

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CRM(M) No. 53/2025

Reserved on: 31/07/2026.
Pronounced on: 14/08/2026.
Uploaded on 14/08/2026.

**Abdul Hamid Bhat
S/o. Habibullah Bhat
R/o. Kawhar Bulbulabad Narwa
District Baramulla**

...Petitioner(s)/Appellant(s).

Through: Mr. Bashir Ahmad Zargar, Advocate

Vs.

**Abdul Rashid Bhat
S/o. Mohd Akbar Bhat
R/o. Kawhar Bulbulabad District Baramulla**

...Respondent(s).

Through: Mr. N.H. Shah, Sr. Advocate with
Ms. Suwaiba, Advocate

CORAM:

**HON'BLE MR. JUSTICE MOHD YOUSUF WANI, JUDGE
JUDGMENT**

1. Through the medium of the instant petition having been filed in terms of provisions of Section 528 of Bharatiya Nagarik Suraksha Sanhita 2023 [BNSS for short], the petitioner has sought the quashment of the orders dated 26-7-2023 and 16-12-2024 passed by the Court of Ld. Judicial Magistrate [Sub-Judge/ Special Mobile Magistrate, Baramulla, and hereinafter referred to as the learned Trial Magistrate], whereby the Ld. Trial Magistrate has closed the evidence of the petitioner/complainant and dismissed his application seeking recalling/revisit of the earlier order, respectively.
2. The case of the petitioner is that he filed a complaint under Section 138 of Negotiable Instruments Act [N.I. Act for short] on 14-2-2020, against the respondent/accused, which came to be assigned for disposal under law to the Ld. Trial Magistrate and is

pending disposal there. That subsequently the COVID-19 infection stopped the routine life activities constraining the government as well as the judiciary to provide for preventive measures. That the normal court proceedings also got affected. That meanwhile, Advocate Saqib Rasool, who was representing him in the matter, got appointed as a Prosecuting Officer, whereafter his case came to be handled by one Ms. Farhat, advocate, who was working in the office of the aforesaid advocate. That Advocate Ms. Farhat did not update him [petitioner] about the proceedings and she, for lack of proper experience, did not deal with his case properly resulting in the closure of evidence vide order dated 26-7-2023. That the said fact of closure of evidence in his case was not even intimated to him and he knew about the same when the aforesaid advocate Ms. Farhat returned the brief of the case to him [petitioner] on the ground of her marriage. That he was not present in the court on 26-7-2023, when the evidence in the complaint was closed.

That he is only a matriculate and does not possess the knowledge relating to the Negotiable Instruments Act. That thereafter he filed an application before the Ld. Trial Magistrate seeking recalling/ revisit of the earlier impugned order dated 26.7.2023 for recording the statements of two important witnesses, that is, the concerned Bank Manager and the Postman, who were required to be summoned through trial court. That the Ld. Trial Magistrate through the second impugned order dated 16.12.2024 dismissed his application seeking recalling/revisit of the earlier impugned order dated 26.7.2023.

The impugned orders have been assailed in this petition on the grounds that the provisions of Code of Criminal Procedure, 1973, [now repealed but applicable in the case and hereinafter referred to as the 'Code' for short], are not **inapplicable** to the proceedings of a complaint initiated under Section 138 of N.I. Act to the extent that same are not repugnant or in conflict with the provisions of N.I. Act. That the Trial Magistrate was well within

his powers under Section 311 of the Code to summon material witnesses or recall and re-examine any person already examined whose evidence appears to be essential to the just decision of the case. That the witnesses sought to be examined after recalling of the impugned order dated 26.7.2023, i.e., the concerned Bank Manager and the Postman, were important for the just decision of the case. That the impugned order dated 16.12.2024 has the effect of defeating the ends of justice.

That The counsel who had been engaged by the petitioner/complainant, was subsequently appointed as Prosecuting Officer who allowed his the then junior advocate to handle the case. That the learned junior counsel was not so experienced and did not also update the petitioner about the status of the proceedings. That in the meantime, the COVID-19 infection affected normal functioning of the court, under which circumstances the Ld. Trial Magistrate ought not to have passed the impugned order dated 26-7-2023, closing the evidence of the petitioner-complainant at a stage when the material witnesses were yet to be examined.

