submitted that Order dated 13th February, 2020 is contrary to law. No cross Order was passed against the Accused and the case was kept for recording statement under Section 313 of Cr.P.C. The Accused had not

appeared before the trial Court from 29th June, 2017. Multiple bailable and non-bailable warrants were issued against the Accused by the trial Court. Warrants were delivered to SP, Thirunelveli District, Tamilnadu where the accused are presently residing. The complainant had forwarded letter dated 14th November, 2019, to both the Accused and their Advocate by RPAD informing all of them that on 17th September, 2019 right to cross-examination has been closed by the Court and the case is kept on 9th January, 2020 for recording statement under Section 313 of Cr.P.C. The original letter, original postal receipt as well as delivery track reports showing due delivery of letter to both the Accused on 19th November, 2019 were placed before the trial Court. The Accused did not remain present before the Court. As per Section 313(1)(b) of Cr.P.C., the Court is empowered to dispense with the statement of the Accused under Section 313 of Cr.P.C. Such powers can be exercised in summons case. The Accused was exempted on five occasions. The trial Court had a lawful discretion to dispense with the examination of the Accused under Section 313 of Cr.P.C. in this case and even the circumstances warranted so, yet the Court has declined to do so on the grounds which are unsustainable. Even if the examination of the Accused under Section 313 of the code has been dispensed with and the Accused is convicted, it is for the Accused to show that any

prejudice indeed has been caused to him due to the trial Court having dispensed with his examination under Section 313 of Cr.P.C. The Accused are either not interested in defending themselves or abusing the process of the Court by being under the impression that unless they turn up before the Court for statement under Section 313 of the Code, the case will never proceed and they will get convicted. The Accused are not desirous of recording their statement under Section 313 of Cr.P.C. However, the trial Court is giving them opportunity. The Accused does not want to avail it. Even if Accused are traced and brought before the Court, if they choose to remain silent or declines to answer the questions put to them in their examination under Section 313, they cannot be compelled to offer answers. The offence under Section 138 of N.I. Act carries a presumption under Section 139 of the Act. The Accused has to rebut the presumption. The Accused have failed to appear before Court for five years. No cross order has been passed in this case. To keep the case in abeyance for recording statement of Accused under Section 313 of Cr.P.C. is denial of justice to complainant. The trial Court ought not to have shifted burden on the complainant to secure the presence of the Accused before the Court. Bailable and non-bailable warrants were issued against them. The Accused had shifted to Tamilnadu. The Advocate representing them has sought exemption

from appearance and subsequently withdrawn himself from appearing before the trial Court on behalf of the Accused. The proceedings under Section 138 of N.I. Act are required to be decided expeditiously within a period of six months. The Hon'ble Supreme Court has issued guidelines and directions for expeditious disposal of the cases under Section 138 of N.I. Act. Sections 143 and 145 of N.I. Act provides the speedy procedure for disposal of cases under the said Act. The proviso in Section 313(1)(b) of the Code is applicable in this case. The trial Court ought not to have distinguished the exemption granted to the accused from the provisions of Sections 205 and 317 of Cr.P.C. Affidavit in evidence of complainant was filed. In the circumstances, it was open to the trial Court to dispense with the recording of statement under Section 313 of the Code. The complaint is under Section 138 of N.I. Act. The Court had dispensed with the personal attendance of the Accused under Section 317 of Cr.P.C. Hence, the proviso to Section 313(1)(b) squarely applies to the present case. The impugned Order is contrary to several decisions of the Hon'ble Supreme Court. The offence under Section 138 of N.I. Act is a document based offence. The cheque, covering letter, dishonour memo, demand notice and postal delivery proof were admitted by the Accused. In view of presumptions under Sections 118, 139, 140 and 146 of the Act and the Accused having

