IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 6721 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE SAMIR J. DAVE

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

==========

MANOJ VASUDEV SOMPURA

Versus

STATE OF GUJARAT

==========

Appearance:
MR ADITYA A GUPTA(7875) for the Applicant(s) No. 1
MR MOHIT A GUPTA(8967) for the Applicant(s) No. 1
for the Respondent(s) No. 2
MR JK SHAH ADDL. PUBLIC PROSECUTOR for the Respondent(s) No. 1

==========

CORAM:**HONOURABLE MR. JUSTICE SAMIR J. DAVE**

Date : 15/09/2023

CAV JUDGMENT

1. By way of this petition filed under Articles 226 & 227 of the Constitution of India read with Section 482 of the Code of

Criminal Procedure, the petitioner has prayed to quash and set aside the order dated 05.05.2023 passed by the Court of learned Addl. Chief Metropolitan Magistrate, Court No.34 (N.I.), Ahmedabad in Criminal Case No.1264 of 2014 whereby, the petitioner, original accused, has been convicted for the offence u/s. 138 of the Negotiable Instruments Act, 1881 (for short, "the N.I. Act") and has been sentenced to undergo simple imprisonment for six months and to pay compensation of Rs.10 Crores along with interest at the rate of 09% per annum to the respondent-original complainant and in default to undergo further imprisonment for a period of three months.

2. The facts in brief are as under;

The petitioner herein and M/s. Rachana Global Excavation Ltd. had availed Cash Credit Loan of Rs.5 Crores and Term Loans of Rs.4.07 Crores and Rs.3.55 Crores from S.M.E. Branch, Mehesana of respondent-State Bank of India. Subsequently, the petitioner herein and said Firm had failed to repay the amount of loans. The petitioner herein, as authorized person of the said Firm, issued Cheque No.00077 dated 15.03.2014 of Rs.10 Crores in favour of the respondent Bank. However, the same got returned on 18.03.2014 with the endorsement of "insufficient funds". After following due process, the respondent Bank filed complaint u/s. 138 of N.I. Act against the petitioner herein and said Firm before the

Metropolitan Magistrate Court, Ahmedabad, which was registered as Criminal Case No.1264 of 2014.

2.1 It is the say of the petitioner that the proceedings before the trial Court were conducted in an ex-parte manner inasmuch as the petitioner was not granted sufficient opportunity to defend himself and hence, the Fundamental Right guaranteed under Article 21 of the Constitution of India stood violated. However, by way of the impugned judgment and order dated 05.05.2023, the trial Court disposed of Criminal Case No.1264 of 2014 by convicting and sentencing the petitioner herein as aforesaid. Hence, this petition.

3. Learned advocate for the petitioner submitted that the trial proceedings before the Court below were conducted in an ex-parte manner. It was pointed out that except section 299 of Cr.P.C., there is no provision for recording of evidence of the complainant in the absence of accused; however, in the present case, the evidence has been recorded in the absence of the petitioner. It was submitted that the petitioner was very much available during the trial and was never declared an absconder and therefore also, the evidence of the complainant could not have been recorded u/s.299 of Cr.P.C.

3.1 It was pointed out by learned advocate for the petitioner

that the examination-in-chief filed by the representative of the complainant named Mr. Ganesh Bhanarkar was received by the advocate of the petitioner on 22.02.2018. However, thereafter, the representative of the complainant had changed and the new representative of the complainant named Mr. Pradip Patel filed another examination-in-chief on 13.01.2020. Even said Mr. Pradip Patel had retired on 06.08.2021 and the complainant had sought time to give name of another representative but no such name was provided. Thus, the examination-in-chief filed Mr. Pradip Patel had also become redundant and it was, accordingly, submitted that there was no examination-in-chief of the complainant on record. It was further submitted that the right of the petitioner to cross-examine the complainant was closed on 20.06.2019 and thereafter, the same was not opened.

3.2 Learned advocate for the petitioner submitted that the trial Court has erred in law and on facts in closing the stage of Further Statement (F.S.) in complete breach of the provisions of section 313 of Cr.P.C. It was contended that such closure of the stage of Further Statement would render the trial void inasmuch as the right of Further Statement of accused in a trial is a valuable legal right provided to the accused under the law. Such right could be closed only when the accused is absconding or when the personal appearance of

accused is dispensed with by the Court but, when the accused is very much available during the trial, the right of Further Statement could not be closed.

