

*Esha***IN THE HIGH COURT OF BOMBAY AT GOA****CRIMINAL WRIT PETITION NO. 40 OF 2026**

MR. DEVESH DASHARATH MALVANKAR, Son
of Dashrath Malvankar, Major of age, R/o Vithaladevi
Warkhand, Pedne, Goa 403 512.

... PETITIONER**~ VERSUS ~**

- 1. MR. SHRIPAD SHANKAR KERKAR**,
son of Shripad Shankar Kerkar, Aged 54
years, Indian National, Residing at House
No. 113, Sawaiwada, Pernem, Goa.

... RESPONDENTS

- 2. STATE OF GOA**, Through Public
Prosecutor, High Court Complex at
Porvorim, Goa.

APPEARANCES:

for the Petitioner

Mr. Tanmai Gawas with Mr. Sachin Raul

for Respondent No. 1

Mr. Laxman Pednekar with Ms. Ketaki Pednekar

for Respondent No. 2

*Mr. Nikhil Vaze, APP**Mr. Shivan Desai, Amicus Curiae with
Ms. Riya Amonkar*

CORAM : AMIT S. JAMSANDEKAR, J.

RESERVED ON : 5th MARCH 2026

PRONOUNCED ON : 6th APRIL 2026

JUDGMENT:

1. Heard the Learned Counsel appearing for the Petitioner.
2. Rule. Mr. Pednekar, the Learned Counsel appearing for the 1st Respondent, waives service and the Learned Additional Public Prosecutor waives service on behalf of the 2nd Respondent. The Rule is made returnable forthwith and heard finally by consent of the parties. On 26th February 2026, Mr. Shivan Desai was appointed as an *Amicus Curiae* to assist in the matter, considering the question of law argued on behalf of the 1st Respondent. Heard Mr. Desai, the Learned *Amicus Curiae*.
3. By the present Petition, the Petitioner challenges the order dated 22nd September 2025 passed by the Learned Judicial Magistrate First Class, Pernem, Goa (***impugned order***). The Learned Magistrate was pleased to dismiss the Application of the Petitioner filed under Sections 348 and 353 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (***BNSS***). The Petitioner, by the Application under Sections 348 and 353 of the BNSS sought to re-open the defence evidence. The ground mentioned in the

Application is that the matter was fixed for defence evidence on 4th June 2025 and on 7th July 2025. On both days, the matter could not be taken up due to a lack of time, and it was adjourned accordingly. It is submitted that on the next occasion, the Petitioner was unable to remain present in Court due to unavoidable personal circumstances, and therefore, could not examine the defence witness. It is the case of the Petitioner that the closure of defence evidence was neither deliberate nor intentional. The Petitioner has always been willing to cooperate in the proceedings. By pleading the provisions of Article 21 of the Constitution of India, the Petitioner submitted that the denial of opportunity to examine the defence witness will result in grave prejudice to the Petitioner and therefore would violate the fundamental right to fair trial. It is submitted on behalf of the Petitioner that the Petitioner wishes to examine four more witnesses and also desires to produce one important document, which, according to the Petitioner, is relevant for the adjudication of the case.

4. By the impugned order, the Learned Magistrate dismissed the Petitioner's Application on the ground that repeated opportunities were given to the Petitioner to lead evidence. However, on several occasions, the Petitioner and his Advocate remained absent. The Learned Magistrate has recorded that the

allegations made by the Petitioner that the matter was adjourned for want of time on two occasions are also false. It is further recorded by the Learned Magistrate that the Application is filed by the Petitioner only to delay the proceedings.

5. The impugned order is challenged by the Petitioner on various grounds, which include that the impugned order is perverse, arbitrary and was passed without application of mind. It is further submitted on behalf of the Petitioner that the Learned Magistrate has not considered the factual aspect of the matter and therefore has arrived at wrong findings. It is submitted that the Learned Magistrate ought to have given an opportunity to the Petitioner to lead evidence in the proceedings. Mr. Gawas, on behalf of the Petitioner, submitted that in the interest of justice, the impugned order be set aside and the Petitioner be granted liberty to lead evidence in the proceedings.
6. Mr. Pednekar, the Learned Counsel appearing for the 1st Respondent, submitted that admittedly the Application filed by the Petitioner under Section 145(2) of the Negotiable Instrument Act, 1881, (**N.I. Act**) was allowed by the Learned Magistrate. However, the Petitioner did not avail the opportunity given to the Petitioner. Therefore, it is submitted by Mr. Pednekar that once the opportunity was granted under Section 145(2) of the N.I.