admitted the documents and considering the fact that Accused are consistently absent for a long period of time, Accused having not cross-examined the complainant, and not being interested in availing the opportunity of giving explanation in the statement under Section 313 of Cr.P.C., the trial Court ought to have dispensed with the statements of the Accused under Section 313 of Cr.P.C. The obligation to put material evidence to the Accused under Section 313 of Cr.P.C. is upon the Court. The main object of recording statement under this provisions is to give an opportunity to explain the circumstances appearing against him as well as to put forward his defence, if the Accused so desires. Once he does not avail this opportunity, consequences of law must follow. When the Accused is called upon to appear before the Court for Section 313, burden is upon him. No fault can be found with the Magistrate if he proceeds with said trial in the absence of examination of Accused under Section 313 of the Code. On account of word “shall” in Section 313(1)(b) it cannot be construed to mean that even if the Court is giving the opportunity to the Accused to appear for recording statement under Section 313 and the Accused is not willing to avail that opportunity, Court cannot proceed with the trial, in the event, the Accused does not appear before the Court. Since the documentary evidence is admitted by Accused and no cross order

was not challenged, examination under Section 313 of Cr.P.C. will not yield any fruitful purpose. When the Accused are not interested in their statement under Section 313 of Cr.P.C., why the case should be kept pending for that reason. It is submitted that copy of this application is served upon Respondents and the Applicant has filed affidavit of service.

8. Learned Advocate for the Applicant has relied upon following decisions;

- i. Usha K. Pillai V/s. Raj K. Srinivas and Others, (1993) 3 SCC 208.*
- ii. Basavaraj R. Patil And Others V/s. State of Karnataka And Others, (2000) 8 SCC 740.*
- iii. Rajesh Agarwal v/s. State & Anr., ILR (2010) VI Delhi 610.*
- iv. Indian Bank Association And Others V/s. Union of Indian And Others, (2014) 5 SCC 590.*
- v. Meters and Instruments Private Limited And Another V/s. Kanchan Mehta, (2018) 1 SCC 560.*
- vi. R.V. Kulkarni V/s. Dakshina Murthy, delivered by Karnataka High Court, Bangalore in Criminal Revision Petition No.437 of 2010 dated 28th June, 2012.*

9. Learned APP submitted that recording of statement under Section 313 of Cr.P.C. is mandatory. The Accused cannot be deprived of giving explanation. The statement under Section 313 of the Code cannot be dispensed with except in accordance with proviso under Section 313(1)(b) of the Code. The Accused were not permanently exempted from appearing before the Court. Merely on the ground that the Accused are absconding it cannot be presumed that the statement of the Accused under Section 313 of the Cr.P.C. can be dispensed with. Section 273 of Cr.P.C. provides that all evidence taken in the Court of trial shall be recorded in the presence of the Accused.

10. Learned APP has relied upon the decision of the Hon'ble Supreme Court in the case of *Reena Hazarika V/s. State of Assam, (2019) 13 SCC 289*.

11. The factual matrix of this case denotes that the case relates to the offence under Section 138 of the N.I. Act. The cheque in question was dishonoured for want of sufficient funds on 3rd November, 2015. The complaint was filed on 11th December, 2015. Process was issued against the Accused. Plea of the Accused was recorded on 20th March, 2017. Affidavit of evidence of the complainant was filed under Section 145 of the N.I. Act. Documents were exhibited in evidence. Case was posted for the cross-

examination of the complainant. Thereafter, the Accused failed to appear before trial Court. The Advocate representing the accused filed applications for exemption of the Accused from appearing before the court. The applications were allowed. Subsequently, neither Accused nor their Advocate are appearing before the Court. Bailable and non-bailable warrants were issued against the Accused. The Accused were residing in Tamilnadu. The complainant had forwarded notice to Accused for appearing before the Court which has been executed upon the Accused. The learned Magistrate proceeded to pass no cross Order on 17th September, 2019. The case was posted for statement of Accused under Section 313 of the code. Since last five years the Accused have managed to evade the trial and appearance in the proceedings. It is not in dispute that the proceedings under Section 138 of N.I. Act are in the nature of summons case. The object of bringing Section 138 of statute was to inculcate efficacy of banking operations and credibility in transacting business on negotiable instruments.

