IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF MAY, 2022

BEFORE

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

CRIMINAL REVISION PETITION NO.1323/2019 c/w Crl.RP.Nos.1338/2019, 1342/2019, 1403/2019, 1405/2019 & 1352/2019

In Crl.RP.No.1323/2019:

BETWEEN:

Mr. G.H.Abdul Kadri,

…Petitioner

(By Sri. P.P.Hegde, Sr.Counsel
for Smt. H.Pavithra, Advocate)

AND:

Mr. Mohammed Iqbal,

…Respondent

(By Sri. Shobhith N.Shetty, Advocate)

This Criminal Revision Petition is filed under Section 397 of r/w 401 Cr.P.C., praying to set aside the judgment of conviction and the order of sentence dated 04.12.2018 passed by the III Addl. Civil Judge

and J.M.F.C., Udupi in C.C.No.2013/2018 and also to set aside the judgment dated 31.08.2019 passed by the Prl. District and Sessions Judge, Udupi in Crl.A.No.08/2019, dismissing the appeal preferred by the petitioner herein and acquit the petitioner.

In Crl.RP.No.1338/2019:

BETWEEN:

Mr. G.H.Abdul Kadri,

…Petitioner

(By Sri. P.P.Hegde, Sr.Counsel
for Smt. H.Pavithra, Advocate)

AND:

Mr. Mohammed Iqbal,

…Respondent

(By Sri. Shobhith N.Shetty, Advocate)

This Criminal Revision Petition is filed under Section 397 of r/w 401 Cr.P.C., praying to set aside the judgment of conviction and the order of sentence dated 04.12.2018 passed by the III Addl. Civil Judge and J.M.F.C., Udupi in C.C.No.2016/2018 and also to set aside the judgment dated 31.08.2019 passed by the Prl. District and Sessions Judge, Udupi in Crl.A.No.07/2019, dismissing the appeal preferred by the petitioner herein and acquit the petitioner.

In Crl.RP.No.1342/2019:

BETWEEN:

Mr. G.H.Abdul Kadri,

…Petitioner

(By Sri. P.P.Hegde, Sr.Counsel
for Smt. H.Pavithra, Advocate)

AND:

Mr. Mohammed Iqbal,

…Respondent

(By Sri. Shobhith N.Shetty, Advocate)

This Criminal Revision Petition is filed under Section 397 of r/w 401 Cr.P.C., praying to set aside the judgment of conviction and the order of sentence dated 04.12.2018 passed by the III Addl. Civil Judge and J.M.F.C., Udupi in C.C.No.2018/2018 and also to set aside the judgment dated 31.08.2019 passed by the Prl. District and Sessions Judge, Udupi in Crl.A.No.05/2019, dismissing the appeal preferred by the petitioner herein and acquit the petitioner.

In Crl.RP.No.1403/2019:

BETWEEN:

Mr. G.H.Abdul Kadri,

…Petitioner

(By Sri. P.P.Hegde, Sr.Counsel
for Smt. H.Pavithra, Advocate)

AND:

Mr. Mohammed Iqbal,

…Respondent

(By Sri. Shobhith N Shetty, Advocate)

This Criminal Revision Petition is filed under Section 397 of r/w 401 Cr.P.C., praying to set aside the judgment of conviction and the order of sentence dated 04.12.2018 passed by the III Addl. Civil Judge and J.M.F.C., Udupi in C.C.No.2015/2018 and also to set aside the judgment dated 31.08.2019 passed by the Prl. District and Sessions Judge, Udupi in Crl.A.No.09/2019, dismissing the appeal preferred by the petitioner herein and acquit the petitioner.

In Crl.RP.No.1405/2019:

BETWEEN:

Mr. G.H.Abdul Kadri,

…Petitioner

(By Sri. P.P.Hegde, Sr.Counsel
for Smt. H.Pavithra, Advocate)

AND:

Mr. Mohammed Iqbal,

…Respondent

(By Sri. Shobhith N.Shetty, Advocate)

This Criminal Revision Petition is filed under Section 397 of r/w 401 Cr.P.C., praying to set aside the judgment of conviction and the order of sentence dated 04.12.2018 passed by the III Addl. Civil Judge and J.M.F.C., Udupi in C.C.No.2019/2018 and also to set aside the judgment dated 31.08.2019 passed by the Prl. District and Sessions Judge, Udupi in Crl.A.No.06/2019, dismissing the appeal preferred by the petitioner herein and acquit the petitioner.

