

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

CRM(M) No. 134/2023

Emaad Muzaffar Makhdoomi  
Through: Mr Hakim Suhail Ishtiaq, Advocate

...Petitioner(s)

**Vs.**

Vikar Ahmad Bhat  
Through: Mr Saleem Jehangir, Advocate for caveator/respondent.

...Respondent(s)

**CORAM:**

**HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE**

**ORDER**

07.04.2023

**(ORAL): -**

1. The instant petition has been filed by the petitioner under and in terms of Section 482 of the Criminal Procedure Code, 1973, (for short 'the Code) seeking quashment of orders dated 01.12.2022, 13.02.2023 and 06.03.2023 (for short 'the impugned orders') passed by the Court of City Judge/Judicial Magistrate 1<sup>st</sup> Class Srinagar, (for short 'the Magistrate), in case titled as "*Vikar Ahmad Bhat Vs. Emaad Muzaffar Makhdoomi*"

**Brief Facts:**

- A complaint alleging commission of the offences under Section 138 of the Negotiable Instrument, 1881, (for short 'the Act') came to be filed by the respondent herein against the petitioner herein on 18.04.2022 before the Magistrate.
- Upon taking cognizance of the said complaint, the Magistrate summoned the accused petitioner herein and the accused petitioner herein thereafter claimed to have entered appearance through his counsel, who had sought time to present the petitioner, however, later expressed his inability to appear before the Magistrate owing to death threats received by the petitioner as evaluated by the CID wing of the J&K Police

followed by his categorization and consequently counsel for the petitioner sought leave of the Court to appear on behalf of the petitioner herein for recording of the statement under Section 251 of the Code as also in further proceedings.

- The Magistrate instead of considering the plea of the counsel for the petitioner issued warrants against the petitioner followed by order dated 01.12.2022 issuing a proclamation against the petitioner under Section 82 of the Code requiring the petitioner to appear before him on 02.02.2023.
- On 13.02.2023, the Magistrate yet, issued fresh proclamation requiring the petitioner to appear before him on 06.03.2023 and in terms of the same order directed the Tehsildar to attach the property of the petitioner.
- The order dated 06.03.2023 passed by the Magistrate came to be followed by another proclamation/order requiring the petitioner to appear before him on 07.04.2023 besides simultaneously directing the Deputy Commissioner Srinagar, to attach all the immovable properties of the petitioner.

**Heard counsel for the petitioner as well as counsel for the caveator/respondent.**

2. Having regard to the nature of controversy involved in the petition and the submissions made by appearing counsel for the parties, the instant petition is taken up for final disposal at this stage with the consensus of appearing counsel for the parties.
3. Before advertng to the issues raised in the petition the provisions of Sections 251 and 317 of the Code being relevant and germane herein need to be referred hereunder: -

Section 251 provides as under: -

251. Substance of accusation to be stated.— When in a summons-case 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 whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge.

A perusal of the above Section would show that in a summons case when the accused appears or is brought before the Magistrate, the particulars of the offences has to be put to him and asked whether he pleads guilty or has any defence to make. It is not necessary to frame formal charge by the Magistrate. The object of the Section seemingly is only to the extent of apprising the accused person with the particulars of the offence/s that is alleged against him and it is only to enquire from him whether he pleads guilty or has any defence to make. The appearance of the accused can either be personal or through his advocate as is provided under Section 205 of the Code which empowers the Magistrate to dispense with personal attendance of the accused, if he sees reason so to do and permit him to appear by his pleader

Section 317 reads as under: -

317. Provision for inquiries and trial being held in the absence of accused in certain cases. (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

Section 317 of the Code supra has to be viewed in the above perspective as it empowers the Magistrate to dispense with the personal appearance of the accused (provided he is represented by a counsel in a case) even for proceeding with further steps in the case,

however, with a caveat that the said benefit can be extended to an accused who gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case and that a counsel in his behalf would be present in the Court and that he has no objection in taking evidence in his absence as this precaution is necessary for the further progress of the proceedings including examination of the witnesses.

The position, therefore, boils down to this, that it is within the powers of the Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal appearance would itself inflict enormous suffering or tribulations to him and the comparative advantage would be less. Such discretion needs to be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons, the Magistrate feels that dispensing with the personal appearance of the accused would only be in the interest of justice. However, the Magistrate who grants such concession to the accused must have to grant the same subject to the aforesaid riders as a matter of course.

In regard to above a reference to the judgement of the Apex Court passed in case titled as **“Bhaskar Industries Limited Vs. Bhiwani Denim and Apparels Ltd., and Ors”**. reported in **2001 (7) SCC 401**, would be relevant wherein at paras 16, 17 and 18 following has been held: -

*16. Section 251 is the commencing provision in Chapter XX of the Code which deals with trial of summons cases by magistrates. It enjoins on the court to ask the accused whether he pleads guilty when the “accused appears or is brought before the magistrate”. The appearance envisaged therein can either be by personal attendance of the accused or through his advocate. This can be understood from [Section 205\(1\)](#) of the Code which says “whenever a magistrate issues a summons, he may, if he*

sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader”.

17. Thus, in appropriate cases the magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. [Section 317](#) of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, on precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

18. A question could legitimately be asked - what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with) does not appear or that the counsel does not co-operate in proceeding with the case? We may point out that the legislature has taken care for such eventualities. [Section 205\(2\)](#) says that the magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceedings. The last limb of [Section 317\(1\)](#) confers a discretion on the magistrate to direct the personal attendance of the accused at any subsequent stage of the proceedings. He can even resort to other steps for enforcing such attendance.

4. Reverting back to the case in hand the perusal of the record tends to show that the complaint before the Magistrate came to be filed on 18.04.2022 and almost a year has passed and trial has seen no

progress. Instead, during the period the personal appearance of the accused petitioner herein has been sought to be enforced by resorting to coercive measures by the Magistrate despite the fact that his counsel has been continuously appearing before him. It is in this view of the matter as well that the petition is taken up for final disposal at this stage as also having regard to the fact that the proceedings pending before the Magistrate pertain to complaint arising out of the Negotiable Instrument Act, 1881, as otherwise retaining of the petition in this Court would further result into delaying the disposal of the case pending before the Magistrate.

5. In light of what has been observed, considered and analyzed herein above the exercise of inherent power is indisputably necessitated in this case. Accordingly, the petition is disposed of in the following manner.

(i) impugned orders 01.12.2022, 13.02.2023 and 06.03.2023 passed by the Court of City Judge/Judicial Magistrate 1<sup>st</sup> Class Srinagar, are set aside.

(ii) The trial Court is directed to proceed in the complaint without seeking personal appearance of the accused petitioner subject to the conditions that the accused petitioner is represented by an advocate and that the accused petitioner submits an undertaking before the Magistrate on next date of hearing to the effect that he would be represented by the advocate and whatsoever the advocate represents before the Magistrate will be accepted by him.

6. **Disposed of.**

7. In view of urgency expressed by counsel for the petitioner, a copy of this order be provided to him under the seal and signature of Bench Secretary of this Court.

**SD/-  
HON'BLE JUDGE**

**SRINAGAR**  
07.04.2023

*Whether approved for reporting*      *Yes*