12. In the case of *Indian Bank Association & Ors. Vs. Union of India & Ors. AIR 2014 Supreme Court 2528*, has observed that the legislature has noticed that the introduction of Sections 138 to 142 of the Act, has not achieved desired result for dealing with dishonoured cheques, hence, it inserted new Sections 143 to 147 in

the Negotiable Instruments Act vide Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 for speedy disposal of cases relating to dishonour of cheques through summary trial as well as making the offence compoundable. The objectives of the proceedings of Section 138 of the Act are that the cheque should not be used by persons as a tool of dishonesty and when cheque is issued by a person, it must be honoured and if it is not honoured, the person is given an opportunity to pay the cheque amount by issuance of a notice and if he still does not pay he must face the criminal trial and consequences. Section 143 of the Act introduced by the 2002, Amendment Act, relates to power of Court to try cases summarily. Section 145 of the Act, deals with the evidence on Affidavit. Under Section 145 of the Act, the complainant can give his evidence by way of an affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the Court, which makes it clear that a complainant is not required to examine himself twice i.e. one after filing complaint and one after summoning of the Accused. The affidavit and the documents filed by the complainant alongwith complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-smmoning stage and the post summoning stage. There is no necessity to recall and re-examine the complainant after summoning of the Accused, unless

the Magistrate passes specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the Accused or under Section 145(2) of the Act *suo moto* by the Court. In summary trial, after the Accused is summoned his plea is to be recorded and his examination if any can be done by a Magistrate and a finding can be given by the Court under Section 263(4) of Cr.P.C. and the same procedure can be followed by a Magistrate for the offence of dishonour of cheque since offence under Section 138 of the Act is a document based offence. If provisos (a), (b) and (c) to Section 138 of the Act are shown to have been complied with, technically the commission of the offence stands completed and it is for the Accused to show that no offence could have been committed by him for specific reason and defences. The Amendment Act, 2002 has to be given effect to in its letter and spirit. The Court issued directions for speedy disposal of the case and directed the criminal Courts in the country dealing with 138 to follow the procedure referred to in the directions for speedy and expeditious disposal of the cases falling under Section 138 of N.I. Act. One of the direction stipulates that the Court should direct the Accused, when he appears to furnish a bail bond to ensure his appearance during trial and ask him to take notice under Section 251 of Cr.P.C. to enable him to enter his plea of of defence and fix the

case of defence evidence, unless an application is made by the Accused under Section 145(2) for recalling a witness for cross-examination. The other directions envisages that the Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The Court has option of accepting affidavits of the witnesses instead of examining them in the Court. The witnesses to the complaint and Accused must be available for cross-examination as and when there is direction to this effect by the Court. The Magistrate should adopt a pragmatic and realistic approach while issuing summons.

13. In the case of *Electronics Trade and Technology Development Corporation Ltd. V/s. Indian Technologists and Engineers (Electronics)(P) Ltd. (1996) 2 SCC 739* the Hon'ble Supreme Court has observed that the object of Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on Negotiable Instruments. Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of the negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the

cheque dishonestly. It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter if any instructions are issued to the bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138.

14. In *Goa Plast (P) Ltd. V/s. Chico Unsula D'souza (2004) 2 SCC 235* the apex Court while dealing with the objects and ingredients of Section 138 and 139 of the Act, observed that the object and ingredients under the provisions, in particular, Section 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment

enacted the aforesaid provisions. The remedy available in a civil Court is a long drawn matter and an unscrupolous drawer normally takes various pleas to defeat the genuine claim of the payee.

