2025:DHC:2367

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 02nd April, 2025

\+ **CRL.M.C. 2202/2025**

NEETI SHARMA .....Petitioner

Through: Mr. Rajat Wadhwa, Mr. Dhruv Choudhary, Mr. Gurpreet Singh, Ms. Anisha Rastogi, Mr. Manish Kumar, Advocates

versus

SARANJIT SINGH .....Respondent

Through: Mr. Laksh Khanna, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

CRL.M.A. 9851/2025 *(Exemption)*

1. Exemption is granted, subject to all just exceptions.

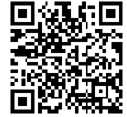
2. The Petitioner shall file legible and clearer copies of exempted documents, compliant with practice rules, before the next date of hearing.

3. Accordingly, the application stands disposed of.

CRL.M.C. 2202/2025 & CRL.M.A. 9850/2025 (for stay)

4. The present petition under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023[1] (formerly Section 482 of the Code of Criminal Procedure, 1973[2]) challenges order dated 15th January, 2025,[3] passed in CC

[1] "BNSS"
[2] "CrPC"



NI Act No. 186/2025 titled as ***Saranjit Singh vs. Neeti Sharma***, whereby the Petitioner has been served with a notice, under section 223 of BNSS, giving him an opportunity of hearing in the aforenoted complaint.

5. Briefly stated, the facts of the case are as follows:

5.1 The cheque allegedly issued by the Petitioner to the Respondent has been dishonoured on presentation, prompting the Respondent to institute a complaint for offence under Section 138 of the Negotiable Instruments Act, 1881.[4]

5.2 On receiving the above complaint, a notice dated 15th January, 2025, was issued by the Trial Court, to the Petitioner/ Proposed Accused in terms of proviso to Section 223 of BNSS affording an opportunity of hearing to the Petitioner, prior to taking cognizance of the offence.

6. Mr. Kapil Wadhwa, counsel for Petitioner, urges the following grounds to challenge the impugned notice:

6.1 The Trial Court has misdirected itself by issuing notice to Petitioner as a Proposed Accused, without applying its judicial mind to the contents of the complaint by first examining the Complainant and its witnesses on oath or examining the affidavits of the Complainant.

6.2 The Impugned notice is pre-mature and contrary to the scheme of Section 223(1) of BNSS, which mandates that the complainant must first be examined, and judicial application of mind must precede the issuance of notice to any proposed accused. Bypassing this safeguard renders the process procedurally defective.

6.3 The complaint on the face of it lacks the necessary material

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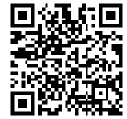
[3] "Impugned notice"

[4] "NI Act"



particulars and foundational facts to sustain even a *prima facie* case under Section 138 of the NI Act. In such circumstances, the Trial Court ought to have dismissed the complaint at the threshold without proceeding to invoke Section 223(1).

6.4 Reliance is placed on the decisions of the High Court of Kerala in ***Suby Antony v. Judicial First-Class Magistrate-III (Deleted) and Others***[5] and judgment of High Court of Karnataka in ***Basanagouda R. Patil v. Shivananda S. Patil***.[6]

6.5 The Impugned order is devoid of any reasoning and is a non-speaking one. It fails to demonstrate application of judicial mind or engagement with the procedural safeguards envisaged under Section 223. In support of the requirement of reasoned orders, reliance is placed on the judgment of the Supreme Court on ***Sant Lal Gupta and Others v. Modern Cooperative Group Housing Society Limited and Others.***[7]

7. Although the State was not initially arrayed as a party, considering the nature of the issue raised and its bearing on the exercise of criminal jurisdiction, the State is impleaded as a co-Respondent. Let the amended memo of parties be filed within one week from today. The Court has accordingly heard Mr. Laksh Khanna, Additional Public Prosecutor, on the question at hand.

8. The Court has carefully considered the rival contentions and examined the legal framework relating the challenge to the Impugned order.