Act, then the Petitioner cannot invoke the provisions of Sections 348 and 353 of the BNSS. This submission is made by Mr. Pednekar on the basis of the provisions of Section 5 of the BNSS which reads as follows:-

“5. Saving.—Nothing contained in this Sanhita shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

7. Mr. Pednekar submits that the N.I. Act is a special statute and it provides a mechanism to deal with the rights of the Accused by virtue of provisions of Section 145(2). Therefore, it is the submission of the 1st Respondent that once the provisions of Section 145(2) of the N.I. Act are exhausted, there cannot be any application under Section 348 or 353 of the BNSS. It is the 1st Respondent's submission that in this situation, the provisions of Section 5 of the BNSS shall apply.

8. Even otherwise, it is submitted by Mr. Pednekar that the Application is an abuse of the process of law and the grounds taken in the Application by the Petitioner are false. Therefore, it is submitted on behalf of the 1st Respondent that the impugned

order is justified in the facts and circumstances of the present case.

9. The matter was heard extensively on 26th February 2026. Considering the submissions made on behalf of the 1st Respondent in respect of the applicability of Section 5 of the BNSS, it was decided to appoint Mr. Shivan Desai, the Learned Counsel of this Court, as *Amicus Curiae* to assist the Court on the question of law raised by Mr. Pednekar.
10. Mr. Desai, the Learned *Amicus Curiae* made detailed submissions on the effect of the interpretation of the provisions of Section 5 of the BNSS *qua* the provisions of the N.I. Act. He also made detailed submissions on the proposition of law as submitted by Mr. Pednekar and its effect on proceedings initiated under Section 138 of the N.I. Act.
11. With reference to the submission of Mr. Pednekar on behalf of the 1st Respondent, Mr. Desai submitted that provisions of the BNSS and the N.I. Act cannot be read in isolation. He submitted that the overall scheme and, in particular, the object of 2002 amendment to the N.I. Act will have to be considered while dealing with the submission made on behalf of the 1st Respondent.

12. He submitted that the benefit of Sections 145(1) and 145(2) of the N.I. Act can only be availed by the Complainant and/or in respect of the Complainant's evidence/witnesses. The provisions of Sections 145(1) and 145(2) of the N.I. Act are not applicable to the evidence/witnesses of the Accused. Section 145 of the N.I. Act reads as follows:

“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.”

13. Mr. Desai submitted that after the amendment to the N.I. Act in 2002, the Hon'ble Supreme Court in ***Mandvi Cooperative Bank Limited v. Nimesh B. Thakore (2010) 3 SCC 83*** has, in detail, narrated the object, scope and machinery provided by the N.I. Act in respect of Section 138 proceedings.

14. In particular, Mr. Desai emphasised the following paragraphs:—

“17. Section 143 gave to the court the power to try cases summarily; Section 144 provided for the mode of service of

summons; Section 145 made it possible for the complainant to give his evidence on affidavit; Section 146 provided that the bank's slip would be prima facie evidence of certain facts and Section 147 made the offences under the Act compoundable.

21. *It is, however, significant that the procedure of summary trials is adopted under Section 143 subject to the qualification "as far as possible", thus, leaving sufficient flexibility so as not to affect the quick flow of the trial process. Even while following the procedure of summary trials, the non obstante clause and the expression "as far as possible" used in Section 143 coupled with the non obstante clause in Section 145 allow for the evidence of the complainant to be given on affidavit, that is, in the absence of the accused. This would have been impermissible (even in a summary trial under the Code of Criminal Procedure) in view of Sections 251 and 254 and especially Section 273 of the Code. The accused, however, is fully protected, as under sub-section (2) of Section 145 he has the absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross-examination.*

23. *Section 145 with its non obstante clause, as noted above, makes it possible for the evidence of the complainant to be taken in the absence of the accused. But the affidavit of the complainant (or any of his witnesses) may be read in evidence "subject to all just exceptions". In other words, anything inadmissible in evidence e.g. irrelevant facts or hearsay matters would not be taken in as evidence, even though stated on affidavit.*

44. *Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on*

affidavit, the High Court has held that subject to the provisions of Sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that Section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit. But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more importantly providing a similar right to the accused would be in furtherance of the legislative intent to make the trial process swifter.

46. On this issue, we are afraid that the High Court overreached itself and took a course that amounts to taking over the legislative functions. On a bare reading of Section 143 (sic Section 145) it is clear that the legislature provided for the complainant to give his evidence on affidavit and did not provide for the accused to similarly do so. But the High Court thought that not mentioning the accused along with the complainant in sub-section (1) of Section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word “accused” with the word “complainant” in Section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission.

47. There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think “it proper to incorporate a word ‘accused’ with the word ‘complainant’ in Section 145(1)....”, it was not open to the

High Court to fill up the self-perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under Section 138 of the Act would be based largely on documentary evidence.

48. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well."

