

**CJ & SVSJ:**

03.06.2020

(through video conferencing)

**W.P.No.7338/2020**

1. With the assistance of the learned counsel who are present today and who were present on the last date, we have gone into two issues which have great deal of relevance in the present day situation. We are dealing with the legal issues which arise during the days of limited functioning of the Courts and even otherwise, the resolution of the legal issues will help the Advocates and litigants.

2. The first issue is whether the personal presence of the complainant is necessary when a complaint reduced into writing is sought to be filed by him in the Court of learned Magistrate. This issue will arise in all categories of such complaints. The other issue which arises is in the context of the complaints under Section 138 of the Negotiable Instruments Act, 1881 (for short 'NI Act'). The question is whether examination upon oath of the complainant as contemplated under Section 200 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C') can be done on the basis of an affidavit of the complainant or affidavit of an authorized representative of the complainant.

3. The next issue which we have examined is whether the personal presence of a party who files a proceeding under the Family Courts Act, 1984 (for short 'Family Courts Act') is mandatory at the time of filing the proceedings. This is in the light of Section 13 of the Family Courts Act, which lays down that no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner.

4. Another issue which arises is when a petition for seeking divorce by mutual consent is filed, whether appearance of both the parties before the Family Court at the time of filing the petition is necessary. As a corollary to this, another issue which arises is when summons is issued in the proceedings filed before the Family Court to the defendant/respondent, whether the personal appearance of the defendant/respondent is mandatory.

5. There are wider issues which arise about conduct of various stages of proceedings in the Family Court through video conferencing with which we are not dealing at this stage. As far as the issues as regards the Family Courts which are noted above are concerned, in view of the two decisions of this Court, perhaps elaborate discussion on these issues may not be

necessary, as according to us, the issues stand concluded. The first decision is of the learned Single Judge in the case of ***MRS. KOMAL S PADUKONE VS THE PRINCIPAL JUDGE***<sup>1</sup>. The learned Single Judge has formulated points for consideration in paragraph 6.1 which read thus:

**“6.1.** The following questions arise for consideration.

- a) **Whether a party cannot seek exemption from personal appearance and permission to engage counsel, unless he/she appears in person before the Family court.**
- b) **Whether a respondent who is unable to appear personally or who does not appear personally, has no right to contest a proceedings before Family Court.**
- c) Whether the Family court having granted permission to the petitioner before it, to engage a legal practitioner, deny such permission to the respondent in the same proceedings.”

(emphasis supplied)

6. After considering the provisions of the Family Courts Act as well as the provisions of the Code of Civil Procedure, 1908 (for short ‘CPC’), the learned Single Judge has recorded his conclusion in paragraph 13 which reads thus:

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<sup>1</sup> ILR 1999 KAR 1866

**“13.** A combined reading of the Act and the Rules with relevant provisions of CPC make the following evidence:

- (i) A petition to the Family Court may be presented by a petitioner either in person or through an Authorised Agent. The petition may be presented even by an Advocate as an Authorised Agent. But, if the petitioner wants ‘representation’ by a legal practitioner, he/she should seek and obtain the permission of the Family Court.**
- (ii) A respondent, who is served with notice of the proceedings, may either appear in person or enter appearance through an authorised Agent [including a Legal Practitioner]. But, if the respondent wants to be represented by a legal practitioner in the proceedings, he/she should seek and obtain the permission of the Family Court.**
- (iii) In regard to proceedings before the Family Court, ‘entering appearance’ in response to a notice/summons through an Authorised Agent (including a Legal Practitioner), is different from being represented in the proceedings by a legal practitioner.**
- (iv) While representation through legal Practitioner without permission is barred, entering appearance in a case, in response to a notice/summons, through a legal practitioner is not barred, if a Legal Practitioner, having entered appearance, wants to represent party in the proceedings, permission of the Family Court should be obtained for such representation.**

- (v) When one party has been permitted to be represented by a legal Practitioner, such permission cannot under any circumstances, be denied to the other party.
- (vi) The Authorised Agent (or the Legal Practitioner permitted to represent a party) can prosecute or defend the proceedings and represent the party unless and until the Family Court makes a specific order to the parties to appear in person, either on a specified date or on further hearing dates, depending on the facts of the case and stage of the case. Once an order for personal appearance has been specifically made, a party will have to seek exemption from appearance, if he/she is not able to appear in the matter.
- (vii) Where a Family Court has a large back log of cases, and there is no possibility of taking up all cases, listed on a day, it may restrict the requirement of personal appearance of parties to specified stages like conciliation and evidence.
- (viii) Where it is possible to do so, consistent with the nature and circumstances of the case, the Family Court, either directly or through counsellors, in the first instance, assist and persuade the parties in arriving at a settlement in respect of the subject matter of the proceedings.”

(emphasis added)

7. There is also a decision of Division Bench of this Court in the case of **CYPRIAN D'SOUZA VS SMT. RENE D'SOUZA**<sup>2</sup>.