9. The Impugned order reads as under:

> *"Fresh file received by way of assignment. It be checked and*

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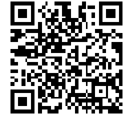
[5] 2025 SCC OnLine Ker 532
[6] 2024 SCC OnLine Kar 96
[7] (2010) 13 Supreme Court Cases 336



registered.

Ld. Counsel for the complainant has submitted that the date of filing in the present matter is 23.12.2024 and the present matter has been instituted after 01.07.2024 and the cognizance has to be taken as per BNSS 2023.

Section 223 of BNSS mandates that before taking cognizance of offence on a complaint, the accused shall be given an opportunity of being heard.

Accordingly, issue notice to the proposed accused on filing of PF returnable on 03.03.2025."

10. The Petitioner has assailed the above order on the basis of the interpretation of Section 223 of BNSS, which, being a new provision, incorporates a procedural safeguard not found in in the corresponding provision in CrPC. For ready reference, Section 223 of BNSS is extracted below:

"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-

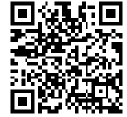
(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(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 a 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."*

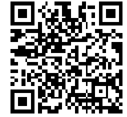
11. In contrast, the corresponding provision in the Code of Criminal Procedure, 1973 (Section 200 CrPC) does not include any mandate for affording an opportunity of hearing to the accused before taking cognizance. Section 200 CrPC is reproduced below for completeness:

> *"**200. Examination of complainant.***
> *A Magistrate 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 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 192 :*
> *Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."*

12. A comparative reading of the above provisions makes it evident that under the erstwhile law, no right of pre-cognizance hearing was envisaged for the proposed accused. This procedural safeguard has now been expressly incorporated by way of the first proviso to Section 223(1) BNSS, which mandates that "*no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard*."

13. In compliance with this statutory requirement, the Magistrate issued the impugned notice to the Petitioner to provide an opportunity of hearing prior to taking cognizance.

14. Mr. Wadhwa's challenge to the Impugned notice is primarily hinged on the submission that the Magistrate erred in issuing notice without first

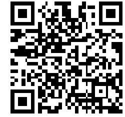


examining the complainant and any witnesses present, on oath, as mandated under the main limb of Section 223(1) of BNSS. It is argued that such examination is a condition precedent and ought to precede the issuance of notice under the proviso.

15. At this juncture, it must be emphasised that the Court is presently dealing with an offence under Section 138 of the NI Act. Consequently, this decision is rendered on the basis of the legal position as it stands in relation to such offences only. In this regard, it is instructive to refer to the decision of the Full Bench of the Supreme Court in ***A.C. Narayanan v. State of Maharashtra and Another***,[8] wherein the Supreme Court, after analysing the relevant provisions of NI Act and Section 200 CrPC, observed as under:

> *"29. From a conjoint reading of Sections 138, 142 and 145 of the NI Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint.* ***Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the NI Act. For the purpose of issuing process under Section 200 of the Code, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the NI Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the NI Act****."*

[8] (2014) 11 Supreme Court Cases 790



16. Thus, in light of the aforenoted decision, it becomes clear that in respect of complaints under Section 138 of the NI Act, once the complainant files an affidavit in support of the complaint, it is within the Magistrate's discretion to decide whether to examine the complainant or witnesses on oath. The Magistrate is not bound to do so and may rely solely on the complaint, supporting documents, and the affidavit to decide whether to issue process.

17. The principle laid down in *A.C. Narayanan* was essentially anchored on the overriding effect of Section 145 of the NI Act, which reads:

> *"**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."*

18. This provision expressly permits the complainant to tender evidence by way of affidavit and enables the Court to proceed on such material unless a request is made for summoning the witness for cross-examination. Thus, the NI Act carves out a procedural departure from the general requirement under Section 200 CrPC (and now Section 223 BNSS), recognising the affidavit as a valid substitute for oral examination at the pre-cognizance stage.

