

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

Reserved on: 12.06.2021
Pronounced on: 15.07.2021

CRMC No.10/2019 [CRM(M) No.10/2019]

Abdul Majeed Dar

...PETITIONER(S)

Through: None

Vs.

Javid Ahmad Bhat

....RESPONDENT(S)

Through: Mr. Hilal A. Wani, Advocate

CORAM:HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1) The petitioner herein is accused in a complaint filed by the respondent under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter "the Act") before the Chief Judicial Magistrate, Ganderbal ("the trial Court"). When the trial Court took up the complaint for final disposal after both sides had adduced their evidence, it was found that at the time of commencing the trial statement of the accused under Section 242 of the Code of Criminal Procedure ("the Code") had not been recorded. The trial Court brought this fact to the notice of the learned counsel appearing for the parties. Learned counsel for the petitioner submitted before the trial Court that there was no need to record his statement under Section 242 of the Code nor the same could be recorded when the trial

had already reached its final stage. He further submitted that failure to record statement of the accused under Section 242 of the Code is defect, which is fatal to the complaint and the trial court has no option but to dismiss the complaint. Learned counsel for the petitioner, therefore, urged the trial Court to acquit the petitioner. *Per contra*, learned counsel appearing for the respondent submitted that omission pointed out could not be made a ground for dismissal of the complaint and acquittal of the petitioner otherwise than on merits. The trial Court allowed the learned counsel for the parties to debate the issue.

2) The trial Court after hearing the rival contentions came to the conclusion that failure to record statement of the accused under Section 242 of the Code was a curable defect and that the statement of the accused could still be recorded before the matter is taken up for final consideration, accordingly, fixed the complaint for recording statement of the accused i.e. petitioner herein.

3) Feeling dissatisfied and aggrieved by the order of the trial Court dated 10.11.2018, the petitioner filed a revision petition before the Principal Sessions Judge, Ganderbal (hereinafter “the Revisional Court”). The Revisional court concurred with the view taken by the trial Court and vide its order dated 26.12.2018 dismissed the revision petition and, thus, paving the way for the trial Court to proceed to record the statement of the petitioner under Section 242 of Code and conduct further proceedings as per the procedure prescribed therefor. It is this order of the Revisional Court as well as order dated

10.11.2018 passed by the trial Court, which are assailed by the petitioner by invoking the inherent powers of this Court vested under Section 561-A of the Code.

4) Heard learned counsel for the respondent and perused the record.

5) Of late there has been no representation on behalf of the petitioner. On 28.08.2019, 15.01.2020 and 16.12.2020 there was no representation on behalf of the petitioner. As a matter of fact, in order dated 16.12.2020, this Court directed listing of the case “for dismissal” on 29.03.2021. It is because of this order, Mr. Wani Manzoor, Advocate caused appearance for the petitioner and made a statement that he was recently engaged and, therefore, matter be adjourned. On his request, the matter was adjourned and listed today for consideration. Today, when the case was called twice before and after break, nobody turned up to represent the petitioner. Be that as it is, the disposal of the revision petition raising a short point cannot be left at the mercy of the petitioner.

6) The issues involved for adjudication in this revision petition are: -

- i) Whether non-recording of statement of accused under Section 242 of the Code is fatal to the case, even if the accused seeking benefit of such omission has not suffered any prejudice on such account?and ;

- ii) Whether statement of the accused under Section 242 of the Code can be recorded even after the evidence in the complaint has been led and the matter is fixed for final consideration?

7) As is provided under Section 143 of the Act, complaint under Section 138 may be tried summarily notwithstanding anything to the contrary contained in the Code. In terms of Section 262 of the Code, while trying the complaint summarily the Court shall only follow the procedure prescribed for summons cases except as mentioned in Sections 263 to 265 of the Code. In a case triable as a summons case, the moment an accused appears or is brought before the Magistrate, particulars of the offence of which he is accused are required to be stated to him and he would be asked if he has any cause to show cause as to why he should not be convicted, however, it shall not be necessary to frame formal charge. This is so provided under Section 242 of the Code, which for facility of reference is reproduced hereunder: -

“242. Substance of accusation to be stated

When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.”

