THE NEW ERA IN THE CRIMINAL PROCEDURE FOR COMPLAINT CASES: A CRITICAL ANALYSIS OF SECTION 223 OF THE BHARTIYA NAGARIK SURAKSHA SANHITA, 2023

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ABSTRACT

The present paper deals with the new challenges which is being faced by the litigants, advocates as well as the judiciary with the advent of the new procedural act ie. Bhartiya Nagarik Suraksha Sanhita,2023 in the area of complaint cases. The rights given to the accused in the new legislation is creating a new problem in the procedure to be followed in the trial of complaint cases. The right of the accused to be heard before the cognizance is taken by the learned magistrate in the new Act is a mandatory provision and has to be exercised by the judicial officer and hence the problem of the stage at which such notice to the accused is to be given being undefined is creating a procedural hurdle and this paper tries to deal and critically analyze the said scenarios and the other challenges associated with it.

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With the notification of the new criminal procedure, a new era with new rights and liabilities has been introduced by the legislature with the effort to curb down the discrepancies and lacunas in the earlier procedure that was prevailing in India for the last 5 decades since 1974. The new procedural enactment has identified the rights of the accused for the first time and tried to strike a balance between the rights of the accused as well as the complainant. In the background of frivolous complaints filed by the complainant, thereby clogging the justice delivery system, the said attempt of the new procedure to winnow the chaff from the grain will might ultimately lead to speeding up the justice delivery process, as is the intention of the legislature.

With the exponential growth in population and the increase in crime leading to a huge rise in cases filed in the courts, the need to speed up the proceedings is what is required. With the new rights introduced by the legislature of hearing and giving a right to be heard to the accused before taking cognizance of the offence by the judicial magistrate, the legislature has tried to curb the delay in the justice granting system. The intention of the legislature is to speed up the judicial process and to reduce the pendency of the cases in India by dismissing the frivolous complaints at the initial stage itself but only after giving a complete hearing to both the parties and then applying the judicial mind.

The Chapter XVI and particularly section 223 of the Bhartiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as "BNSS") deal with the cases initiated on the complaint filed by the complainant and is pari- materia to Section 200 of the Criminal Procedure code,1973.

Section 223[1]-

Examination of complainant.

(1) A Magistrate having jurisdiction while taking cognizance of an offence on 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

[1] Section 223 (Bhartiya Nyaya Suraksha Sanhita,2023)

witnesses, and also by the Magistrate:

Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:

Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:

Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless—

(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and

(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received.

The said section is quite similar to the earlier legal provision envisaged in Criminal Procedure Code,1973 but the new act however introduces the concept of according a hearing to the accused at the inception when the criminal complaint is initiated against the accused person and before the cognizance of the offense. The proviso to section 223(1) of BNSS provides the mandatory provision of according/providing a mandatory hearing to the accused persons before the cognizance is taken of the offence by the magistrate. The said right is mandatory in nature as is explicit from the wordings of the section. However the problem arises as the legislature has failed to specify the stage and manner in which the right has to be exercised and the accused

is to be accorded a hearing. The said problem has turned out to be a procedural menace as the stage at which the hearing is to be accorded to the accused person is still a mystery as no explanation or clarity has been provided by the legislature in the new act ie BNSS, 2023. The provisions of the new act fails to provide an insight or a clear procedure to be followed by the court on the point of the time / stage at which the accused is to be heard and is defeating the object of the said provision of early disposal of cases.

Earlier as per the procedure envisaged under Chapter XV particularly in section 200 of the Criminal Procedure Code, 1973[2] the complaint was initiated by the complainant through a written complaint initiated/filed before the magistrate and on the complaint the magistrate proceeds forward and records the pre summoning evidence and examines the complainant and the witnesses brought by the complainant to prove the allegations alleged in the complainant. Thereafter, the stage of pre-summoning evidence is closed and the complainant is heard on the summoning of the accused person on the basis of the complaint, documents and evidences produced and witnesses examined by the complainant. That only after hearing the complainant the magistrate takes cognizance of the offence and issue summons to the accused persons.

In accordance with the new provision, a complaint is filed/initiated similarly through a written complaint filed before the magistrate but however, the provision thereafter fails to provide the stage as to when the accused is to be issued notice for being heard. The provision only provides simply for the right of the accused of being heard before the magistrate takes cognizance of the offence.