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<sup>2</sup> ILR 2002 KAR 5145

Though the appeal before this Court arose out of an order passed on the application filed under Order VII Rule 11 of CPC, the Division Bench had an occasion to go into all the procedural aspects. In fact, in paragraph 6, the Division Bench has extensively quoted with approval the view taken by the learned Single Judge in the case of **KOMAL S PADUKONE**. Ultimately, in paragraphs 7 and 8 of the decision, the Division Bench held thus:

**“7. While these Sections do not mandate that the petitioner should present the petition in person and should be present before the Court at the first hearing, on the other hand, sub-section (2) of Section 20 positively enable the contents of a petition to be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints and may, at the hearing, be referred to as the evidence. As noticed above, Section 21 provides for adopting the procedure under the Code of Civil Procedure, 1908.**

**8. There is no scope for inference that a petition presented through an authorised agent, becomes such an improper presentation warranting the rejection of the petition itself.”**

(emphasis added)

8. On a conjoint reading of both the decisions, according to us, the legal position is crystal clear. When a petition is filed to the Family Court, it can be presented by the petitioner either in person or through an authorized agent. The petition may be

presented by an advocate as an authorized agent of the petitioner. Therefore, a petitioner can file a petition in the Family Court through an advocate acting as an authorized agent. In such a case, the personal presence of the petitioner at the time of presentation of the petition cannot be insisted upon. The petition can be accompanied by an application seeking permission to be represented by the advocate who has filed the petition as an authorized agent. The learned Judge of the Family Court can always pass an appropriate order on such application for grant of permission to engage the same advocate so that the advocate who files the petition as an authorized agent can continue to represent the petitioner as an Advocate. The same principles will apply to a respondent who is served with a notice of proceedings before a Family Court. The respondent may either appear in person or enter appearance through an advocate in his capacity as an authorized agent. The respondent can also file an application for grant of permission to engage services of an advocate.

9. When a joint petition for divorce by mutual consent is presented by the parties for seeking a decree of divorce by mutual consent before a Family Court, both the husband and

wife will be in position of the petitioners and therefore, the same principles which are laid down above will apply.

10. Therefore, we hold that there is no legal basis for the practice adopted by some of the Family Courts in the State when they insist on personal presence of the petitioner or petitioners at the time of filing the cases. Their personal presence is not required when a petition is presented by an advocate as an authorized representative of the petitioner or petitioners. In the same way, when a notice of proceedings filed in the Family Court is served, on the returnable date, the Family Court cannot insist on personal presence of the respondent when the respondent enters appearance through a legal practitioner as an authorized agent.

11. Now, we come to the issue of presence of the complainant when a complaint in writing which is governed by Section 200 of Cr.P.C is filed in the Court of a Judicial Magistrate. For that purpose, it is necessary to look at the provisions of the Cr.P.C. Under Chapter XIV, under the heading "Conditions requisite for initiation of proceedings", there are relevant provisions starting from Section 190. Section 190 deals with the power of any Magistrate of the first



class or any Magistrate of the second class specially empowered under sub-section (2) of Section 190 of Cr.P.C to take cognizance. Clause (a) of sub-section (1) of Section 190 of Cr.P.C provides that cognizance can be taken upon receiving a complaint of facts which constitute such offence. Obviously, such complaint can be a complaint in writing. Section 200 in Chapter XV of Cr.P.C provides that a Magistrate taking cognizance of an offence on a 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. There are two exceptions to this Section. The first exception is in clause (a) which is in two cases. (i) a complaint filed by a public servant acting or purporting to act in discharge of his official duties and (ii) a complaint filed by a Court. Another exception which is carved out is in a case of a complaint filed alleging commission of an offence punishable under Section 138 of the NI Act.

12. We find no provision in Cr.P.C which makes mandatory the presence of a complainant who files a written complaint as contemplated by clause (a) of sub-section (1) of Section 190 at

the time of filing of the complaint in the Court of a learned Magistrate when he is represented by an advocate who files *vakalath* along with the complaint. As far as the requirement of the Magistrate examining a complainant on oath in accordance with Section 200 of Cr.P.C is concerned, except in cases governed by clauses (a) and (b) of the proviso to Section 200 and the complaints alleging offences punishable under Section 138 of NI Act, the examination of the complainant upon oath as per Section 200 is mandatory.

13. As far as the complaint alleging an offence under Section 138 of the NI Act is concerned, it is governed by a special procedure as provided in NI Act and especially, Section 145 there of which overrides the provisions of Cr.P.C by providing that 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 proceedings under Cr.P.C.