- 8) It is only, if the accused admits that he has committed the offence of which he is accused, his admission shall be recorded and if

he fails to show any sufficient cause as to why he should not be convicted, the Magistrate may convict him accordingly. This is so provided in Section 243 of the Code. However, in a case where accused does not admit the charge, the Magistrate shall proceed to hear the complainant, if any, and take all such evidence as may be produced in support of prosecution and shall also hear the accused and take all evidence as he produces in his defence. Section 244 of the Code makes such provision in the Code.

9) Admittedly, in the instant case the trial Court at the relevant point of time omitted to record statement of the accused/petitioner under Section 242 of the Code and proceeded to record the evidence of the complainant and the evidence of the accused in defence. Never ever before the trial Court it was pointed out by the petitioner nor he ever raised any objection in this regard. It is not a case of the petitioner that had the substance of accusation put to him at the beginning of the trial in terms of Section 242 of the Code, he would have admitted the charge. The fact that he participated in the trial and contested the same on merits, clearly indicates that non-recording of statement of the petitioner under Section 242 of the Code has not caused any prejudice to the petitioner. It is true that recording of statement under Section 242 of the Code is an important aspect of trial in summons cases and it provides an opportunity to the trial Court to terminate the proceedings at its inception, if accused admits that he has committed the offence of which he is accused. However, where the accused does not admit the accusation, the trial Court shall proceed

and hear the complainant and take all such evidence, as may be produced in support of the prosecution. The trial Court shall also hear the accused and take all such evidence as he produces in his defence.

10) All this has happened in the instant case, as per the procedure prescribed under the Code. It is, thus, clear case where omission to record the statement of the petitioner under Section 242 of the Code has not caused any prejudice to the petitioner. At least, the petitioner has not pleaded or demonstrated any such prejudice. His only submission that failure to record the statement of the accused under Section 242 of the Code vitiates the whole trial and, therefore, the complaint is liable to be dismissed is without any substance.

11) Omission to record the statement of accused under Section 242 of the Code is a mere irregularity curable under Section 537 of the Code, unless such irregularity has occasioned failure of justice. The petitioner has not been able to demonstrate as to how omission by the trial Court to record his statement under Section 242 of the Code has occasioned any failure of justice or that the failure of the trial Court to record his statement under Section 242 of the Code has caused any prejudice to him. It is a case where notwithstanding that statement of accused was not recorded under Section 242 of the code, the trial has been conducted substantially in the manner prescribed by the Code but some irregularity occurred in the course of such conduct, which is curable under Section 537 of the Code. Distinction between an illegality and irregularity is one of degree rather than of kind. In the

absence of any prejudice to the petitioner or demonstrated failure of justice, the omission to record statement of the accused under Section 242 of the Code cannot be held to be an illegality fatal to the validity of the trial.

12) The object of recording statement under Section 242 of the Code, as already discussed above, is to provide an opportunity to the accused to admit the charge and get the trial concluded at the inception. However, in a case where the accused decides to contest the accusation, recording of statement under Section 242 of the Code pales into insignificance. In the instant case, the trial Court could have proceeded to decide the matter finally on the basis of evidence on record notwithstanding its omission to record the statement under Section 242 of the Code at the relevant stage. Otherwise also, accepting the contention of the petitioner that omission of the Court to record his statement under Section 242 of the Code has vitiated the trial and, thus, renders the complaint liable to be dismissed, would be tantamount to punishing the complainant for no fault of his.

13) That apart, in the instant case, the maxim “**actus curiae neminem gravabit**”, which means that “the act of Court shall prejudice no one”, is fully attracted. Omission to record statement under Section 242 of the Code is attributable to the Court and no prejudice on account of such omission can be caused to the complainant. If that be the position, it does not lie in the mouth of the petitioner that the omission by the trial Court to record his statement

under Section 242 of the Code has vitiated the trial and that he is entitled to acquittal in the mater.

14) In the instant case, the trial Court as well as the Revisional Court have even gone to the extent of permitting the recording of statement under Section 242 of the Code at this stage with further observation that its impact on the evidence already recorded shall, thereafter, be examined. The petitioner should have felt more than satisfied but in a bid to come out of the accusation on mere technicality, the petitioner has ventured to bring the matter before this Court, which was not called for at all.

15) For the foregoing reasons, I find no merit in this petition, the same is, accordingly, dismissed.

(Sanjeev Kumar)
Judge

Srinagar
15.07.2021
"Vinod, PS"

Whether the order is speaking: **Yes**
Whether the order is reportable: **Yes**