15. In Re: Expeditious Trial of cases under Section 138 of N.I. Act AIR 2021 SC 1957 the Hon'ble Supreme Court examined the reasons for the delay in disposal of cases under Section 138 of N.I. Act. It was noted that pendency of complaints under Section 138 of the Act had an adverse effect in disposal of other criminal cases. Section 143 to 147 were inserted in the Act. Section 143 of the Act empowers the Court to try complaints filed under Section 138 of the Act, summarily. Sub-Section (3) of Section 143 stipulates that an endeavour be made to complete the trial within six months. Section 144 deals with mode of service of summons. Section 145 stipulates that the evidence of the complainant given by him on affidavit may be read as evidence in an inquiry, trial or other proceedings under the code. Banks slip or memo denoting that the cheque has been dishonoured is presumed to be *prima facie* evidence of the fact of dishonour of the cheque, according to Section 146. Section 147 makes offences punishable under the Act compoundable. The situation has not improved as Courts continue to struggle with pendency of complaints under Section 138 of the Act. After analyzing various provisions of the Act, suggestions of learned

Advocate appointed as *amicus curiae*, the Court issued directions stipulated in paragraph 24 of the decision. The High Courts were requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial. Conduct inquiry under Section 202 of Cr.PC. when the Accused resides beyond jurisdiction of Court and various other directions.

16. In the present case Accused had not appeared before the trial Court since 29th June, 2017. The question is whether it is justifiable to wait for their appearance on their own or production after their arrest in execution of non-bailable warrants by law enforcement agency. The directions/guidelines stipulated in aforesaid decisions and various other decisions provide measures for expeditious disposal of cases. To meet the situation of pendency of large number of such cases provisions were inserted by amending the Act. In view of these circumstances whether the impugned order passed by trial Court on the ground that, report on non-bailable warrant issued against the Accused is not received, it is for the complainant to take appropriate steps to secure presence of the Accused, as per principle of natural justice no man should be condemned unheard, attendance of Accused was not dispensed with under Section 205 or 317 of Cr.PC. is tenable in law ?

17. The complainant/applicant is justified to contend that, the facts of the present case did certainly warrant exercise of the discretion. However, no palatable justification is given by the learned Magistrate in the impugned order, as to why Court has refrained from exercising the discretion against the accused. 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 of the crime, should not be made to suffer for no fault of his. The fate or the command/control of a criminal trial cannot be 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. A criminal court is not powerless or helpless against such mischievous accused persons. The trial court cannot play the role of a mute spectator. The learned Magistrate has failed to use powers to compel the attendance of the accused before the Court since last 5 years despite issuance of plenty of bailable and non-bailable warrants, and for which, the complainant should not be penalized. There is no condition or criteria laid down, in order for a trial court to exercise its discretion under the proviso to section 313(1)(b), except that the court should have dispensed earlier with the personal attendance of the accused u/s 205 or 317 CrPC. In this case, the attendance of the

accused has been dispensed/exempted under Section 317 on 6 occasions. Accused and their advocate having shown least respect for the process of law and for the Court, the situation demanded that discretion under section 313(1)(b) should have been exercised against the accused. The complainant has served a copy of the present petition upon the accused. Accused are thus aware that the complainant has filed the present petition to dispense with their 313 examination. However, the accused have not yet bothered to appear before this Hon'ble Court, nor engaged an advocate, to contest this matter, despite being served. This means that they are not at all bothered or interested in the trial against them. The trial is going on since last 7 years, which ought to have been completed within 6 months. The accused last appeared before the trial court on 29th June, 2017. Similarly, their Advocate too has last appeared before the Court on 31st October, 2017. Right since 4th November, 2019, the matter is adjourned for recording statement under Section 313 of Cr.P.C.. On 29th June, 2017, the accused offered their admissions and admitted the entire documentary evidence which *inter-alia* included the cheque, the covering letter, the dishonour memo, the demand notice, the postal AD card etc., which were then marked/exhibited. The "No cross" order was passed on 17th September, 2019. Lack of cross-examination of a witness

amounts to the entire evidence adduced by the witness having gone un rebutted, unchallenged. The no cross order is not challenged by the accused, and it has attained finality.