3.3 It was pointed out that in the trial proceedings, the petitioner-accused was all throughout available and was never absconding. If the trial Court was of the view that the petitioner was not remaining present or was not available, then it ought to have issued Warrant against the petitioner; however, no such steps were taken and straightaway the stage of Further Statement of the petitioner came to be closed, which is illegal and erroneous. It was vehemently contended that there can be no dispensation of examination of accused under section 313 of Cr.P.C. and accordingly, it was urged that valuable right of the petitioner under section 313 of Cr.P.C. has been violated.

3.4 Learned advocate for the petitioner submitted that the trial Court has delivered the impugned judgment and order of conviction and sentence dated 05.05.2023 in the absence of the petitioner-accused. Attention of the Court was drawn to the provision of section 353 Cr.P.C. to point out that presence of the accused is necessary when a judgment is delivered by the Court. However, in the present case, the impugned judgment is delivered in the absence of the accused and thus, the

mandatory provision of section 353 Cr.P.C. has also been violated. It was, accordingly, urged to quash and set aside the impugned judgment and order dated 05.05.2023 and to direct the trial Court to conduct trial from the stage of Further Statement of the petitioner-accused.

3.5 Learned advocate for the petitioner lastly submitted that the petitioner has no other alternative equally efficacious remedy available under law except approaching this Court under the writ jurisdiction. The fundamental right of the petitioner to get his Further Statement recorded u/s.313 of Cr.P.C. was closed without affording any opportunity and though he was very much available during the trial. Further, the impugned judgment and order of conviction was delivered in the absence of the petitioner in gross violation of the provision of section 353 Cr.P.C. Moreover, the Notice u/s.138 of N.I. Act was not delivered at the correct address of the petitioner-accused. It was submitted that in the facts and circumstances of the case, this Court has the powers to exercise writ jurisdiction and that the availability of alternative remedy does not operate as a bar to the exercise of writ jurisdiction since the fundamental right of the petitioner has been violated and there is a failure of natural justice while passing the impugned judgment and order of conviction.

4. On the aspect of exercise of powers of writ jurisdiction even if alternative remedies are available, learned advocate for the petitioner placed reliance upon the following decisions;

(a) The State of Uttar Pradesh v. Mohammad Nooh, AIR 1958 SC 86.

(b) Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others, (1998) 8 SCC 01.

(c) Punjab State Warehousing Corporation, Faridkot v. Shree Durga Ji Traders and Others, (2011) 14 SCC 615.

(d) Vijay and Another v. State of Maharashtra and Another, (2017) 13 SCC 317.

(e) Assistant Commissioner of State Tax and Others v. Commercial Steel Limited, 2021 SCC OnLine SC 884.

4.1 Learned advocate for the petitioner-accused also placed reliance upon the following decisions;

(a) The judgment of Hon'ble High Court of Karnataka in the case of G.H. Abdul Kadri v. Mohammed Iqbal and others, 2002 SCC OnLine Kar 1478.

(b) The judgment of Hon'ble High Court of Jharkhand at Ranchi in the case of Ramesh Kumar v. State of Jharkhand, 2021 SCC OnLine Jhar 565.

(c) The judgment of Apex Court in the case of Basavaraj R. Patil and others v. State of Karnataka and others, (2000) 8 SCC 740.

(d) The judgment of Apex Court in the case of Mohd. Sukur Ali v. State of Assam, (2011) 4 SCC 729.

(e) The judgment of Apex Court in the case of Noor Mohammed v. Khurram Pasha, AIR 2022 SC 3592.

5. Learned APP Mr. J.K. Shah for the respondent State submitted that though sufficient opportunity was granted to the petitioner-accused before the trial Court, he did not avail the opportunities. The petitioner was granted multiple opportunities by the trial Court to carry out cross-examination of the complainant; however, no action was taken by him. In fact, the petitioner and his advocate had remained absent in the proceedings before the trial Court for a period of more than one year and hence, the trial Court had no other alternative but, to decide the case in the absence of the petitioner and / or his advocate. It was, accordingly, urged that the trial Court

was justified in passing the impugned judgment and order. Thus, it was urged to dismiss the petition.

6. Heard learned advocates on both the sides. In this writ petition, the petitioner has challenged the judgment and order dated 05.05.2023 passed by the Court of learned Addl. Chief Metropolitan Magistrate, Ahmedabad, by which he has been convicted for the offence u/s.138 of the N.I. Act and has been imposed sentence, as mentioned in the earlier part of this judgment. Against the aforesaid judgment and order of conviction and sentence, statutory remedy of filing appeal u/s. 148 of the N.I. Act is available to the petitioner; however, without exhausting such remedy, the petitioner has approached this Court under Articles 226 & 227 of the Constitution read with Section 482 of Cr.P.C.