In Crl.RP.No.1352/2019:

BETWEEN:

Mr. G.H.Abdul Kadri,

…Petitioner

(By Sri. P.P.Hegde, Sr.Counsel
for Smt. H.Pavithra, Advocate)

AND:

Mr. Mohammed Iqbal,

…Respondent

(By Sri. Shobhith N.Shetty, Advocate)

This Criminal Revision Petition is filed under Section 397 of r/w 401 Cr.P.C., praying to set aside the judgment of conviction and the order of sentence dated 04.12.2018 passed by the III Addl. Civil Judge and J.M.F.C., Udupi in C.C.No.2017/2018 and also to set aside the judgment dated 31.08.2019 passed by the Prl. District and Sessions Judge, Udupi in Crl.A.No.10/2019, dismissing the appeal preferred by the petitioner herein and acquit the petitioner.

These Criminal Revision Petitions pertaining to Bengaluru Bench having been heard & reserved on 05.04.2022, coming on for pronouncement this day, the Court sitting at Kalaburagi Bench through video conferencing pronounced the following:

ORDER

All these revision petitions are disposed of by a common order as the parties and the question to be decided are common.

2. The Principal District and Sessions Judge, Udupi, by his common judgment dated 31.8.2019 dismissed Criminal Appeals 5 to 10/2019 preferred by the petitioner herein challenging the judgment of conviction passed by Judicial Magistrate First Class ('Magistrate' for short'), Udupi, in C.C.Nos.

2013/2018, 2015/2018, 2016/2018, 2017/2018, 2018/2018 and 2019/2018. The petitioner being the accused in all these criminal cases faced prosecution for the offence under section 138 of the Negotiable Instruments Act as the cheques issued by him for discharging his liability in connection with the loan said to have been obtained by him from the respondent were dishonoured for want of sufficient funds in his bank account.

3. It has been held by the Magistrate in all the cases that the petitioner did not appear before the court in spite of service of summons on him. Therefore the Magistrate, following the judgment of the Supreme Court in the case of ***Indian Bank Association and Others vs Union of India [(2014) 5 SCC 590],*** accepted the affidavits filed in all the cases by the respondent, dispensed with the statement of the accused under

section 313 Cr.P.C and then proceeded to convict and sentence the petitioner in all the cases. Except referring to the judgments of the Supreme Court in ***Indian Bank Association, T.Vasanthakumar vs Vijayakumari [(2015) 8 SCC 378], K.Subramani vs Damodar Naidu [(2015) 1 SCC 99] and Heinz India Private Limited vs State of Uttar Pradesh [(2012) 5 SCC 443],*** the learned Magistrate has not discussed the facts and the evidence.

4. The learned Sessions Judge has held that from the evidence given by the complainant and the documents produced by him, a case against the petitioner/accused was made out. The Sessions Judge has observed that as it is held in various judgments that offence under section 138 is a document based offence and therefore there is no need for waiting for the accused to appear before

the court, the trial court is justified in convicting the petitioner in all the cases.

5. Sri P.P.Hegde, learned senior counsel for the petitioner, assailing the judgment of the Sessions Court as also of the Magistrate urged the following grounds for consideration in these revision petitions : -

5.1. The trial court erred in holding the trial in the absence of the accused; unfortunately the Sessions Court also affirmed the findings of the trial court without noticing the fact that the accused was not secured at all. Criminal trials must be held in the presence of the accused unless the accused seeks exemption of his personal appearance.

5.2. Section 143 of the Negotiable Instruments Act provides for summary trial and it is clearly mentioned in the said section that the procedure prescribed in sections 262 to 265 of the

Code of Criminal Procedure shall apply for conducting trials. In this view, recording plea of the accused under section 251 of Cr.P.C is compulsory. Since the trial court has not followed this procedure, the judgment of conviction violates the concept of due procedure of law found in Article 21 of the Constitution of India.

5.3. The trial court has referred to many judgments of the Supreme Court, but it has failed to understand the actual principles laid down in them. The Sessions Judge, sitting in appeal, should have meticulously examined whether the judgment of the trial court challenged before him could actually be sustained. Even the approach of the Sessions Judge appears to be very mechanical.