The provision is silent on the exact stage in the criminal complaint cases as to when the right to be heard is to be provided to the accused. The two stages as per the procedure which is evident from the bare perusal of the whole procedure is either at the time of initiation of the written complaint by the complainant and the cognizance of the initiation of the complaint is taken when the magistrate takes note of the case being registered or right after the stage when

[2] A Magistrate taking cognizance of an offence on 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;
Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses,

1. if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or
2. if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192;
Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

the pre-summoning evidence of the complainant and other witnesses is recorded and before the cognizance is about to be taken by the magistrate. The said scenarios and the pros and cons in the the trial ahead is to be examined and requires consideration for understanding and coming up with a suitable answer in light of the object of the new act.

In the first scenario, the complaint is being brought by the complainant and on the basis of the complaint and documents filed along with, the accused is served with a notice to provide with an opportunity of being heard and produce its part of the story and defence. The said stage is proper as the accused is given an opportunity to provide their side of the story and defence and also further dispute the reliance of the complainant on the documents which cannot be turned into a material evidence during trial and grants an opportunity to the accused to also raise objections to the validity and admissibility of document into evidence. The right of being heard if provided at this stage shall further reduce the time taken for delivering the judicial process and further can also contribute to and safeguard the accused persons from the rigours of trial. However, the issue still remains as to whether there is an application of mind envisaged before issuance of notice to the accused by the magistrate or is the order of notice is to be passed mechanically the moment a criminal complaint comes before the court and the magistrate takes cognizance of the complaint filed.

In the second scenario, the complaint is being brought by the complainant and on the basis of the complaint and documents filed along with the magistrate takes cognizance of the complaint and proceed to the recording of the pre - summoning evidence and examines the complainant and other witnesses on oath and only after the recording of the pre – summoning evidence is over the accused is sent a notice to provide with an opportunity of being heard and produce its part of the story and defence. The accused and complainant is being heard and accorded a hearing and thereafter the magistrate either takes cognizance of the offence and issues process against the accused person or dismiss the complaint at the threshold. However, in such a scenario the examination of the complainant is being done in absence of the accused person and also the recording of the evidence could be avoided if the accused produces any document or defence totally thrashing the case set up by the complainant and unravelling the frivolous facts and revealing the vexatious complaint filed by the complainant.

The legislature failed to provide the timeline for the stage at which the accused is to be sent a notice to appear and defend the case thereby providing the opportunity of being heard before

the cognizance of the offence is taken by the magistrate. Recently a single bench of Karnataka High Court in the matter of Sri Basanagouda R. Patil v. Sri Shivnanda S. Patil[3] bearing criminal petition no 7526 of 2024 has held that the notice is to be sent to the accused in terms of section 223(1) of BNS and shall append to it the complaint : the sworn statement : statement of witness if any , for the accused to appear and submit his case before taking of cognizance. The learned single judge has also held that the accused should be given an opportunity of being heard and such right is not a mere empty formality. The judgement of the single judge has tried to throw some clarity on the stage of notice to be issued to the accused as well as the seriousness of the right granted in favor of the accused. But however, whether the said judgement is the correct interpretation to the intention of legislature or not is something which is still to be clarified by an authoritative judgement of the supreme court.

That another difficulty which is to be faced by the judicial officers is to adjudicate in case the accused even after issuing of the notice to him/her chooses not to show up and fail to put its defence before the Hon`ble court. the legislature has failed to render any insight in the new act on this aspect and further, no clarification has been issued and it is upon the judiciary to adjudicate upon the same and render assistance and clarity on this aspect. The question arises that such non-appearance and non-availment of the right granted of being heard will be taken as if the accused has waived off his/her right? In other words, whether the accused avails this opportunity or not is entirely his/her prerogative, or is it a duty to assist is the question that needs to be answered by the judiciary in the coming time.

That such a change of procedure may also lead to a mini-trial at the stage before the cognizance is taken. The same may lead to the early disposal of the cases or can also lead to pendency due to the non-service of the notice upon the accused and due to other procedural fallacies. The biggest procedural burden in cheque bounce cases of section 138 Indian Negotiable act,1881 is the failure of service of summons on the accused persons which render the summary trial a futile and cumbersome process for the complainant. The same fate can be also foreseen in the case of Section 223 BNSS in scenarios wherein the notice issued to the accused is not been served and the process reaches to procedural halt. In such scenarios the court right of being heard may be a new tool for halting the criminal process and lead to the lapse in the justice delivery system. The said difficulties are to be faced by the trial courts and the judicial

[3] Criminal petition no. 7526 of 2024, high court of Karnataka decided on 27.09.2024

conclusion shall be rendered by the judiciary in due course. The legislature shall also meanwhile provide clarification and remove the difficulties in terms of BNSS as the said procedural lapse may result to a judicial halt before the judicial magistrate of all the states.