14. In the case of ***A.C.NARAYANAN vs. STATE OF MAHARASHTRA AND ANOTHER***<sup>3</sup>, the Apex Court while dealing with the issue of the complaint filed by a power of attorney

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<sup>3</sup> (2014) 11 SCC 790

holder has dealt with the issue in relation to Section 200 of Cr.P.C. In paragraph 29, the Apex Court held thus:

***“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.”***

15. There is one more decision of the Apex Court on the issue of procedure to be followed during the trial of a complaint under NI Act. That is in the case of **METERS & INSTRUMENTS PVT. LTD. vs. KANCHAN MEHTA**<sup>4</sup> which deals with the issue of conducting entire proceedings of the complaint online. It holds that it is open for the High Courts to consider and lay down a category of cases, which can be conducted online by the designated Court or otherwise. This decision expects the High Courts to issue the directions dealing with the cases under Section 138 of NI Act. We will consider the question of issuing directions in terms of the said decision for online conduct of the proceedings of a complaint alleging offence under Section 138 of NI Act.

16. As far as the statement of the complainant under Section 200 of Cr.P.C is concerned apart from the decision in the case of **A.C.Narayanan**, there is another decision of the Apex Court in the case of **INDIAN BANK ASSOCIATION. vs. UNION OF INDIA**<sup>5</sup> wherein, the Apex Court in the context of the complaint under Section 138 of NI Act held that the affidavit filed by the complainant along with the complaint for taking cognizance of the offences is good enough be read in evidence at both the

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<sup>4</sup> (2018) 1 SCC 560

<sup>5</sup> (2014) 5 SCC 590

stages, that is, pre-summoning stage and post-summoning stage. In fact, in paragraph 23.1 of the said decision, the Apex Court has observed that the Metropolitan Magistrate/Judicial Magistrate on the day when the complaint under Section 138 of NI Act is presented, shall scrutinize the complaint and if the complaint is accompanied by an affidavit, and that the affidavit and the documents, if any, are found to be in order, may take cognizance and direct issuance of summons.

17. In the case of ***RADHEY SHYAM GARG vs. NARESH KUMAR GUPTA***<sup>6</sup>, the Apex Court has dealt with the provisions of Section 145 of NI Act by observing that the same starts with a *non-obstante* clause that overrides the provisions of Cr.P.C.

18. Therefore, to conclude, when a written complaint as contemplated by clause (a) of sub-section (1) of Section 190 of Cr.P.C is filed and when the complainant is represented by an advocate, the Courts of Magistrate cannot insist upon personal presence of the complainant at the time of filing of the complaint. In case of a complaint alleging offence punishable under Section 138 of NI Act, it is not necessary for the Magistrates in every case to insist upon personal presence of the complainant for examining him upon oath as contemplated

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<sup>6</sup> (2009) 13 SCC 201

by Section 200 of Cr.P.C, if such a complaint is accompanied by an affidavit of the complainant or his authorized representative. After perusing the affidavit and documents, if any, if the Magistrate is satisfied, he can order issue of summons.

19. The Registrar General will communicate this order to all the Principal District Judges and Principal Judges who in turn will circulate the same for the benefit of all the Judicial Officers.

20. As observed earlier, the other procedural aspects and the issue of conduct of online trial for the offence under Section 138 of NI Act will be considered on the next date.

21. Today, we have extensively heard the learned counsel appearing for the parties on the issue of mandatory requirement of personal production of the accused before the learned Judicial Magistrate at the time of first remand and at the time when the police custody remand is granted. We have granted time to the learned Additional Advocate General to take instructions on certain procedural aspects from the State Government and from the Police. This issue will be dealt with on 5<sup>th</sup> June 2020.

22. Another issue which will arise in the context of COVID-19 and even otherwise is about the judicial deposits and payment of amounts to the litigants from the judicial deposits. This issue arises in money cases including the compensation cases under the Motor Vehicles Act, 1988 and under the provisions of the Land Acquisition Act, 1894 for disbursement of compensation amount. The issue may arise in the money suits and other civil cases where an order of monthly maintenance is issued and especially, in matrimonial cases. We may observe here that while passing an order directing payment of maintenance, it may be possible for the Judicial Officers to take the account details of the person to whom maintenance is payable on record and direct the person liable to pay maintenance to directly transfer the maintenance amount to the account of the beneficiary.

23. Considering the present situation and even otherwise, it will be appropriate if all the monetary transactions in the Courts should not be manual transactions. Before we deal with this issue, we direct the Registrar (Computers) of this Court to prepare an exhaustive note dealing with both the legal and technical issues concerning the Treasury Rules, the manner in which Khajane – 2 operates, etc. We grant time of one week to

the learned Registrar (Computers) to file a note before the Court.

24. On 5<sup>th</sup> June 2020, we will deal with the issue of remand as well as the issue of conducting Lok Adalat by video conferencing.

25. Shri C.V.Nagesh, the learned Senior Counsel invited our attention to a circular issued by the Registry bearing No.LCA1/420/92 dated 17<sup>th</sup> August 1992. The Registry to place on record the said circular.

26. While we thank all the learned counsel for the assistance rendered by them, we adjourn this petition till 5<sup>th</sup> June 2020. To be listed at 10.30 a.m. for video conferencing hearing.

**Sd/-  
CHIEF JUSTICE**

**Sd/-  
JUDGE**

AHB/SN