18. Chapter XVI of the Cr.P.C. deals with the commencement of the proceedings before the Magistrate. Under Section 204 Cr.P.C. the Magistrate after taking cognizance of the offence issues summons or warrants, depending upon the case, i.e., either a summons case or a warrant case. Under Section 205 (1), Cr.P.C., the Magistrate having issued the summons for the personal attendance of the accused can permit him to appear by his pleader/advocate. Under Sub-Section (2) even if the Magistrate dispenses with the personal attendance of the accused in his discretion at any stage of the proceedings, he is empowered to direct the personal attendance of the accused in the manner provided in the Section. Chapter XXIV, Cr.P.C. deals with the general provisions as to enquiries and trials. Under Section 317, at any stage of the enquiry or trial, the concerned Judge or Magistrate trying the case is empowered to dispense with the personal attendance of the accused before the Court in the interest of Justice or in the event the accused is found persistently disturbing the proceedings of the Court. At the same time at any stage of the proceedings he could direct the personal attendance of the accused. Under sub-Section (2), even if the accused is not represented by an

Advocate, if the presiding officer feels that the personal attendance of the accused is necessary, he may adjourn the enquiry or trial. Section 273 relates to evidence to be recorded in presence of Accused. Section 205, Section 273 and Section 317 of Cr.P.C. reads as follows;

205. Magistrate may dispense with personal attendance of accused.- (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.

273. Evidence to be taken in presence of accused.- 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:

[Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the Court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.]

317. Provision for inquiries and trial being held in the absence of accused in certain cases – (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is

satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

19. In the case of *Sharad Jethalal Savla V/s State of Gujarat*, the *High Court of Gujarat (Criminal Misc. Application No.19862 of 2015, dated 14th November, 2016)* has observed that the provisions of Sections 205 of Cr.P.C. and 317 of Cr.P.C. are distinct provisions. They have been engrafted by the legislature knowingly well the existence of each other. Section 205 of Cr.P.C. gives discretion to the Court to exempt a person from personal appearance till such time, his personal appearance is necessary for the trial. Whereas, Section 317 of Cr.P.C. is a provision where on any particular day, if the Accused required to be present in person is unable to come or appear, then he may seek leave and be absent and for this he is to move the Court under Section 317 of Cr.P.C.

20. The trial is kept on hold for recording statement of Accused under Section 313 of Cr.P.C. Whether the Court could have dispensed with recording statement of Accused under Section 313 on account of continuous absence of the Accused and proceeded to next stage of the trial is a prime question.

21. Section 313 of the Code reads as follows:

313. Power to examine the accused. - (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court -

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

[(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.]

22. The Code of Criminal Procedure, 1898 (for short “the old code”) contained Section 342 relating to power to examine accused.

It was worded as follows:

“342. (1). For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1)”.

23. In *Hate Singh Bhagat Singh V/s. State of Madhya Bharat AIR 1953 SC 468* the three Judge Bench of the Hon'ble Supreme Court interpreted the said provision of the old code as :

“The statement of the Accused recorded by the committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America would be free to state in his own way in the witness box. They have to be received in evidence and treated as evidence and be duly considered at trial”.

24. Parliament then introduced Section 342-A in the old code which corresponds to Section 315 of the present code by which permission is given to an accused to offer himself to be examined as a witness if he so chose.

25. In *Bibhuti Bhusan Das Gupta V/s. State of W.B.* another three-Judge Bench dealing with the combined operation of Sections 342 and 342-A of the old Code made the following observations:

“Under Section 342-A only the accused can give evidence in person and his pleader's evidence cannot be treated as his. The answers of the accused under Section 342 is intended to be a substitute for the evidence which he can give as a witness under Section 342-A. The privilege and the duty of answering questions under Section 342 cannot be delegated to a pleader. No doubt the form of the summons show that the pleader may

answer the charges against the accused, but in so answering the charges, he cannot do what only the accused can do personally. The pleader may be permitted to represent the accused while the prosecution evidence is being taken. But at the close of the prosecution evidence the accused must be questioned and his pleader cannot be examined in his place.”