7. It has been vehemently argued on behalf of the petitioner that availability of alternative remedy would not operate as a bar for entertaining the writ petition for the reason that the Fundamental Right of the petitioner has been violated. The basis of this argument is that in the trial proceedings, the right of the petitioner to record his Further Statement u/s. 313 of Cr.P.C. was closed without affording any opportunity. Though the petitioner was very much available during the trial and was never declared an 'absconder'; the said right was closed,

which violated the Fundamental Right of the petitioner to get a fair trial. Further, after closure of said right, trial was proceeded in his absence and ultimately, the impugned judgment and order of conviction and sentence came to be passed.

8. There is no quarrel on the issue that availability of alternative remedy would not operate as a bar for exercising writ jurisdiction under Article 226 of the Constitution. If an effective and efficacious remedy is available, then the High Court would not normally exercise its jurisdiction. It has been consistently held by the Hon'ble Apex Court that availability of alternative remedy would not operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the *vires* of an Act is challenged. Now, whether the case on hand falls under any of the aforesaid contingencies is to be determined in the facts and circumstances of the case.

9. The record of the case reveals that the cheque in question of Rs.10 Crores was issued on 15.03.2014, which got dishonored on 18.03.2014 on the ground of "insufficient funds". The legal Notice u/s.138 of the N.I. Act was issued on

03.04.2014 and the same was duly served at the address of accused No.1-Company. However, the same was returned on 05.04.2014 with the endorsement of "left" when it was attempted to be served at the given address of accused No.2, i.e. the petitioner herein. In response to the aforesaid statutory Notice, no reply was given nor any payment was made by the accused.

10. It is pertinent to note that the trial Court has recorded in the impugned judgment and order that the evidence of the complainant came to be closed vide closing *purshis* Exhibit-31. The Further Statement of the petitioner u/s. 313 of Cr.P.C. was recorded but, it could not be exhibited on the particular date. On the next date, neither the petitioner nor his advocate had remained present and therefore, his Further Statement, which was recorded on the earlier date and was also available on record, could not be exhibited. There is nothing on record to suggest that the petitioner or his advocate had filed any application before the trial Court seeking exemption from the trial proceeding on the date when his Further Statement recorded u/s. 313 of Cr.P.C. was to be exhibited or seeking any modification in the Further Statement recorded on the earlier date before it is exhibited.

11. Before the trial Court, sufficient opportunities were

granted to the petitioner to conduct the cross-examination of the complainant. However, it appears that the petitioner had not availed of any of the opportunities provided by the trial Court to conduct cross-examination of the complainant. The trial Court had even imposed costs upon the petitioner for getting his right to conduct cross-examination of the complainant re-opened but, even thereafter, the petitioner had not availed of the opportunity to cross-examine the complainant for reasons best known to him. Further, the petitioner had not produced any evidence in his defence nor had submitted any oral / written arguments or had examined any witness in his defence.

12. From the above set of facts, it appears that the decision to not remain present on the next date after getting his Further Statement u/s. 313 of Cr.P.C. recorded on the earlier date and to not conduct cross-examination of the complainant in spite of being afforded with sufficient opportunities, was a deliberate or voluntary decision taken by the petitioner. In the interregnum, there is nothing to suggest that the petitioner or his advocate had filed any application requesting the trial Court to grant him an opportunity to record his Further Statement u/s. 313 of Cr.P.C. or to conduct cross-examination of the complainant. The petitioner went into oblivion after the date when his Further Statement u/s. 313 of Cr.P.C. came to

be recorded but before it could be exhibited. Therefore, the trial Court was left with no other option but to conduct the trial in the absence of the petitioner, who had deliberately or voluntarily chosen to evade the trial proceedings. Under these circumstances, there was no reason for the trial Court to issue any warrant against the petitioner, as contended by learned advocate for the petitioner. Moreover, the petitioner had not produced any evidence in his defence or had made any submissions either oral or in writing.