That the impugned orders have visited the petitioner/complainant with evil consequences and if such orders will not be set aside, grave injustice will be caused to the petitioner. That the petitioner-complainant is likely to be prevented from proving his prima facie and concrete case in case the material witnesses, that is, the concerned Bank Manager and the Postman are not examined at the proceedings of the complaint. That the petitioner has mentioned the names of the aforesaid witnesses in his complaint.

That the Ld. Trial Magistrate has passed the impugned orders in hot haste, without appreciating the fact that same shall have the effect of miscarriage of justice. That the petitioner is not seeking any order adverse to the other side, but is only seeking the

examination of the important witnesses through the assistance of the court.

3. I have heard the learned counsel for both the parties in respect of the matter and considered their rival submissions. The record of the instant petition has also been perused.
4. As per the impugned order dated 26-07-2023, whereas the Ld. Trial Magistrate proceeded to close the evidence of the complainant, the latter was absent on that day when his counsel was present. Admittedly, no witness was present on that day. Prior to the aforesaid crucial order dated 26-7-2023, also there was representation on the part of the complainant on consecutive preceding hearings. The Ld. Trial Magistrate ought to have passed an alarming order prior to the closure of the evidence of the complainant-petitioner by directing for production of the entire evidence with the stipulation that in case of failure, the court can close the evidence for paving a way for expeditious trial of the case, which appears to have not been done. It is true that the complainant's evidence was awaited since a long period with intervening COVID-19 pandemic.
5. The learned counsel for the petitioner-complainant during his arguments, inter alia, submitted that on the one hand, the COVID-19 pandemic spell intervened during the proceedings of the complaint, and secondly, the counsel representing him got appointed as a Prosecuting Officer, which led to his case being handled by a junior advocate, who also handed over the brief to him [petitioner] on account of her marriage. It was further submitted by the learned counsel that petitioner-complainant was not apprised about the status of the complaint and the requirement for production of evidence by the learned junior counsel.
6. Subsequently, the petitioner-complainant filed an application before the Ld. Trial Magistrate seeking recalling of the earlier impugned order dated 26-7-2023, for the purpose of examination

of his two important witnesses. The scanned record of the trial complaint submitted by the Ld. Trial Magistrate reveals that another application had been filed by the petitioner-complainant through his counsel in terms of the provisions of Section 311 of the Code, seeking the summoning of examination of his two important witnesses. The Ld. Trial Court has, through the second impugned order, dismissed the application of the petitioner-complainant as being meritless. The said impugned order has been passed on the main grounds that the petitioner-complainant failed to produce all his evidence or to seek assistance of the Court in procuring the attendance of any witnesses, despite availing of innumerable opportunities. It was further observed by the Ld. Trial Magistrate that a Magistrate cannot recall his own orders.

7. The learned counsel for the petitioner-complainant, in support of his contentions has placed reliance on the judgment of a coordinate bench of this Court passed in case titled ***“Farooq Ahmad Wani vs. Tariq Ahmad Khan 2024 (2) SLJ HC 837 decided on 06-05-2024, in CRM(M) No. 400 of 2024”***, in which it has been held that power of a court under Section 311 of the Code is intended to enable a court to determine the truth and render a just decision.
8. It has further been held in the said case that rejection of an application for summoning of defense witnesses solely on the ground that the case has been pending for a long period is improper. The Ld. Coordinate Bench of this court in the above-referred judgment has relied upon the judgment of the Hon'ble Supreme Court in ***“Manju Devi versus State of Rajasthan and Anr, 2019 SCC 203”***, in which it has been held that age of a case by itself cannot be decisive when a prayer is made for examination of material witnesses.
9. The learned counsel for the respondent/accused, on the other hand, contended that there is no merit in the petition filed by the petitioner-complainant which deserves an outright dismissal. The

learned Senior Counsel contended that the complainant's evidence in the complaint came to be closed by the Ld. Trial Magistrate when the complainant failed to produce the entire evidence despite availing of innumerable opportunities during a period of more than three years. He submitted that the petitioner-complainant did not apply to the Ld. Trial Magistrate seeking assistance in procuring the attendance of the witnesses who are sought to be produced by the complainant. The learned Senior Counsel submitted that the Ld. Trial Magistrate has assigned reasons for passing of both the orders in paras 3 and 4 of the order dated 16-12-2024. He further contended that the respondent-accused stands unnecessarily tried for a false and frivolous complaint and the trial proceedings have already become oppressive against him. He submitted that the Ld. Trial Magistrate has rightly observed that he cannot recall his own orders.