26. The Law Commission in its 41st Report considered the aforesaid decisions and also various other points of view and then made the report after reaching the conclusion that:

- (i) in summons cases where the personal attendance of the accused has been dispensed with, either under Section 205 or under Section 540-A, the court should have a power to dispense with his examination; and
- (ii) in other cases, even where his personal attendance has been dispensed with, the accused should be examined personally.

27. The said recommendation has been followed up by Parliament and Section 313 of the Code, as is presently worded, is the result of it. It would appear prima facie that the court has discretion to dispense with the physical presence of an accused during such questioning only in summons cases and in all other cases it is incumbent on the court to question the accused personally after closing prosecution evidence. Nonetheless, the Law Commission was conscious that the rule may have to be relaxed eventually, particularly when there is improvement in literacy and legal-aid

facilities in the country. This thinking can be discerned from the following suggestion made by the Law Commission in the same report :

“We have, after considering the various aspects of the matter as summarized above, come to the conclusion that Section 342 should not be deleted from the statute-book. With further increase in literacy and with better facilities for legal aid, it may be possible to take that step in the future.”

28. In *Usha K. Pillai V/s. Raj K. Srinivas and Others*, (1993) 3 SCC 208, it was held that the examination of the Accused personally can be dispensed with only in summons case. The Court was considering a case where the offence involved was Section 363 of IPC. It was held as follows:

“A warrant case is defined as one relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Since an offence under Section 363 of IPC is punishable with imprisonment for a term exceeding two years it is a warrant case and not a summons case. Therefore, even in cases where the Court has dispensed with the personal attendance of the accused under Section 205(1) or Section 317 of the Code, the Court cannot dispense with the examination of the accused under clause ‘b’ of Section 313

of the Code because such examination is mandatory”.

29. In *Shivaji Sahebrao Bobade V/s. State of Maharashtra (1973)*

2 SCC 793, the Bench of three Judges made following observations:

“It is trite law, nevertheless fundamental, that the prisoner’s attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not *ipso facto* vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction.”

30. The aforesaid observations indicate some dilution of the rigour of the provision can be made even in the light of a contention raised by the accused that non questioning him on a vital circumstance by trial Court has caused prejudice to him. The explanation offered by

the counsel of the accused at the appellate stage was held to be sufficient substitute for the answers given by the accused himself.

31. In the case of *Basavaraj R. Patil And Others V/s. State of Karnataka And Others* (supra) the Court dealt with questions, when a criminal Court completes prosecution evidence (other than in summons cases) is it indispensably mandatory that the accused himself should be questioned ? Can not the court allow the Advocate to answer such questions on behalf of the accused atleast in some exigent conditions ? Since the two Judges Bench in *Usha K. Pillai V/s. Raj K. Srinivas and Others* (supra) held that there is no alternative to it permissible under law, reference was made to larger Bench. One of the contentions raised by the appellants was that if the Court did not put questions under Section 313 of the Code there is no reason for the complainant to be aggrieved thereof because the prejudice can be caused only to the accused due to non-compliance with the said provision. The other contention was that no criminal Court can be rendered absolutely powerless to deal with situation like this, i.e. if the accused is in such a far away country and when he has to incur a expenditure and long journey solely for the purpose of answering the Court questions, he himself pleaded that his counsel may be allowed to answer such question on his behalf. The Court analyzed scope of Section 313 of the Code. The Court however,