13. At this juncture, it would be beneficial to refer to a judgment of this Court passed in Criminal Misc. Application No.5080 of 2023 decided on 23.03.2023, more particularly, on the observations made in paragraph-7.1 therein, which reads thus;

> "7.1 At this stage, in a decision of this Court in case of **Harivallabh Parikh v. State of Gujarat** reported in **1997 (1) GLR 638**, this Court has observed as under:
>
> > *"14. Having held that an application under Section 438 of the Cr.P.C. is maintainable to the aforesaid extent, a petition under Article 226 of the Constitution of India would not be maintainable. this Court and the Apex Court have repeatedly said that wherever efficacious alternate remedy available, the provisions of Article 226 or 227 of the Constitution of India cannot be evoked. There is*

a growing tendency of approaching to this Court under Article 226 of the Constitution of India inspite of the fact that there is a remedy available under the Civil Procedure Code or Criminal Procedure Code. If the Court questions with respect to the maintainability of the petition in view of the alternate remedy available under the C.P.C. or Cr.P.C. a casual prayer is made to treat the petition under the alternate provisions available under the C.P.C. or Cr.P.C. Now the time has come that, in order to overcome such casual approach, such prayer should not be entertained just for asking. In Durga Prasad v. Navinchandra the Apex Court has noted that when the matter came up for admission, the Court asked the learned Counsel as to how the writ petition is maintainable. As usual, the time was sought to study the matter. On the adjourned date, the Counsel contended that there are three remedies open to the appellant under the C.P.C., the right of appeal under Section 96 or appeal under Order 43 read with Section 104 or a revision under Section 115 of the C.P.C. It was contended that, as the matter does not fall within the four corners of the three remedies, the appellant was left to no other remedy except to approach the High Court under Article 226 of the Constitution of India. The Court found that the impugned order was not appealable either under Section 96 or under Order 43 read with Section 104 of C.P.C. but still the revision was maintainable and whether order could be revised or not, that is a matter to be considered by the High Court on merits. The Apex Court held that the petition under Article 226 was not maintainable by passing the alternate remedy available under Section 115 of the C.P.C. The bar of Section 18 will not come in the way if the case calls for judicial scrutiny to the limited extent

indicated above.

15. There is also growing tendency to approach to the High Court under Section 438 of the Cr.P.C. for anticipatory bail directly without approaching to the Court of Sessions Judge. It is true that the High Court and the Court of Sessions judge have concurrent jurisdiction under Section 438 of the Cr.P.C. for grant of bail to person apprehending the arrest. But considering the convenience, smooth and effective functioning of the Court, it is always desirable that, at the first instance, the application is made to the Court of Sessions Judge, otherwise, if all the applications under Section 438 are filed before the High Court directly, the police papers will have to be summoned from the various parts of the State, putting the entire police machinery only at the disposal of the High Court for consideration of application under Section 438. On the other hand, if the applicant moves to the Court of Sessions Judge within whose jurisdiction the case has been registered, police papers can be quickly made available. The Public Prosecutor and the police will be able to effectively and quickly assist the Court in consideration of an application under Section 438 of the Cr.P.C. In case the bail application is rejected and the matter comes to the High Court, it would be advantageous for the High Court to not only know the full facts but also the views of the Sessions Judge. In view of this, well established practice in almost all the High Courts is that in the matter of application under Section 438 or 439 of Cr.P.C. the party first approach to the Court of the Sessions Judge. Thus, in my view, the practice of filing the bail application under Section 438 or 439 of the Cr.P.C. straightaway to the High Court without resorting to filing of such applications before the Court of Sessions should not

be permitted unless there are exceptional and compelling circumstances.” (sic)

14. Considering the facts and circumstances of the case, this Court is of the opinion that the trial Court was completely justified in passing the impugned judgment and order. The decision to not conduct cross-examination of the complainant in spite of repeated opportunities and to not remain present on the next date of trial when his Further Statement u/s. 313 of Cr.P.C. recorded on the earlier date was to be exhibited was a deliberate, intentional and conscious decision on the part of the petitioner. It was not that the petitioner was not aware about the stage of trial proceedings. However, deliberately, the petitioner had chosen to remain absent from the trial proceedings from the date his Further Statement u/s. 313 of Cr.P.C. was recorded but before it could be exhibited.

15. The above set of circumstances could not be classified as a ‘contingency’ warranting exercise of writ jurisdiction or the inherent powers u/s. 482 of Cr.P.C. when an effective alternative remedy of filing appeal is available to the petitioner. The petitioner has the effective remedy of filing statutory appeal u/s. 148 of the N.I. Act against the impugned judgment and order of conviction and sentence. None of the decisions relied upon by learned advocate for the petitioner,

though being good law, would be of any assistance to the petitioner in the facts and circumstances of this case. Hence, the petition, being devoid of merits, deserves to be rejected.

16. For the foregoing reasons, the petition is dismissed.

(SAMIR J. DAVE,J)

PRAVIN KARUNAN