10. In the light of the perusal of the record of the instant file and the consideration of rival contentions advanced on both the sides, this Court is of the opinion that it may meet the ends of justice in case the impugned orders are set aside so as to provide an opportunity to the petitioner-complainant to produce his two material witnesses-Bank Manager and the Postman concerned, in support of his complaint filed under Section 138 N.I. Act.

Through the impugned order dated 16.12.2024, the Ld. Trial Magistrate has declined to recall its earlier order dated 26.7.2023 on the ground that the complaint was filed on 14.2.2020 and the complainant's evidence was directed to be produced vide order dated 12.10.2021. That the petitioner-complainant did not produce the entire evidence despite innumerable opportunities till 26.7.2023.

It has however *inter alia* been averred by the petitioner-complainant in his petition that he was prevented from producing his entire evidence, especially the two material witnesses needed to

be examined due to intervening COVID-19 pandemic period as also on account of the appointment of his engaged counsel, Mr. Saqib Rasool, as a Prosecuting Officer, who handed over the brief of his case to his junior counsel, who also subsequently got married and returned the brief.

11. As hereinbefore mentioned, there was representation on the part of the petitioner-complainant through his counsel on the crucial date i.e. on 26-7-2023, when his evidence was closed, and also during consecutive preceding hearings. The Ld. Trial Magistrate ought to have passed a binding order for production of entire evidence with the stipulation of closure of the same in case of failure, so that the petitioner-complainant could have been alarmed in respect of his obligation to produce the entire evidence. Secondly, the contention of the Ld. Magistrate, that there is no provision in the Code giving him the power to recall his own orders, does not appear to be justified because the provisions of Section 362 of the Code corresponding to Section 403 of BNSS authorizes a criminal court to alter or review its orders which are not final and dispose of the case. The Ld. Magistrate could have exercised his powers under Section 362 of the Code to recall the order dated 26-7-2023, as there were justified grounds warranting the same.

Further, the provisions of Section 311 of the Code corresponding to Section 348 of BNSS lay down the power of a criminal court to be exercised at any stage of inquiry, trial or other proceeding under the Code/BNSS for summoning any person as a witness or to examine any person in attendance, though not summoned as a witness, or to recall and re-examine any person already examined, if his evidence appears to the court to be essential to the just decision of the case.

12. The provisions of Sections 362 and 311 of the Code cannot be said to be inapplicable to the proceedings of a complaint initiated under Section 138 of the NI Act because most of the sections of Chapter XVII of the Negotiable Instruments Act, 1881, viz., Sections 142, 142(a), 143, 143(a), 144, 145, 147, and 148, start with a *non-obstante clause*, i.e., “notwithstanding anything” meaning thereby that the said provisions apply to the proceedings of a complaint filed under Section 138 of the NI Act despite anything contrary therein to the provisions of the Code of Criminal Procedure. It, at the same time, also means and conveys that the provisions of the Code are not inapplicable in respect of other matters of procedure arising out of a complaint under Section 138 of the NI Act.

Clause 2 of Section 145 of the NI Act independently lays down that 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.

The highest thing that could have happened if the Ld. Magistrate would have allowed the application of the complainant-petitioner, for recalling of the earlier closure order, is that the petitioner-complainant would have been in a position to get his two material witnesses examined in the proceedings of the complaint, which would have, in turn, facilitated a fair, transparent, and just decision of the case.

Courts are respected not for legalizing injustice, but for removing the same. The passing of the impugned orders has led to the filing of the instant petition under Section 528 of BNSS, in which, at the first hearing on 7-2-2025, the basic impugned order dated 26-7-2023 came to be stayed. The orders passed in a casual, hot haste, and cavalier manner, actually delay the proceedings as a consequence thereof.

13. For the foregoing discussion, the instant petition is allowed, and the impugned orders dated 26-7-2023 and 16-12-2024 of the learned Trial Court are set aside. The Ld. Trial Magistrate is directed to allow the petitioner-complainant to produce and examine his two material witnesses i.e., the Bank Manager and the Postman concerned. In case the petitioner-complainant seeks the assistance of the learned trial magistrate in procuring the attendance of his said witnesses the same shall be provided to him.

14. **Disposed of.**

(MOHD YOUSUF WANI)
JUDGE

SRINAGAR
14.08.2026
Shahid Manzoor

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| 1. Whether the judgment is speaking | Yes |
| 2. Whether approved for reporting in
Law Journal/Reporter (print/electronic) | Yes |