considered the fact whether with revolutionary change in technology of communication and transmission and the improvement in facilities for legal aid, is it necessary that in all cases the accused must answer by personally remaining present in Court. It was observed that one category of offences which is specifically exempted from rigour of Section 313(1)(b) of the Code is summons case. Other offences generally belong to a different category among which are included offences punishable with varying sentences from imprisonment of three years upto imprisonment for life and death penalty. Even in cases involving less serious offences, can not the Court extend a helping hand to an accused who is placed in a predicament deserving such a help ? A pragmatic and humanistic approach is warranted in regard to such special exigencies. The word 'shall' in clause (b) to Section 313 (1)(b) of the Code is to be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should in appropriate cases eg. if the accused satisfies the Court that he is unable to reach the venue of the Court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in

substantial manner. If the Accused who is already exempted from personally appearing in the Court makes an application to the Court praying that he may be allowed to answer the questions without making his physical presence in Court on account of justifying exigency the Court can pass appropriate orders thereon, provided such application is accompanied by an affidavit shown by the accused himself containing the matters, viz. a narration of facts to satisfy the Court of his real difficulties to be physically present in Court for giving such answers. An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning. An undertaking that he would not raise any grievance on that score at any stage of the case. If the Court is satisfied of the genuineness of the statements made by the accused, it is open to the Court supply the questionnaire to his Advocate and fix the time within which the same has to be returned duly answered by the accused together with properly authenticated affidavit that those answers were given by the accused himself. If he does not wish to give any answer to any questions he is free to indicate that fact. If the accused fails to return questionnaire with answers he shall forfeit his right to seek personal exemption from Court during such questioning. If the above course is adopted in exceptional exigency it would not violate the legislative intent

envisaged in Section 313 of the Code.

32. This Court is conscious of the fact that in the present case the accused are not seeking dispensation of recording of statement under Section 313 of the Code. However, the accused are prosecuted in summons case. If the accused is facing prosecution in summons case and Court dispensed with the personal attendance of the accused, it may dispense with his examination under clause (b). Section 313 does not provide such concession for warrant cases. The aforesaid decision provides exemption from personal appearance for recording such statement even in warrant triable cases. In view of object of Section 138 of N.I. Act, directives for speedy disposal, introduction of provisions for expeditious conclusion in cases in the Act, in the circumstances existing in the present case there is no reason for not dispensing the recording of statement of the accused under Section 313 of the Code. The law provides to accused the right to defend. At the same time complainant cannot be made to wait for indefinite period till the presence of the accused is secured. The accused in this case had stopped appearing before trial Court from 29th June, 2017. On six occasions they were exempted from appearing before Court. In spite of issuance of warrants the accused could not be arrested and brought before the Court. Section 313 of the Code enunciates salutary principle of natural justice enshrined in the *maxim audi*

alterm partem. However, if the accused refuses to answer such questions, or gives false answers, he shall not render himself liable to punishment. No oath is administered to the accused when he is examined under sub-section (1) of 313 of the Code. The provision is not intended to nail him to any position. Then in the event the accused choose to refrain from appearing before the trial Court for more than five years, why it cannot be said that the accused have given up their right to give explanation under Section 313 of Cr.P.C. or recording of evidence in their presence as envisaged under Section 273 of the Code.

33. The Hon'ble Supreme Court in the case of *Ramnaresh and Others V/s. State of Chattishgarh*, AIR 2012 SC 1357, has observed as follows:

“It is a settled principle of law that the obligation to put material evidence to the accused under Section 313 Cr.P.C. is upon the Court. One of the main objects of recording of a statement under this provision of Cr.P.C. is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defense, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity,

then his statement made under Section 313 of Cr.P.C. insofar as it support the case of prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law.”