15. Therefore, in view of the above binding precedent, I completely agree with the first submission of Mr. Desai that the provisions of Section 145(1) and 145(2) are in respect only of the evidence of the Complainant and/or the Complainant's witness and not the evidence of the Accused or the witness of the Accused.

16. Mr. Desai submitted that the interpretation of the provisions of Section 5 of the BNSS, as submitted by Mr. Pednekar, cannot be made applicable in abstract and to all the provisions of the N.I.

Act. Each case will have different facts and different stages, and therefore, there cannot be any absolute proposition as suggested by Mr. Pednekar. Mr Desai, further submitted that, in view of the facts and circumstances of the present case, the court need not decide the issue raised by the 1st Respondent about the applicability of Section 5 of the BNSS. The reason being that the Petitioner has closed his evidence on his own and that statement of the Petitioner is recorded by the Learned Magistrate on 4th June 2025, which the Petitioner has not challenged. Therefore, Mr. Desai submitted that there is no need to decide any question of law in the present matter. I completely agree with Mr. Desai and therefore, I have decided to proceed on the facts of the matter and without getting into the question of law as argued by Mr. Pednekar on the basis of Section 5 of the BNSS.

17. I have perused the Roznama dated 4th June 2025, which records as follows:-

*“Called out today. Adv. V. Palni present for the complainant. Adv. D. Pednekar present for the accused D-16-Application for cancellation of NBW OP-Granted. Issue letter accordingly. **C-17-313 statements of the accused is recorded and Accused submits that he did not wish to lead evidence in the defense.** D-18-Application for exemption-OP-Granted. And seeks time-Time granted. Matter adj. for Defence Evi. on 07.07.2025 at 10.00 a.m.”*

(emphasis supplied)

18. Thereafter the matter was listed on 07th July 2025 and it was adjourned to 11th August 2025 for want of time.

19. The Roznama dated 11th August 2025 records as follows:-

“Called out today. Adv V. Palni present for the complainant. Adv. D. Pednekar present for the accused at first round and thereafter called out absent. Accused absent. It is seen from the records that despite giving opportunities accused failed to lead evidence in defence, hence opportunity is closed. Issue NBW against the accused upon payment of process fee. Process fee paid. OP-Issue. Matter adj for FA on 08.09.2025 at 10.00 a.m.”

20. Thereafter, the Roznama dated 8th September 2025 records as follows:-

“Called out today. Adv V. Palni present for the complainant. Adv A. Morajkar present for the accused. D-19-Letter of Authority. OP-File. D-20-Application for cancellation of warrant. OP- Granted. Hence not to issue warrant against the accused. D-21-Application for recall of witness. Say endorsed by Advocate for complainant. OP-Heard and perused. There is no document produced by the accused in support of the application. Hence the application is dismissed. Final arguments heard. Matter adj. for judgment on 22.09.2025 at 2:30 p.m.”

21. Thereafter, only on 22nd September 2025, the Petitioner filed an Application under Sections 348 and 353 of the BNSS seeking leave of the Court to re-open the defence evidence.

22. The Learned Magistrate has decided this Application of the Petitioner by recording the previous Roznama in the matter, which is quoted herein above. It is recorded by the Learned Magistrate in the impugned order that an opportunity was given to the Petitioner to lead evidence. However, the Petitioner has acted irresponsibly. The Learned Magistrate has recorded a finding that the application has been filed solely to delay the proceedings.

23. The record of the matter clearly shows that ample opportunity was given to the Petitioner to lead evidence. In fact, the application filed by the Petitioner under Section 145(2) of the N.I. Act was allowed by the Learned Magistrate on 22nd September 2024. Though, this application was allowed the Petitioner did not avail the opportunity to cross-examine the 1st Respondent. Thereafter, the evidence of the Petitioner was closed on 4th June 2025 on a statement made by the Petitioner. The Petitioner has not challenged the order dated 4th June 2025 by which the evidence of the Petitioner was closed on a statement made by the Petitioner. Further, I find that the grounds mentioned by the Petitioner in the Application are false. The statements made by the Petitioner are contrary to the admitted

record, including the Roznamas dated 04.06.2025, 07.07.2025 and 08.09.2025.

24. Therefore, I do not find any arbitrariness or perversity in the impugned order. The Learned Magistrate has decided the application of the Petitioner after considering the earlier orders and the conduct of the Petitioner in the proceedings. I completely agree with the view taken by the Learned Magistrate and the finding that the application has been filed by the Petitioner solely to delay the proceedings.

25. In view thereof, **the Writ Petition stands dismissed.**

26. No order as to cost.

27. I appreciate the assistance provided by Mr. Desai, the Learned *Amicus* and his Associate Ms. Riya Amonkar.

28. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[AMIT S. JAMSANDEKAR, J.]