19. At this stage, it would also be useful to refer to the decision of the Supreme Court in ***A. R. Antulay v. Ramdas Sriniwas Nayak***[9] wherein the

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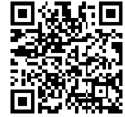
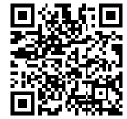
[9] (1984) 2 SCC 500



procedural steps to be followed by the Magistrate upon the filing of a private complaint were discussed in detail. The Court explained:

> *"31.….When a private complaint is filed, the court has to examine the complainant on oath save in the cases set out in the proviso to Section 200 CrPC. After examining the complainant on oath and examining the witnesses present, if any, meaning thereby that the witnesses not present need not be examined, it would be open to the court to judicially determine whether a case is made out for issuing process. When it is said that court issues process, it means the court has taken cognizance of the offence and has decided to initiate the proceeding and as a visible manifestation of taking cognizance, process is issued which means that the accused is called upon to appear before the court. This may either take the form of a summons or a warrant, as the case may be. It may be that after examining the complainant and his witnesses, the court in order to doubly assure itself may postpone the issue of process, and call upon the complainant to keep his witnesses present. The other option open to the court is to direct investigation to be made by a police officer…. Upon a complaint being received and the court records the verification, it is open to the court to apply its mind to the facts disclosed and to judicially determine whether process should or should not be issued. It is not a condition precedent to the issue of process that the Court of necessity must hold the inquiry as envisaged by Section 202 or direct investigation as therein contemplated. The power to take cognizance without holding inquiry or directing investigation is implicit in Section 202 when it says that the Magistrate may "if he thinks fit, postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer..., for the purpose of deciding whether or not there is sufficient ground for proceeding". Therefore, the matter is left to the judicial discretion of the court whether on examining the complainant and the witnesses if any as contemplated by Section 200 to issue process or to postpone the issue of process. This discretion which the court enjoys cannot be circumscribed or denied by making it mandatory upon the court either to hold the inquiry or direct investigation. Such an approach would be contrary to the statutory provision. Therefore, there is no merit in the contention that by entertaining a private complaint, the purpose of speedy trial would be thwarted or that a pre-process safeguard would be denied."*

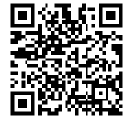
20. While Section 223 of the BNSS broadly retains the procedural framework of Section 200 of the CrPC with respect to the examination of the complainant and witnesses, it introduces a significant departure through the insertion of a proviso mandating that the proposed accused be afforded



an opportunity of hearing before cognizance is taken. This proviso marks a substantive procedural safeguard that did not exist under the earlier regime. However, with regard to offences under Section 138 of the NI Act, the Supreme Court in *A.C. Narayanan v. State of Maharashtra* has categorically held that the Magistrate may, in his discretion, proceed on the basis of the complaint, supporting documents, and an affidavit of the complainant, without necessarily examining the complainant or witnesses on oath prior to issuing process. Accordingly, in the Court's view, the procedure for such cases has not undergone any material change with the enactment of Section 223 of the BNSS. The requirement of examining the complainant and the witnesses upon oath, at the pre-cognizance stage remains directory and not mandatory in complaints under Section 138 of the NI Act.

21. Therefore, in cases under Section 138 of the NI Act, the Magistrate is not bound to examine the complainant and witnesses on oath before issuing notice under the first proviso to Section 223(1) of the BNSS. The requirement of a pre-cognizance hearing now statutorily introduced under the BNSS is a distinct and additional procedural step, but it does not alter the established position that, for offences under the NI Act, reliance on affidavits and documentary material suffices for taking cognizance. In this light, the Petitioner's contention, that the Magistrate erred in issuing notice under Section 223 without first examining the complainant and witnesses on oath, does not merit acceptance. The challenge to the Impugned notice is, therefore, misconceived and without legal basis.

22. The decisions relied upon by the Petitioner, are not applicable to the present factual context. The judgment of High Court of Karnataka in ***Basanagouda R. Patil*** concerns an offence under Section 356(2) of the



BNSS and does not deal with offences under the Negotiable Instruments Act. Similarly, the judgment of High Court of Kerala in ***Suby Antony*** is factually distinguishable and does not apply to the controversy at hand.

23. In light of the above, the Court finds no merit in the present petition.

24. Dismissed.

SANJEEV NARULA, J

APRIL 2, 2025/*d.negi*