34. Karnataka High Court in the case of *R.V. Kulkarni V/s. Dakshina Murthy* (supra), had dealt with the issue relating to the dispensing with recording of evidence under Section 313 of Cr.P.C. The complaint was under Section 138 of N.I. Act. The trial Court had proceeded with the case after futile efforts to secure the presence of the Accused and convicted him on the basis of evidence tendered by the complainant. The Appellate Court had set aside the conviction on the ground that the statement of the Accused was not recorded under Section 313 of Cr.P.C. The High Court noted that the presence of the Accused could not be secured even in the proceeding before the High Court. Reference was made to the decision in the case of *Basavaraj R. Patil And Others V/s. State of Karnataka And Others* (supra), and it was observed that the accused had at all point of time attempted to misuse the process of the Court in partially seeking to defend himself and thereafter abandoning the proceedings and after having suffered an order of conviction, proceeding to challenge the same in appeal, and having raised the grounds on which the

prejudice was sought to be pleaded and the appellate Court having allowed the appeal, it was incumbent on the accused to have availed opportunity to appear before the Court and to explain the circumstances that seem to appear against him before the trial Court. However, the Accused did not choose to do so on the matter having been remanded to trial Court. Now again same tactics having practiced by the accused in having firstly remained indolent before the trial Court is not having contested the proceedings and thereafter having filling an appeal on the very ground that was urged earlier and the appellate Court having summarily allowed the appeal would, in effect, defeat the very proceedings that had been legitimately instituted by the complainant and hence the Judgment of the appellate Court overlooks the conduct of the accused in mechanically applying the law that non-recording of the statement under Section 313 of Cr.P.C. would vitiate the proceedings. Having considered the scope and object of Section 313, there is no injustice occasioned in the said case, with the statement of the accused not having been recorded under Section 313 of Cr.P.C. The scope and object of Section 313 of Cr.P.C. was required to be kept in view by the Court below having due regard to the nature of the case that was involved and the circumstances that could possibly sought to be explained by the accused as appearing against him. It was for the accused to have

appeared before the Court and to have defended himself effectively and to make himself available for the Court to record the statement under Section 313 of Cr.P.C. The Accused did or did not choose to appear before the Court below according to his convenience. There was no justification for the Appellate Court having held that there is failure of justice on account of a statement of the Accused not having been recorded under Section 313 of Cr.P.C. Having due regard to the fact that it was a summons case and the accused himself was to blame for non-compliance with the said provision, no fault can be found either with the complainant or the trial Court.

35. Considering the fact that the proceedings under Section 138 of N.I. Act are required to be concluded expeditiously in the light of guidelines issued by the Courts from time to time for speedy disposal of the cases, the scope of Sections 141, 142, 143 and 145 of the N.I. Act, it was not necessary for the trial Court to wait for Accused to make his appearance. The facts of the present case denote that the Accused was exempted from appearing and thereafter they continued to disappear from appearing before the Court. Warrants were issued. The warrants could not be executed. The Accused even failed to appear before this Court. In this circumstances, the Court is empowered to proceed with the case without recording the statement of the Accused under Section 313 of Cr.P.C. The decision

relied upon by learned APP *Reena Hazarika V/s. State of Assam* (supra) relates to scope of Section 313 of the Code. It is observed that the Section 313 of the Code confers valuable right upon the accused to establish his innocence. The mere use of word 'may' cannot be held to confer a discretionary power on the Court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice. However, in the present case, accused have not bothered to remain present before the Court. The complainant is victim He is running from pillar to post for prosecuting the accused. This is a fit case to exercise discretion and proceed with case by dispensing with statement under Section 313 of the Code. The accused have no regard for directions of Court. The trial Court had already passed order of no cross. Hence, the impugned order of trial Court is required to be set aside with direction to dispense with statement of accused under Section 313 of the Code and proceed with the case.

36. Hence, I pass the following order;

ORDER

- i. The Criminal Application No.490 of 2020 is allowed and disposed off.

ii. Order dated 13th February, 2020 passed by Metropolitan Magistrate, 14th Court, Girgaon Mumbai, below Exhibit-36 in C.C. No.5658/SS/2015 is quashed and set aside.

iii. The trial Court shall proceed with C.C. No.5658/SS/2015 by dispensing with statement of Accused under Section 313 of Cr.P.C. and conclude the case in accordance with law.

[PRAKASH D. NAIK, J.]