5.4. If the accused does not respond to the summons issued by the Magistrate, his presence must be secured by issuing warrant or proclamation. The judgment of the Supreme Court

in ***Indian Bank Association*** does not state that the trial can be held in the absence of the accused, there is no concept of placing the accused ex-parte as is prevalent in civil trials. Examination of the accused under section 313 Cr.P.C is also mandatory and it can be dispensed with only in summons trials if the personal appearance of the accused is exempted. This is not the case here. Thus both the courts have failed to follow the procedure and thereby deprived the accused of an opportunity to defend himself. In this view, all the petitions require to be allowed and the judgments of the appellate court as also the trial court are to be set aside and the trial court be directed to hold fresh trial.

6. Sri Shobhith N Shetty, learned counsel for the respondent in all the cases, argued that actually summons was served on the accused, he did not appear before the court and in this view

the trial court had to proceed further in his absence. The Magistrate has followed the procedure laid down by the Supreme Court in ***Indian Bank Association***. There is no legal infirmity in the judgment of the trial court which has been rightly confirmed by the appellate court. Therefore the petitions are to be dismissed.

7. I have carefully considered the arguments of the learned counsel for the parties. The judgment of the sessions court in the appeal, as has been already observed, is since mechanical affirmation of the findings of the trial court, it is better to examine the findings recorded by the trial court.

8. In the beginning itself, unhesitatingly, it can be stated that the judgment of the trial court is a very good example as to how justice suffers if the judges blindly place reliance on case law without understanding the true purport of the

principles laid down in those decisions with utter disregard for the first principles of law.

9. The reasoning portion of the judgment of the trial court starts from para 16. The trial court has drawn presumption in favour of the respondent under sections 118 and 139 of the Negotiable Instruments Act observing that the petitioner being the accused failed to rebut the evidence given by the respondent. Following the judgment of the Supreme Court in the case of ***Indian Bank Association***, the trial court adopted the affidavit filed by the respondent at the inception as sufficient compliance of evidence to be adduced post summons stage, and of course there is no legal infirmity in it. But the trial court has proceeded on the ground that the Hon'ble Supreme Court in the case of ***Indian Bank Association*** has held that there is no need to secure the presence of the accused. This is the wrong committed by

the trial court. If the entire judgment of the Supreme Court in the said case is read, no where it is found that in case the accused fails to appear before the court having received summons, the trial can be held in his absence. In the guidelines the Hon'ble Supreme Court has set out, guideline Nos.2,3 and 4 read as below:

> *"23.2. MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The Court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.*
>
> *23.3. Court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if*

such an application is made, the Court may pass appropriate orders at the earliest.

23.4. 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 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for re-calling a witness for cross-examination."

10. The above observations clearly indicate that summons must be sent to the proper address of the accused and that the summons may also be served by sending it to the email address of the accused; and in appropriate cases, the assistance of the police or the near by court may be sought for service of summons. It is further stated that if the summons served is received back unserved, immediate follow up action must be taken. That

means, if summons is not served, the reason for non-service must be ascertained and then summons may be re-issued or warrant may be issued. This para does not indicate that if the accused does not appear before the court in spite of service of summons on him, the trial can be held in his absence. Contextually, reliance may be placed on the judgment of the Division Bench of this court in ***M/s Mac Charles (I) Limited vs Chandrashekar and Another [ILR 2005 KAR 3648],*** where it is held :

> *"9. …… The Rule enacted in this Section makes it imperative that all evidence in an inquiry or trial shall be taken in the presence of the accused. That being so, no exparte decision regarding the guilt or otherwise of the accused can be recorded in the absence of the accused. This being the clear position of law in case of criminal trials, it is to be held that no criminal trial where the plea of the accused has to be*

recorded, the evidence has to be taken at a trial and the accused if found guilty will have to be convicted and sentenced either with imprisonment or fine, could be effectively held in the absence of the accused. In other words, the exparte procedure as prescribed under the civil law is unknown to criminal law. In this view of the matter, our answer to Question No. 3 must necessarily be in the negative."

11. Chapter XXIII of Code of Criminal Procedure deals with evidence in inquiries and trials and this chapter is applicable irrespective of the nature of trial, whether it be summary or summons or warrant or sessions. Section 273 which is a part of Chapter XXIII clearly states as below:

"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.

***Explanation**.- In this section," accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."*

Reading of this section makes it very clear that the evidence must be taken in the presence of the accused and it may be recorded in the absence of the accused if it is expressly provided in Cr.P.C. If the personal attendance of the accused is dispensed with, evidence may be recorded in the presence of the pleader of the accused. The only provision that provides for recording of evidence in the absence of the accused is section 299. Therefore it is clear that except under Section 299, evidence cannot be recorded for any other reason in the absence of the accused.

12. In the case on hand, it is not in dispute that the petitioner did not appear before the court. If the petitioner did not appear having received summons, the trial court ought to have issued warrant and then proclamation for securing his presence. The records do not disclose any such effort being made by the trial court to secure the presence of the accused. This is the blatant error that can be pointed out from the judgment of the trial court. It is trite to observe here that in the Code of Criminal Procedure, there is no provision for keeping an accused ex parte similar to one found in Code of Civil Procedure which provides for placing a defendant ex parte if there is due service of summons or notice on him. The reason may perhaps be due to requirement that trial is to be held in the presence of the accused. If for any reason the presence of the accused cannot be secured despite exhausting every mode of service, especially in relation to offences under special

laws, including Negotiable Instruments Act and if evidence is to be recorded in the absence of the accused, law requires to be amended. The legislature must think of bringing suitable amendment to Code of Criminal Procedure or to the special law to enable the court to conduct the proceedings in the absence of the accused. The amendment, perhaps, may deter unscrupulous elements who would resort to avoiding service of summons or execution of warrant against them.

13. The trial court has then dispensed with examination of the accused under section 313 of Cr.P.C. The accused did not appear and examining him under this section did not arise. But the trial court has given some reasons again based on the judgment in ***Indian Bank Association.*** The appellate court holds that the conclusion of trial court to dispense with recording of statement under section 311 Cr.P.C is also supported by

another judgment of the Supreme Court in the case of ***Basavaraj R Patil and Others vs State of Karnataka and Others [(2000) 8 SCC 740]*** and of the coordinate Bench of this court in ***M/s Cheminova India Limited vs Jajee Pesticides and Others [ILR 2013 KAR 5395].*** Therefore appellate court is also of the view that recording of statement of the accused under section 313 Cr.P.C can be dispensed with.

14. Now if these decisions are read, ***Indian Bank Association*** does not discuss the aspect of examining the accused under section 313 Cr.P.C; and it has given certain directions for the trial of the cases under section 138 of Negotiable Instruments Act. In ***Basavaraj R Patil***, the discussion pertains to alternative mode of obtaining statement of accused without securing his personal presence. What is held is :

"24. We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall in clause (b) to Section 313(1) 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, e.g., 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 a substantial manner. How this could be achieved?

25. 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 sworn to by the accused himself containing the following matters: (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers. (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning. (c) An undertaking that he would not raise any grievance on that score at any stage of the case."

Therefore it is clear that ***Basavaraj R Patil*** does not dispense with examination of the accused under section 313 Cr.P.C.

15. The facts in ***Cheminova India Limited*** show that the trial court dispensed with the examination of the accused under section 313

Cr.P.C, but that aspect did not actually emanate for discussion before the coordinate bench. The scope of section 145 of Negotiabie Instruments Act was the point of discussion and no where it is held that examination of the accused under section 313 Cr.P.C can be dispensed with. Thus it is clear that both the courts below have misapplied the principles laid down in the above referred decisions.

16. Conclusion therefore is that trial cannot be held in the absence of an accused unless personal appearance is dispensed with for valid reasons and there cannot be dispensation of examination of an accused under section 313 Cr.P.C if incriminating evidence appears in the evidence of the witness. Speedy trial does not take the meaning of jumping the stages in criminal trial. In view of this discussion, I hold that all these revision petitions deserve to be allowed for

the purpose of disposal of all the cases afresh by the trial court. Hence, the following :

ORDER

The revision petitions are allowed.

(i) Judgment dated 31.8.2019 in Criminal Appeals 5 to 10/2019 on the file of Principal District and Sessions Judge, Udupi, is set aside, consequently the appeals are allowed, the judgments of III Addl. Judicial Magistrate, First Class, Udupi, in C.C.Nos. 2013/2018, 2015/2018, 2016/2018, 2017/ 2018, 2018/2018 and 2019/2018 are set aside, and all the cases are remanded to the court of III Addl. Judicial Magistrate, First Class, Udupi, for disposal afresh.

(ii) The parties are directed to appear before the Magistrate Court on **27.6.2022,** and that the accused subject to provision as to bail after his appearance before the

Magistrate, is given liberty to apply under section 145 of Negotiable Instruments Act for cross-examining the complainant and his witnesses. He is also given liberty to adduce defence evidence. The respondent – complainant can also adduce further evidence if necessary.

(iii) The accused shall pay cost of Rs.2,000/- to the complainant in each case.

(iv) The trial court shall expedite the trial.

Sd/-
JUDGE

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